



# Moving to Belgium as an EU citizen

Registration formalities for EU workers, self-employed persons, jobseekers and their family members in Belgium, with a comparative outlook

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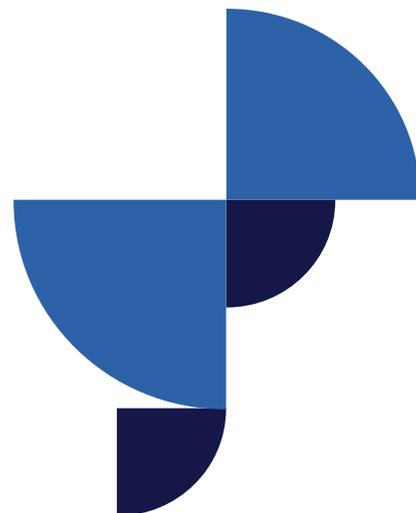


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# List of abbreviations

ABRA	Association of Belgian Relocation Agents
ADDE	<i>Association pour le droit des étrangers</i> (Association for the right of foreigners)
ADIB/DGIP	<i>Algemene Directie Instellingen en Bevolking / Direction générale des institutions et de la population</i> (General Directorate of Institutions and Population)
AGII	<i>Agentschap voor Integratie en Inburgering</i> (Agency for Integration and Civic Integration)
CALL	Council for Alien Law Litigation ( <i>Raad voor Vreemdelingenbetwistingen / Conseil du Contentieux des Étrangers</i> )
CBSS	Crossroads Bank for Social Security ( <i>Banque Carrefour de la Sécurité Sociale / Kruispuntbank van de Sociale Zekerheid</i> )
CJEU	Court of Justice of the European Union
DVZ/OE	<i>Dienst Vreemdelingenzaken / Office des Etrangers</i> (Belgian Immigration Office)
ECAS	European Citizens' Action Service
EEA	European Economic Area
EP	European Parliament
EU	European Union
EURES	European cooperation network of employment services
FEANTSA	<i>Fédération Européenne des Associations Nationales Travaillant avec les Sans-Abri</i> (European Federation of National Organisations Working with the Homeless)
GAPEC	<i>Groupement pour les Agents Etat civil-Population de Wallonie</i> (Association for Civil Status – Population Agents of Wallonia)
GDPR	General Data Protection Regulation
INSZ/NISS	<i>Identificatienummer van de Sociale Zekerheid / Numéro d'identification à la sécurité sociale</i> (National identification number for social security)
OCMW/CPAS	<i>Openbaar Centrum voor Maatschappelijk Welzijn / Centre public d'action sociale</i> (Public social assistance centre)
RIZIV/INAMI	<i>Rijksdienst voor Ziekte- en Invaliditeitsverzekering / Institut national d'assurance maladie-invalidité</i> (National institute for health and invalidity insurance)
RSZ/ONSS	<i>Rijksdienst voor Sociale Zekerheid / Office National de Sécurité Sociale</i> (Belgian Social Security Office)
RVA/ONEM	<i>Rijksdienst voor Arbeidsvoorziening / Office National de l'Emploi</i> (National Employment Office)
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
VVSG	<i>Vereniging van Vlaamse Steden en Gemeenten</i> (Association of Flemish Cities and Municipalities)

# General introduction

## Objectives and context of the study

This study examines the formalities involved when EU workers, self-employed persons, jobseekers and their family members take up residence in Belgium for a period exceeding three months, namely the registration requirements and procedures linked to obtaining residence documentation relating to this type of long-term stay. In addition, the formalities involved in obtaining EU permanent residence are examined, as well as the impact of residence formalities on access to employment, conditions of employment, social security and fiscal benefits. In order to develop grounded policy recommendations, a comparative analysis with selected other EU Member States has also been undertaken. The countries included are the Netherlands, Luxembourg, France, Germany and Italy.

This research was commissioned by the Federal Migration Centre – Myria, in the framework of Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. Myria is a designated body for “the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement”<sup>1</sup>, with the possibility to extend this monitoring to all EU citizens exercising their right to free movement and their family members.<sup>2</sup>

The study was carried out by a consortium consisting of the law firm Fragomen, the University of Kent and Ghent University. The research team consisted of Roos-Marie van den Bogaard (University of Kent / Ghent University), Rimma Abadjan, Jo Antoons, Nivard Bronckaers, Pauline Chomel, Ana Correia Horta, Andreia Ghimis and Wout Van Doren (Fragomen), prof. Anthony Valcke and prof. Harm Schepel (University of Kent) and prof. Ellen Desmet (Ghent University).

## Scope and limitations

The categories of EU citizens covered are workers (both locally hired and posted workers), self-employed persons

(both locally established and posted) and jobseekers. The requirements that apply to the family members of these three categories are also examined. Even though the personal scope of this study thus excludes holders of sufficient resources (also referred to as “economically inactive citizens”) and students, many research findings and the majority policy recommendations are equally valid in respect of all other categories of EU citizens and their family members.

This study contains various limitations. First, it focuses on a socio-legal assessment of municipal registration practices from the viewpoint of the municipalities and other relevant institutional stakeholders, such as the Immigration Office. Within the confines of this study, the experiences and perceptions of EU citizens and their family members could not be considered. Second, the municipalities included in the sample (see Chapter 2) were all municipalities with a relatively high number of EU citizens, EU workers and/or EU self-employed persons. This may imply an underassessment of the challenges faced by smaller municipalities, which may not have the same human resources and expertise to handle registration requests from EU citizens. Finally, various issues emerged from the research that merit an independent and more in-depth analysis. These include the change of residence status, the visa requirements for non-EU family members, the termination of residence rights, the appeals process, and the use of languages by the municipalities in their interactions with EU citizens and their family members – these are all highlighted as recommendations for future research.

## Overview of methodology

A multi-method research design was adopted, combining desk-based study and qualitative research methods.

A desk-based study was undertaken to examine the residence registration requirements in EU legislation and case law, as well as the residence formalities and practices in Belgium, its neighbouring countries, and Italy. The impact of registration formalities on the access to certain social rights (e.g. employment and social security) was also mainly done on the basis of a document analysis.

An analysis of registration practices of a sample of municipalities was undertaken on the basis of a threefold approach: a review of the information available on municipal websites, an elaborate survey, and semi-structured interviews with municipal officials.

1 Art. 4, Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014], OJ L 128/8.

2 Art. 7(2), Directive 2014/54/EU.

The information retrieved in this way for Belgium on the registration formalities, municipal practices and the impact of the registration process on social rights, was contextualised and complemented with semi-structured interviews with key institutional stakeholders. In particular, interviews were conducted with the Immigration Office, the Association of Flemish Cities and Municipalities (*Vereniging van Vlaamse Steden en Gemeenten - VVSG*), the Federal Ombudsman, the communal ombudspersons of two interviewed municipalities,<sup>3</sup> ABRA (the Association of Belgian Relocation Agents), GAPEC (*Groupement pour les Agents Etat civil-Population de Wallonie*), Agoria (the sector federation of Belgian technology driven companies), the public social assistance center of Ghent (*OCMW Gent*) and the National institute for health and invalidity insurance (*RIZIV / INAMI*).

These interviews mainly took place in May and June 2020 through an online communication platform (due to the COVID-19 pandemic) and lasted between 1 and 2 hours. They aimed to gain a deeper understanding of the broader policy context and the interaction between the various actors involved, as well as to check and nuance preliminary findings. Finally, some reported practices in Belgium and beyond were confirmed by the experience of international law firm Fragomen which co-authored this report, as well as advisors from the European Commission’s Your Europe Advice service.

The draft report was shared with all municipalities which participated in the survey together with the institutional stakeholders. They were invited to provide their feedback both in writing and during the workshop “Loket Vrij Verkeer – Guichet Libre Circulation” which was hosted by Myria on 6 July 2021. The report is updated as at 7 July 2021.

Where relevant, more detailed methodological information is provided in the first section of each chapter. As a final point, it should be noted that the gender-neutral pronouns “they/them” are used.

## Structure of the report

*Chapter 1* analyses the Belgian and EU legal framework governing residence formalities for EU workers, self-employed persons, jobseekers and their family members. *Chapter 2* provides insight in the municipal practices

<sup>3</sup> A communal ombudsperson from a third interviewed municipality replied that an interview was not considered useful as they had very few relevant cases to report on issues relating to the registration of EU citizens and their family members.

regarding the processing of registration requests received by these categories of EU citizens and their family members. *Chapter 3* outlines the impact of residence formalities on access to employment, conditions of employment, social security and social assistance as well as fiscal benefits. *Chapter 4* provides a comparative overview of the implementation of residence formalities and practices in the Netherlands, Luxembourg, France, Germany and Italy.

*Chapter 5* presents policy recommendations based on the current registration procedure, mainly to the Minister/Secretary of State for Asylum and Migration, the Immigration Office, the municipalities and Myria. *Chapter 6* makes the case to move towards an immediate registration system, and lays out the framework for such a system.

Most chapters are similarly structured, following the various phases of the residence registration process:

Preparatory phase
Application phase
Verification of domicile
Registration phase
Applications for permanent residence
Appeals

*Table 1 - Overview of the phases of the residence registration process and of the structure of most chapters*

Given the focus of Chapter 3 on the impact of residence formalities on access to employment, conditions of employment, social security and social assistance as well as fiscal benefits, this chapter is thematically structured to cover these topics.

## Additional materials

The following materials can be consulted on the website of Myria:

- › Executive summaries (ENG, FR, NL)
- › Glossary (ENG, FR, NL)
- › Survey (FR, NL)
- › Country fiches for France, Germany, Italy, Luxembourg and the Netherlands





# Chapter 1

**Legal framework  
applicable to registration  
formalities in Belgium**



# Chapter 1

## Legal framework applicable to registration formalities in Belgium



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# 1. Introduction

This chapter analyses the legal framework applicable to the registration of EU citizens and their family members in Belgium. Directive 2004/38 on the rights of entry and residence of EU citizens and their family members<sup>4</sup> (hereinafter the “Citizens Rights Directive”) defines the rights of EU citizens to move and reside freely within the territory of the EU Member States. These free movement rights have also been extended to all EEA nationals within the European Economic Area (EEA).<sup>5</sup> Although the Directive does not apply to Switzerland, similar rules apply to Swiss nationals by virtue of the bilateral agreement on the free movement of persons concluded with the EU.<sup>6</sup> References to “EU citizens” in this study should be understood as including EEA nationals (i.e. from Norway, Iceland and Liechtenstein) as well as Swiss nationals. For the sake of completeness, it should also be mentioned that UK nationals who are beneficiaries of the Withdrawal Agreement<sup>7</sup> by virtue of having been resident in Belgium before the end of the transitional period on 31 December 2020 will continue to benefit from the majority of the provisions of the Citizens Rights Directive as regards their right to remain in Belgium after that date.<sup>8</sup>

The overarching objective of the Citizens Rights Directive is to facilitate the free movement of EU citizens to other EU Member States. In order to achieve this, the Directive aims to reduce the administrative burden of taking up residence in an EU country, to provide a more generous framework for family members to join the EU citizen to whom they are related, and to enhance legal certainty by limiting

the scope for refusing the entry or terminating the right of residence of EU citizens and their family members<sup>9</sup>.

More than 10 years have elapsed since the deadline for transposition of the Citizens Rights Directive in 2006. As this is a fundamental area of law and its proper operation is crucial for the functioning of the European internal market, numerous studies have been conducted both at European level and in individual Member States to ascertain the quality of implementation. The first one was the EU-wide compliance study published in 2008 which included Belgium.<sup>10</sup> A year later, a comparative study was undertaken by the European Citizens' Action Service (ECAS)<sup>11</sup> at the behest of the European Parliament's Policy Department for Internal Policies. The implementation of the Citizens Rights Directive was the subject of the bi-annual FIDE congress on EU law<sup>12</sup> and also featured in the reports published by the Network on the Free Movement of Workers which operated until 2013.<sup>13</sup> In 2016, Milieu Ltd has conducted further research focusing on the obstacles to the right of free movement and residence,<sup>14</sup> this time for the European Parliament's Civil Liberties Committee. In 2018, ECAS published a comprehensive report outlining the difficulties encountered by mobile EU citizens when exercising their free movement rights.<sup>15</sup> The Citizens Rights Directive itself has also been the subject of detailed analysis and commentary.<sup>16</sup>

In addition, the transposing Belgian legislation has been carefully scrutinized in several reports. The most recent ones are the country report for Belgium of the 2016 study on obstacles to free movement conducted by Milieu Ltd

4 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77.

5 EEA Joint Committee Decision No 158/2007 of 7 December 2007 [2008] L124/20, which incorporates the Directive at point 3 of Annex VIII to the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L 1/3.

6 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

7 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7.

8 See further Section 3. *Personal scope of the study*, Subsection 3.9 *Post-Brexit registration formalities for UK nationals* in this Chapter. For analysis, see for example, Ronald Fonteyn and Elisabeth Destain, *Brexit - analyse de la situation des ressortissants du Royaume-Uni et des membres de leur famille en Belgique après le 1<sup>er</sup> janvier 2021*, ADDE 2021.

9 European Citizens' Action Service, *Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States*, Study for European Parliament's Policy Department for Internal Policies (2009).

10 Milieu Ltd and Edinburgh University, *Conformity Study for Belgium. Directive 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*, Study for European Commission (2008).

11 European Citizens' Action Service, (n 9).

12 Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen (eds.), *Citizenship: Development, Impact and Challenges*, XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Volume 2, 28-31 May 2014.

13 These reports are available on the website of Radboud University's Centre for Migration Law which coordinated this network <https://www.ru.nl/law/cmrl/research/research-projects/fmow-2>.

14 Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their families: comparative analysis*, Study for the European Parliament's Civil Liberties Committee (2016).

15 European Citizens' Action Service, *Freedom of movement in the EU: a look behind the curtain* (2018).

16 See for example, Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (2<sup>nd</sup> ed., Oxford University Press, 2019); Anastasia Iliopoulou Penot, *Directive 2004/38 relative au droit de séjour des citoyens de l'Union européenne et des membres de leur famille - Commentaire article par article* (Larcier, 2020); Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th ed., Oxford University Press, 2014).

for the EP's Civil Liberties Committee<sup>17</sup> and the Fitness Check Report<sup>18</sup> produced by Anthony Valcke for FEANTSA (2018). A detailed examination of the Belgian practice on the termination of the residence rights of EU citizens was also published in 2020.<sup>19</sup> The Belgian transposing rules are also discussed in several manuals on Belgian immigration law.<sup>20</sup>

## 2. Legal context: EU and Belgian legislation

As previously mentioned, the overall objective of the Citizens Rights Directive is to facilitate the entry and residence of EU citizens and their family members in other EU Member States.<sup>21</sup> The Directive aims to consolidate previous EU legislation by bringing together various instruments which dealt separately with workers, self-employed persons and non-economically active categories of citizens such as students.<sup>22</sup> The Directive also seeks to codify the pre-existing case law of the Court of Justice of the European Union (CJEU), which gives a broad interpretation to the free movement of workers and service providers, and takes account of the introduction of the concept of EU citizenship, following ratification of the Maastricht Treaty in 1992.

Currently the legal basis for the free movement of people is to be found in Article 3(2) Treaty of the European Union (TEU) and Articles 20, 21, 45, 49 and 56 of the Treaty on the Functioning of the European Union (TFEU).<sup>23</sup> The

freedom of movement and residence is also mentioned in Article 45 of the Charter of Fundamental Rights of the European Union.<sup>24</sup>

The Citizens Rights Directive is the principal instrument laying down the limitations and conditions relating to the right to move and reside freely within the territory of the Member States which is laid down by Article 21 TFEU. The Commission has also issued guidelines to assist in the interpretation of the Directive.<sup>25</sup> The Directive is complemented by Regulation 492/2011<sup>26</sup> and Directive 2014/54<sup>27</sup> as regards the free movement of workers. However, the latter two instruments do not apply to self-employed persons.

In Belgium, the Citizens Rights Directive has been transposed by a Belgian law adopted on 25 April 2007 which entered into force on 1 June 2008<sup>28</sup> and which amended Articles 40 onwards of the Belgian Immigration Law of 15 December 1980,<sup>29</sup> together with a Royal Decree of 7 May 2008<sup>30</sup> which amended Articles 43 to 70 of the Royal Decree on Immigration.<sup>31</sup>

17 Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their family members: country report for Belgium*, Study for European Parliament's Civil Liberties Committee (2016).  
 18 Anthony Valcke, *Fitness Check Report for Belgium: A review of the state of compliance of Belgium's implementation of Directive 2004/38 on residence rights of EU citizens and their family members*, FEANTSA study (2018).  
 19 Anthony Valcke, "Expulsion from the Heart of Europe - The Belgian law and practice relating to the termination of EU residence rights" in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill 2020), pp. 155-189.  
 20 See for example, Jean-Yves Carlier and Sylvie Saroléa, *Droit des Etrangers* (Larcier, 2016), Steven Bouckaert, Marie Ryckaseys and Dirk Vanheule, *Vreemdelingenrecht: geannoteerd* (Die Keure 2016), Serge Bodart, Sylvie Sarolea and Paul Vandercam, *Droit des étrangers annoté* (La Croix 2015).  
 21 Recital 4, Directive 2004/38.  
 22 Recitals 3 and 4, Directive 2004/38.  
 23 Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/01. Arts. 20, 21, 45, 49 and 56 TFEU respectively relate to EU citizenship, the free movement of persons, the free movement of workers, the freedom of establishment and the freedom to provide cross-border services.

24 Charter of fundamental rights of the European Union [2016] OJ C 202/389. For commentary, see Eleanor Spaventa, "Article 45 - Freedom of Movement and of Residence" in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights - A Commentary* (Hart Publishing 2014), pp.1161-1176.  
 25 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 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, COM(2009) 313 final. This guidance is currently under revision with a view to the issuance of updated guidance incorporating the CJEU's case law handed down since 2009.  
 26 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/01.  
 27 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/08.  
 28 Law of 25 April 2007 modifying the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 25 april 2007 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 10-05-2007, 14584).  
 29 Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the "Belgian Immigration Law" (*Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers/ Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 31-12-1980, 14584).  
 30 Royal Decree of 7 May 2008 amending the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners (*Arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit van 7 mei 2008 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 13-05-2008, 25092).  
 31 Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the "Royal Decree on Immigration" (*Arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 27-10-1981, 13470).

Both instruments have since been modified on numerous occasions. A number of recent modifications were made to the Royal Decree on Immigration in June 2020<sup>32</sup> (see Box 1), entered partially in to force on 10 May 2021.<sup>33</sup>

A further set of amendments were made in December 2020 to provide for the implementation of the Withdrawal Agreement in respect of the UK's withdrawal from the EU.<sup>34</sup>

These rules are further supplemented by administrative circulars<sup>35</sup> and official guidance issued by the Immigration Office in the form of a so-called “GemCom” guidelines,<sup>36</sup> comprising a “Syllabus” and a number of subject-specific “fiches” which are made available to municipalities via the GemCom portal.<sup>37</sup> This guidance is aimed at municipal authorities and describes various practical aspects of the registration process for EU citizens and their family members: timelines, competent authority, documentation required, etc.

32 Royal Decree of 12 June 2020 modifying Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the “Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration” (*Arrêté royal du 12 juin 2020 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit van 12 juni 2020 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 29-06-2020, 47612).

33 Ministerial Decree of 27 April 2021 on modernising residence documents issued to citizens of the European Union (*Arrêté ministériel du 27 avril 2021 relatif à la modernisation des documents de séjour délivrés aux citoyens de l'Union européenne / Ministerieel besluit van 27 april 2021 betreffende de modernisering van de verblijfsdocumenten die aan burgers van de Europese Unie uitgereikt worden*, MB/BS 06-05-2021, 46473).

34 See further Section 3. *Personal scope of the study*, Subsection 3.9 *Post-Brexit registration formalities for UK nationals* in this Chapter.

35 These circulars are published on the website of the Immigration Office in French <https://dofi.ibz.be/sites/dvzoe/FR/Pages/Circulaires.aspx> and in Dutch <https://dofi.ibz.be/sites/dvzoe/NL/Pages/Omzendbrieven.aspx>.

36 The official guidance of the Immigration Office is not publicly available. The authors of this study were provided with certain portions of the Syllabus, which is issued by the Immigration Office to the municipalities, regarding the registration of EU citizens and their family members (edition of 29 October 2020). Other official guidance is available in the GemCom “fiches”, which are frequently updated, but only incorporated twice per year in the Syllabus. Therefore, some divergences between the two types of guidance may persist. Moreover, according to one of our interviewees, the Syllabus does not include the instructions issued by the Immigration Office on a bilateral basis to municipalities. The Immigration Office confirmed that in case a municipality mentions in a question that it is unclear in the Syllabus, then Immigration Office takes this into account for the next Syllabus update (twice per year). According to our interviewee (interview with municipality C, 22 October 2020), municipalities also use online platforms with guiding work-flow charts, which are developed by private companies. The authors have not checked these online platforms but were informed that they seem to lack complete legal accuracy because the work-flow charts are limited to the most common cases and exemptions are not taken into consideration, which poses the risk that municipalities which rely on these work-flow charts might refuse registration thereby depriving EU citizens from some of their rights. It was indicated that this is becoming more and more problematic as most municipalities rely on these platforms as their main or only guide.

37 The GemCom portal can be accessed by municipalities online <https://gemcom.ibz.be>.

Overall, the transposition of the Citizens Rights Directive in Belgium has been assessed as satisfactory in a study commissioned by the European Parliament.<sup>38</sup> However, various issues of non-compliant transposition remain, which have been highlighted below.

#### Summary of changes contained in Royal Decree of 12 June 2020

1. The titles of the E card (registration certificate) and E+ card (permanent residence document) will be changed to EU card and EU+ card respectively. The EU card will include an explicit reference to Article 8 of Directive 2004/38 and the EU+ card to Article 19 of Directive 2004/38.
2. Annex 8 (registration certificate) and Annex 8bis (permanent residence document) will no longer be issued in paper format. Pending the issue of EU and EU+ cards, an Annex 8ter or 8quater will be issued as a temporary residence document.
3. The F card (residence card for family members of EU citizens) and F+ card (permanent residence cards for family) will retain their existing titles, but will incorporate the label “*Familielid EU/Membre Famille UE*” and a reference to Articles 10 and 20 of Directive 2004/38 and be issued in the uniform format of residence permits laid down by Regulation 1030/2002.
4. The validity of the EU+ and F+ card will be increased to ten years, instead of the current practice which limits their validity to five years.

*Box 1 - Overview of relevant changes envisaged by the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration. All of these changes have also been highlighted in this chapter.*

38 Valcke (n 18), p. 4, quoting ECAS (n 9), p. 51.

# 3. Personal scope of the study

Article 7(1) of the Citizens Rights Directive provides workers and self-employed persons with a right to reside beyond three months in a host EU Member State, subject to conditions.<sup>39</sup> The right of residence of more than three months has been transposed by Article 40 §4 of the Belgian Immigration Law and which is commonly referred to as a “long stay”.<sup>40</sup> Different categories of beneficiaries of this right of residence can be distinguished.

## 3.1 Workers

The notion of “worker” is not defined by EU legislation. No definition of what constitutes a “worker” is contained either in Article 45 TFEU, which sets out the basic provisions of the free movement of workers, or in secondary EU legislation including the Citizens Rights Directive. Some clarification has nevertheless been given by the CJEU in its extensive case law.<sup>41</sup> According to the Court, the concept of “worker” has an independent meaning under EU law<sup>42</sup> and implies the existence of three main constitutive elements<sup>43</sup>: the performance of a service by a person, for and under the direction of another person, in exchange for

remuneration.<sup>44</sup> In order to be considered a worker<sup>45</sup> under Article 45 TFEU, a person must engage in genuine and effective economic activities.<sup>46</sup> However, these activities should not be performed on such a small scale so as to be considered purely marginal and ancillary.<sup>47</sup>

The provision of remuneration is one of the necessary elements of the concept of worker under Article 45 TFEU. This means that unpaid or volunteer activities do not fall within the concept of “worker” under EU law. On the other hand, internships and professional work placements will be covered provided they are remunerated.<sup>48</sup> However, the fact that a person’s wages may be below the equivalent of a living wage in the Member State concerned is immaterial for the purposes of considering that a person can claim the status of a worker.<sup>49</sup> Indeed, in certain cases remuneration that is effected in kind, such as the provision of free accommodation by an employer, may be sufficient.<sup>50</sup>

The CJEU has consistently held that the origin of the worker’s remuneration is of no consequence for the purposes of determining if a person is a worker under EU law<sup>51</sup>, so that remuneration which is funded by public subsidies should not affect whether a person is considered to be a worker. It used to be the case that the Belgian Immigration Office refused to recognise the status of a “worker” under Article 45 TFEU to EU citizens working in Belgium under cover of a measure intended to facilitate access to employment, the so-called “Article 60 contracts”<sup>52</sup> whereby a person is employed by a public social assistance centre in order to accumulate work

39 Under Art. 6(1), Directive 2004/38, an EU citizen has a right to reside in a host Member State for up to three months without the need to fulfil any requirements besides holding a valid passport and identity documents. The only further administrative formality allowed by Art. 5(5), Directive 2004/38 is an obligation to report one’s presence within the national territory within a reasonable and non-discriminatory period of time. In order to have a right to reside in the host Member State beyond this initial period of three months, an EU citizen must meet the requirements under Art. 7(1), Directive 2004/38, which essentially means they will need to work as an employee or a self-employed capacity or if they are not working, for example because they study or are, they must have adequate financial resources to support themselves while living in the host Member State so as not to become an unreasonable burden on the social assistance system of that country and they must have comprehensive sickness insurance in place. Alternatively, under Art. 7(2), Directive 2004/38, they must be a family member of such EU citizen having such a primary right of residence.

40 *Long séjour / lang verblijf*.

41 The case law on the definition of “worker” is further summarised in the Commission’s Communication “Reaffirming the free movement of workers: rights and major developments” COM(2010) 373.

42 Case C-65/73 *Hoekstra* EU:C:1964:19.

43 Case C-66/85 *Lawrie-Blum* EU:C:1986:284; Case C-3/90 *Bernini* EU:C:1992:89.

44 Catherine Barnard, *The Substantial Law of the EU: The Four Freedoms* (4th ed, 2014 OUP) pp. 274-276; Martin Risak and Thomas Dullinger, *The concept of “worker” in EU law* (2018) European Trade Union Institute Report No 140, p. 29; see also Inga Daukšienė, “Definition of a “Worker” under Article 45 of the Treaty on the Functioning of the European Union” (2010) *Societal Studies Research Journal*, vol. 3, no. 7, p. 292.

45 This study does not cover the retention of worker status in accordance with Art. 7(3), Directive 2004/38 nor does it examine the retention of the residence rights by family members in the event of death or departure of the EU citizen or in case of divorce under Arts. 12 and 13, Directive 2004/38.

46 Case 53/81 *Levin* EU:C:1982:105.

47 *Ibid*.

48 Case C-66/85 *Lawrie-Blum* EU:C:1986:284.

49 Case C-53/81 *Levin* EU:C:1982:105.

50 Case C-456/02 *Trojani* EU:C:2004:488.

51 Case C-344/87 *Bettray* EU:C:1989:226; Case C-188/00 *Kurz* EU:C:2002:694; Case C-316/13 *Fenoll* EU:C:2015:200.

52 This is a contract entered into on the basis of Art. 60(7), Law of 8 July 1978 on public social assistance centres (*Loi organique des centres publics d’action sociale du 8 juillet 1978 / Organieke wet van 8 juli 1978 betreffende de openbare centra voor maatschappelijk welzijn*, MB/BS 05-08-1976, 9876), which provides the possibility for a public social assistance centres to provide employment to a person for the purposes of accumulating contributory periods for social security purposes, or acquiring work experience. For further discussion, see Jean-François Neven, “Citoyens européens, CPAS et expulsions - le mode d’emploi de l’Office des étrangers”, *Revue Nouvelle* No 4/5 2014; Carlo Caldarini, “Avantages et inconvénients des contrats “article 60” pour les travailleurs étrangers” in Alta Manço and Leïla Scheurette (eds.) *L’inclusion des personnes d’origine étrangère sur le marché de l’emploi. Bilan des politiques en Wallonie* (l’Harmattan, 2021), pp. 63-74.

experience.<sup>53</sup> Following a change of policy in May 2014<sup>54</sup>, such contracts should now be accepted as constituting work for the purposes of establishing “worker” status under the Belgian Immigration Law.<sup>55</sup> This change in approach has now been followed by the Council for Alien Law Litigation (CALL).<sup>56</sup>

The CJEU has held that the duration of the activities pursued by a person is a factor which may be taken into account. The Court has previously recognised that the irregular nature and limited duration of the services performed under an “on-call” contract of employment may be an indication that the activities exercised are purely marginal and ancillary and not genuine and effective<sup>57</sup>. On the other hand, the Court’s case law also suggests that employment of only two and a half months’ duration should be sufficient for the person concerned to be categorised as a worker for the purposes of Article 45 TFEU.<sup>58</sup>

Nonetheless, the number of hours worked and the duration of the working relationship should also not be seen as the sole determinative factors. The CJEU has indicated that in cases where the hours worked are limited, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing a person to be granted the status of “worker”.<sup>59</sup> The other factors, which should be taken into account when making an overall assessment of the working relationship concerned, include the existence of entitlements to paid leave and sickness pay and the fact that the employment is covered by the relevant

collective agreement,<sup>60</sup> as well as the overall duration of the employment relationship.<sup>61</sup>

It should be noted that the current Belgian administrative practice imposes a restrictive condition as regards the minimum number of hours which must be worked on a weekly basis. It has previously been reported that in Belgium “work not exceeding 12 hours per week is quasi-irrefutable evidence of the activity being marginal and ancillary”.<sup>62</sup> The Immigration Office has recently opted to explicitly include the 12 hours threshold in the Syllabus, indicating that work not exceeding this threshold is considered to be marginal. Individuals working less than 12 hours per week will therefore according to the Syllabus not be considered a worker.<sup>63</sup> In an interview, the Immigration Office nuanced this position, stating that the 12 hour limit is merely an indicative threshold and that municipalities can send applications to the Immigration Office for further review.<sup>64</sup>

The 12-hour requirement corresponds to the minimum number of hours that must be worked in order to be eligible for unemployment benefit.<sup>65</sup> This approach appears to have been endorsed by the CALL.<sup>66</sup> However, such an approach is questionable in view of the case law of the CJEU according to which weekly average working times of 10, 12 or 18 hours per week do not prevent a person in part-time work from being considered a worker under EU law.<sup>67</sup> As a result, it does not necessarily follow that a person who engages in part-time work of less than 12 hours per week

53 The Belgian Immigration Office used to refuse to recognise the status of a “worker” to EU citizens working in Belgium under cover of an Article 60 contract on the basis that such work created a “burden on social assistance”. This approach was upheld by the CALL; see for example, CALL, judgment No 118 038 of 30 January 2014.

54 Following the opening of an investigation by the Commission, the Belgian authorities amended their practice from the end of April 2014 so that persons working under such a measure are now considered workers under the Directive, see House of Representatives, General Policy Note, Asylum and Migration (28 November 2014) (*Chambre des Représentants de Belgique, Note de Politique Générale, Asile et Migration / Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie*”, Doc No 54 K0588/026, 28-11-2014).

55 Milieu Ltd, *Country report for Belgium* (n 17), pp. 44-45.

56 CALL judgment No 199 532 of 12 February 2018.

57 Case C-357/89 *Raulin* EU:C:1992:87, which concerned a person employed in the Netherlands as a waitress under an on-call contract (“*oproepcontract*”) concluded for a fixed period of six months, under which she worked for 60 hours in the period between 5 and 21 March 1986.

58 Case C-413/01 *Ninni-Orasche* EU:C:2003:600.

59 Case C-14/09 *Genc* EU:C:2010:57, in which the CJEU ruled that there is nothing to prevent a person employed as a cleaner who worked on average 5.5 hours per week from being considered a worker because that person was paid €7.87 per hour (approximately €175 per month representing 25% of the living wage), was entitled to sick pay and was entitled to 28 days paid leave a year, and had been employed for over five years.

60 Ibid.

61 Ibid. Note that Case C-184/99 *Grzelczyk* EU:C:2001:458 is also relevant from this point of view. Despite the claimant having taken on various jobs during his period of residence in Belgium, the CJEU considered him to be a *student* and not a *worker* and deferred to the national court’s order for reference, which had considered that the claimant did not fulfil the criteria to be treated as a worker (paras. 10 and 15 of the judgment). However, this view was not shared by the Advocate General who considered that “an activity or a succession of individual employment relationships which enable a worker to support himself without external assistance for a period of three years cannot under any circumstances be regarded as purely marginal and ancillary” (Opinion of Advocate General Alber delivered on 28 September 2000 ECLI:EU:C:2000:518, para. 71). The Court did indicate in its judgment that this was ultimately a question for “the national court to determine, in the light, in particular, of the Opinion of the Advocate General, whether or not the facts and circumstances of the case are such as to permit Mr Grzelczyk to be regarded as a worker for the purposes of Community law.” (para. 16 of the judgment).

62 Charlotte O’Brien, Eleanor Spaventa and Joyce De Coninck, *FRESSCO Comparative Report 2015, The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, Report for the European Commission (2015), p. 27.

63 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR). The Syllabus states that an EU citizen who does not exercise an activity of at least 12 hours per week will not be considered as a worker for registration purposes. Their residence rights will be dependent upon them qualifying as holders of sufficient means, which is decided by the Immigration Office.

64 Interview with Immigration Office, 10 December 2020.

65 Art. 33, 1° Royal Decree of 25 November 1991 regulating unemployment (*Arrêté royal du 25 novembre 1991 portant réglementation du chômage/Koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering*).

66 CALL judgment No 93 730 of 17 December 2012.

67 Case C-444/93 *Megner & Scheffel* EU:C:1995:44.

should not be considered a worker under Article 45 TFEU, simply because the hours they have worked means they would not be eligible for unemployment benefits under national law in the event of involuntary unemployment.

It should also be noted that where an EU citizen ceases to be employed or to be self-employed, the person concerned may retain the status of a worker in certain circumstances.<sup>68</sup> In a similar fashion, the Citizens Rights Directive also allows family members to retain a right of residence in the event of death of their EU relative or the latter's departure from the host Member State,<sup>69</sup> as well as in situations relating to divorce or termination of a registered partnership.<sup>70</sup>

Given that such situations will arise after registration has taken place, they have not been covered by this study. However, concerns have been expressed as to how the EU rules are applied in practice by the Belgian authorities as regards the termination of residence rights, which would merit further research.<sup>71</sup>

## 3.2 Posted workers



A “posted worker” is an employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis.<sup>72</sup> This entails a situation where an employee usually pursues an activity in an EU Member State on behalf of an employer and is temporarily seconded by this employer to another EU Member State while remaining affiliated to the social security system of the first EU Member State for up to two years. A posting

may occur within the context of the provision of services by employers to their clients which requires the worker to be sent to another Member State.<sup>73</sup> It may also occur where an employee is sent to work to another company within the same group.<sup>74</sup> Alternatively, a posting may also take the form of a worker being hired out through a temporary work agency to its customer.<sup>75</sup>

Workers who are posted from another Member State differ from those who are locally hired in the host EU country due to their reduced entitlement to equal treatment with nationals of that country with respect to employment and remuneration conditions<sup>76</sup> as well as their social security situation in which they remain covered by their home Member State.<sup>77</sup> According to the CJEU, the reason explaining this difference is that posted workers do not gain access to the labour market of the host Member State because the posted workers will return to their country of origin after the completion of their work.<sup>78</sup> This is reflected in the legal basis for the posting of workers by companies, which is founded on the freedom of businesses to provide cross-border services under Article 56 TFEU<sup>79</sup> rather than the free movement of workers.

However, it is not clear at present whether a posted worker should also be considered as having the status of a “worker” for the purposes of Article 45 TFEU, although some scholars have argued in support for this view.<sup>80</sup> There is also case law which suggests that a posted worker can invoke the EU rules on the free movement of workers to challenge any obstacles put up by their Member State of

68 Art. 7(3), Directive 2004/38. For case law on this provision, see C-442/16 *Gusa* EU:C:2017:1004; Case C-618/16 *Prefeta* EU:C:2018:719; C-483/17 *Tarola* EU:C:2019:309. In addition, in Case C-507/12 *St Prix* EU:C:2014:2007, the CJEU has also recognised that a woman who gives up work, or seeking work, because of pregnancy and subsequent childbirth retains the status of “worker” within the meaning of Article 45 TFEU, provided she returns to work or finds another job within a reasonable period after the birth of her child. The same principle has been extended to self-employed persons as regards Article 49 TFEU in Case C-544/18 *Daknevičiute* EU:C:2019:761.

69 Art. 12, Directive 2004/38. There has so far been no case law on this provision.

70 Art. 13, Directive 2004/38. For case law on this provision, see Case C-45/12 *Hadj Ahmed* EU:C:2013:390; Case C-218/14 *Kuldip Singh* EU:C:2015:476; Case C-115/15 *NA* EU:C:2016:487.

71 Milieu (n 14); Valcke (n 18); Valcke (n 19). A number of petitions have also been brought before the European Parliament claiming breaches of these rules, see for example Petition 1851/2013 by Marius Ferestean (Romanian), on a breach of rules by the Belgian State with regard to a place of residence and Petition 0021/2014 by Giuseppe Mazzella (Italian) on EU rights denied. For cases suggesting that the Immigration Office sometimes refrains from applying these provisions, see for example CALL judgments No 140 965 of 13 March 2015 and No 151 491 of September 2015.

72 Art. 2(1), Directive 96/71 concerning the posting of workers [1996] OJ L 18/01 as amended by Directive 2018/957 [2018] OJ L 173/16.

73 Art. 1(3)(a), Directive 96/71.

74 Art. 1(3)(b), Directive 96/71.

75 Art. 1(3)(e), Directive 96/71.

76 According to Art. 3(1), Directive 96/71, posted workers are entitled in the host EU Member State to equal treatment with respect to a “nucleus of mandatory rules for minimum protection” including those relating to remuneration, working time, rest periods, paid annual leave and other conditions of employment. In addition, under Art. 3(1a), Directive 96/71, when the effective duration of the posting exceeds 12 months (or 18 months where this is specifically motivated by an employer), posted workers can claim full equal treatment in respect of all applicable terms and conditions of employment set out in the laws and/or generally binding collective labour agreements of the host Member State, except those with respect to the conclusion and the termination of the employment contract and supplementary occupational retirement pension schemes.

77 Posted workers remain subject to their home country's social security scheme for up to two years in accordance with Art. 12, Regulation 883/2004 on the coordination of social security systems [2004] OJ L 166/01. As a result, posted workers that fall within the scope of Art. 12, Regulation 883/2004 are excluded from any obligation to pay social security contributions in the host EU country but will have no right to claim benefits there. They cannot claim social security benefits according to host country social security schemes, except when the coordination provisions of Regulation 883/2004 provide for this.

78 Case C-113/89 *Rush Portuguesa* EU:C:1990:142 and Case C-43/93 *Vander Elst* EU:C:1994:310.

79 Recitals 1 to 5, Directive 96/71; see also recital 5, Directive 2014/54.

80 Robin C.A. White, *Workers, Establishment, and Services in the European Union* (Oxford University Press, 2004), p. 41.

origin upon their return home.<sup>81</sup> Furthermore, the Court of Justice has also acknowledged that, in certain cases, posted workers do gain access to the labour market in the host Member State,<sup>82</sup> for example where a worker is posted by a temporary work agency, in which case a worker remains employed by the temporary work agency but is then hired out to perform their work for the benefit and under the supervision of the agency's customer in the host State.<sup>83</sup> As a result, there is nothing in the current state of EU law which would categorically prevent a posted worker from being considered a "worker" for the purposes of the Citizens Rights Directive. The view of the European Commission appears to support the view that posted workers should be assimilated to workers for the purposes of the Citizens Rights Directive.<sup>84</sup>

In any event, posted workers remain subject to the same obligation to comply with residence formalities under the Citizens Rights Directive as locally-hired workers from other Member States. For the purpose of this study, it was decided to distinguish between these two categories of workers because, in practice, in Belgium they will be registered differently and will be required to furnish different documentation to establish their right of residence.

Even though the situation of posted workers is not explicitly addressed by the Citizens Rights Directive, when taking up residence in the country where they are posted for more than three months, they will be required to register there in the same way as locally-hired workers.

As regards posted workers, the latest version of the Syllabus<sup>85</sup> contains a major policy change, which no longer considers that posted workers should be registered as workers, and instead considers that they should be registered as self-sufficient persons. This policy change does not affect posted self-employed persons, as they were already required to register as self-sufficient persons. The trigger for this policy change appears to have been official

Commission guidance<sup>86</sup> regarding the personal scope of application of the UK Withdrawal Agreement, where the difference between the freedom of movement of workers and the freedom to provide services has become very relevant. According to the Dutch version of the Syllabus,<sup>87</sup> in previous years EU citizens posted to Belgium have been registered as a worker, but this practice is not correct. The Syllabus goes on to explain that a seconded EU citizen is not making use of the right to free movement of workers, but instead is making use of the free movement of services. The Syllabus confirms that a posted worker will still be considered to be exercising freedom of movement but as a self-sufficient person. The Immigration Office also issued separate instructions regarding this policy change.<sup>88</sup>

As a result of this policy change, this category of EU citizens will now fall under the decision-making competence of the Immigration Office instead of the municipalities. It also affects the documents that posted workers will be asked to provide, given that they will now have to demonstrate holding sufficient resources and comprehensive sickness insurance, thus imposing a heavier documentary burden as compared to locally-hired workers.

It is questionable whether this new policy is compatible with EU law, given that there is no reason posted workers could not be considered as "workers" for the purposes of the Citizens Rights Directive.

For the sake of completeness, it should be observed that posted workers also need to comply with certain formalities arising under other EU legal instruments.

As stated above, a posted worker will remain subject to the social security legislation of the sending Member State during the first two years of the posting.<sup>89</sup> An employer who sends a worker on a posting is required to

81 Case C-18/95 *Terhoeve* EU:C:1999:22, which concerned a Dutch national, who had lived and worked in the United Kingdom because his employer, established in the Netherlands, had posted him there.

82 Case C-113/89 *Rush Portuguesa* EU:C:1990:142.

83 This is the situation contemplated by Article 1(3)(c), Directive 96/71 which confirms that a posting includes a situation where "a temporary employment undertaking or placement agency, hire[s] out a worker to a user undertaking established or operating in the territory of a Member State, provided that there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting".

84 The Commission's view as reflected on its Your Europe portal [https://europa.eu/youreurope/citizens/residence/residence-rights/workers/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/residence-rights/workers/index_en.htm).

85 Immigration Office, Syllabus (June 2021), pp. 168, 170 (FR) / pp. 151, 153 (NL).

86 European Commission, Guidance Note relating to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (C(2020) 2939 final) dated 12 May 2020, which states at point 1.2.2.1 that "People relying solely on rights deriving from Article 56 TFEU are not covered by the Agreement (...). The Agreement does not confer any entitlement to posted workers to remain in the host State after the end of the transition period." However, this statement must be tempered in view of the fact that posted workers who were residing in the host State would fall within the personal scope of the Withdrawal Agreement under Article 10(1) because they were EU citizens exercising a right to reside in the UK or vice-versa as regards UK nationals in an EU country.

87 Immigration Office, Syllabus (June 2021), p. 151 (NL). There is no equivalent explanation in the French version of the Syllabus.

88 Immigration Office, note entitled "*Citoyens de l'Union européenne - travailleur détaché - changement de compétence (OE) / Burgers van de Europese Unie - gedetacheerde werknemer - wijziging van bevoegdheid (DVZ)*" 20 May 2021.

89 Art. 12(1), Regulation 883/2004; see also Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State [2010] OJ C 106/05.

notify their home social security institution.<sup>90</sup> A posted worker will then be issued with Form A1<sup>91</sup> that confirms their continued affiliation to their home social security institution, as well as Form S1<sup>92</sup> which confirms their right to receive healthcare treatment in the Member State where the posting takes place at the expense of their home social security institution.

Separately, the Posted Workers Enforcement Directive<sup>93</sup> allows the relevant authorities of the Member State of destination to require an employer to notify them of the posting before it takes place. As a result, an employer sending a worker on a posting to Belgium is required to submit a notification to the Belgian liaison office<sup>94</sup> before the posting commences by making what is called a “Limosa” declaration.<sup>95</sup>

## 3.3 Frontier workers



Frontier workers – also called cross-border workers – are those who work in one Member State but reside in another. Such workers fall within the scope of Article 45 TFEU and may invoke free movement rights in both their country of work<sup>96</sup> and their country of residence.<sup>97</sup>

Although the Citizens Rights Directive does not explicitly address the situation of frontier workers, for the purposes of complying with residence formalities, the right of residence of frontier workers will fall to be assessed under the rules applicable to self-sufficient persons, given that they are not employed in the host Member State. As a result, frontier workers seeking registration of their residence in the host Member State will have to demonstrate they have sufficient resources so as not to be a burden on social assistance and hold comprehensive sickness insurance for both themselves and their family members.<sup>98</sup>

It should be noted that the concept of frontier worker is given a narrower definition under the EU rules on the coordination of social security, which refer to any worker who is employed or self-employed person in one Member State but resides in another Member State, provided that the workers return to their country of residence on a daily or weekly basis.<sup>99</sup> However, for the purposes of this study, the concept of frontier worker has been used in its wider sense to cover any situation where a worker resides in Belgium but works in another Member State.<sup>100</sup> This study does not cover the reverse situation of a frontier worker working in Belgium while residing in a neighbouring country.<sup>101</sup>

Under the EU rules on the coordination of social security<sup>102</sup>, frontier workers should be entitled to health

90 Art. 15, Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems [2009] OJ L 204/01.

91 This is a certificate concerning the social security legislation which applies to its holder, which confirms the single Member State's social security legislation that applies to a worker, which is issued by the social security institution to which the posted worker is affiliated. In C-359/16, *Altun and others* EU:C:2018:63, the ECJ stated that national courts may, in cases of fraud, disregard social security certificates issued to posted workers within the EU. In Case C-356/15 *Commission v. Belgium* EU:C:2018:555, the CJEU found that Belgian legislation was found contrary to Arts. 11, 12 and 76(6), Regulation 883/2004 as well as Article 5 of Regulation 987/2009, insofar as it allowed the Belgian authorities to decide unilaterally, without following a dialogue and reconciliation procedure required by EU law, that Form A1 issued to posted workers can constitute an abuse of rights. Belgian law was amended in 2019 to correct this compliance issue and led to the repeal of Arts. 22, 23, 24 and 25, Programme Act of 27 December 2012 (*Loi-programme du 27 décembre 2012 / Programmawet van 27 december 2012*, MB/BS 31-12-2012, 88860) by the Law of 21 December 2018 amending various social provisions (*Loi du 21 décembre 2018 portant des dispositions diverses en matière sociale / Wet van 21 december 2018 houdende diverse bepalingen inzake sociale zaken*, MB/BS 17-01-2019, 5806).

92 This is a certificate of entitlement to healthcare confirming which Member State is responsible for meeting a person's healthcare costs, which is issued by the social security institution to which the posted worker is affiliated.

93 Art. 9, Directive 2014/67 on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services [2016] OJ L 159/11.

94 This is currently located within the Federal Public Service for Employment, Labour and Social Dialogue: <https://employment.belgium.be/en/themes/international/posting/liaison-offices-and-labour-inspectorate>.

95 Arts. 138-139, Program Law (I) of 27 December 2006 (*Loi-programme (I) du 27 décembre 2006 / Programmawet (I) van 27 december 2006*, MB/BS 28-12-2006, 75178) and Arts. 1-13, Royal Decree of 20 March relating to the prior notification for posted workers and posted self-employed persons (*Arrêté royal du 20 mars 2007 pris en exécution du Chapitre 8 du Titre IV de la loi-programme (I) du 27 décembre 2006 instaurant une déclaration préalable pour les travailleurs salariés et indépendants détachés / Koninklijk besluit van 20 maart 2007 tot uitvoering van het Hoofdstuk 8 van Titel IV van de programmawet (I) van 27 december 2006 tot voorafgaande melding voor gedetacheerde werknemers en zelfstandigen*, MB/BS 28-03-2007, 16975). For further information on the “Limosa” notification process, see [https://www.international.socialsecurity.be/working\\_in\\_belgium/en/limosa.html](https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html).

96 C-152/03 *Ritter-Coulais* E U:C:2006:123.

97 Case C-457/12 *S & G* EU:C:2014:136.

98 Art. 7(1)(b), Directive 2004/38.

99 Art. 1(f), Regulation 883/2004.

100 This is also the approach adopted by the CJEU, see Case C-379/11 *Caves Krier Frères* EU:C:2012:798.

101 This study concerns workers who are subject to residence formalities in Belgium. In circumstances where a frontier worker works in Belgium while residing in a neighbouring country, that worker will not be subject to residence formalities in Belgium. However, it should be noted that such workers are covered by Arts. 106 §1 and 107, Royal Decree on Immigration and are required to notify their presence to the local municipality of the place where they work in order to obtain a certificate (Annex 15) in accordance with Art. 109, Royal Decree on Immigration.

102 For the sake of completeness, it should also be noted that Art. 13, Regulation 883/2004 lays down detailed rules to determine which Member State's social security system will apply where a worker pursues activities in two or more Member States. For an explanation of these rules, see Commission, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland* (2013) <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>.

care in both their country of residence and the country of work.<sup>103</sup> They will be eligible to receive an S1 Form from the social security institution of the country where they are affiliated to confirm their entitlement to healthcare treatment<sup>104</sup> in the country of residence at the expense of their social security institution of affiliation. Once the S1 Form has been obtained in the country of work, the frontier worker will need to present it to the respective health insurance authority in the country of residence (“*mutuelle*” or “*ziekenfonds*” in Belgium).

## 3.4 Self-employed persons



The right of free movement of self-employed persons is derived directly from Articles 49 TFEU concerning the freedom of establishment<sup>105</sup> and 56 TFEU<sup>106</sup> concerning the freedom to provide services. This involves the right to take up and pursue activities as self-employed persons in a host Member State and to set up and manage undertakings.<sup>107</sup> Self-employment also covers the provision of services of a commercial or industrial nature as well as those of craftsmen and the professions<sup>108</sup> Self-employment consists in activities that are performed by a person outside any relationship of subordination.<sup>109</sup>

This study covers a number of different scenarios involving self-employed persons residing in Belgium. The most common situation will involve self-employed persons who establish themselves in Belgium and whose business will be the subject of registration with the Belgian business registry.<sup>110</sup> They will have to comply with certain formalities and obligations which apply to all self-employed persons who establish themselves in Belgium.<sup>111</sup>

In addition, this study also covers circumstances where an EU citizen works in a self-employed capacity in Belgium but whose business is registered in another Member State, which covers two further distinct situations.

103 Art. 17, Regulation 883/2004 on the coordination of social security systems [2004] OJ L 166/01

104 For further explanation, see n 80.

105 Case 48/75 *Royer* E U:C:1 976:57.

106 Art. 56 TFEU.

107 Art. 49 TFEU.

108 Art. 57 TFEU.

109 Case C-104/97 *Asscher* E U:C:1 996:251.

110 This is known as the Crossroads Bank for Enterprises (*Banque-carrefour des entreprises / Kruispuntbank voor ondernemingen*). For further details, see <https://economie.fgov.be/en/themes/enterprises/crossroads-bank-enterprises>.

111 For a detailed overview, see Chapter 3, Section 2. *Impact of residence formalities on access to an occupation*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.3 *Self-employed persons*.

One situation concerns cross-border self-employed persons who wish to take up residence in Belgium while continuing to work in another Member State. For the purposes of registering their residence, such cross-border self-employed persons will fall to be assessed under the rules applicable to self-sufficient persons given that they are not working in Belgium. They will therefore have to demonstrate that they hold sufficient resources so as not to become a burden on the Belgian social assistance system and that they possess comprehensive sickness insurance.

A further situation covers posted self-employed persons who normally pursue an activity in an EU Member State and who will temporarily perform a similar activity in another EU Member State. Similarly to posted workers, the EU social security rules also foresee that posted self-employed persons will remain subject to the social security legislation of the sending Member State during the first two years of the posting.<sup>112</sup> A self-employed person on a posting is required to notify their home social security institution,<sup>113</sup> which should issue them with Form A1 (certificate of affiliation)<sup>114</sup> and Form S1 (entitlement to healthcare).<sup>115</sup> This can then be used to register their residence as a self-employed person. However, according to the Syllabus, such posted self-employed persons should be registered as self-sufficient persons.<sup>116</sup> This approach is contestable given that there is nothing in the present state of EU law which would prevent a posted self-employed person from being considered as being “self-employed” for the purposes of the Citizens Rights Directive.

## 3.5 Jobseekers



The CJEU has ruled that the free movement of workers also benefits jobseekers, who have a right to move to another Member State to seek employment.<sup>117</sup> A host Member State must allow jobseekers a reasonable period of time to find work (six months being given as an indication by the CJEU)<sup>118</sup> and to stay beyond that time as long as they

112 Art. 12(2), Regulation 883/2004; see also Decision No A2 (n 89).

113 Art. 15, Regulation 987/2009.

114 For further explanation see n 88.

115 For further explanation see n 89.

116 Immigration Office, Syllabus (June 2021), p. 171 (FR) / p. 154 (NL).

117 Case C-292/89 *Antonissen* EU:C:1991:80.

118 Case C-710/19 *G.M.A.* EU:C:2020:1037. See also Commission’s Communication “Reaffirming the free movement of workers: rights and major developments” COM(2010) 373 which states that “jobseekers have the right, in accordance with the case-law of the CJ [Case C-292/89] and recital 9 of the Directive, to reside in the host Member State for at least six months without any conditions or formalities other than to have a valid passport or identity card”.

can prove that they are looking for employment and that they have genuine chances of being engaged.<sup>119</sup>

It has previously been reported that the Belgian authorities have been considered to follow a “very restrictive interpretation” of the concept of a “genuine chance of being engaged”.<sup>120</sup> It has also been observed that the Belgian Immigration Office has tended to interpret this requirement in a restrictive manner.<sup>121</sup> For example, if a jobseeker has never worked in Belgium, that person will not be considered as having a “genuine chance of being engaged”, even if this person may have previously worked in another Member State.<sup>122</sup> Another reason for refusing to accept that a jobseeker has a “genuine chance of being engaged” may be that the person concerned received a single letter of refusal after making half a dozen applications.<sup>123</sup> A long period of inactivity is usually taken as demonstration that a jobseeker does not have a “genuine chance of being engaged”.<sup>124</sup> Taking language classes<sup>125</sup> or engaging in vocational training<sup>126</sup> is not considered as sufficient to demonstrate a “genuine chance of being engaged”. In a similar fashion the fact that a jobseeker is looking for highly-skilled work following specialised postgraduate studies without being willing to take on more generic (and less remunerated) work has led the Belgian Immigration Office to conclude that the jobseeker is unable to demonstrate a “genuine chance of being engaged”.<sup>127</sup> There are serious doubts as to whether

such an interpretation of the notion of a “genuine chance of being engaged” complies with EU law.<sup>128</sup>

The period in which a jobseeker should be able to find work has also come under criticism.<sup>129</sup> In a recently decided case, the CJEU held that the Belgian authorities may not require jobseekers to demonstrate that they have a genuine chance of being engaged during the first six months following the date of their registration in Belgium.<sup>130</sup> This position has subsequently been endorsed by the Belgian Council of State.<sup>131</sup>

## 3.6 Family members



Whereas the Citizens’ Rights Directive does not provide any definition of the various categories of economically active persons mentioned above, it clearly identifies the family members of mobile EU citizens who are able to derive a right of free movement from their EU relative.<sup>132</sup> The Directive distinguishes between close family members, who benefit from the right to reside with their EU relative in the same Member State,<sup>133</sup> and other family members, whose entry and residence must only be “facilitated” by the host Member State<sup>134</sup> and whose situation is discussed in the next section.

In Article 2(2) of the Directive such close “family members” are defined as follows: the spouse, the partner in a registered partnership equivalent to marriage, their direct descendants who are under the age of 21 or those

119 Ibid.; see also Art. 14(4), Directive 2004/38.

120 O’Brien, Spaventa and De Coninck (n 62), p. 68.

121 Valcke (n 18), p. 10.

122 CALL, judgments No 158 838 and 158 871 of 15 December 2015; on appeal, such a reason was considered by the Council to be contrary to the aim of Art. 40, Belgian Immigration Law, which is to allow EU citizens to stay in Belgium in order to look for work.

123 CALL, judgment No 197 303 of 22 December 2017; on appeal such a reason was considered by the Council to constitute an insufficient reason for concluding on the absence of any “genuine chance of being engaged”.

124 CALL, judgments No 158 835 of 17 December 2015 and No 111 081 of 30 September 2013; in both cases the Immigration Office’s decision was upheld on appeal.

125 CALL, judgment No 185 928 of 26 April 2017, which upheld the Immigration Office’s decision on appeal.

126 CALL, judgments No 188 824 of 23 June 2017 and No 180 103 of 23 December 2016; upholding both decisions of the Immigration Office on appeal.

127 CALL, judgment No 140 965 of 13 March 2015; again upholding the Immigration Office’s decision on appeal.

128 Case C-710/19 *G.M.A.* EU:C:2020:1037 in which the CJEU held a para. 47 that “those authorities and courts will have to carry out an overall assessment of all relevant factors such as, for example, as observed by the Advocate General in points 75 and 76 of his Opinion, the fact that the jobseeker has registered with the national body responsible for jobseekers, that he or she regularly approaches potential employers with letters of application or that he or she goes to employment interviews. In the context of that assessment, those authorities and courts must take into account the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker in question. By contrast, the fact that that jobseeker refused offers of employment which did not correspond to his or her professional qualifications cannot be taken into account for the purpose of considering that that person does not satisfy the conditions laid down in Article 14(4)(b) of Directive 2004/38.” In his Opinion delivered on 17 September 2020 EU:C:2020:739, at para. 77, Advocate General Szpunar also considered that “given that jobseekers are looking for their first employment in the host Member State, the fact that they have never worked in the host Member State cannot be taken into account in the context of the checks referred to as a basis for finding that they do not have genuine chances of being engaged”.

129 Valcke (n 18), p. 9.

130 Case C-710/19 *G.M.A.* EU:C:2020:1037, which was referred to the CJEU by the Belgian Council of State (*Conseil d’État/Raad van State*) by judgment No 245.426 of 12 September 2019.

131 Council of State, judgment No 251.458 of 10 September 2021.

132 Case C-127/08 *Metock* EU:C:2008:449.

133 Case C-40/11 *Iida* EU:C:2012:691.

134 Case C-83/11 *Rahman* EU:C:2012:519.

above that age who are dependent upon the EU citizen or their spouse or partner, and their dependent direct relatives in the ascending line.

Pursuant to Articles 3(1), 7(1)(d) and (2) of the Directive, such family members derive a right of residence from an EU citizen to whom they are related when they accompany or join them in another EU Member State. In this respect it should be noted that the right of close family members to reside with their EU relative in the host Member State derives from the family relationship alone.<sup>135</sup> As a result, the issuance of a residence document to family members is not constitutive of a right of residence but merely serves to prove their status.<sup>136</sup>

The CJEU has also confirmed that family members may derive a right of residence from an EU citizen only insofar as their EU relative benefits from a primary right of residence under the Directive.<sup>137</sup> However, the rights of non-EU family members are not conditional upon them having previously lawfully resided in another Member State<sup>138</sup> and regardless of how they entered the host Member State.<sup>139</sup> It therefore follows that the right of residence of non-EU family members cannot be made conditional upon them obtaining a family reunification visa or other long-stay visa prior to joining their EU relative in the host Member State.<sup>140</sup>

The provisions of the Citizen Rights Directive concerning close family members have been transposed by Article 40bis of the Belgian Immigration Law. The Belgian rules cover all categories of family members identified by the Directive.<sup>141</sup>

It should also be noted that Article 40bis of the Belgian Immigration Law adds to the definition of “family member of an EU citizen”<sup>142</sup> a further category consisting in the partner with a registered partnership which is not considered equivalent to marriage in Belgium. For this category, additional conditions are imposed. First, both partners must be over 21 years of age.<sup>143</sup> If they provide proof that they have lived together for at least one year before their arrival in Belgium, this minimum age is

reduced to 18 years.<sup>144</sup> Secondly, their relationship must be “stable and durable”, which can be proven in one of three ways: (i) by establishing uninterrupted cohabitation in Belgium or abroad for at least one year before the application for registration; or (ii) by demonstrating that the couple has known each other for at least two years preceding the application for registration, which must be supported by proof of having maintained regular contact by telephone, regular or electronic mail (e.g. email, photos, etc.) and by having met on at least three occasions during these two years provided that their meetings have lasted a total of 45 days or more; or (iii) by having a child in common.<sup>145</sup> Third, both partners must be intending to live together.<sup>146</sup> Fourth, they must not be married or be in a durable relationship with another person.<sup>147</sup> Finally, they cannot be persons who are legally excluded from marriage in Belgium because of their family ties (e.g. siblings),<sup>148</sup> and they may not have been the subject of a final decision refusing to perform a marriage.<sup>149</sup>

A Royal Decree further specifies that registered partnerships which are recognised as equivalent to marriage in Belgium are those partnerships which have been registered in Denmark, Finland, Germany, Iceland, Norway, the United Kingdom and Sweden.<sup>150</sup>

This Royal Decree does not provide any explanation for the respective inclusion and exclusion of various forms of

135 Case C-459/99 *MRAX* EU:C:2002:461; Case C-157/03 *Commission v Spain* EU:C:2005:225.

136 *Ibid.*

137 Case C-40/11 *Jida* EU:C:2012:691; Case C-86/12 *Alopka* EU:C:2013:645; Case C-87/12 *Ymeraga* EU:C:2013:291.

138 Case C-127/08 *Metock* EU:C:2008:449.

139 Case C-551/07 *Sahin* EU:C:2008:755.

140 Case C-157/03 *Commission v Spain* EU:C:2005:225; Case C-459/99 *MRAX* EU:C:2002:461.

141 Art. 2(2), Directive 2004/38.

142 Art. 40bis § 2, 2°, Belgian Immigration Law.

143 Art. 40bis § 2, 2°, c), Belgian Immigration Law.

144 *Ibid.* It should be noted that where the partners arrive separately, it is not clear which date of arrival will serve as the date of reference for the purposes of determining whether there has been cohabitation lasting at least one year (i.e. is it one year from the date of arrival of the EU citizen or from the date of application by that family member?). While art. 40bis, Belgian Immigration Law seems to indicate that the arrival date of the EU citizen is to be used as the date of reference (“proof of cohabitation of at least one year before the arrival of the foreigner who is being joined”), whereas the Syllabus indicates in the notes to the summary table overview that the one-year period is to be calculated from the date of submission of the application by the family member (Immigration Office, Syllabus (June 2021), p. 130 (FR): “*les partenaires prouvent qu’ils ont cohabité de manière interrompue en Belgique ou dans un autre pays pendant au moins un an avant la demande*” / p. 130 (NL): “*bewijs 1 jaar (voor de aanvraag) te hebben samengewoond in België of in buitenland*”). Nonetheless, in other sections of the Syllabus it refers to the date of arrival of the EU citizen (*ibid.*, pp. 123 and 125 (FR) / pp. 103 and 105 (NL)).

145 Art. 40bis § 2, 2°, a), Belgian Immigration Law.

146 Art. 40bis § 2, 2°, b), Belgian Immigration Law.

147 Art. 40bis § 2, 2°, d), Belgian Immigration Law.

148 Art. 40bis § 2, 2°, e), Belgian Immigration Law.

149 Art. 40bis § 2, 2°, f), Belgian Immigration Law.

150 Art. 4, Royal Decree of 7 May 2008 establishing certain modalities of implementation of the law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the “Royal Decree of 7 May 2008”, (*Arrêté royal du 7 mai 2008 fixant certaines modalités d’exécution de la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers MB 29-08-2008, 45148 / Koninklijk besluit van 7 mei 2008 tot vaststelling van bepaalde uitvoeringsmodaliteiten van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, BS 29-08-2008, 45148*).

registered partnerships<sup>151</sup> from the scope of this measure. However, the explanatory text to the draft bill<sup>152</sup> which led to the amending law of 15 September 2006<sup>153</sup> sought to clarify this difference in treatment between partnerships which are recognised as equivalent to marriage and other partnerships which are not considered equivalent. The justification advanced for this distinction focused on the recognition by some foreign legislators themselves that certain partnerships create a bond between the persons concerned which is equivalent to marriage, as regards the consequences of the partnership not only for the partners themselves – such as creating an impediment to marriage until such time as the partnership may be dissolved – but also as regards the partners’ assets, as well as the conditions and process governing termination of their relationship. The explanatory text states that the conclusion which must therefore be drawn from such a distinction, is that the first category of registered partners should be granted the right to family reunification under the same conditions which apply to spouses, whereas the other registered partners whose relationship is not considered equivalent to marriage are subject to certain additional conditions.

The explanatory text further clarifies that this justification is the same one that prompted the Belgian parliament in the Belgian Code of private international law<sup>154</sup> to make a distinction between the rules applicable to partnerships which create a bond equivalent to marriage and those applicable to other partnerships which do not create such a bond. It is therefore relevant to look at the circulars

relating to the Belgian Code of private international law<sup>155</sup> as these provide additional insight into the decision to distinguish between different forms of partnerships which resulted in the list of partnership which are considered equivalent to marriage as contained in the Royal Decree of 7 May 2008.<sup>156</sup>

These circulars state that any relationship instituted under foreign law may be considered as equivalent to marriage only to the extent that the registered partnership produces effects which are comparable to marriage and requires registration with a public authority and provided it is governed by the same rules that apply to marriage or rules which are almost identical as regards the conditions for establishing the relationship, the causes, conditions and manner of its termination, as well as its effects on the person and property, with the exception of the rules on parentage and adoption.

However, according to these circulars a partnership will not be considered as equivalent marriage if the governing legal framework also allows the partners concerned to enter into marriage. This last exclusion aims to avoid recognition of equivalence if the parties concerned have implicitly indicated, by their choice of partnership, that they intend on refraining from entering into a relationship which is

151 According to the European Commission, 20 Member States provide for some form of registered partnership, namely Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Slovenia, Spain and Sweden; see further [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships\\_en-registeredpartnership](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships_en-registeredpartnership).

152 House of Representatives, draft law to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Chambre des Représentants de Belgique, Projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Kamer van Volksvertegenwoordigers, Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, Doc 51 2478/001, 10-05-2006).

153 Law of 15 September 2006 modifying the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 15 septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 15 september 2006 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 06-10-2006, 53533). This law sought to transpose Directive 2003/86 on family reunification [2003] OJ L 251/12 among others but did not concern the Citizens Rights Directive as such.

154 Law of 16 July 2004 instituting the Code of private international law (*Loi du 16 juillet 2004 portant le Code de droit international privé / Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht*, MB/BS 27-07-2004, 57344).

155 Circular of 23 September 2004 on Law of 16 July 2004 instituting the Code of private international law in respect of the civil status of individuals (*Circulaire du 23 septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel / Circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelsstatuut*, MB/BS 28-09-2004, 69594). This was supplemented by the Circular of 16 January 2006 (*Circulaire du 16 janvier 2006 relative à la loi du 3 décembre 2005 modifiant les articles 64 et 1476 du Code civil et l'article 59/1 du Code des droits de timbre en vue de simplifier les formalités du mariage et de la cohabitation légale / Circulaire van 16 januari 2006 betreffende de wet van 3 december 2005 tot wijziging van de artikelen 64 en 1476 van het Burgerlijk Wetboek en artikel 59/1 van het Wetboek van Zegelrechten met het oog op de vereenvoudiging van de formaliteiten voor het huwelijk en de wettelijke samenwoning*, MB/BS 23-01-2006, 3680). The Circular of 23 September 2004 has been updated by the Circular of 29 May 2007 (*Circulaire du 29 mai 2007 modifiant la circulaire du 23 septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel / Circulaire van 29 mei 2007 tot wijziging van de circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelsstatuut*, MB/BS 31-05-2007, 29469) and the Circular of 7 December 2017 (*Circulaire du 7 décembre 2017 relative au droit applicable au nom et aux prénoms et à la reconnaissance des décisions et actes étrangers qui concernent ces matières, modifiant la circulaire du 23 septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel, et relative à l'article 335quater du Code civil qui autorise un éventuel changement de nom en cas de reconnaissance de ces actes et décisions étrangers relatifs au nom / Omzendbrief van 7 december 2017 betreffende het op de naam en de voornamen toepasselijk recht en de erkenning van buitenlandse beslissingen en akten hieromtrent, tot wijziging van de omzendbrief van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelsstatuut, en betreffende artikel 335quater van het Burgerlijk Wetboek dat een eventuele naamsverandering toelaat in geval van erkenning van buitenlandse akten en beslissingen inzake de naam*, MB/BS 13-12-2017, 111136).

156 See n 147.

assimilated to marriage. This reasoning has been followed by the Belgian Constitutional Court, which has held that the legislator was reasonably entitled to have considered that cohabiting partners who choose to be united by legal cohabitation and not by marriage are aware of the respective advantages and disadvantages of each form of relationship and accept the legal consequences of their choice.<sup>157</sup>

On the basis of these criteria, according to the circulars, the registered partnerships instituted in various Scandinavian countries – namely Denmark, Finland, Iceland, Norway and Sweden – can therefore be considered equivalent to marriage. The same applies to the German life partnership (“*lebenspartnerschaft*”)<sup>158</sup> and the civil partnership introduced in the United Kingdom.<sup>159</sup>

Using the same approach, certain other forms of registered partnerships have not been considered equivalent to marriage. This is the case as regards a Dutch registered partnership<sup>160</sup> which is not considered equivalent because Dutch law allows both marriage and registered partnership in respect of both mixed-sex and same-sex couples and the manner in which a registered partnership is dissolved differs from that of marriage. As regards, the registered partnership introduced in Switzerland<sup>161</sup> in 2007 the circular considers this not to be equivalent either, as there are significant differences in terms of consequences as compared to marriage, especially as regards the property consequences and the conditions for termination. Finally, the French “*pacte civil de solidarité*” (PACS),<sup>162</sup> the Luxembourg partnership<sup>163</sup> and the various forms of cohabitation introduced in various Spanish provinces, which, like Belgian legal cohabitation, do not prevent marriage, are not considered equivalent to marriage either.

Several questions can be raised regarding this approach in Belgian legislation and administrative practice.

157 Constitutional Court, judgment No 120/2017 of 12 October 2017, point B.9.4

158 Act on Registered Life Partnership (*Gesetz über die Eingetragene Lebenspartnerschaft*, BGBl. I S. 2639). The Circular of 23 September 2004 (n 148) initially excluded this form of partnership, but the Circular of 16 January 2006 (n 148) noted that the German rules had been changed so that the existence of a civil partnership became an impediment to marriage with effect from 1 January 2005. Art. 1306, German Civil Code (*Bürgerliches Gesetzbuch*), explicitly prohibits a person who is in a registered partnership from being able to conclude a marriage with another person. Since September 2017, German law has allowed same-sex marriage and it is no longer possible to enter into such a registered partnership in Germany. Since October 1, 2017, registered partners can apply to convert their registered partnership into a marriage under Section 20a, Act on Registered Life Partnership.

159 Civil Partnership Act 2004.

160 Articles 1:80a-1:80g, Dutch Civil Code (*Burgerlijk Wetboek*).

161 Federal Law on registered partnerships between same-sex persons (*Loi fédérale sur le partenariat enregistré entre personnes du même sexe / Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare*).

162 Art. 515-1 onwards, French Civil Code.

163 Law of 9 July 2004 relating to the legal effects of certain partnerships (*Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*).

First, it is questionable whether a difference in treatment between different forms of registered partnerships is justified when transposing the residence rights of registered partners.

On the one hand, it is true that the Citizens Rights Directive limits the definition of close “family member” to registered partner only to the extent that those registered partnerships are treated as equivalent to marriage by the legislation of the host Member State and in accordance with the conditions laid down in the relevant legislation of the host Member State.<sup>164</sup> Recital 5 also provides that the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage. This would suggest that Member States can attach further conditions as regards their status as a “family member”.

On the other hand, the reference to the registered partnerships being treated as equivalent to marriage “in accordance with conditions laid down in the relevant legislation of the host Member State” could be interpreted as a reference to the conditions governing the substantive validity of a registered partnership in the host Member State, so that recognition by that State of a registered partnership concluded in another Member State can only be legitimately refused if those substantive conditions are not met. This would be the case for example, where a partnership had been concluded between blood relatives or between persons below the minimum permitted age, contrary to the conditions concerning the substantive validity of a registered partnership laid down in the national law of the host Member State.

It should also be noted that, according to the Commission’s original proposal, the concept of registered partnerships under the Citizens’ Rights Directive is intended “to treat unmarried partners as equivalent to spouses for residence purposes, where the legislation of the host Member State provides for unmarried partner status.”<sup>165</sup> It could therefore be argued that the intent of the Citizens Rights Directive was to ensure that as soon as the institution of registered partnership is recognised in the host Member State, then any partner who has validly contracted a registered partnership – whatever its form<sup>166</sup> – in another Member State is entitled to be considered as close family members and thereby benefit from a right of residence without further

164 Art. 2(2)(b), Directive 2004/38.

165 Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257, p. 8.

166 It should be recalled that when the Citizens Rights Directive was adopted very few Member States allowed same-sex marriage at the time and the institution of registered partnership was often seen as a compromise solution to allow same-sex couples to officialise their union.

conditions being attached besides the existence of a legally-recognised relationship which has been validly concluded.

Furthermore the Court of Justice has held – albeit in the context of the Family Reunification Directive – that the rules relating to authorisation of family reunification include specific positive obligations and require the Member States to authorise that reunification without exercising their discretion.<sup>167</sup> It is not therefore clear whether the Citizens Rights Directive provides sufficient discretion to Member States whose legal system provides for the institution of registered partnership – whatever its form – to create a further distinction between registered partnerships which are considered equivalent to marriage and those which are deemed not to be equivalent to marriage as regards the recognition of registered partnerships concluded abroad for the purposes of transposing the Citizens Rights Directive. Ultimately, this would be a matter for the EU Court of Justice to determine.

Secondly, it is questionable whether the distinction is made on the basis of transparent and objectively-justified criteria. In this respect it should be observed that the criteria used in Belgian practice to determine whether a partnership is equivalent to marriage are unclear. Indeed, some of the arguments advanced appear contestable and arguably present a skewed view of the conditions attaching to registered partnerships under the law of these Member States. For example, marriage is a bar to entering into a registered partnership in France<sup>168</sup> and Luxembourg,<sup>169</sup> so that a married person cannot conclude a registered partnership with another person, which would suggest equivalence. Furthermore, in circumstances where a partner to such a registered partnership does subsequently enter into marriage, French and Luxembourg law both provide that the registered partnership is automatically dissolved.<sup>170</sup>

Thirdly, the criteria are also not set out in legislation but rather only in administrative guidance. This may raise an issue of insufficient transposition, given that the Citizens Rights Directive refers to “the conditions laid down in the relevant *legislation* of the host Member State”. According to well-established case law of the EU Court of Justice, the use of administrative or ministerial circulars does not meet the obligation of a Member State to transpose EU directives<sup>171</sup> with legally-binding measures.<sup>172</sup>

167 C-578/08 *Chakroun* EU:C:2010:117; Case C-153/14 *Minister van Buitenlandse Zaken v K and A* EU:C:2015:453; Case C-257/17 *C and A v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2018:876.

168 Art. 515-2, French Civil Code.

169 Art. 4, Law of 9 July 2004 relating to the legal effects of certain partnerships (n 163).

170 Art. 515-7, French Civil Code.

171 Article 288 TFEU.

172 Case 96/81 *Commission v Netherlands* EU:C:1982:192; Case 145/82 *Commission v Italy* EU:C:1983:75; Case 29/84 *Commission v Germany* EU:C:1985:229; Case 116/86 *Commission v Italy* EU:C:1988:111; Case C-361/88 *Commission v Germany* EU:C:1991:224; Case C-9/92 *Commission v Greece* EU:C:1993:338.

On a final point, it should be noted that the list of registered partnerships as contained in the Royal Decree of 7 May 2008<sup>173</sup> is not up to date given that several other countries have since adopted legislation on registered partnerships including Italy<sup>174</sup> and Ireland<sup>175</sup>

A final category of family members who benefit from the right to reside with their EU relative primarily concerns non-EU parents of EU children, although they are not explicitly covered by the definition of “family member” in the Directive. The CJEU<sup>176</sup> has held that the non-EU primary carer of an EU minor who is exercising their freedom of movement must also benefit from residence rights in the host Member State as long as, through their primary carer, the child is covered by comprehensive sickness insurance and has sufficient resources for them not to become a burden on the social assistance system of the host Member State. Belgian law has codified the so-called “Chen carers” line of case law.<sup>177</sup>

However, it should be noted that Belgian law does not explicitly address the residence rights of primary carers of EU minors who remain in education and who are the children of former EU workers.<sup>178</sup> This is a potentially significant omission given that the CJEU has recognised that so-called “*Ibrahim/Teixeira* carers” benefit from a right of residence under Article 10 of Regulation 492/2011 on the free movement of workers<sup>179</sup> without the need to demonstrate they meet the conditions of the Citizens Rights Directive as regards possession of sufficient resources so as not to become a burden on the social assistance system of the host Member State or possession of comprehensive sickness insurance.<sup>180</sup>

173 See n 147.

174 Law No 16 of 20 May 2016 on regulating civil unions between persons of the same sex and rules on cohabitation (*Legge dal 20 maggio 2016, n. 76 sulla Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*).

175 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

176 Case C-200/02 *Zhu and Chen* EU:C:2004:639; confirmed by C-86/12 *Aloka & Moudoulou* EU:C:2013:645 and C-165/14 *Rendón Marín* EU:C:2016:675.

177 Art. 40bis § 2, 5°, Belgian Immigration Law.

178 C-413/99 *Baumbast and R*, EU:C:2002:493; Case C-310/08 *Ibrahim* EU:C:2010:80; C-480/08 *Teixeira* EU:C:2010:83; Joined Cases C-147/11 and C-148/11 *Czop and Punakova* EU:C:2012:538; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

179 Art. 10, Regulation 492/2011 provides as follows: “The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.” This provision as formerly contained in Article 12, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257 / 2.

180 Case C-310/08 *Ibrahim* EU:C:2010:80; C-480/08 *Teixeira* EU:C:2010:83; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

## 3.7 Other family members



In addition to the close family members mentioned above, Article 3(2) of the Directive also requires EU countries to facilitate the entry and residence rights of other family members of an EU citizen. Such “other family members” are defined as including those who are dependents on an EU citizen, or members of their household, or where serious health grounds require the personal care of the family member by the EU citizen, or the partner with whom the EU citizen has a “durable relationship duly attested”.

The obligation of facilitation under Article 3(2) of the Directive imposes a duty on the host Member States to confer a certain advantage to other family members of an EU citizen who are applying for recognition of their residence rights as compared with applications for entry and residence submitted by other non-EU citizens.<sup>181</sup> When complying with its obligation to facilitate the residence of other family members, the host Member State benefits from a wide discretion as regards the selection of the factors to be taken into account when undertaking an assessment of dependence and the degree of relationship between the family member and their EU relative, while ensuring that its legislation contains criteria which do not undermine the effectiveness of the EU rules.<sup>182</sup> Furthermore, the host Member State must ensure that its assessment is founded on an extensive examination of the personal circumstances of those other family members and that justification is given for any denial of residence.<sup>183</sup>

Although the initial Belgian transposing measures did not cover “other family members”,<sup>184</sup> Belgium transposed this provision in 2014 by inserting a new chapter into the Belgian Immigration Law which comprises articles 47/1 to 47/4.<sup>185</sup> Belgium has opted to provide the *right of residence*<sup>186</sup> (as opposed to only a right to facilitation as required by EU law) for the categories of other family members covered by Article 3(2) of the Directive, namely

the partner with whom the EU citizen has a durable relationship, family members who are dependents or whom are part of the household of the EU citizen in their country of origin, and family members who require the personal care of the EU citizen on serious health grounds.

For several years, it had been the position taken by the Immigration Office that the categories of (close) family members covered by Article 2(2) of the Citizens Rights Directive as transposed by Article 40bis §2 of the Belgian Immigration Law were by definition prevented from submitting an application as “other family members” under Article 47/1 onwards of the Law which gives effect to Article 3(2) of the Citizens Rights Directive and would exclude, for example, parents applying as members of the EU citizen’s household). However, in a judgment of 27 April 2017, the CALL held that ascendants are entitled to invoke Article 47/1, 2° of the Belgian Immigration Law insofar as they can provide evidence that they do not meet the conditions of Article 40bis §2, 4° of the Law.<sup>187</sup> Although the judgment only concerned ascendants who were not dependent on, yet part of the household of the EU citizen in their country of origin, this case law would appear to be relevant to other categories of family members as well, so that close family members who do not fulfil the requirements of Article 40bis §2, of the Law cannot generally be prevented from invoking rights as “other family members”. The Immigration Office confirmed that they have changed their position following the jurisprudence of the CALL and thus accept that the following categories of close family members could also apply for family reunification as “other family members”: non-dependent ascendants of EU citizens who are members of the EU citizen’s household in their country of origin (Art. 47/1, 2°, Belgian Immigration Law), ascendants of EU citizens who require personal care by the EU citizen on serious health grounds (Art. 47/1, 3°, Belgian Immigration Law), non-dependent descendants of EU citizens aged 21 or over who are members of the EU citizen’s household in their country of origin (Article 47/1, 2° of the Belgian Immigration Law) or who require personal care by the EU citizen due to serious health reasons (Art. 47/1, 3°, Belgian Immigration Law) and the registered partner of an EU citizen who does not meet all the conditions laid down in Art. 40bis §2, 2°, Belgian Immigration Law.<sup>188</sup>

181 Case C-83/11 *Rahman* EU:C:2012:519; Case C-89/11 *Banger* EU:C:2018:70; Case C-129/18 *SM* EU:C:2019:248.

182 *Ibid.*

183 *Ibid.*

184 Milieu (n 14), pp. 23-25.

185 Chapter Ibis entitled “Other family members of an EU citizen” of the Belgian Immigration Law, as inserted by the law of 19 March 2014 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 19 maart 2014 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 05-05-2014, 36137).

186 Art. 47/2, Belgian Immigration Law provides that the provisions on family members covered by Art. 40bis are to apply to “other family members”.

187 CALL judgment No 186 142 of 27 April 2017.

188 Interview with Immigration Office, 10 December 2020. DVZ mentioned however that some municipalities might not be aware of this change in position and might thus misinform applicants. See further, AGII, “Ook ascendenten van Unieburgers kunnen gezinshereniging vragen als “ander familielid” (“Ascendants of Union citizens can also request family reunification as “other family members””), 17 December 2017, <http://www.agii.be/nieuws/ook-ascendenten-van-unieburgers-kunnen-gezinshereniging-vragen-als-ander-familielid>.

## 3.8 Situations falling outside the scope of this study



This study focuses on the residence rights of more than three months of EU workers, self-employed persons, jobseekers and their family members in Belgium (commonly referred to as long stay).<sup>189</sup> Consequently, the residence rights of EU citizens in Belgium for less than three months (short stay) are not covered.<sup>190</sup> In addition, the other two categories of EU citizens who benefit from a right of residence of more than three months under the Citizenship Rights Directive, namely holders of sufficient resources and students, are also excluded from the scope of this study, given that they do not fall under the scope of Directive 2014/54 on the free movement of workers.

In addition, insofar as they are not residing in Belgium, certain other categories of EU citizens are also not included in this study. This involves frontier workers and “multi-state” workers (working in more than one country) who, although they are working in Belgium, will be residing in a different EU country.<sup>191</sup> Likewise, cross-border students,<sup>192</sup> who are studying in Belgium but residing in another EU country are not covered either. Although these categories have to declare their presence towards the Belgian authorities, their residence is not established in Belgium and they are therefore not subject to registration formalities which apply to EU citizens coming to reside in Belgium.

A further situation which is not covered by this study is that of the residence rights of primary carers of EU minors residing in their Member State of nationality such as the situations contemplated by the ruling in the *Ruiz Zambrano* line of case law.<sup>193</sup> This judgment concerned the right of residence of the Colombian parent who was the primary carer of two Belgian minors. Although there was no cross-border element to this case, the CJEU held that the two Belgian children would be deprived from enjoying the genuine substance of the rights conferred

by EU citizenship if their father was denied a right of residence in Belgium. This is because the children would have been obliged to leave the territory of the EU as a whole (not only Belgium) because they would have had to follow their parent back to Colombia in case the latter was refused a right of residence.<sup>194</sup> The *Ruiz Zambrano* judgment has since been the subject of clarification by the CJEU in several rulings.<sup>195</sup>

Finally, the rules on family reunification by Belgian nationals<sup>196</sup> are not covered by this study including those who have returned to Belgium after residing in another EU country.<sup>197</sup>

<sup>194</sup> The *Ruiz Zambrano* ruling has been codified by Article 40ter §2, 2°, Belgian Immigration Law.

<sup>195</sup> Case C-256/11 *Dereci* EU:C:2011:734; Joined Cases C-356/11 & C-357/11 *O., S. & L.* EU:C:2012:776; Case C-165/14 *Rendón Marín* EU:C:2016:675; Case C-304/14 *CS* EU:C:2016:674; Case C-133/15 *Chavez-Vilchez* EU:C:2017:534; Case C-82/16 *K.A. and Others* EU:C:2018:308; Case C-836/18 *RH* EU:C:2020:119.

<sup>196</sup> Art. 40ter §2, Belgian Immigration Law.

<sup>197</sup> Art. 40ter §1, Belgian Immigration Law. Art. 40ter, Belgian Immigration Law initially provided that the rules relating to EU citizens and their family members also extended to family members of Belgian citizens. However, this provision was subsequently amended with the aim of align the conditions applicable to the residence rights of family members of Belgian citizens with those applicable to family reunification by third-country nationals by Law of 8 July 2011 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners in respect of the conditions governing family reunification (*Loi du 8 juillet 2011 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial / Wet van 8 juli 2011 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging*, MB/BS 12-09-2011, 58915). This law was subsequently challenged on several grounds by a number of individuals and organisations before the Belgian Constitutional Court. In its ruling the Court held that the law was unlawful insofar as it discriminated against family members of Belgian citizens who had exercised their free movement rights by imposing harsher conditions than those that applied to family members of EU citizens (Constitutional Court, judgment No 121/2013 of 26 September 2013). The ruling subsequently led to the enactment of the Law of 4 May 2016 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 4 mai 2016 portant des dispositions diverses en matière d'asile et de migration et modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers / Wet van 4 mei 2016 houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen*, MB/BS 27-06-2016, 38643). As a result of this law, Art. 40ter, Belgian Immigration Law now explicitly extends the benefit of the provisions relating to family members of EU citizens to the non-EU family members of Belgian citizens who have exercised free movement rights in another EU country and have returned to Belgium, in line with Case C-370/90 *Surinder Singh* EU:C:1992:296.

<sup>189</sup> *Long séjour / lang verblijf*.

<sup>190</sup> This is covered by Art. 6(1) and (2), Directive 2004/38 as transposed by Art. 40 §3 and 40bis §3, Belgian Immigration Law.

<sup>191</sup> Under Art. 109, Royal Decree on Immigration, such workers are obliged to notify their presence to the local municipality of the place where they work in order to obtain a certificate (Annex 15).

<sup>192</sup> Under Art. 102, Royal Decree on Immigration, cross-border students who are nationals of bordering Member States are required to notify their presence to the local municipality of the place where they work and receive a certificate to that effect (Annex 33).

<sup>193</sup> Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. This situation is different from that of the *Chen* line of case law (n 176) which concerns the primary carers of EU citizens who have exercised their right to freedom of movement as codified by Art. 40bis § 2, 5°, Belgian Immigration Law.

## 3.9 Post-Brexit registration formalities for UK nationals



The UK withdrew from the European Union on 31 January 2020 and ceased to be a Member State at midnight on that date. However, during the transition period foreseen by the Withdrawal Agreement<sup>198</sup> which ended on 31 December 2020,<sup>199</sup> UK nationals continued to benefit from the EU rules on the free movement of persons.<sup>200</sup> UK nationals therefore remained subject to Belgian residence formalities in respect of stays longer than three months under the same conditions as any other EU citizen residing in Belgium.

Following the end of the transition period, UK nationals ceased to benefit from the free movement of persons. However, the Withdrawal Agreement aims to protect the acquired rights of UK nationals who were residing in the Member States before 31 December 2020.

Belgium has made use of the option under Article 18(1) of Withdrawal Agreement to require all UK nationals residing in Belgium to apply for a new residence document which confers rights under the Withdrawal Agreement.<sup>201</sup>

Following amendments made to the Belgian rules in December 2020,<sup>202</sup> procedures have been put in place to safeguard the acquired residence rights of UK nationals and their family members who were residing in Belgium by the end of the transition period on 31 December 2020.

UK nationals and their family members have until 31 December 2021<sup>203</sup> to complete an additional administrative process which requires them to exchange their current residence documents<sup>204</sup> (E, E+, F, or F+ cards as the case may be) for an “Article 50 TEU residence card”<sup>205</sup> (the so called “M card”)<sup>206</sup> which is specific to beneficiaries of the Withdrawal Agreement. UK nationals and their family members may apply even if they were not registered in Belgium prior to 31 December 2020 provided they can nonetheless prove they were exercising free movement rights.<sup>207</sup> No fee may be charged for the exchange of residence documentation.<sup>208</sup>

202 Law of 16 December 2020 relating to beneficiaries of the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (*Loi du 16 décembre 2020 relative aux bénéficiaires de l'accord sur le retrait du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord de l'Union européenne et de la Communauté européenne de l'énergie atomique / Wet van 16 december 2020 betreffende de begunstigden van het akkoord inzake de terugtrekking van het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland uit de Europese Unie en de Europese Gemeenschap voor Atoomenergie*, MB/BS 23-12-2020, 93542) and Royal Decree of 24 December 2020 modifying Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners in respect of beneficiaries of the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (*Arrêté royal du 24 décembre 2020 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers relatif aux bénéficiaires d'accord sur le retrait du Royaume-Uni de Grande Bretagne et d'Irlande du Nord de l'Union européenne et de la Communauté européenne de l'énergie atomique / Koninklijk besluit van 24 december 2020 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen betreffende de begunstigden van het akkoord inzake de terugtrekking van het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland uit de Europese Unie en de Europese Gemeenschap voor Atoomenergie*, MB/BS 31-12-2020, 98083). These instruments respectively inserted Art. 47/5, Belgian Immigration Law and Art. 69undecies, Art. 69duodecies and Art. 69terdecies, Royal Decree on Immigration.

203 Art. 47/5 §3, Belgian Immigration Law.

204 Art. 47/5 §2, Belgian Immigration Law.

205 Commission Implementing Decision of 21 February 2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2020) OJ

206 Art. 69duodecies, Royal Decree on Immigration. UK nationals and their family members who have acquired permanent residence will be issued with an M card with a permanent residence endorsement with a validity of ten years (Annex 54) while those who have resided in Belgium for less than five years will be issued with an M card with a validity of five years (Annex 53).

207 Art. 47/5 §6, Belgian Immigration Law; Art. 69duodecies §3 and §4, Royal Decree on Immigration.

208 Art. 2, second para., Law of 14 March 1968 on the abolition of the laws on residence tax for foreigners, art 2 (*Loi du 14 mars 1968 abrogeant les lois relatives aux taxes de séjour des étrangers / Wet van 14 maart 1968 tot opheffing van de wetten betreffende de verblijfsbelasting voor vreemdelingen*, MB/BS 05-04-1968, 3786).

198 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7 (hereafter the “Withdrawal Agreement”).

199 Art. 126, Withdrawal Agreement.

200 Art. 127, Withdrawal Agreement.

201 Specialised Committee on Citizens’ Rights, *Joint report on the implementation of residence rights under Part Two of the Withdrawal Agreement* (2020).

This residence document will allow UK nationals and their family members to continue residing legally in Belgium<sup>209</sup> and gives them access to the labour market after the end of the transition period.<sup>210</sup>

The Belgian Immigration Law explicitly provides for the continued application of the rules governing the rights of residence of EU citizens and their family members to beneficiaries of the Withdrawal Agreement insofar as those rules do not conflict with the provisions of the Withdrawal Agreement.<sup>211</sup> Nonetheless, there are some notable differences in the application process for beneficiaries of the Withdrawal Agreement compared to the ordinary registration process for EU citizens and their family members. Aside from the deadline for submitting an application and the documentation which is issued, the main difference resides in the additional requirement for all applicants to have to furnish a report on their criminal record.<sup>212</sup>

When submitting their application, applicants will be issued with both a temporary residence document (Annex 56 with an initial validity of three months)<sup>213</sup> and a certificate of application (Annex 58).<sup>214</sup> Until such time as their application is decided (including a potential appeal), applicants are deemed to benefit from all rights arising under the Withdrawal Agreement.<sup>215</sup> All existing and unexpired E, E+, F and F+ cards issued to UK nationals and their family members will automatically expire on 31 March 2022.<sup>216</sup>

The rules also provide for the possibility for UK nationals who were working in Belgium (while residing elsewhere) by the end of the transition period to apply for a frontier worker permit (the so-called “N card” or Annex 55).<sup>217</sup>

It should also be noted that a failure by an applicant to meet the deadline of 31 December 2021 will not automatically render an application inadmissible, provided that the applicant can show there are reasonable grounds for

having missed the deadline.<sup>218</sup> However, it should be observed that the GemCom note issued to municipalities contains no guidance on this point.<sup>219</sup>

## 4. EU law relating to registration formalities

Aside from the rules contained in the Citizens Rights Directive, the CJEU has had the opportunity to consider the essence of the EU residence rules in several of its rulings which have an incidence on how registration formalities should be applied by the national authorities.

### 4.1 The nature of registration formalities

Under the Citizens Rights Directive, Member States have the option to decide whether to make registration compulsory for EU citizens and family members who are themselves EU citizens when staying on their territory for more than three months.<sup>220</sup> When Member States make use of this option, EU citizens are then under an obligation to register when they are intending to stay beyond three months. The deadline for registration may not be less than three months from the date of arrival in the host Member State.<sup>221</sup>

The Citizens Rights Directive also foresees the registration for non-EU family members to be obligatory in all cases<sup>222</sup> and requires non-EU family members who are accompanying or joining an EU citizen to apply for a residence card when staying in a host Member State

209 Art. 47/5, Belgian Immigration Law.

210 Art. 4/1, Royal Decree of 2 September 2018 executing the law of 9 May 2018 (*Arrêté royal du 2 septembre 2018 portant exécution de la loi du 9 mai 2018 relative à l'occupation de ressortissants étrangers se trouvant dans une situation particulière de séjour / Koninklijk besluit van 2 september 2018 houdende de uitvoering van de wet van 9 mei 2018 betreffende de tewerkstelling van buitenlandse onderdanen die zich in een specifieke verblijfsituatie bevinden MB/BS 17-09-2018, 72187*).

211 Art. 47/5 §1, Belgian Immigration Law.

212 Art. 47/5 §4, Belgian Immigration Law; Art. 69duodécies §2, 2° §3, 2° and §4, 2°, Royal Decree on Immigration.

213 Art. 69duodécies §1, second para., Royal Decree on Immigration. This serves to prove they benefit from temporary status as beneficiaries under Art. 18(3), Withdrawal Agreement.

214 Art. 69duodécies §3, 2° and §4, 2°, Royal Decree on Immigration.

215 Art. 18(3), Withdrawal Agreement.

216 Art. 47/5 §8, Belgian Immigration Law.

217 Art. 69terdecies §1, Royal Decree on Immigration.

218 Art. 18(1)(d), Withdrawal Agreement; Art. 47/5 §3, para. 3, Belgian Immigration Law.

219 GemCom note to municipalities concerning British citizens and their family members who are protected by the Withdrawal Agreement (23 December 2020) (*Note aux communes concernant les britanniques et les membres de leur famille protégés pa" l'Accord de Retrait / Noot aan de gemeenten in verband met de Britten en hun familieleden die worden beschermd door het terugtrekkingsakkoord*).

220 Art. 8(1) and recital 12, Directive 2004/38.

221 Art. 8(2), Directive 2004/38.

222 Art. 9(1) and recital 13, Directive 2004/38.

for more than three months.<sup>223</sup> Again, the deadline for applying for a residence card may not be less than three months from the date of arrival.<sup>224</sup>

According to well-established case law which predates the Citizens Rights Directive, possession of a residence document is not a pre-condition for exercising any right connected to the free movement of persons and in particular the right to reside in another Member State both as regards EU citizens<sup>225</sup> and their non-EU family members.<sup>226</sup>

The reason is that the right of EU citizens and their family members to enter the territory of another Member State and reside there is a right conferred directly by the Treaty or, as the case may be, by the measures adopted for its implementation.<sup>227</sup> As a result, the grant of a residence document to an EU citizen or their family member is not constitutive of rights, but merely serves to prove their individual position as regards the provisions of EU law.<sup>228</sup>

The same approach has been confirmed as regards permanent residence. The Directive does not oblige EU citizens to apply for any residence document when they acquire a right of permanent residence in a host Member State.<sup>229</sup> The Directive provides merely for the issue, upon application, of a document certifying the permanence of their residence, without requiring such a formality.<sup>230</sup> Such a document has only declaratory and probative force but does not give rise to any right.<sup>231</sup>

It should be noted that Belgium has not transposed Article 25(1) of the Directive<sup>232</sup> which is intended to codify this case law and provides that the exercise of a right or

completion of an administrative formality cannot be made conditional upon possession of a residence document.<sup>233</sup>

This case law has also been confirmed by the Court in the specific context of the Citizens Rights Directive.<sup>234</sup> The declaratory character of residence documents means that those documents merely certify that a right already exists.<sup>235</sup> As a result, an EU citizen or their family member may not be regarded as irregularly present in the host Member State solely on the basis that they do not hold a residence card.<sup>236</sup> However, it also precludes an EU citizen or their family member from being regarded as legally resident on the sole basis that such a residence document was validly issued to them.<sup>237</sup> Nonetheless, the issue of a residence card (or permanent residence card) to a non-EU family members under the Citizens Rights Directive<sup>238</sup> constitutes a formal finding of the factual and legal situation of the person concerned with regard to that Directive and constitutes sufficient proof of the status of family member of an EU citizen of the person who holds such a card.<sup>239</sup>

The issue of a permanent residence card implies that the host Member State has necessarily verified, in advance, that the person concerned has the status of a family member of an EU citizen.<sup>240</sup> A permanent residence card may be issued only to non-EU family members who have first obtained a residence card for a family member of a Union citizen.<sup>241</sup>

## 4.2 Burden of proof



When an EU citizen and their family members apply for registration of their residence under the Citizens Rights Directive, they bear the burden of proving that they meet the conditions for having a right of residence under Article 7. According to the CJEU, the right of residence under EU law is not unconditional and it is for EU citizens and their

223 Ibid.

224 Art. 9(2), Directive 2004/38.

225 Case C-48/75 *Royer* EU:C:1976:57; Case C-138/02 *Collins* EU:C:2004:172; Case C-215/03 *Oulane* EU:C:2005:95.

226 Case C-459/99 *MRAX* EU:C:2002:461; Case C-157/03 *Commission v Spain* EU:C:2005:225.

227 Case C-48/75 *Royer* EU:C:1976:57; Case 249/86 *Commission v Germany* EU:C:1989:204; Case C-376/89 *Giagounidis* EU:C:1991:99; Case C-215/03 *Oulane* EU:C:2005:95.

228 Case 48/75 *Royer* EU:C:1976:57; Case C-138/02 *Collins* EU:C:2004:172; Case C-215/03 *Oulane* EU:C:2005:95 and Case C-408/03 *Commission v Belgium* EU:C:2006:192 as regards EU citizens; Case C-459/99 *MRAX* EU:C:2002:461 and Case C-157/03 *Commission v Spain* EU:C:2005:22 as regards non-EU family members.

229 Case C-123/08 *Wolzenburg* EU:C:2009:616.

230 Ibid.

231 Ibid.

232 This provides as follows: "Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof."

233 See also recital 11 of Directive 2004/38 which states that "The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures".

234 Case C-325/09 *Dias* EU:C:2011:498 and Case C-184/16 *Petrea* EU:C:2017:684 as regards EU citizens; Case C-202/13 *McCarthy* EU:C:2014:2450, Case C-456/12 *O & B* EU:C:2014:135 and Case C-246/17 *Diallo* EU:C:2018:499 as regards non-EU family members.

235 Ibid.

236 Ibid.

237 Ibid.

238 Art. 10, Directive 2004/38.

239 Case C-758/18 *RyanAir* EU:C:2020:478.

240 Ibid.

241 Ibid.

family members to adduce the necessary evidence that they meet the conditions laid down by the Directive.<sup>242</sup>

While the limitations and conditions which are laid down by the Citizens Rights Directive are based on the idea that the exercise of the right of residence of EU citizens can be subordinated to the legitimate interests of the Member States, the national authorities must apply those limitations and conditions in compliance with the general principles of EU law, in particular the principle of proportionality.<sup>243</sup> This means that the national measures which are adopted in application of the EU residence rules must be necessary and appropriate to attain the objective pursued.<sup>244</sup> It therefore follows that, while EU citizens and their family members may bear the burden of proving that they meet the conditions for exercising a right of residence under the Citizens Rights Directive, the national authorities are under an obligation to assess all evidence furnished in a proportionate manner.

When assessing the evidence submitted by EU citizens and their family members, the national authorities do not have an unfettered discretion. Indeed, when exercising their powers in this area, the host Member State must uphold both the basic freedoms guaranteed by the Treaty and the effectiveness of directives in order to facilitate the exercise of the right of residence by EU citizens and their family members.<sup>245</sup> The administrative authorities of the host Member State remain bound by the overall aim and purpose of the Citizens Rights Directive which is to simplify and strengthen residence rights.<sup>246</sup> Furthermore, the provisions of the Directive should not be interpreted restrictively and must not in any event be deprived of their effectiveness.<sup>247</sup> Finally, the authorities must also refrain from imposing excessively burdensome formalities that pose an obstacle to the free movement of EU citizens and their family members.<sup>248</sup>

## 4.3 Availability of information



EU legislation obliges Member States to disseminate information concerning the rights and obligations of EU

242 Case C-408/03 *Commission v Belgium* EU:C:2006:192.

243 Case C-413/99 *Baumbast* EU:C:2002:493; Case C-408/03 *Commission v Belgium* EU:C:2006:192.

244 *Ibid.*

245 Case C-424/98 *Commission v Italy* EU:C:2000:287.

246 Recital 3, Directive 2004/38.

247 Case C-127/08 *Metock* EU:C:2008:449; Case C-162/09 *Lassal* EU:C:2010:592; Case C-202/13 *McCarthy* EU:C:2014:2450; C-673/16 *Coman* EU:C:2018:385; Case C-483/17 *Tarola* EU:C:2019:309.

248 Recital 14, Directive 2004/38.

citizens and their family members by means of awareness-raising campaigns conducted through national and local media and other means of communication. This obligation is specified in Article 34 of the Citizens Rights Directive.

In addition, it should be noted that Article 6(2) of Directive 2014/54 on the free movement of workers requires Member States to “provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date.” This provision also requires this information to be made accessible through the Your Europe portal<sup>249</sup> and the website of EURES,<sup>250</sup> the European job mobility network.<sup>251</sup>

Recital 23 of Directive 2014/54 explains further the content of the information covered by this obligation: “Member States should establish how Union citizens, such as workers, students and recent graduates, as well as employers, the social partners and other interested parties can be provided with easily accessible, relevant information on the provisions of this Directive and of Regulation (EU) No 492/2011, including information about the bodies designated under this Directive and available means of redress and protection. Member States should take measures to make this information available in more than one official Union language taking into account demands in the labour market. That information could be provided by individual counselling and should also be easily accessible through Your Europe and EURES.”

In addition, the Regulation on the Single Digital Gateway<sup>252</sup> applies to information relating to residence formalities.<sup>253</sup> This Regulation provides for the creation of a Single Digital Gateway that consists of a common user interface to be integrated into the “Your Europe” portal<sup>254</sup> and which

249 The Your Europe portal provides information to EU citizens and their family members on their rights moving, travelling, living, studying, working and shopping within the EU and can be accessed here [https://europa.eu/youreurope/citizens/index\\_en.htm](https://europa.eu/youreurope/citizens/index_en.htm).

250 The EURES portal can be accessed here: <https://ec.europa.eu/eures/public/en/eures-services>.

251 EURES is a cooperation network designed to facilitate the free movement of workers within the EU-27 countries plus Switzerland, the United Kingdom, Iceland, Liechtenstein and Norway. Its functioning is governed by Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European cooperation network of employment services (EURES), workers' access to mobility services and the further integration of labour markets [2016] OJ L 107/01.

252 Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 [2018] OJ L 295/1 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services; see further [https://ec.europa.eu/growth/single-market/single-digital-gateway\\_en](https://ec.europa.eu/growth/single-market/single-digital-gateway_en).

253 Art. 2(2)(a) and Annex I, entry D., Regulation 2018/1724.

254 Your Europe portal on the Europa server <https://europa.eu/youreurope/index.htm>.

should give access to relevant Union and national webpages.<sup>255</sup>

The Gateway is intended to provide information on rights, obligations and rules laid down in Union and national law that are applicable to users exercising or intending to exercise their rights derived from Union law in the field of the internal market.<sup>256</sup> This includes information relating to taking up residence in another Member State,<sup>257</sup> including moving temporarily or permanently to another Member State<sup>258</sup> and the requirements for residence cards for Union citizens and their family members, including family members who are not Union citizens.<sup>259</sup>

As regards the national webpages which feed into the Single Digital Gateway, Member States are obliged to ensure that users have easy, online access on their national webpages to information about those rights, obligations and rules that relate to residence formalities and which are derived from national law.<sup>260</sup> These national webpages should also feature a link to the Single Digital Gateway using the logo which has been decided upon.<sup>261</sup> The deadline for national-level websites to upload information on residence formalities expired on 12 December 2020, whereas municipal authorities have until 12 December 2022 to do so.<sup>262</sup>

Member States are also required to ensure that such is made accessible in an official EU language that is “broadly understood by the largest possible number of cross-border users.”<sup>263</sup> Member States have the possibility of soliciting

the assistance of the European Commission in translating this information.<sup>264</sup>

## 4.4 Documentary requirements



Article 8 of the Citizens Rights Directive concerns the administrative formalities with which EU citizens are required to comply, while Articles 9 and 10 deal with the corresponding administrative formalities applicable to their non-EU family members.

These provisions identify the categories of documents that may be required by the national authorities in respect of workers, self-employed persons and their family members, irrespective of whether the latter are EU citizens themselves or third country nationals.<sup>265</sup> However, the Directive does not explicitly address the documentary requirements which apply to jobseekers, posted workers or frontier workers.

In some instances, the Citizens Rights Directive provides that a specific document should be provided.<sup>266</sup> For example, proof of “worker” status is demonstrated by producing a specific document in the form of “a confirmation of engagement from the employer or a certificate of employment.”<sup>267</sup> The Directive also provides that proof of identity and nationality can be established by EU citizens presenting a valid identity card or passport,<sup>268</sup> while non-EU family members must present a valid passport.<sup>269</sup> However, this requirement is subject to the caveat that EU citizens and their family members must be able to provide unequivocal proof of their nationality by means other than a valid identity card or passport.<sup>270</sup> As a result, the host Member State may not refuse to recognise their right of residence on the sole ground that they have not presented one of those identity documents.<sup>271</sup>

However, the Citizens Rights Directive does not contain a comprehensive listing of all the documents which EU citizens must submit in order to demonstrate that they meet the other conditions of the Directive. In some

255 Art. 2(1), Regulation 2018/1724.

256 Art. 2(2)(a), Regulation 2018/1724.

257 Annex I, entry D., Regulation 2018/1724.

258 Annex I, entry D. point 1, Regulation 2018/1724.

259 Annex I, entry D. point 4, Regulation 2018/1724.

260 Art. 4(1)(a), Regulation 2018/1724.

261 Art. 22(2), Regulation 2018/1724.

262 Art. 39, Regulation 2018/1724.

263 Art. 9(2), Regulation 2018/1724. Further explanation is contained in recital 35: “The accessibility of information for cross-border users can be substantially improved where that information is made available in an official language of the Union broadly understood by the largest possible number of cross-border users. This language should in most cases be the foreign language most widely studied by users across the Union, but in some specific cases, more particularly in the case of information to be provided at local level by small municipalities close to the border of a Member State, the most suitable language may be the one used as a first language by the cross-border users in the neighbouring Member State. The translation from the official language or languages of the Member State in question into this other official language of the Union should accurately reflect the content of the information provided in the original language or languages. Translation may be limited to the information that users need in order to understand the basic rules and requirements that apply to their situation. While Member States should be encouraged to translate as much information as possible into an official language of the Union that is broadly understood by the largest possible number of cross-border users, the volume of information to be translated under this Regulation will depend on the financial resources available for this purpose, in particular those from the Union budget. The Commission should make the appropriate arrangements to ensure the efficient delivery of translations to the Member States at their request. The gateway coordination group should discuss and provide guidance on the official language or languages of the Union into which such information should be translated.”

264 Art. 12, Regulation 2018/1724.

265 For the sake of completeness, it should be mentioned that documentary requirements are also laid down as regards students and the self-sufficient.

266 For a comparison with documentary requirements laid down by Belgian law, see further Section 5. *The registration process in Belgium*, Subsection 5.5 *Documentary requirements* in this Chapter.

267 Art. 8(3), first indent, Directive 2004/38.

268 Art. 8(3), Directive 2004/38.

269 Art. 10(2)(a), Directive 2004/38 as regards non-EU family members.

270 Case C-215/03 *Oulane* EU:C:2005:95 as regards EU citizens and Case C-459/99 *MRAX* EU:C:2002:461 as regards non-EU family members.

271 *Ibid.*

instances, the Directive simply requires that “proof” of a relevant condition is to be submitted. This is the case as regards establishing self-employment.<sup>272</sup> In this respect, the CJEU has previously held that prior registration of a self-employed person in the relevant social security scheme cannot be imposed as a condition either for obtaining the right of residence or for the issuance of a residence document.<sup>273</sup> Although not in scope of this study, it is important to note the parallel with self-sufficient persons who also benefit from a broad approach as to the requirement to submit “proof” of satisfying the sufficient resources<sup>274</sup> and comprehensive sickness insurance<sup>275</sup> conditions.

This is also the case as regards establishing the existence of a family relationship,<sup>276</sup> submitting evidence of being an “ascendant” or “dependent ascendant,”<sup>277</sup> proving the existence of an unmarried durable relationship,<sup>278</sup> or as regards proving fulfilment of the other conditions applicable to “other family members.”<sup>279</sup>

It should also be noted that there is no requirement contained in the Citizens Rights Directive as regards the nature of an EU worker’s accommodation. The former requirement contained in Article 10(3) of Regulation 1612/68<sup>280</sup> that “the worker must have available for his family housing considered as normal for national workers

in the region where he is employed”<sup>281</sup> was not carried over into the Directive.<sup>282</sup>

While the Directive is silent on the precise documents which jobseekers should provide when applying for registration of their residence, the recent case law of the CJEU indicates that when jobseekers first register their residence, the host Member State can only require them to demonstrate they are looking for work<sup>283</sup> and they cannot also be obliged to provide evidence of a genuine chance of being engaged.<sup>284</sup>

In the absence of specific provisions that identify what documents should be produced, EU citizens and their family members must be able to prove that they meet the conditions for exercising a right of residence by any appropriate means.<sup>285</sup> The national authorities are not entitled to limit the means of proof which may be relied upon or require that particular documents must be issued or certified by the authority of a Member State.<sup>286</sup>

In addition, the national authorities must make use of the various possibilities offered by other rules of EU law, particularly in relation to the production of evidence by means of certificates.<sup>287</sup> This includes making use of certificates issued by social security institutions<sup>288</sup> in accordance with the EU rules on the coordination of social security<sup>289</sup> or of standard format certificates in accordance with the EU rules on civil status documents.<sup>290</sup> Generally speaking, unless there are genuine doubts about the accuracy or authenticity of documents, the administrative and judicial authorities of the host Member State must accept certificates and personal status documents issued by the competent authorities of the other Member States.<sup>291</sup>

272 Ibid, which only provides that such persons should provide “proof that they are self-employed persons”.

273 Case C-363/89 *Roux* EU:C:1991:41.

274 The requirement to hold sufficient resources is also subject to Article 8(4) of Directive 2004/38 which provides as follows: “Member States may not lay down a fixed amount which they regard “sufficient resources” but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.”

275 Article 8(3), second indent, of Directive 2004/38 simply refers to the obligation to “provide proof that they satisfy the conditions laid down therein”.

276 Article 8(5)(b) of Directive 2004/38 requires family members who are themselves EU citizens to furnish “a document attesting to the existence of a family relationship or of a registered partnership” and Article 10(2)(b) contains the same requirement as regards non-EU family members.

277 Article 8(5) of Directive 2004/38 only specifies that “in cases falling under point (c) and (d) of Article 2(2)” the family members concerned should submit “documentary evidence that the conditions laid down therein are met” and Article 10(2)(d) contains the same requirement as regards non-EU family members.

278 Article 8(5)(f) of Directive 2004/38 requires that unmarried partners “falling under Article 3(2)(b)” should provide “proof of the existence of a durable relationship with the Union citizen” and the same requirement is contained in Article 10(2)(f) as regards non-EU family members.

279 Article (5)(e) of Directive 2004/38 requires that other family members “falling under Article 3(2)(a)” should submit “a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen” and the same requirement applies to non-EU family members under Article 10(2)(e).

280 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/02.

281 See also Case 249/86 *Commission v Germany* EU:C:1989:204, in which Germany was found to have infringed EU law by making renewal of the residence document of family members of EU migrant workers conditional upon their living in appropriate housing, not only at the time when they install themselves with the migrant worker concerned but for the entire duration of their residence.

282 Article 38 of Directive 2004/38 repealed Articles 10 and 11 of Regulation 1612/68 relating to workers’ families. Article 10, paragraphs (1) and (2) of Regulation 1612/68 were respectively replaced by Articles 2(2) and 3(2) of Directive 2004/38, while Article 11 of the Regulation on the right of family members to work in the host Member State was replaced by Article 23 of the Directive.

283 Case C-710/19 *G.M.A.* EU:C:2020:1037.

284 Ibid.

285 Case C-363/89 *Roux* EU:C:1991:41; Case C-215/03 *Oula ne* EU:C:2005:95; Case C-1/05 *J ia* EU:C:2007:1.

286 Case 424/98 *Commission v Italy* EU:C:2000:287.

287 Ibid.

288 Ibid.

289 Regulations 883/2004 and 987/2009 and implementing decisions.

290 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [2016] OJ L 200/01.

291 Case C-336/94 *Dafeki* EU:C:1997:579.

In its guidelines, the European Commission considers that the host Member State may also require that documents be accompanied by translations if the national authority concerned cannot comprehend the language in which the particular document is drafted.<sup>292</sup> The guidelines also mention that official public documents may undergo legalisation or authentication only insofar as there is a suspicion about the authenticity of the issuing authority.<sup>293</sup> However, such guidelines should be read alongside EU rules on civil status documents which have abolished legalisation<sup>294</sup> and translation<sup>295</sup> requirements for civil status certificates issued by the Member States in multilingual standard format.

The documentary requirements of the Citizens Rights Directive should be seen exhaustive in nature.<sup>296</sup> The Directive is intended to comprehensively specify the documents which may be requested by the competent authorities for the issuing of residence documentation to EU citizens and their family members in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of their right of residence.<sup>297</sup> It follows that Member States may not require additional documentation beyond the categories of documents specified by the Directive.<sup>298</sup> For example, this means that the national authorities cannot insist on workers and the self-employed having to provide evidence of affiliation to the national social security system of the host Member State as a condition for registering their residence.<sup>299</sup>

The Directive does not provide for any documentary requirements as regards permanent residence and only requires Member States to verify duration of residence.<sup>300</sup> The Directive also provides that continuity of residence may be attested by any means of proof in use in the host Member State.<sup>301</sup>

292 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 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, COM(2009) 313 final, p. 7.  
C-157/03 *Commission v Spain* EU:C:2005:225; Case C-127/08 *Metock* EU:C:2008:449.

293 *Ibid.*

294 Art. 4, Regulation 2016/1191

295 Art. 6(1)(b), Regulation 2016/1191.

296 C-157/03 *Commission v Spain* EU:C:2005:225; Case C-127/08 *Metock* EU:C:2008:449.

297 Recital 14, Directive 2004/38.

298 Case C-127/08 *Metock* EU:C:2008:449.

299 Case C-363/89 *Roux* EU:C:1991:41.

300 Art. 19(1), Directive 2004/38.

301 Art. 21 of Directive 2004/38. This provision has not been explicitly transposed by Belgium.

## 4.5 Deadlines applicable to residence formalities



The Citizens Rights Directive gives Member States the option to decide whether to make it compulsory for EU citizens and family members who are themselves EU citizens to register their residence when staying on their territory for more than three months.<sup>302</sup> Member States are therefore entitled to oblige EU citizens who are intending to stay beyond three months to register. The deadline for registration may not be less than three months from the date of arrival in the host Member State.<sup>303</sup>

However, registration for non-EU family members is compulsory.<sup>304</sup> The Directive requires non-EU family members to apply for a residence card when staying in a host Member State with their EU relative for more than three months.<sup>305</sup> The deadline for applying for a residence card may not be set at less than three months from the date of their arrival.<sup>306</sup>

The Citizens Rights Directive also imposes time limits on Member States for the issuance of residence documents to EU citizens and their family members. Following their application, EU citizens must immediately be issued with a registration certificate.<sup>307</sup> As made clear by the Commission's proposal for the Directive, the intention is that "a registration certificate [should] be issued on the spot by the competent national authority. The registration certificate is meant to be a kind of receipt for the citizen and proof for the authorities that the formality has been carried out. The certificate is to be issued immediately by the department responsible, once the formalities [...] have been completed. The residence certificate states the name and address of the person concerned; it does not have a period of validity and simply states the date of registration. The purpose of the certificate is merely to record that an administrative formality has been carried out."<sup>308</sup> Likewise, a document certifying permanent residence must be issued to an EU citizen as soon as possible following submission of an application.<sup>309</sup>

302 Art. 8(1) and recital 12, Directive 2004/38.

303 Art. 8(2), Directive 2004/38.

304 Art. 9(1) and recital 13, Directive 2004/38.

305 *Ibid.*

306 Art. 9(2), Directive 2004/38.

307 Art. 8(2), Directive 2004/38.

308 Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257, p. 12.

309 Art. 19(2), Directive 2004/38.

As regards non-EU family members, Member States are under an obligation to issue residence documentation within the six-month deadline set by the Directive.<sup>310</sup> The same deadline applies when non-EU family members apply for a permanent residence card.<sup>311</sup>

This requires that the host Member State must take a decision on whether to grant a residence card as soon as possible and in any event no later than six months from the date on which the application was submitted.<sup>312</sup> This six-month deadline implies that a decision must be made on an application and notified to the applicant before the deadline expires.<sup>313</sup> It is of little importance in that regard that an applicant may provisionally reside in the national territory while awaiting the decision concerning the grant or refusal of their residence card.<sup>314</sup>

Where the six-month deadline is not respected, it is contrary to EU law for national law to provide that the national authorities are obliged to issue a residence card of a family member of a Union citizen to the person concerned, without finding beforehand that the person concerned actually meets the conditions for residing in the host Member State.<sup>315</sup> While there is nothing to prevent national law from providing that silence on the part of the administration after a period of six months has elapsed from the lodging of the application constitutes a refusal, the Citizens Rights Directive precludes that silence from being deemed as constituting an acceptance.<sup>316</sup> Every time an application for a residence card is submitted by a non-EU family member, the competent national authorities must verify whether the third-country national is in a position to prove that they fall within the scope of the concept of “family member” through the submission of the documents listed in Article 10(2) of the Directive. The host Member State may therefore only issue a residence card after having made a finding that the applicant actually meets the conditions for residing in the host Member State in accordance with EU law.<sup>317</sup>

310 Art. 10(1), Directive 2004/38.

311 Art. 20(1), Directive 2004/38.

312 C-157/03 *Commission v Spain* EU:C:2005:225.

313 Case C-246/17 *Diallo* EU:C:2018:499.

314 C-157/03 *Commission v Spain* EU:C:2005:225; Case C-246/17 *Diallo* EU:C:2018:499.

315 Case C-246/17 *Diallo* EU:C:2018:499.

316 *Ibid.*

317 *Ibid.*

## 4.6 Consequences of failing to comply with residence formalities

The failure to comply with residence formalities does not of itself constitute a threat to public policy or public security.<sup>318</sup> The mere failure to comply with such formalities cannot therefore justify any decision ordering imprisonment<sup>319</sup> or expulsion.<sup>320</sup> Failure to comply with residence formalities may only be sanctioned by proportionate and non-discriminatory penalties.<sup>321</sup> This means the host Member State may only impose penalties comparable to those attached to minor offences committed by their own nationals.<sup>322</sup> In addition, applications may be rejected in case of fraud or abuse.<sup>323</sup>

## 4.7 Fees

The Citizens Rights Directive provides that all documents should be issued free of charge or for a charge not exceeding that imposed by the host Member State on its own nationals for issuing similar documents.<sup>324</sup> This applies to all residence documentation, whether registration certificates and documents attesting to permanent residence as issued to EU citizens, or residence cards and permanent residence cards issued to their non-EU family members.<sup>325</sup>

318 Case C-48/75 *Royer* EU:C:1976:57 and Case C-215/03 *Oulane* EU:C:2005:95 as regards EU citizens and Case C-459/99 *MRAX* EU:C:2002:461 as regards non-EU family members.

319 Case C-157/79 *Pieck* EU:C:1980:179.

320 Case C-48/75 *Royer* EU:C:1976:57; Case 118/75 *Watson and Belmann* EU:C:1976:106.

321 Articles 8(2) and 9(3) of Directive 2004/38 as regards EU citizens and non-EU family members respectively. Article 20(2) of the Directive contains the same limitations as regards the penalty that may be imposed for a failure by non-EU family members to apply for a permanent residence card before their residence card expires. In addition, Article 36 of the Directive provides that any sanction which is imposed for breaching the national measures that are adopted for its implementation must be “effective and proportionate”.

322 Case C-157/79 *Pieck* EU:C:1980:179. Case C-265/88 *Messner* EU:C:1989:632.

323 Art. 35, Directive 2004/38.

324 Art. 25(2), Directive 2004/38.

325 Art. 25(2) of Directive 2004/38, which refers back to Art. 25(1) which contains a list of those documents.

## 4.8 Validity of residence documents

Article 11 of the Citizens Rights Directive provides that a residence card issued to non-EU family members should be valid for a period of five years or for the envisaged period of residence if it is less than five years. The Directive only refers to the validity of residence cards of non-EU family members and does not contain a corresponding fixed period of validity for registration certificates issued to EU citizens.<sup>326</sup> The Directive therefore does not provide for the imposition of any temporal limitation as regards the validity of the registration certificate issued to EU citizens.<sup>327</sup>

## 5. The registration process in Belgium

The registration process in Belgium can be broken down into a number of distinct phases covering, first, a **preparatory phase** during which EU citizens and their family members may seek to obtain information about Belgian registration formalities; second, the **application phase** which involves the submission of an application for registration by EU citizens and their family members at the local municipality; third, the **verification of domicile phase** which involves the municipal authorities checking the existence of an applicant's domicile; and fourth, the **registration phase** which involves the competent authority reviewing the application and making a decision. Each of these phases is analysed in further detail below.

<sup>326</sup> No such limitation on the period of validity of registration certificates is contained in Art. 8, Directive 2004/38, which relates to administrative formalities for EU citizens.

<sup>327</sup> This was explicitly the case for the legislation which was replaced by Directive 2004/38. For example, under Art. 6, Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L 257/13, where the residence permit for EU citizens was limited to five years or a lesser period matching the expected period of employment for seasonal workers or those employed on a contract lasting less than a year.

## 5.1 Preparatory phase

This phase of the registration process covers in the means by which EU citizens and their family members may seek to obtain information about registering their residence in Belgium.

Under Article 34 of the Citizens Rights Directive, a host Member State is under an obligation to disseminate information concerning the rights and obligations of EU citizens and their family members on the matters covered by the Directive.<sup>328</sup>

In Belgium, pursuant to legislation on transparent governance and public service charters<sup>329</sup>, administrative authorities have a duty to inform citizens of the registration procedure in a helpful and clear manner and information contained on websites should be regularly updated.<sup>330</sup>

The Immigration Office provides information on the residence registration process for EU citizens and their family members on its website, which is made available in Dutch<sup>331</sup> and French.<sup>332</sup> The Immigration Office has indicated that improvements to this website are scheduled to be implemented in the future, including making the information available in English and improving the accessibility of information.<sup>333</sup>

It should be noted that national legislation on the use of languages<sup>334</sup> currently places limitations on the use of languages by municipalities in their interactions with

<sup>328</sup> See further Section 4. *EU law relating to registration formalities*, Section 4.3 *Availability of information* in this Chapter.

<sup>329</sup> See, at the federal level, law on administrative transparency (*Loi du 11 avril 1994 relative à la publicité de l'administration/ Wet van 11 april 1994 betreffende de openbaarheid van bestuur*, MB/BS 30-06-1994, 17662), the public-service user charter (*Charte du 4 décembre 1992 de l'utilisateur des services publics / Handvest van 4 december 1992 van de gebruiker van de openbare diensten*, MB/BS 22-01-1993, 1150) and the charter for user-friendly governance (*Charte du 23 juin 2006 pour une administration à l'écoute des usagers / Handvest van 23 juni 2006 van de klantvriendelijke overheid <*; see also, at the municipal level, law on administrative transparency at provincial and municipal levels (*Loi du 12 novembre 1997 relative à la publicité de l'administration dans les provinces et les communes / Wet van 12 november 1997 betreffende de openbaarheid van bestuur in de provincies en gemeenten*, MB/BS 19-12-1997, 34253).

<sup>330</sup> The charter for user-friendly governance (*Charte du 23 juin 2006 pour une administration à l'écoute des usagers / Handvest van 23 juni 2006 van de klantvriendelijke overheid*).

<sup>331</sup> Immigration Office website, "Burger van de EU", <https://dofi.ibz.be/nl/themes/burger-van-de-eu>.

<sup>332</sup> Immigration Office website, "Citoyen de l'Union", <https://dofi.ibz.be/fr/themes/citoyens-de-lunion>.

<sup>333</sup> Interview with Immigration Office, 25 May 2020. Some sections of the website currently mention "under construction".

<sup>334</sup> Law of 18 July 1966 on the use of languages in administrative matters (*Lois du 18 juillet 1966 sur l'emploi des langues en matière administrative / Wetten van 18 juli 1966 op het gebruik van de talen in bestuurszaken*, MB/BS 02-08-1966, 7799), local services should only use the language of their region in their communication towards the public.

members of the public. In particular municipal officials are required to make exclusive use of the language of the region in their communications and dealings with members of the public, without prejudice to the option which is left to them to respond to individuals residing in another linguistic region in the language used by the person concerned.<sup>335</sup> This would appear to prevent municipal officials for using any other language when communicating with EU citizens and their family members. In view of the CJEU case law on this point,<sup>336</sup> there are some doubts whether such restrictions are compatible with the EU free movement rules. However, this would require further research to determine whether such rules pose an obstacle to residence rights of EU citizens and their family members.

The results of the survey conducted on the practical application of the publicity obligations contained in the Citizens Rights Directive are discussed in the next Chapter of this study.

### 5.1.1 The obligation to register for periods of residence longer than three months

Belgium has made use of the option provided by Article 8(1) of the Citizens Rights Directive to make it compulsory for EU citizens to register their residence when they intend on staying in Belgium for over three months. As a result, Belgian law requires EU citizens to register with their local municipality.<sup>337</sup> They must do so within three months of their arrival in Belgium<sup>338</sup> in line with the deadline allowed under Article 8(2) the Directive.

This registration requirement applies in the same way to all categories of economically active EU citizens, who are the subject of this study.<sup>339</sup> The same applies for family members who are themselves EU citizens.

In addition, Article 9 of the Citizens Rights Directive obliges Member States to issue a residence card to those

family members who are not EU citizens. This makes registration for non-EU family members not an optional but a compulsory requirement. In line with Article 9(2) of the Directive, non-EU family members must apply for a residence card at their local municipality<sup>340</sup> within three months of their arrival.<sup>341</sup>

### 5.1.2 Failure to comply with registration formalities

According to Articles 8(2) and 9(3) of the Citizens Rights Directive, EU citizens and family members who do not comply with registration obligations may be liable to proportionate and non-discriminatory sanctions.

Belgian legislation foresees the possibility for the imposition of an administrative penalty of 200 EUR in case of non-compliance with registration obligations.<sup>342</sup> This penalty can be imposed on EU citizens and their family members by the Immigration Office.<sup>343</sup> The decision imposing a penalty must be notified to the defaulting person by registered post<sup>344</sup> or served in person through the local municipality or police officer.<sup>345</sup> A right of appeal against the decision imposing such a fine lies before the first instance tribunal.<sup>346</sup> It is important to note that the imposition of a fine is not an obligation under the law, but remains at the discretion of the Immigration Office.<sup>347</sup>

## 5.2 Application phase

This phase of the registration process comprises the submission of an application for registration by EU citizens and their family members at the local municipality.

335 Art. 12, Law of 18 July 1966.

336 Case C-202/11 *Las* ECLI:EU:C:2013:239. In this case the CJEU held that the Decree of 19 July 1973 on the use of languages in relations between employers and employees (*Decreet van 19 juli 1973 tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers*, BS 06-09-1973, 10089) constituted an unjustified restriction on the free movement of workers contrary to Article 45 TFEU. See also Case C-15/15 *New Valmar* EU:C:2016:464, in which the CJEU considered that the Belgian rules on invoicing amounted to a measure having equivalent effect to a quantitative restriction on exports in obliging businesses that are established in the Flanders region and which engage in cross-border transactions to draw up invoices exclusively in the Dutch language.

337 Art. 50 §1, Royal Decree on Immigration.

338 Art. 42 §4, Belgian Immigration Law.

339 For the sake of completeness, it should be mentioned that the obligation also applies to non-economically active EU citizens and their family members.

340 Art. 52 §1, Royal Decree on Immigration.

341 Art. 42 §4, Belgian Immigration Law.

342 Art. 42 §4, Belgian Immigration Law.

343 Art. 42octies, Belgian Immigration Law.

344 Art. 62 §3, second para., Belgian Immigration Law.

345 *Ibid.*

346 Art. 42octies, Belgian Immigration Law.

347 Circular of 16 June 2016 relating to the imposition of administrative fines of €200 under the Belgian Immigration Law (*Circulaire du relative à l'application des amendes administratives de 200 euros dans le cadre de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Omzendbrief van 16 juni 2016 inzake de toepassing van de administratieve geldboetes van 200 euro op basis van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 14-07-2016, 44395).

## 5.2.1 Overview of the procedure

For EU citizens and family members who are themselves EU citizens, Article 8(2) of the Citizens Rights Directive obliges the national authorities to issue a registration certificate, stating their name, address and date of registration. According to the Directive, such a registration certificate must be issued immediately.

For family members who are non-EU citizens, under Article 10(1) of the Directive, the national authorities are under the obligation to issue a residence card no later than six months from the date on which they submit their application. Such a document should be labelled “residence card of a family member of a Union citizen”. When an application is first lodged, the non-EU family members must immediately be issued with a certificate of application.

In Belgium, the responsibility for issuing residence documentation to EU citizens and their family members is shared between the municipalities and the Immigration Office. To initiate the procedure, EU citizens and their family members must visit the local municipality of their place of residence<sup>348</sup> and must do so within three months of arrival in Belgium.<sup>349</sup> The application must be made in person.<sup>350</sup>

In terms of deadlines, in Belgium, EU citizens and their non-EU family members are treated in the same way, in the sense that they must be issued with a registration certificate or residence card respectively “as soon as possible and not later than six months” after the application.<sup>351</sup> For EU citizens this is considered non-compliant transposition of the Citizens Rights Directive, as immediate issuance of a registration certificate is required under Article 8(2) of the Directive.<sup>352</sup>

## 5.2.2 Initial documents required: proof of identity

During the first visit to the municipality, EU citizens must prove their EU citizenship.<sup>353</sup> Non-EU family members are required to provide proof of their identity within three months from the date of submission of their application.<sup>354</sup>

This is usually done by providing a valid passport or national identity card issued by an EU Member State as regards EU citizens<sup>355</sup>. Non-EU family members are required to produce a valid passport.<sup>356</sup> Belgian legislation does allow for other means of proof of EU citizenship as well, such as the use of an expired identity document or “any other form of proof”.<sup>357</sup> This provision is in line with EU law.<sup>358</sup> It should be noted that this provision only applies for the benefit of EU citizens and there is no corresponding provision of Belgian law applicable to non-EU family members.

However, it should be noted that as a matter of EU law, non-EU family members must be able to provide unequivocal proof of their nationality by means other than a valid passport.<sup>359</sup>

Nonetheless, the Belgian authorities have also indicated in a circular that a person seeking to register without a valid identity card or passport may be fined 200 EUR.<sup>360</sup> During our interview, the Belgian Immigration Office stated that fines are not applied in practice and that expired documents are accepted as proof of identity.<sup>361</sup>

As part of anti-fraud measures (the so-called “Project Europa”),<sup>362</sup> all travel and ID documents furnished by persons purporting to be EU citizens are subject to systematic verification as to their authenticity.<sup>363</sup> This involves Belgian municipalities making a scanned copy of the passport or identity card submitted by EU citizens who applying for a residence of more than three months, and sending this to the local police in order for them to verify the authenticity of these documents.<sup>364</sup> Authentication is then undertaken by the local police using the security features identified on the PRADO website<sup>365</sup> among several tools.<sup>366</sup> In case of suspected fraud, the scanned documents

348 Arts. 50 §1 and 52 §1, Royal Decree on Immigration.

349 Art. 42 §4, Belgian Immigration Law.

350 Ibid.

351 Art. 42 §1, Belgian Immigration Law.

352 Milieu (n 14), pp. 29-30 ; Valcke (n 18), p. 6; for further discussion, see below Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*; for a discussion of the relevant EU rules, see Section 4. *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities* in this Chapter.

353 Art. 50 §1, Royal Decree on Immigration.

354 Art. 52 §2, Royal Decree on Immigration.

355 Art. 41 §1, Belgian Immigration Law.

356 Art. 41 §2, Belgian Immigration Law.

357 Art. 46, Royal Decree on Immigration. In the past, the Immigration Office did not allow municipalities to decide whether an expired passport or national identity card could be accepted: the file had to be sent to the Immigration office for decision-making.

358 See further Section 4. *EU law relating to registration formalities*, Subsection 4.4 *Documentary requirements* in this Chapter.

359 Case C-459/99 *MRAX* EU:C:2002:461.

360 Circular of 16 June 2016 relating to the imposition of administrative fines of €200 under the Belgian Immigration Act (n 347).

361 Interview with Immigration Office, 25 May 2020.

362 Interview with Municipality C, 22 October 2020.

363 Circular of 2 June 2015 relating to the fight against the fraudulent use of identity and travel documents issued by the Member States or their forgeries (*Circulaire du 2 juin 2015 relative à la lutte contre l'usage frauduleux de documents d'identité ou de voyage émis par les Etats membres de l'Union européenne ou imitant ceux-ci / Omzendbrief van 2 juni 2015 betreffende de strijd tegen het frauduleus gebruik van identiteitsdocumenten of reisdocumenten uitgegeven door de lidstaten van de Unie of aangewend ter nabootsing hiervan*, MB/BS 18-06-2015, 35736).

364 Immigration Office, Syllabus (June 2021), p. 148 (NL) / p. 165 (FR).

365 This refers to the Council's Public Register of Authentic travel and identity Documents Online (PRADO) <https://www.consilium.europa.eu/prado/en/prado-start-page.html>.

366 Interview with Municipality C, 22 October 2020.

are sent to the federal police for further action.<sup>367</sup> The Syllabus explicitly specifies that the municipality cannot refuse to issue a certificate of application (Annex 19) or issue a registration certificate (Annex 8 or EU card), given that the power to refuse applications on the basis of fraud is only vested in the relevant Minister or his delegate (in practice the Immigration Office).<sup>368</sup>

It is not clear to what extent this verification process may create further delays in the processing of residence applications. In theory, the two processes operate independently so municipalities should be able to proceed with an application for residence without having to put the registration procedure on hold while awaiting the outcome of the verification of travel documents by the local police. However, it was reported that, especially in the past, some municipalities were putting the applications on hold until the green light was received from the police.<sup>369</sup>

It should be noted in this respect that an EU Regulation on security of identity documents<sup>370</sup> adopted in 2019 should eventually help to reduce instances of forged documentation being used. Under the Regulation, Member States will be obliged to make all identity documents machine-readable among other requirements.<sup>371</sup> While new identity cards issued by Member States to their own nationals will need to comply with the new security requirements laid down in this Regulation from 2 August 2021, existing identity cards which are not machine-readable will be phased out over a five-year period ending in August 2026.<sup>372</sup>

### 5.2.3 Initial documents required: proof of relationship for non-EU family members

In addition to proof of identity, non-EU family members have to provide documentary proof attesting to their family relationship.<sup>373</sup> This is usually achieved by providing an official civil status document in accordance with Article 30 of the Belgian Code of private international law<sup>374</sup> or

the relevant international agreement,<sup>375</sup> but other means of proof may be accepted.<sup>376</sup>

### 5.2.4 Initial documents which should not be required: entry visa for non-EU family members

Non-EU family members are sometimes required to hold a visa in order to be permitted to apply for a residence card. Belgian law currently requires non-EU family members who apply for a residence card to demonstrate they meet the conditions of entry, which includes holding an entry visa.<sup>377</sup>

This requirement is likely to be contrary to the established case law of the CJEU.<sup>378</sup> It is important to note in this respect that the CJEU has previously confirmed that their right of residence cannot be made conditional upon them having obtained a family reunification visa or other long-stay visa prior to joining their EU relative in the host member state.<sup>379</sup> Given that the case law concerned situations that pre-dated the entry into force of the Citizens Rights Directive, the case law of the CJEU does not make a distinction between non-EU “family members” covered by Article 2(2) of the Citizens Rights Directive, who have the right to reside with their related EU citizen on the one hand, and the non-EU “other family members” as referred to in Article 3(2) of the Directive, whose residence rights should only be facilitated, on the other hand. Furthermore, there are no reasons to consider that this case law would not also apply to “other family members” falling within the scope of Article 3(2) of the Directive.<sup>380</sup> Moreover, following the entry into force of the Directive, the CJEU has also held that the rights of non-EU family members are not conditional upon them having previously lawfully resided in another Member State<sup>381</sup> and regardless of how they entered the host Member State.<sup>382</sup>

However, the CALL appears to have upheld the requirement to hold a visa in the majority of appeals concerning a refusal to issue residence cards to “other

367 Interview with Municipality C, 22 October 2020. This would tend to affect documents purporting to be issued by Italy, Romania and Greece.

368 Art. 44, Belgian Immigration Law.

369 Interview with Municipality C, 22 October 2020.

370 Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement [2019] OJ L 188/67.

371 Art. 3, Regulation 2019/1157.

372 Art. 5, Regulation 2019/1157.

373 Art. 52 §1, Royal Decree on Immigration.

374 Law of 16 July 2004 instituting the Code of private international law (*Loi du 16 juillet 2004 portant le Code de droit international privé / Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht*, MB/BS 27-07-2004, 57344).

375 This potentially includes a Multilingual Standard Form issued by another Member State under Regulation 2016/1191 on public documents [2016] OJ L 200/01.

376 Art. 44, Royal Decree on Immigration.

377 Art. 40bis §4, second sentence, Belgian Immigration Law, which refers back to the conditions of entry contained in Art. 41 §2,

378 Case C-459/99 *MRAX* EU:C:2002:461 and Case C-157/03 *Commission v Spain* EU:C:2005:225.

379 *Ibid.*

380 See to that effect Case C-89/17 *Banger* ECLI:EU:C:2018:570 and Case C-129/18 *SM* ECLI:EU:C:2019:248 in which the CJEU has confirmed that procedural safeguards under Directive 2004/38 also apply to “other family members” covered by Article 3(2) of the Directive.

381 Case C-127/08 *Metock* EU:C:2008:449.

382 Case C-551/07 *Sahin* EU:C:2008:755.

family members” who did not have an entry visas.<sup>383</sup> As regards such “other family members” covered by Article 3(2) of the Citizens Rights Directive, the CALL upheld the Immigration Office’s approach by distinguishing such cases on the basis that the CJEU’s case law<sup>384</sup> – which predates the Citizens Rights Directive – only applies to close family members covered by Article 2(2) of the Directive.<sup>385</sup> There is also a further case concerning close family members covered by Article 2(2) of the Citizens Rights Directive,<sup>386</sup> although in that case the applicant’s counsel failed to challenge the visa requirement on the basis of the relevant case law of the CJEU. However, there is also opposing case law which has struck down the visa requirement, in which the CALL ruled that “other family members” cannot be required to present a valid visa, as it was the explicit will of the legislator to extend the provisions which are applicable to close “family members” so that they also benefit “other family members”.<sup>387</sup> It remains to be seen which line of case law will ultimately prevail, ideally following a reference to the CJEU to settle the matter.

## 5.2.5 Initial documents required: legalisation and translation formalities

Belgian law imposes a general requirement for foreign documents to be legalised.<sup>388</sup> However there are a number of exceptions to this general requirement.

The most recent concerns the abolition of legalisation by Regulation 2016/1191<sup>389</sup> in respect of documents issued by the public authorities of the Member States. This covers public documents – such as birth and marriage certificates<sup>390</sup> – and their certified copies and requires such documents to be accepted without the need for legalisation or authentication by apostille.<sup>391</sup> This Regulation also prevents national authorities from asking for both the original document and a certified copy of that document at the same time.<sup>392</sup> In addition, Regulation 2016/1191 removes the obligation to provide

an official translation if the document is presented in one of the official languages of the host Member State or is accompanied by a multilingual standard form from the Member State which issued the document.<sup>393</sup>

However, this Regulation does not cover official certificates issued by the authorities of third countries.<sup>394</sup> As a result civil status documents emanating from third countries will need to be accompanied by a translation and need to be legalised as the case may be. Nonetheless, they may be exempt from legalisation in accordance with other international instruments providing for the abolition of legalisation, such as the Brussels Convention of 25 May 1987<sup>395</sup>, the European Convention of 7 June 1968<sup>396</sup>, the Hague Convention of 5 October 1961 on apostilles<sup>397</sup> or the Vienna Convention of 8 September 1976 on multilingual certificates<sup>398</sup> or any bilateral agreement which Belgium may have concluded.<sup>399</sup>

In its instructions to the municipalities comprised in a Syllabus, the Immigration Office states that civil status documents must be translated by a sworn translator if they are not issued in French, Dutch, German or English.<sup>400</sup> However, it should be observed that the Syllabus makes no mention of Regulation 2016/1191 which removes the need for a translation where the civil status certificate is issued by a Member State and is accompanied by a multilingual standard form.<sup>401</sup> The Immigration Office confirmed that municipalities were informed of the Regulation by other government bodies competent in this area. It seems advisable however to also add this information to the relevant section of the Syllabus, as this is the primary source of guidance for municipalities.

383 CALL, judgments No 235 170 of 15 April 2020, No 235 273 of 17 April 2020, No 246 767 of 23 December 2020.

384 Case C-459/99 *MRAX* EU:C:2002:461 and Case C-508/03 *Commission v Spain* EU:C:2006:287.

385 CALL, judgments No 235 170 of 15 April 2020, No 235 273 of 17 April 2020, judgment No 246 767 of 23 December 2020.

386 CALL, judgment No 223 830 of 9 July 2019.

387 CALL, judgment No 236 793 of 12 June 2020. Art. 47/2, Belgian Immigration Law provides that the provisions on family members covered by Art. 40bis are to apply to “other family members” covered by Art. 47/1.

388 Art. 30, Belgian Law of 16 July 2004 containing the Private International Law Code (n 374).

389 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union [2016] OJ L 200/01.

390 Art. 2(1), Regulation 2016/1191.

391 Art. 4, Regulation 2016/1191.

392 Art. 5, Regulation 2016/1191.

393 Art. 6, Regulation 2016/1191.

394 Art. 2(3), Regulation 2016/1191.

395 Convention abolishing the legalisation of documents in the Member States of the European Communities done at Brussels on 25 May 1987, <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=1987011>.

396 European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers done at London on 7 June 1968, ETS 63, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/063/signatures>.

397 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents done at the Hague on 5 October 1961 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>.

398 Convention on the Issue of Multilingual Extracts from Civil Status Records done at Vienna on 8 September 1976 <https://www.admin.ch/opc/fr/classified-compilation/19760205>.

399 See for example, the Declaration of 21 December 1928 between Belgium and the United Kingdom on the abolition of legalisation for certain official documents (*Déclaration du 21 décembre 1928 entre la Belgique et la Grande Bretagne concernant la suppression de la légalisation de certains documents officiels / Verklaring van 21 december 1928 tussen België en Groot-Brittannië betreffende de afschaffing van de legalisatie van bepaalde officiële documenten*, MB/BS 11-01-1929).

400 Immigration Office, Syllabus (June 2021), p. 111, 117, 159, 162, 165, (NL) / p. 130, 135, 181, 185 (FR).

401 Ibid. This is also highlighted by Sarah Den Haese and Jinske Verhellen, *Foreign Birth and Marriage Documents: The Voice of Belgian and Dutch Public Servants* (2020) NIPR, vol. 2 pp. 195–215.

## 5.2.6 Issuance of a certificate of application

Once the necessary documentary proof has been provided, demonstrating EU citizenship or the existence of a family relationship as the case may be, the applicant will be provided with a certificate of application.<sup>402</sup> This certificate of application is issued on the spot by a municipal official using the relevant standard form, namely Annex 19 for EU citizens or Annex 19ter in the case of non-EU family members.<sup>403</sup>

At this stage, the personal details of EU citizens will be entered in the register of pending applications<sup>404</sup> until their domicile has been verified.<sup>405</sup> This involves the EU citizen concerned being issued with a unique personal identification number.<sup>406</sup> The Belgian Immigration Office highlighted, that, in their view, this practice complies with the obligation placed upon national authorities by Article 8(2) of the Citizens Rights Directive to issue a registration certificate to EU citizens immediately following their application.<sup>407</sup>

The details of non-EU family members will not be entered on any register until a positive report on their verification of domicile has been received from the local police, which is discussed in the next section.<sup>408</sup>

## 5.3 Verification of domicile



EU legislation does not provide for a procedure for verification of domicile. However, it is implicitly permitted by the Citizens Rights Directive, given that Article 8(2) provides that the registration certificate to be issued to EU citizens should contain details of their address.

In Belgium, once proof of EU citizenship has been provided and a certificate of application (Annex 19) has been issued, the applicant will be registered in the

register of pending applications and the municipality will request the local municipal police to perform a “control of effective domicile”<sup>409</sup> to verify the person’s declared domicile.<sup>410</sup> Likewise, once a non-EU family member has applied for registration and been issued with a certificate of application (Annex 19ter), a request to verify their domicile will be sent to the local police.<sup>411</sup>

This involves a municipal police officer undertaking a visit to the address specified by the applicant to verify whether the applicant has taken up residence at this address and to provide a report to the municipality.<sup>412</sup> The effective verification of domicile should be undertaken by the police within 15 working days of an application being made and the police should report back to the municipality on the outcome of this check within one month.<sup>413</sup> This report will then be forwarded to the Immigration Office.<sup>414</sup> The methods by which the verification is to be conducted are not laid down by law and instead it is for municipalities to lay down regulations governing the process and format of the report.<sup>415</sup> However, plans are under way to digitalise this process across the country.<sup>416</sup>

409 This is referred to as *contrôle de la résidence effective / controle van de effectieve verblijfplaats*.

410 Art. 50 §1, second para., Royal Decree on Immigration, The SPF Interior Ministry has instructed municipalities to regulate this verification of domicile and to adopt a standard form for the report (Article 10 Royal Decree of 16 July 1992)

411 Art. 52 §1, second para., Royal Decree on Immigration

412 Art. 7 §5, Royal Decree of 16 July 1992 concerning the population registers and the foreigners’ register, hereafter the “Royal Decree on population and foreigners” register (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers / Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister, MB/BS 15-08-1992, 18028*),

413 Ibid.

414 Arts. 50 §1, second para., and 52 §1, second para., Royal Decree on Immigration.

415 Art. 10, Royal Decree of 16 July 1992 requires municipalities to lay down regulations governing the process of verification of domicile and the format of the report. The FPS Internal Affairs has also issued guidance on the process in its General Instructions of 31 March 2019 on the keeping of population registers (*Instructions générales du 31 mars 2019 concernant la tenue des registres de la population* <https://www.ibz.rrn.fgov.be/fr/population/reglementation/instructions/> / *Algemene Onderrichtingen van 31 maart 2019 betreffende het houden van de bevolkingsregisters* <https://www.ibz.rrn.fgov.be/nl/bevolking/reglementering/onderrichtingen>).

416 The FPS Internal Affairs is reported to be developing a tool at national level (the so-called WOCODO project - *Wooncode-ControleDomicile*) for the digitalisation of communications between the police and the municipality regarding the verification of domicile. This follows recommendations made by the so-called “Comité P”, the Permanent Police Oversight Committee (*Vast Comité van Toezicht op de politiediensten / Comité permanent de contrôle des services de police*), in its report on the verification of domicile (2014) (*Comité P, Toezichtsonderzoek “Domiciliëring”, Dossiënummer 62605, Beeldvorming van de wijze waarop de lokale politiekorpsen de woonstcontrole uitvoeren*, p. 39 <https://comitep.be/document/onderzoeksrapporten/2014-12-11-Beeldvorming-van-de-wijze-waarpour-lokale-politiekorpsen-de-woonstcontrole-uitvoeren.pdf> / *Comité P, Enquête de contrôle “Domiciliations”, Numéro de dossier 62605, Image globale de la manière dont les corps de police locale exécutent le contrôle domicile*, p. 33 <https://comitep.be/document/onderzoeksrapporten/2014-12-11-Image-globale-de-la-maniere-dont-les-corps-de-police-locale-executent-le-contrôle-domicile.pdf>).

402 Arts. 50 §1 and 52 §1, Royal Decree on Immigration.

403 Ibid. The standard form of the annexes is to be found in the correspondingly numbered annex (*annexe/bijlage*) of the Royal Decree on Immigration.

404 This is referred to as the *registre d’attente / wachtregister*.

405 Art. 50 §1, second para., Royal Decree on Immigration.

406 This refers to the *numéro de registre national / Rijksregisternummer*. This personal identification number should be generated when the EU citizen is registered on the register of pending applications under Art. 2 §1, 2° and §3, Law of 8 August 1983 establishing a national Register of physical persons (*Loi du 8 août 1983 organisant un Registre nationale des personnes physique / Wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, MB/BS 21-04-1984, 5247*),

407 Interview with Immigration Office, 25 May 2020.

408 Art. 52 §1, second para., Royal Decree on Immigration.

In case the local municipal police issues a negative report, the Belgian rules provide a right of administrative review by the Minister of the Interior<sup>417</sup> and a subsequent right of judicial review before the Council of State.<sup>418</sup> However, EU citizens are not very well informed of this right as they are not always made aware of it in case the police send a negative report to the municipality following a verification of an applicant's domicile.<sup>419</sup> This is important because sometimes negative reports are based on an error (for example, the police undertake a visit to the wrong address). Most often, the applicant has to begin the whole registration process all over again, which potentially adds further unnecessary delay.

It should also be noted that Belgian law is unclear on the precise consequences of a negative report for the registration of EU citizens. Whereas the Belgian rules explicitly provide that, in the event the local municipal police issues a negative report in respect of non-EU family members, the municipality will issue a decision refusing their registration (Annex 20),<sup>420</sup> there is no such corresponding rule as regards EU citizens. Indeed, the provision which refers to the verification of domicile is completely silent on the consequences of a negative report for the registration of EU citizens.<sup>421</sup> The linguistic versions of the Syllabus also contain different guidance, with the French version suggesting that a decision refusing registration (Annex 20) will be taken in respect of an EU citizen who is the subject of a negative report,<sup>422</sup> whereas

no such explanation is given in the Dutch version.<sup>423</sup> A further difference between linguistic versions is also apparent in the standard format of a decision to refuse the registration of EU citizens and their family members (Annex 20): whereas the French version of Annex 20 suggests that such a decision refusing registration can only be taken following a negative report on the verification of domicile as regards family members,<sup>424</sup> there is no such explicit limitation in the Dutch version of Annex 20.<sup>425</sup>

As a result, the Belgian rules remain unclear on the precise consequences for the registration of EU citizens which a negative report following verification of domicile will have. It is not clear whether such a negative report will necessarily lead to a decision being taken to refuse an EU citizen's residence on the basis that they are not residing in the municipality concerned, which would be the case in respect of a non-EU family member who is the subject of such a report.

## 5.4 Registration phase

This phase of the registration process involves the competent authority reviewing and making a decision on applications submitted by EU citizens and their family members.

### 5.4.1 Overview of the procedure

Following a positive verification of an applicant's domicile, the municipality will register the applicant in the register

417 Art. 8, Law of 19 July 1991 concerning the population registers, identity cards, foreigner's cards and residence documents (*Loi du 19 juillet 1991 relative aux registres de la population, aux cartes d'identité, aux cartes des étrangers et aux documents de séjour / Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten*, MB/BS 03-09-1991, 19075).

418 Art. 14, Law relating to the Council of State (*Lois coordonnées du 12 janvier 1973 sur le Conseil d'État / Gecoördineerde wetten op de Raad van State*. MB/BS 21-03-1973, 3461).

419 According to the General Instructions of 31 March 2019 (n 415), municipalities are obliged to inform the EU citizen on the registration refusal by means of the "Model 9" form.

420 Art. 52 §3, Royal Decree on Immigration. See also Immigration Office, Syllabus (June 2021), pp. 99 and 104 (NL) and pp. 105 (FR)

421 Art 50 §1 Royal Decree on Immigration.

422 Immigration Office, Syllabus (June 2021), p. 165 (FR) in the chart on procedures the following guidance is provided: "*Contrôle adresse négatif Radiation du RA "pas de droit d'inscription(9)"*" with the associated footnote stating: "*9) Radiation - pas de droit d'inscription : à la date du rapport de police au moyen du code 99998 au TI 001 Cette radiation se fait directement sans intervention du Collège. Attention : l'annexe 19 n'est pas clôturée, prenez contact avec le bureau UE pour mettre fin à la procédure (annexe 20)*". The last sentence reads as follows "Warning: The Annex 19 is not cancelled, please make contact with the EU Bureau to end the procedure (Annex 20)".

423 Immigration Office, Syllabus (June 2021), p. 145 (NL) in the chart on procedures the following guidance is provided: "*Neg. woonstcontrole Afvoering WR wegens "geen recht op inschrijving(9)"*" with the relevant footnote stating "*9)) Afvoering - geen recht op inschrijving : op datum van het politieverlag op zijn minst de code 99998 in IT 001. Deze afvoering gebeurt onmiddellijk zonder tussenkomst van het College*". There is no wording corresponding to the last sentence of the French version: "*Attention : l'annexe 19 n'est pas clôturée, prenez contact avec le bureau UE pour mettre fin à la procédure (annexe 20)*" (translation "Warning: The Annex 19 is not cancelled, please make contact with the EU Bureau to end the procedure (Annex 20)").

424 The French version of the standard form of Annex 20 (*Annexe 20*) contains the following statement for refusing registration on the basis of a negative report on domicile: "*Il ressort du contrôle de résidence que le membre de la famille ne demeure pas sur le territoire de la commune*". (translation: "It emerges from the verification of domicile that the family member is not living on the territory of the municipality").

425 The Dutch version of the standard form of Annex 20 (bijlage 20) contains the following differently worded statement for refusing registration on the basis of a negative report on domicile: "*Uit de controle van de verblijfplaats blijkt dat de betrokkene niet verblijft op het grondgebied van de gemeente waar hij/zij zijn/haar aanvraag heeft ingediend*". (translation: "The verification of domicile shows that the person concerned does not reside in the territory of the municipality where he/she has submitted an application."

of foreigners.<sup>426</sup> Non-EU family members will also be registered in the register of foreigners and be issued a temporary residence card<sup>427</sup> (*Attest van Immatriculatie/Attestation d'immatriculation*, so-called "orange card").<sup>428</sup>

An applicant has three months (from the date of submission of the application) to complete their application and provide the necessary documents which demonstrate that they meet the conditions for having a right of residence.<sup>429</sup> At this stage of the procedure, non-EU family members must prove their identity (if they have not yet done so already) and that they meet the requirements for being considered a family member.<sup>430</sup>

In line with the CJEU's case law<sup>431</sup>, the CALL has ruled that EU citizens and their family members bear the burden of furnishing all necessary documents to prove that they meet the conditions for having a right of residence.<sup>432</sup>

The specific documents which are to be provided by applicants are examined further below. In case of a failure to provide the required documentation within this three-month period, an application will be refused in a written decision, using the standard form (Annex 20).<sup>433</sup> Such a decision may be appealed.<sup>434</sup> EU citizens, however, are provided an additional month to provide the necessary documents.<sup>435</sup>

## 5.4.2 Decision-making

In case of timely submission of the required documents within the three-month deadline,<sup>436</sup> either the Immigration Office or the municipality will take a decision depending on the nature of the application.

Municipalities may take a decision in straightforward cases. This includes applications received from workers and self-employed persons.<sup>437</sup> The municipality can also

take a decision regarding their spouse or registered partner or any descendant under the age of 21, provided that such family members are EU citizens and have produced an official document attesting to their family relationship.<sup>438</sup>

In its instructions to the municipalities, the Immigration Office urges the municipalities to make maximum use of their competence to take a decision.<sup>439</sup> During an interview with the authors,<sup>440</sup> the Immigration Office noted that some cases that would fall under the municipality's competence are nonetheless forwarded to the Immigration Office, notably cases of workers in which the municipality asks the Immigration Office to verify effective employment by consulting the social security databases (to which the Immigration Office has access),<sup>441</sup> as well as cases of interim workers and posted workers.

In this respect, it should be noted that although Member States are entitled in individual cases to verify if an EU citizen or their family member meets the conditions for having a right of residence under the Citizens Rights Directive, the Directive also explicitly prohibits systematic verification from taking place.<sup>442</sup>

Other cases which are deemed more complicated, such as jobseekers,<sup>443</sup> employees working in another member state,<sup>444</sup> self-employed persons who are posted or registered in another member state<sup>445</sup> (considered as self-sufficient persons) and other family members will

426 Art. 50 §1, second para., Royal Decree on Immigration.

427 Art. 52 §1, second para., Royal Decree on Immigration.

428 A specimen form can be found on the website of the Immigration Office: [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Annexe\\_04.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Annexe_04.pdf).

429 Arts. 50 §2, and 52 §2, Royal Decree on Immigration.

430 Art. 52 §2, Royal Decree on Immigration.

431 Case C-408/03 *Commission v Belgium* EU:C:2006:192.

432 CALL judgments No 193 660 of 13 October 2017, No 185 638 of 20 April 2017, No 159 084 of 21 December 2015, No 157 479 of 30 November 2015 and No 128 423 of 29 August 2014.

433 Art. 51 §1, Royal Decree on Immigration as regards EU citizens and Art. 52 §4 as regards non-EU family members.

434 Arts. 39/2 §2 and 39/79 §1, 7°, Belgian Immigration Law.

435 Art. 51 §1, second para., Royal Decree on Immigration.

436 Arts. 50 §2, and 52 §2, Royal Decree on Immigration

437 Art. 51 §3, Royal Decree on Immigration. This also includes self-sufficient persons provided that proof of sufficient means of subsistence is provided by means of an invalidity allowance, an early retirement pension, an old-age benefit or a benefit under the insurance scheme for accidents at work or occupational diseases. These situations are however outside the personal scope of this study.

438 Ibid.

439 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR).

440 Interview with Immigration Office, 25 May 2020.

441 Sectoral Committee for Social Security and Healthcare, Decision No 06/005 of 17 January 2006 concerning the transfer of personal data to the Immigration Office - DIMONA database and employee records, CSSS/06/008; Decision No 12/054 of 3 July 2012 concerning the transfer of personal data to the Immigration Office through the DOLSIS web application, CSSS/12/201 (*Comité sectoriel de la sécurité sociale et de la santé, Délibération n° 06/005 du 17 janvier 2006 relative à la communication de données à caractère personnel à l'Office des étrangers du Service Public Fédéral Intérieur - messages électroniques l850 et l851 (banque de données DIMONA) et 1950 (fichier du personnel), CSSS/06/008; Délibération n° 12/054 du 3 juillet 2012 relative à la communication de certaines données à caractère personnel à l'Office des étrangers au moyen de l'application web DOLSIS, CSSS/12/201 / Sectoraal Comité van de Sociale Zekerheid en van de Gezondheid, Beraadslaging nr. 06/005 van 17 januari 2006 m.b.t. de mededeling van persoonsgegevens aan de Dienst Vreemdelingenzaken van de Federale Overheidsdienst Binnenlandse Zaken - elektronische berichten l850 en l851 (DIMONA-gegevensbank) en 1950 (personeelsbestand), SCSZ/06/008; Beraadslaging nr. 12/054 van 3 juli 2012 met betrekking tot de mededeling van bepaalde persoonsgegevens aan de Dienst Vreemdelingenzaken door iddle van de webtoepassing DOLSIS, SCSZ/12/201).*

442 Art. 14(2), Directive 2004/38 provides that "In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically."

443 Immigration Office, Syllabus (June 2021), p. 154 (NL) / p. 172 (FR).

444 Immigration Office, Syllabus (June 2021), p. 153 (NL) / p. 170 (FR).

445 Immigration Office, Syllabus (June 2021), p. 153 (NL) / p. 170 (FR).

be transferred to the Immigration Office for a decision.<sup>446</sup> Applications by non-EU family members are automatically transferred to the Immigration Office.<sup>447</sup>

In the event that the application is successful, an EU citizen (including any family member who is also an EU citizen) will receive an electronic identity card which is valid for five years (so-called “EU card”).<sup>448</sup> Where a positive decision is taken on an application submitted by a non-EU family member, they will be issued with a residence card,<sup>449</sup> which can also be issued in electronic format with a period of validity of five years (so-called “F card”).<sup>450</sup>

Until May 2021 an EU citizen could choose to obtain a registration certificate from the local municipality<sup>451</sup> in paper format (Annex 8).<sup>452</sup> This has changed following a set of changes introduced by the Royal Decree of 12 June 2020<sup>453</sup> which entered partially into force in May 2021.<sup>454</sup> The registration certificate (Annex 8) will no longer be issued in paper format. Pending the issue of their residence documents, a paper-based temporary residence document (Annex 8ter) will be issued. The title of the registration certificate changed from “E card” to “EU card” and now includes an explicit reference to Article 8 of Directive 2004/38.<sup>455</sup> The physical appearance of the EU card is also different from the other types residence cards.

The residence card for family members of EU citizens (“F card”) will retain its existing title, but it now incorporates the label “*Familielid EU / Membre Famille UE*”, includes a reference to Article 10 of Directive 2004/38 and is issued in the uniform format of residence permits

laid down by Regulation 1030/2002.<sup>456</sup> These changes are mandated by Regulation 2019/1157.<sup>457</sup>

In case an application submitted by an EU citizen or their non-EU family member is rejected,<sup>458</sup> the applicant is issued with a standard form (Annex 20).<sup>459</sup> Such a decision may be appealed.<sup>460</sup> It should be noted that applications may also be rejected in the event of fraud or abuse<sup>461</sup> or on grounds of public order or public security<sup>462</sup> as allowed under EU law.<sup>463</sup>

As explained further in section 7.2.3, the Immigration Office considers that – because an appeal does not have suspensive effect – as soon as a decision has been taken to refuse, terminate or withdraw a right of residence, the individual concerned no longer has a right of residence and as a result must have their entry deleted from the register.<sup>464</sup> The Immigration Office has issued instructions to municipalities to proceed with deletion of the affected person’s entry from the national register<sup>465</sup> from the moment that a decision has been taken to refuse or withdraw their right of residence with the issue of an

446 This is not explicitly provided but results from the exclusion of such persons from the list contained in Art. 51 §3, Royal Decree on Immigration. Immigration Office, Syllabus (June 2021), p. 103 - 116 (NL) / p. 123 - 135 (FR).

447 Ibid.

448 Art. 51 §4, Royal Decree on Immigration. The Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration foresees that the title of this card will change from “E card” to “EU card”.

449 Art. 52 §4, Royal Decree on Immigration.

450 The standard format for the residence card is set out in Annex 9, Royal Decree on Immigration. The format will change in line with the modifications introduced by the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration.

451 Art. 51 §2, Royal Decree on Immigration.

452 The standard format for the registration certificate is set out in Annex 8, Royal Decree on Immigration. The Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration foresees that Annex 8 will no longer be issued in paper format. Annex 8ter will be issued as a provisional document until the EU card is issued.

453 Royal Decree of 12 June 2020 modifying Royal Decree on Immigration (n 32).

454 Ministerial Decree of 27 April 2020 on modernising residence documents issued to citizens of the European Union (*Arrêté ministériel du 27 avril 2021 relatif à la modernisation des documents de séjour délivrés aux citoyens de l'Union européenne / Ministerieel besluit van 27 april 2021 betreffende de modernisering van de verblijfsdocumenten die aan burgers van de Europese Unie uitgereikt worden*, MB/BS 06-05-2021, 46473).

455 The latter change is required by Art. 6, Regulation 2019/1157 (n 370).

456 Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

457 Art. 7, Regulation 2019/1157 (n 370).

458 During the VVSG meeting of 27 October 2020, it was confirmed that no F card will be issued to the EU citizen’s family members in the event that the EU citizen’s application is refused. When a decision to refuse an EU citizen’s application (Annex 20) is communicated to the municipality, the cover letter will indicate that the municipality can contact the Immigration Office’s family reunification bureau to obtain further instructions as regards the non-EU family members concerned.

459 Art. 51 §2, Royal Decree on Immigration as regards EU citizens and Art. 52 §4 as regards non-EU family members.

460 Arts. 39/2 §2 and 39/79 §1, 7°, Belgian Immigration Law.

461 Arts. 43 §1, 1° and 44, Belgian Immigration Law. These provisions give the Immigration Office the power to withdraw the right of residence of EU citizens and their family members in the event that they have had recourse to false or misleading information, used forged or falsified documents or where they have had recourse to fraud or other unlawful means that contributed to the recognition of their right of residence. The Immigration Office has explicitly advised municipalities to report any information in respect of fraud, abuse, public order concerns, signs of radicalization or unjustified applications via e-mail or phone; see Immigration Office, Syllabus (June 2021), p. 146 (NL) / p. 162 (FR). For further discussion, see Subsection 5.7 *Refusal, termination and withdrawal of residence rights*, Paragraph 5.7.4 *Withdrawal of residence rights on grounds of fraud or abuse*.

462 Arts. 43 §1, 2° and 44bis §1, Belgian Immigration Law. For further discussion, see Subsection 5.7 *Refusal, termination and withdrawal of residence rights*, Paragraph 5.7.3 *Termination of residence rights on public policy or public security grounds*

463 Art. 35, Directive 2004/38.

464 Circular of 30 August 2013 repealing the circular of 20 July 2001 relating to the legal effect of Annex 35 to the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners (*Circulaire du 30 août 2013 abrogeant la circulaire du 20 juillet 2001 relative à la portée juridique de l'annexe 35 de l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers. — Radiations des registres. — Inscription. / Omzendbrief van 30 augustus 2013 tot opheffing van de omzendbrief van 20 juli 2001 betreffende de juridische draagwijdte van bijlage 35 van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. — Afvoering van de registers. — Inschrijving*, MB/BS 06-09-2013, 63240).

465 This leads to the deactivation of their personal identification number of EU citizens and their family members on the national population register.

Annex 20<sup>466</sup> or Annex 21<sup>467</sup> on the basis that they are no longer lawfully resident.<sup>468</sup> The legality of this position and practice is questionable, as we will explain further in section 7.2.3.

### 5.4.3 Deadlines for the issuance of residence documents

Both the municipalities and the Immigration Office are under a legal obligation to ensure that a decision is taken as soon as possible and not later than six months after submission of the application, which applies equally to EU citizens and non-EU family members.<sup>469</sup>

As previously mentioned,<sup>470</sup> contrary to the requirements of the Citizens Rights Directive<sup>471</sup>, the Belgian rules thus do not require EU citizens to be issued a registration certificate immediately upon submitting an application. However, the Belgian Immigration Office considers that the issuance of a certificate of application (Annex 19) fulfils the obligation which is incumbent upon national authorities to issue a registration certificate to EU citizens immediately following their application under Article 8(2) of the Citizens Rights Directive.<sup>472</sup>

In the event that no decision is taken within six months, Belgian law provides that the application should be deemed accepted and the relevant residence document issued to the applicant.<sup>473</sup>

However, in *Diallo*,<sup>474</sup> the CJEU has upheld that EU law precludes national legislation which obliges authorities to automatically issue a residence card to non-EU family members of EU citizens upon expiry of the six-month deadline contained in Article 10 of the Citizens Rights

Directive without first finding that the family member actually meets the conditions for residing in the host Member State.

This ruling has since been the subject of divergent approaches taken by the CALL<sup>475</sup> and the civil courts.<sup>476</sup> Whereas the CALL considers that the non-EU family members of EU citizens can no longer rely on the relevant provisions of national law to obtain the issuance of a residence card when the six-month deadline has expired, the civil courts have ruled the opposite on the basis that a Member State cannot rely on its own failure to transpose a directive correctly to deny citizens certain rights contained therein in reliance upon the *Ratti* ruling.<sup>477</sup> An appeal has reportedly since been brought before the Council of State<sup>478</sup> against a decision by the CALL<sup>479</sup> which considered that the CJEU case law<sup>480</sup> according to which a directive cannot of itself impose obligations on an individual and which precludes a Member State from relying on its own failure to transpose directives correctly does not apply insofar as the provision at issue<sup>481</sup> does not consist in transposition of the Citizens Rights Directive, given that the Directive is silent as to what sanction should attach to the failure to issue a residence card within the six-month deadline. On the other hand, in a further line of cases<sup>482</sup> the CALL has also held that the non-EU family members of Belgian nationals who have not exercised free movement rights may nonetheless rely on this provision since their

466 Annex 20, Royal Decree on Immigration. This is the standard form used to take a decision to refuse recognition of a right of residence beyond three months.

467 Annex 21, Royal Decree on Immigration. This is the standard form used to take a decision to withdraw a right of residence beyond three months.

468 Immigration Office, Syllabus, (June 2021), pp. 158 - 159(NL) / pp. 175 - 176 (FR). For a discussion of the consequences, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status* as regards the deletion from the national register following a refusal to recognise a right of residence on the basis that the EU citizen did not provide sufficient proof of their status within three months of submitting an application (Annex 20); Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*

469 Art. 42 §1, Belgian Immigration Law.

470 Milieu (n 14), pp. 29-30 ; Valcke (n 16), p. 6.

471 Art. 8(2), Directive 2004/38; see further discussion Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

472 Interview with Immigration Office, 25 May 2020.

473 Arts. 51 §2 and 52 §4, Royal Decree on Immigration.

474 Case C-246/17 *Diallo* EU:C:2018:499.

475 CALL, judgments No 220 998 of 10 May 2018, No 210 732 of 10 October 2018, No 213 977 of 13 December 2018, No 214 835 of 8 January 2019, No 215 688 of 24 January 2019, No 222 042 of 28 May 2019, No 220 998 of 10 May 2019, No 225 296 of 27 August 2019, No 240 753 of 14 September 2020.

476 Dendermonde Court of first instance, judgment No 19/25/A of 29 January 2019, in which the court ordered the municipality to issue a residence card to the family member concerned, and imposed a daily penalty €250 for each day of delay; for discussion, see AGII "*Familielid Unieburger heeft nog steeds recht op F kaart na zes maanden zonder beslissing*" ("Family member of Union citizen remains entitled to an F card after six months without a decision") (19 March 2019) <https://www.agii.be/nieuws/familielid-unieburger-heeft-nog-steeds-recht-op-f-kaart-na-zes-maanden-zonder-beslissing>.

477 In Case 148/78 *Ratti* EU:C:1979:110 the CJEU held that a Member State which has not transposed a directive within the prescribed deadline may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

478 AGII "*RvV: na Diallo-arrest geen ambtshalve afgifte F kaart meer*" ("CALL: after Diallo ruling, F cards can no longer be automatically issued") (11 June 2019) <https://www.agii.be/nieuws/rvv-na-diallo-arrest-geen-ambtshalve-afgifte-f-kaart-meer>.

479 CALL, judgment No 225 296 of 27 August 2019.

480 This was not explicitly cited in the CALL's judgment, but it would appear to refer to case law such as *Ratti* (n 468), Case 8/81 *Becker* EU:C:1982:7, Case 152/84 *Marshall* EU:C:1986:84, Case 80/86 *Kolpinghuis Nijmegen* EU:C:1987:431, C-91/92 *Faccini Dori* EU:C:1994:292, Case C-192/94 *El Corte Inglés* EU:C:1996:88, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* EU:C:2004:584, Case C-201/02 *Wells* EU:C:2004:12, Case C-282/10 *Dominguez* EU:C:2012:33, C-425/12 *SPDG* EU:C:2013:829.

481 Art. 52 §4, Royal Decree on Immigration.

482 CALL, judgments No 219 484 of 4 April 2019, No 235 479 of 22 April 2020 and No 244 323 of 17 November 2020. This approach has also been endorsed by the civil courts, see Hasselt Court of first instance, judgment 19/1895/A of 18 December 2019.

situation falls outside the scope of the Citizens Rights Directive.<sup>483</sup>

In its 2020 policy note,<sup>484</sup> the federal government has indicated that it intends to repeal the rule<sup>485</sup> which provides for the automatic issuance of a residence card to the family members of EU citizens when the Immigration Office has failed to take a decision on an application for family reunification within the six-month deadline.<sup>486</sup> Although the government has also indicated that decisions cannot be delayed indefinitely, it has not indicated what practical measures will be taken to ensure compliance with legal deadlines.<sup>487</sup> At the same time, the government has pledged to examine the possibility of shortening processing times in respect of applications for family reunification.<sup>488</sup> However, during our interview,<sup>489</sup> the Immigration Office stated that at present, they do not have sufficient resources to follow up on all applications.<sup>490</sup> In the view of the Immigration Office, granting further autonomy to the municipalities would be very challenging to achieve as this would require major legislative changes and significant political will. The government has also stated its intention to examine how workflow processes can be enhanced by the use of digitalisation.<sup>491</sup>

#### 5.4.4 Fees for residence documents

In accordance with the Citizens Rights Directive, all documents should be issued free of charge or for a charge not exceeding that imposed on nationals for issuing similar documents.<sup>492</sup>

Belgian law foresees the possibility for municipalities to charge EU citizens and their family members a fee for issuing residence documentation in order to cover the administrative costs.<sup>493</sup> This fee cannot exceed the fee

imposed on Belgian nationals when delivering Belgian identity documents.<sup>494</sup>

#### 5.4.5 Validity of residence documents

As mentioned above,<sup>495</sup> the Citizens Rights Directive provides that a residence card issued for non-EU family members should have a validity of five years. There are no provisions in the Directive specifying any period of validity as regards the registration certificate which is issued to EU citizens.

Belgian legislation provides that a residence card issued to non-EU family members (F card) should be valid for a period of five years.<sup>496</sup> While Belgian law is silent on the period of validity of the registration certificate (EU-card) issued to EU citizens, in practice such registration certificates are issued with a period of validity of five years. This has not changed with the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration.<sup>497</sup>

## 5.5 Documentary requirements



The documents which EU citizens and their family members are required to submit will depend on the nature of their occupational activity and family ties. This is in line with Article 8(3) and (5) and Article 10(2) of the Citizens Rights Directive as regards EU citizens, family members who are themselves EU citizens and non-EU family members respectively.

It should also be noted that the documents listed in the provisions of the Directive are intended to be exhaustive in nature and have been “comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.”<sup>498</sup>

483 The rules on family reunification by Belgian nationals are governed by Art. 40ter, Belgian Immigration Law, which are not covered by this study.

484 House of Representatives, General Policy Note, Immigration and Asylum and the National Lottery (4 November 2020), (*Chambre des Représentants de Belgique, Note de Politique Générale, Asile et Migration et Loterie Nationale /Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie en Nationale Loterij, 2019-2021, Doc 55 1580/014, 04-11-2020*).

485 Art. 52 §4, Royal Decree on Immigration.

486 General Policy Note (n 481), p. 28.

487 Ibid, p. 28.

488 Ibid, p. 29.

489 Interview with Immigration Office, 25 May 2020.

490 The Immigration Office has suggested as a best practice for municipalities to call the Immigration Office's relevant bureau two to three weeks before the expiry of the six-month deadline in order to flag up problematic files. Larger municipalities have pointed to the unfeasible nature of this recommendation.

491 General Policy Note (n 481), p. 13.

492 Art. 25(2) of Directive 2004/38; for further discussion see Section 4. *EU law relating to registration formalities* Subsection 4.7 *Fees* in this Chapter.

493 Art. 2 Law of 14 March 1968 (n 208).

494 Art. 51 §4, Royal Decree on Immigration as regards EU citizens and art. 52 §4, third paragraph as regards non-EU family members. The fees for the issuance of Belgian identity cards varies according to municipality and can be consulted on the following website of the Federal Public Service for Home Affairs <https://www.ibz.rrn.fgov.be/fr/documents-didentite/aid/tarifs>.

495 Section 4. *EU law relating to registration formalities*, Subsection 4.8 *Validity of residence documents*.

496 Art. 31, Royal Decree on Immigration.

497 Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration (n 32).

498 Recital 14, Directive 2004/38.

### 5.5.1 Specific provisions on documentary requirements: workers

For workers, Article 8(3), first indent, of the Citizens Rights Directive allows EU member states to require the following documents to be submitted: (i) a valid identity card or passport, and (ii) a confirmation of engagement from the employer or a certificate of employment. No distinction is made between locally hired or posted workers, those employed under part-time or full-time contracts, those working as agency or interim workers, nor are there any specific language requirements imposed.

Belgian legislation correctly transposes the rules contained in the Citizens Rights Directive as regards the documents that may be required from workers.<sup>499</sup> The Belgian rules provide that proof of employment may be furnished by confirmation of engagement or by a certificate of employment,<sup>500</sup> which should be issued in standard format (Annex 19bis).<sup>501</sup>

The Syllabus issued by the Immigration Office indicates, however, that in cases where it is already known that an EU citizen will work for less than three months, this individual *can* (Dutch-language version) or *should* (French-language version) be issued with a declaration of presence (Annex 3ter).<sup>502</sup> The Dutch-language version of the Syllabus adds that the municipality is however required to issue an Annex 19 (instead of an Annex 3ter) in case an applicant insists on being issued with this document, while there is no such instruction contained in the French-language version of the Syllabus.<sup>503</sup> This does not appear to comply with EU case law which suggests that a person working for a short-term contract can still be considered a worker.<sup>504</sup>

The Syllabus issued by the Immigration Office mentions that the work needs to be the principal activity and should not be marginal,<sup>505</sup> reflecting EU case law on the concept of a worker under Article 45 TFEU.<sup>506</sup> In the version provided

to us for the purposes of this study,<sup>507</sup> an explicit reference is made to a minimum of 12 hours per week<sup>508</sup> as the decisive criterion which is applied to determine whether part-time work is considered genuine and effective as opposed to marginal and ancillary. In an interview, the Immigration Office nuanced this position, stating that the 12-hour limit is merely an indicative threshold.<sup>509</sup> Where an applicant's work is below this 12-hour threshold, the municipalities are instructed to send the case file to the Immigration Office to enable the latter to take a decision.<sup>510</sup> As mentioned above, the existence of a threshold which excludes any other factors from being taken into account is not in keeping with EU law.<sup>511</sup>

In connection with interim or agency workers, the Syllabus specifies that interim or agency workers may be considered workers if their activity is not marginal.<sup>512</sup> There is no minimum period of employment required, although a contract of only one day's duration is considered insufficient.<sup>513</sup>

For posted workers, the instructions issued to municipalities contained Syllabus used to treat them as workers and required them to provide one of the following documents: Form A1, Limosa declaration<sup>514</sup> or the agreement on posting.<sup>515</sup> Following the change of policy which now treats posted workers as self-sufficient persons,<sup>516</sup> the Syllabus now requires that a posted worker can prove possession of sufficient resources by any means, including the posting agreement or recent pay slips from his employment in the home Member State.<sup>517</sup> The Syllabus specifies that the A1 form or the Limosa attestation are not sufficient because proof of sufficient resources cannot be established from these documents.<sup>518</sup>

499 Art. 50 §2, 1°, Royal Decree on Immigration.

500 This refers to an *attestation patronale / werkgeversattest*.

501 The standard form for the certificate of employment is set out at Annex 19bis, Royal Decree on Immigration.

502 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR).

503 Ibid. A discrepancy was noted between different linguistic versions of the Syllabus. While the Dutch-language version of the Syllabus (ibid, p. 150), indicates that the municipality is however required to issue an Annex 19 (instead of an Annex 3ter) in case an applicant insists on being issued with this document because they intend to stay in Belgium for longer than 3 months, there is no such instruction contained in the French-language version of the Syllabus (ibid, p. 167).

504 Case C-413/01 *Ninni-Orasche* EU:C:2003:600, in which the CJEU suggested that employment of only two and a half months' duration should be sufficient for the person concerned to be categorised as a worker for the purposes of Article 45 TFEU.

505 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR). The syllabus also states that a one-day contract is not sufficient as to immediately receive a registration certificate (Annex 8) as a worker.

506 See Section 3. *Personal scope of the study*, Subsection 3.1 *Workers* in this Chapter.

507 Ibid. For explanation of the version of the Syllabus made available to us, see further n 36.

508 Ibid. Please note that this reference to the 12-hour per week criterion was not included in the GemCom guidelines – neither in the Syllabus nor in the fiches – issued by the Immigration Office in the version in force at the time of the survey.

509 Interview with Immigration Office, 10 December 2020.

510 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR).

511 See Section 3. *Personal scope of the study*, Subsection 3.1 *Workers* in this Chapter.

512 Immigration Office, Syllabus (June 2021), p. 150 (NL) / p. 167 (FR).

513 Ibid.

514 This is the notification which should be made by an employer that a worker has been posted to Belgium; see further n 95.

515 Immigration Office, Syllabus (former version of 29 October 2020), p. 138 (NL) / p. 157 (FR).

516 See Section 3. *Personal scope of the study*, Subsection 3.2 *Posted workers* in this Chapter.

517 Immigration Office, Syllabus (June 2021), p. 151 (NL) / p. 168 (FR).

518 Immigration Office, Syllabus (June 2021), p. 153 (NL) / p. 170 (FR).

## 5.5.2 Specific provisions on documentary requirements: jobseekers

The Citizens Rights Directive does not explicitly address registration formalities for jobseekers. It only provides that jobseekers may not be expelled from a Member State as long as they are looking for work and have a genuine chance of being engaged.<sup>519</sup>

However, in a 2020 ruling which concerned the situation of jobseekers in Belgium,<sup>520</sup> the CJEU held that proof of “a genuine chance of being engaged” cannot be required from EU jobseekers when they first register, given that at the time when they lodge their application for registration as a jobseeker, EU citizens have to be given at least a reasonable period of time during which the national authorities can only require them to demonstrate that they are seeking employment.<sup>521</sup> The Court also explicitly ruled that Article 45 TFEU and Article 14(4)(b) of the Citizens Rights Directive preclude national legislation which imposes a condition on jobseekers to demonstrate that they have “a genuine chance of being engaged” when they first apply to register.<sup>522</sup>

Belgian law has yet to be amended to reflect this ruling. The Royal Decree on Immigration currently requires that jobseekers should provide both i) proof of registration with a jobcentre or proof of job applications, as well as ii) proof of “a genuine chance of being engaged”.<sup>523</sup> The latter requirement involves taking into account the personal situation of the individual concerned, including any diploma that they have obtained, any professional training that they have undertaken and the duration of the period of job seeking.<sup>524</sup> However, this latter requirement will need to be removed in light of the recent CJEU ruling<sup>525</sup> as regards the documents which a jobseeker may be required to furnish when they first register.

Nonetheless, there is nothing to prevent the Belgian authorities from amending their rules on post-registration verification of residence rights<sup>526</sup> to enable them to verify after a reasonable period of time – which should be no less than six months – whether jobseekers can demonstrate not only that they are looking for work but that they have “a genuine chance of being engaged”. This involves taking into account additional factors that are not presently reflected in the Belgian rules, including actions taken by a jobseeker such as registration with a public employment service, regularly sending out letters of application to

potential employers or attending interviews, as well as the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker in question.<sup>527</sup>

## 5.5.3 Specific provisions on documentary requirements: self-employed persons

As regards self-employed persons, under Article 8(3), first indent, of the Citizens Rights Directive, they may be required to submit the following documents: (i) valid identity card or passport and (ii) proof that they are self-employed. According to the CJEU, proof of self-employment may be established by any means.<sup>528</sup>

Belgian legislation is more descriptive than the Directive and defines how proof of self-employment should be adduced. A self-employed person should provide i) proof of their registration on the Belgian business register<sup>529</sup> and ii) a certificate of enrolment with a social security institution in Belgium.<sup>530</sup> The certificate of enrolment should be issued directly by the social security institution concerned<sup>531</sup> using the prescribed standard form.<sup>532</sup>

However, as regards the latter requirement, it should be noted that the CJEU has previously held that the issuance of a residence document to a self-employed person cannot be made conditional upon prior registration with the relevant social security scheme.<sup>533</sup> In this respect, it should be noted that the possibility of adducing other means of proof of self-employment is not reflected in Belgian law, nor is it addressed in the Syllabus.<sup>534</sup>

527 In Case C-710/19 *G.M.A.* EU:C:2020:1037, at para. 47, the Court ruled that the national authorities “will have to carry out an overall assessment of all relevant factors such as, for example [...] the fact that the jobseeker has registered with the national body responsible for jobseekers, that he or she regularly approaches potential employers with letters of application or that he or she goes to employment interviews. In the context of that assessment, those authorities and courts must take into account the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker in question. By contrast, the fact that that jobseeker refused offers of employment which did not correspond to his or her professional qualifications cannot be taken into account for the purpose of considering that that person does not satisfy the conditions laid down in Article 14(4)(b) of Directive 2004/38.”

528 Case 48/75 *Royer* EU:C:1976:57.

529 *Banque-carrefour des entreprises / Kruispuntbank voor ondernemingen.*

530 Art. 50 §2, 2°, Royal Decree on Immigration.

531 Immigration Office, Syllabus (June 2021), p. 151 (NL) / p. 168 (FR).

532 Ministerial decree of 15 October 2015 establishing the standard form of the certificate of enrolment (*Arrêté ministériel du 12 octobre 2015 établissant le modèle d'attestation d'affiliation visé à l'article 50 § 2, 2°, de l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Ministerieel besluit van 15 oktober 2015 tot vaststelling van het model van aansluitingsattest beoogd in artikel 50 § 2, 2°, van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, MB/BS 04-11-2015, 66818*).

533 Case C-363/89 *Roux* EU:C:1991:41.

534 Immigration Office, Syllabus (June 2021), p. 151 (NL) / p. 168 (FR).

519 Article 14(4), Directive 2004/38.

520 Case C-710/19 *G.M.A.* EU:C:2020:1037.

521 *Ibid.*, para. 48.

522 *Ibid.*, para. 50.

523 Art. 50 §2, 3°, Royal Decree on Immigration.

524 Art. 50 §2, 3°, point b), Royal Decree on Immigration.

525 Case C-710/19 *G.M.A.* EU:C:2020:1037.

526 Art. 42bis, Belgian Immigration Law.

### 5.5.4 Specific provisions on documentary requirements: family members

Under the Citizens Rights Directive, the documentary requirements for family members are the same irrespective of whether the family members are EU citizens or third-country national, aside from the requirement that non-EU family members should provide a valid passport,<sup>535</sup> whereas EU family members may present a valid identity card or passport.<sup>536</sup>

Both Article 8(5) and 10(2) of the Directive allow Member States to require all family members to present the following documents: (i) a document attesting the existence of a family relationship or registered partnership and (ii) the registration certificate of the EU citizen whom they are accompanying. However, it should be noted that there is nothing contained in the Citizens Rights Directive which would prevent a family member from applying at the same time as the EU citizen to whom they are related.

In addition, the Directive also allows additional documents to be requested depending on the specific situation of the family member that establishes that the conditions of the Directive are met.<sup>537</sup>

For direct descendants, this would mean documents demonstrating that they are under the age of 21 or are dependants of the EU citizen or their spouse or partner.<sup>538</sup>

As for direct ascendants of the EU citizen or their spouse or partner, the supporting documents should demonstrate that they are dependent on the EU citizen or their spouse or partner.<sup>539</sup>

Finally, as regards “other family members” who are claiming facilitation of their residence rights under Article 3(2) of the Directive, they would need to provide documentation demonstrating that they meet one of the four situations contemplated by that provision, namely either they are dependent on their EU relative, or they are members of their EU relative’s household, or they strictly require the personal care of their EU relative on serious

health grounds,<sup>540</sup> or they are in “a durable relationship, duly attested”<sup>541</sup> with their EU partner.<sup>542</sup>

The provisions of the Directive have been adequately transposed into Belgian legislation.<sup>543</sup> Family members should provide the following documents<sup>544</sup>: i) a passport (or national identity card for EU family members), ii) proof of their family relationship, for example by providing an official civil status document<sup>545</sup> and iii) proof of meeting any other applicable condition, such as dependence.

As regards the additional category of registered partnerships which Belgium does not consider equivalent to marriage<sup>546</sup>, the two partners have to prove cohabitation for a continuous period of at least one year in Belgium or elsewhere, before submitting the registration request in Belgium.<sup>547</sup> Another way of proving the durable nature of their relationship is for the partners to prove they have known each other for at least two years and that they have met at least three times during these two years, for a minimum cumulative period of at least 45 days.<sup>548</sup> Having a child together can also prove a durable relationship.<sup>549</sup>

The same rules apply to “other family members” who submit an application for a residence card.<sup>550</sup> Such other family members have to produce documentary proof of either the existence of material dependence on their EU relative, or membership of the EU citizen’s household, or personal dependence on serious health grounds, or proof of the existence of a durable relationship which is duly attested.<sup>551</sup>

Although the Belgian rules are open-ended and do not restrict the supporting documents that may be provided by family members, in practice this may lead to confusion at the municipal level about what documents should be requested.

535 Art. 8(5)(a), Directive 2004/38.

536 Art. 10(2)(a), Directive 2004/38.

537 Art. 8(5)(d), Directive 2004/38 as regards family members who are themselves EU citizens and Art. 10(2)(d) as regards family members who are third-country nationals.

538 Arts. 8(5)(d) and 10(2)(d), Directive 2004/38 read in conjunction with Art. 2(2)(c).

539 Arts. 8(5)(d) and 10(2)(d), Directive 2004/38 read in conjunction with Art. 2(2)(d).

540 Arts. 8(5)(e) and 10(2)(e), Directive 2004/38 read in conjunction with Art. 3(2)(a).

541 It should be noted that Art. 3(2)(b), Directive 2004/38 does not further specify what this would entail.

542 Arts. 8(5)(f) and 10(2)(f), Directive 2004/38 read in conjunction with Art. 3(2)(b).

543 Arts. 50 §2, 6° and 52 §2, Royal Decree on Immigration. Art. 58 also provides that the same provisions are to apply as regards other family members falling within the scope of Art. 47/1, Belgian Immigration Law.

544 Ibid.

545 Art. 44, Royal Decree on Immigration.

546 Art. 40bis § 2, 2°, Belgian Immigration Law. For further discussion, see Section 3. *Personal scope of the study*, Subsection 3.6 *Family members* in this Chapter.

547 Ibid. This is further iterated in the Syllabus on cases falling within Article 40bis; see Immigration Office, Syllabus (June 2021), p. 105 (NL) / p. 125 (FR).

548 Ibid.

549 Ibid.

550 Art. 58, Royal Decree on Immigration provides that the same rules that apply to family members are to apply as regards other family members falling within the scope of Art. 47/1, Belgian Immigration Law.

551 Syllabus on cases falling within Article 47/1; see Immigration Office, Syllabus (June 2021), pp. 112 - 113 (NL) / p. 132 (FR).

## 5.6 Statistical data on residence applications



The Immigration Office regularly publishes data on residence applications in its annual reports.<sup>552</sup> This is complemented by a more recent detailed publication on residence documents aimed at satisfying its obligations under EU law to collate migration statistics.<sup>553</sup> Additional data is also publicly available from other sources such as the Belgian parliament, reports of the Belgian Court of Audit,<sup>554</sup> as well Myria's annual reports. In addition, a specific request for statistics was addressed to the Immigration Office for the purposes of this study. This statistical data is reviewed below.

### 5.6.1 Overall stock of residence documentation issued to EU citizens

As at 1<sup>st</sup> January 2020, there were 316,306 EU citizens in possession of an EU card in Belgium, whereas 418,301 EU citizens held an E+ card.<sup>555</sup> Minors under the age of 12 who hold a child's document are tallied separately, with 112,240 such minors being EU citizens.<sup>556</sup> In addition, a further 29,561 EU citizens hold residence documentation issued on some other legal basis.<sup>557</sup> In total, 876,408 EU citizens hold some form of residence document issued by the Belgian authorities.

This compares with an EU resident population of 939,965 EU citizens living in Belgium as reported by Eurostat as at 1<sup>st</sup> January 2020.<sup>558</sup> This difference could suggest that a small but significant proportion of resident EU citizens (7% or approximately 64,000) are either not registered or hold an expired residence card. According to the Immigration Office, these differences in statistics are explained by errors committed at municipal level.

It is also interesting to note that the statistical data on residence cards suggests that 350 EU citizens hold an F card, while a further 675 EU citizens hold an F+ card, even though in theory such cards should only be issued to non-EU family members. According to the Immigration Office, this may be due to a number of factors. First there may be mistakes made at the level of the municipality, given that there is no check to ensure that the latter proceeds to order the correct residence card in the electronic system for identity cards and residence document ("Belpic"<sup>559</sup>). This system falls under the responsibility of the General Direction of Institutions and Populations (under the FPS Internal Affairs). The Immigration Office has requested to be able to carry out such checks, but such a system is not operational yet. Another reason may be a change of nationality of the person involved, which is duly registered in the National Register. As a result of the acquisition of the nationality of a Member State, the person's F card or F+ card should be changed by the municipality into an EU card or E+ card. Even though the Immigration Office may have requested for this to be undertaken, the municipality may not have performed the change. A further possible explanation is that a person with a double nationality (EU and non-EU) is registered in the national population register as a non-EU national.<sup>560</sup>

Likewise, the data reports on four EU citizens holding EC long-term residence status<sup>561</sup>, even though the underlying directive<sup>562</sup> only applies to third-country nationals. The Immigration Office explained that all four of these situations are due to a mistake in moving from paper-based documentation to electronic cards in 2008 and that it is following up to have these situations corrected.<sup>563</sup>

552 These are published on the Immigration Office's website: <https://dofi.ibz.be/sites/dvzoe/index.html>.

553 Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] OJ L 199/23.

554 Belgian Court of Audit, Report on the processing of registration requests from family members by the Belgian Immigration Office, January 2020 (*Cour des Comptes, Rapport "Office des étrangers: traitement des demandes de regroupement familial"* / *Rekenhof, Dienst Vreemdelingenzaken: Behandeling van aanvragen voor gezinshereniging*) <https://www.ccrek.be/EN/Publications/Fiche.html?id=00941793-8faf-4512-9877-8d230e08fd86>.

555 Immigration Office, 2019 statistical report on residence documents issued to foreigners in Belgium, Table 1.13, p. 13 (*Cartes pour étrangers et documents de séjour - Statistiques annuelles 2019 / Vreemdelingenkaarten en Verblifsdocumenten - Jaarlijkse statistieken 2019*) [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Statistiques\\_cartes\\_documents\\_2019\\_Fr.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Statistiques_cartes_documents_2019_Fr.pdf).  
[https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Vreemdelingenkaarten\\_en\\_verblifsdocumenten\\_2019.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Vreemdelingenkaarten_en_verblifsdocumenten_2019.pdf).

556 Ibid.

557 Ibid. This would include officials working with an EU institutions or international organisation (special identity card), recognised refugees (B card), beneficiaries of subsidiary protection (A or B card) or those admitted to stay for exceptional, humanitarian or medical reasons (A or B card) or those admitted as family members of third-country nationals (A, B or C card) or those benefiting from long-term residence status (D card).

558 Eurostat, dataset on population on 1 January 2019 by age group, sex and citizenship [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_pop1ctz&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_pop1ctz&lang=en).

559 Further information on the Belpic application can be found on the FPS Internal Affairs website <https://www.ibz.rn.fgov.be/fr/documents-didentite/eid/documentation/> / <https://www.ibz.rn.fgov.be/nl/identiteitsdocumenten/eid/documentatie>.

560 Interview with Immigration Office, 25 May 2020.

561 Immigration Office, 2019 statistical report on residence documents (n 555), Table 1.13, p. 13.

562 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

563 Interview with Immigration Office, 25 May 2020.

## 5.6.2 Applications for a registration certificate submitted by EU citizens

The Immigration Office keeps a record of the number of applications submitted by EU citizens over the course of each year, which is published in its annual reports.

Table 1.1 reflects the volume of applications which have been submitted since 2014:<sup>564</sup>

Table 1.1 - Annual number of applications submitted by EU citizens

	2014	2015	2016	2017	2018	2019
Number of applications for registration certificates submitted as measured by number of "Annex 19" forms issued	63,853 <sup>565</sup>	62,055 <sup>566</sup>	54,808 <sup>567</sup>	61,820 <sup>568</sup>	66,414 <sup>569</sup>	71,987 <sup>570</sup>

Interestingly, during this period the bulk of applications have been submitted by the same five nationality groups – namely Romanians, French, Dutch, Italian and Polish nationals – which together account for about two thirds of applications submitted every year, as shown in Table

1.2. However, in 2019, the proportion of applications submitted by Bulgarian nationals was more important than the corresponding proportion of applications made by Polish nationals.

Table 1.2 - Applications submitted by top five nationality groups<sup>571</sup>

	2014	2015	2016	2017	2018	2019
Romania	19%	20%	25%	24%	26%	27%
France	17%	18%	19%	16%	16%	15%
Netherlands	12%	13%	14%	12%	12%	11%
Italy	7%	8%	8%	8%	8%	7%
Poland	10%	9%	9%	8%	7%	n/a
Bulgaria	n/a	n/a	n/a	n/a	n/a	7%
Other nationalities	35%	32%	26%	32%	32%	35%

<sup>564</sup> Data is also available for previous years but has not been included here.

<sup>565</sup> Immigration Office, Annual Report 2014, p. 24

[https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2014\\_FR\\_v3.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2014_FR_v3.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2014\\_NL\\_v3.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2014_NL_v3.pdf).

<sup>566</sup> Immigration Office, Annual Report 2015, p. 21

[https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2015\\_FR.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2015_FR.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2015\\_NL.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2015_NL.pdf).

<sup>567</sup> Immigration Office, Annual Report 2016, p. 21

[https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2016\\_FR.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2016_FR.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2016\\_NL.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2016_NL.pdf).

<sup>568</sup> Immigration Office, Annual Report 2017, p. 27

[https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2017\\_FR.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2017_FR.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2017\\_NL.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2017_NL.pdf).

<sup>569</sup> Immigration Office, Annual Report 2018, p. 23 [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2018.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2018.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2018.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2018.pdf).

<sup>570</sup> Immigration Office, Annual Report 2019, p. 23

[https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport\\_statistiques\\_2019.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Rapport_statistiques_2019.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch\\_jaarverslag\\_2019.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistisch_jaarverslag_2019.pdf).

<sup>571</sup> Calculations based on data contained in the Immigration Office's Annual Reports 2014-2019 (n 565-570).

Statistics are also published on the number of residence documents issued every year (Table 1.3).<sup>572</sup> However, the Immigration Office had advised that this data is of relatively limited use because it does not distinguish between residence documents issued for the first time

and those which are renewals following their expiry or loss. As a result, no meaningful conclusions as to the respective rates of success and refusal in connection with residence applications submitted by EU citizens should be drawn from this data.

Table 1.3 - Annual number of EU cards issued to EU citizens

	2014	2015	2016	2017	2018	2019
Number of EU cards issued by municipalities to EU citizens during the course of the year	78,443 <sup>573</sup>	77,356 <sup>574</sup>	78,744 <sup>575</sup>	80,778 <sup>576</sup>	86,523 <sup>577</sup>	86,833 <sup>578</sup>

Due to the Immigration Office's collection method, no statistics are available which track the specific outcome of each application for registration. It is also not possible to determine whether a person has submitted more than one application. As a result, there are no available data which could provide a precise indication of how many applications are successful, how many are refused, how many are declared inadmissible, or how many applications are withdrawn before a decision is made.

Nonetheless, other data are available which can also be used to provide an estimate of the refusal rate relating to applications submitted by EU citizens.

The data in Table 1.4 reflects the number of first-time residence documents issued to EU citizens during the course of the year, which therefore does not reflect renewals. This data is further disaggregated by status of the applicant enabling to calculate the relative size of each applicant category.

Table 1.4 - Annual number of first-time residence documents issued to EU citizens by status<sup>579</sup>

	2014	2015	2016	2017	2018	2019
Number of first-time residence documents issued to EU citizens during the year in their capacity as:						
workers and self-employed persons	40%	39%	41%	42%	45%	46%
students	7%	7%	7%	7%	7%	7%
family members	40%	40%	37%	35%	36%	36%
refugees	<1%	<1%	<1%	0%	0%	0%
beneficiaries of subsidiary protection	<1%	<1%	<1%	0%	0%	0%
exceptional cases	<1%	<1%	<1%	<1%	<1%	<1%
undetermined	5%	5%	5%	6%	2%	1%
other	7%	8%	9%	9%	9%	9%

572 Immigration Office, Annual Reports 2015-2019 (n 565-570).

573 Source: Immigration Office, Annual Report 2014 (n 565), p. 25.

574 Source: Immigration Office, Annual Report 2015 (n 566), p. 22.

575 Source: Immigration Office, Annual Report 2016 (n 567), p. 27.

576 Source: Immigration Office, Annual Report 2017 (n 568), p. 23.

577 Source: Immigration Office, Annual Report 2018 (n 569), p. 24.

578 Immigration Office, data not publicly available.

579 Calculations based on data contained in the Immigration Office's 2019 statistical report on residence documents (n 555), Table 2.1.6, p. 22.

This shows that on average every year approximately 42% of residence documents are issued to EU citizens in their capacity as workers and approximately 37% of such documents are issued to EU citizens in their capacity as family members. As opposed to the top five nationality groups accounting for submitted applications, the following five nationality groups – namely Romanians, French, Dutch, Italian and Spanish nationals – together account for two thirds of recipients of residence documents in 2019.<sup>580</sup> A further group comprising Polish, Bulgarian, Portuguese, German and British nationals make up 25% of applications, while the remaining 10% concern other EU nationalities.<sup>581</sup>

In response to a request for information made in connection with this study, the Immigration Office provided data on refusals as measured by the number of “Annex 20” forms issued (Table 1.5). However, the Office was not able to specify how many decisions of inadmissibility were taken by reference to the number of “Annex 19quinquies” forms issued, i.e. a decision of non-consideration based on the lack of proof of EU citizenship. Also, it indicated that no data is available as to the number of applications which are withdrawn before a decision is made.

Table 1.5 - Annual number of refusal decisions issued to EU citizens<sup>582</sup>

	2014	2015	2016	2017	2018	2019
Number of refusal decisions taken as measured by number of “Annex 20” forms issued to EU citizens	n/a	n/a	n/a	n/a	3,217	1,551

The above statistics would suggest a rate of refusal of approximately 5% in 2018 and 2% in 2019 regardless of whether this is measured against the number of applications for registration certificates submitted by EU citizens as measured by the number of “Annex 19” forms issued (Table 1.1) or against the number of first-time residence documents issued to EU citizens (Table 1.4). It is not possible to determine whether this might be a cause for concern given that no further data is available as regards their occupational status.

### 5.6.3 Overall stock of residence documentation issued to non-EU family members

The Immigration Office reports that, as at 1<sup>st</sup> January 2020, 87,507 third-country nationals held a family member residence card (F card) and a further 57,327 third-country nationals held a permanent residence card (F+ card).<sup>583</sup> The statistics do not specify what proportion of the 83,820 non-EU minors under the age of 12 who hold a child’s document are family members of an EU citizen.<sup>584</sup>

The statistics also suggest that 1,202 third-country nationals held an EU card and a further 654 held an E+ card at the beginning of 2020. The same factors identified by the Immigration Office to explain the reasons for EU citizens holding an F card or F+ card are also likely to apply in this context. There has been a small rise in numbers of third-country nationals holding EU cards or E+ cards since 2019.

580 Calculations based on data contained in the Immigration Office’s 2019 statistical report on residence documents (n 555), Table 2.1.8, p. 24.

581 Ibid.

582 Immigration Office, data not publicly available.

583 Immigration Office, 2019 statistical report on residence documents (n 555), Table 1.13, p. 13.

584 Ibid.

## 5.6.4 Applications for a residence card submitted by non-EU family members

The Immigration Office was unable to provide statistics on the number of applications for residence cards submitted by non-EU family members as measured by the number of “Annex 19ter” forms issued. This information is not currently published in its annual reports.

However, data are available on the number of first-time residence cards issued to third-country nationals on the basis of family reunification to an EU citizen during the course of the year as shown in Table 1.6. The statistics for 2018 and 2019 are currently unavailable. It appears that no statistics are collated as regards other family members who have applied for issued a residence card on the basis of Article 47/1 of the Belgian Immigration Law.

Table 1.6 - Annual number of first-time residence documents issued to non-EU family members

	2014 <sup>585</sup>	2015 <sup>586</sup>	2016 <sup>587</sup>	2017 <sup>588</sup>	2018	2019
Number of first-time residence documents issued to non-EU family members during the year in their capacity as:	3,607	4,225	4,011	5,202	n/a	n/a
spouse	52%	43%	43%	32%	n/a	n/a
descendant	44%	53%	53%	64%	n/a	n/a
ascendant	4%	4%	4%	4%	n/a	n/a

The Immigration Office was not able to provide any data on decisions taken to refuse applications submitted by non-EU family members by reference to the number of “Annex 20” forms issued. The Office was also unable to specify how many decisions of inadmissibility were issued to non-EU family members by reference to the number

of “Annex 19quinquies” forms issued, i.e. a decision of non-consideration based on the lack of proof of the family relationship with the EU citizen.

## 5.7 Refusal, termination and withdrawal of residence rights

585 Immigration Office's statistical report residence documents issued within the framework of family reunification for the period 2010-2014, Table 2.6, p.10 (*Cartes pour étrangers et documents de séjour délivrés dans le cadre de regroupement familial - Statistiques annuelles 2010-2014 / Vreemdelingenkaarten en Verblifsdocumenten afgegeven in het kader van de gezinshereniging - Jaarlijkse statistieken 2010-2014* [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat\\_A\\_RGF\\_Fr\\_2014.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat_A_RGF_Fr_2014.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat\\_A\\_GH\\_NL\\_2014.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat_A_GH_NL_2014.pdf)).

586 Immigration Office's statistical report residence documents issued within the framework of family reunification for the period 2010-2015, Table 2.3, p. 6 (*Cartes pour étrangers et documents de séjour délivrés dans le cadre de regroupement familial - Statistiques annuelles 2010-2015 / Vreemdelingenkaarten en Verblifsdocumenten afgegeven in het kader van de gezinshereniging - Jaarlijkse statistieken 2010-2015* [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat\\_A\\_RGF\\_Fr\\_2015.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat_A_RGF_Fr_2015.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat\\_A\\_GH\\_NL\\_2015.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat_A_GH_NL_2015.pdf)).

587 Immigration Office's statistical report residence documents issued within the framework of family reunification for the period 2010-2016, Table 1.8, p. 6 (*Cartes pour étrangers et documents de séjour délivrés dans le cadre de regroupement familial - Statistiques annuelles 2010-2016 / Vreemdelingenkaarten en Verblifsdocumenten afgegeven in het kader van de gezinshereniging - Jaarlijkse statistieken 2010-2016* [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat\\_A\\_RGF\\_Fr\\_2016.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat_A_RGF_Fr_2016.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat\\_A\\_GH\\_NL\\_2016.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat_A_GH_NL_2016.pdf)).

588 Immigration Office's statistical report residence documents issued within the framework of family reunification for the period 2010-2017, Table 1.8, p. 6 (*Cartes pour étrangers et documents de séjour délivrés dans le cadre de regroupement familial - Statistiques annuelles 2010-2017 / Vreemdelingenkaarten en Verblifsdocumenten afgegeven in het kader van de gezinshereniging - Jaarlijkse statistieken 2010-2017* [https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat\\_A\\_RGF\\_Fr\\_2017.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/Statistiques/Stat_A_RGF_Fr_2017.pdf) / [https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat\\_A\\_GH\\_NL\\_2017.pdf](https://dofi.ibz.be/sites/dvzoe/NL/Documents/Statistieken/Stat_A_GH_NL_2017.pdf)).

Belgian law has made use of all the possibilities afforded by Directive 2004/38<sup>589</sup> to endow the competent national authorities with the power to refuse, terminate or withdraw residence rights.<sup>590</sup>

The submission of an application by an EU citizen or their family member requires that a decision be made by the competent authority.<sup>591</sup> This involves either a positive a

589 On the powers of Member States to expel EU citizens and their family members, see further, Niamh Nic Shuibhne, “Derogating from the Free Movement of Persons: When can EU Citizens be Deported?” (2006) *Cambridge Yearbook of European Legal Studies* 8, pp. 187-227; Solange Maslowski, “The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice” (2015) *Central and Eastern European Migration Review* 4(2), pp. 61-85; Eleanor Spaventa, “Once a foreigner always a foreigner: who does not belong here anymore? Expulsion measures” in H. Verschuere (ed), *Residence, employment and social rights of mobile persons. On how EU law defines where they belong?* (2016 Intersentia), pp. 89-110; Sandra Mantu et al, *EU Citizenship and Expulsion* (2017) Nijmegen Centre for Migration Law Working Paper 2017/02.

590 For a further discussion, see Valcke (n 19).

591 Case C-246/17 *Diallo* EU:C:2018:499.

decision being taken, in which case the relevant residence document will be issued, or on the contrary it may result in a decision to refuse recognition of the right to reside.

As a result, in circumstances where an EU citizen (or their family member) has failed to demonstrate that they benefit from a right of residence, the Immigration Office (or a municipality as the case may be),<sup>592</sup> may issue a decision refusing an application for recognition of the right to reside in Belgium beyond three months.<sup>593</sup> In such cases, the EU citizen or the family member(s) concerned will be issued with a written decision using the relevant standard form<sup>594</sup> setting out the reasons for the refusal.<sup>595</sup> The person concerned has 30 days to lodge an appeal against such a decision.<sup>596</sup>

Following the Immigration Office's internal reorganisation in June 2019<sup>597</sup> and in view of the limited human resources available to process case files of EU citizens and their family members, the Immigration Office has indicated a change to its casework priorities. Even though there has been no change in the legal framework on the right of residence of EU citizens and their family members have, the priority in enforcement has now shifted from taking action to refuse applications at the registration stage (Annex 20 decisions) to the post-registration verification of case files with a view to taking action to terminate the residence rights of EU citizens and their family members (Annex 21 decisions).<sup>598</sup>

Priority is now being given to the files of EU citizens who are suspected of being a burden on the social assistance system,<sup>599</sup> constituting a threat to the public order, or having engaged in fraud.<sup>600</sup>

In cases where the right of residence of an EU citizen (or their family members) has previously been recognised, there are several legal bases upon which the Belgian authorities may subsequently take action to terminate or withdraw this right.

### 5.7.1 Termination of residence rights due to non-fulfilment of conditions

Under the Citizens Rights Directive, citizens and their family members have the right of residence of more than three months as long as they continue to meet the conditions set out in the Directive.<sup>601</sup> However, the Directive also provides that in specific cases where there is a reasonable doubt as to whether EU citizens or their members satisfy the conditions set out in Articles 7, 12 and 13, the host Member State is entitled to verify if these conditions are fulfilled,<sup>602</sup> provided that this verification is not be carried out systematically.<sup>603</sup> The CJEU has previously recognised that the host Member State may take action in a situation where an EU citizen (or their family member) ceases to meet the conditions of residency the Directive.<sup>604</sup>

These provisions have been transposed into Belgian law and enable the Immigration Office to terminate the residence rights of EU citizens,<sup>605</sup> family members who are themselves EU citizens<sup>606</sup> and family members who are third-country nationals<sup>607</sup> because they no longer meet the conditions for having a right of residence.

### 5.7.2 Termination of residence rights due to being a burden on social assistance

A further basis for terminating residence rights involves circumstances where an EU citizen (or their family

592 For a discussion on the respective competences of the Immigration Office and the municipalities, see Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

593 Art. 51 §1, third para., Royal Decree on Immigration provides a basis for refusing an application as regards EU citizens who fail to provide supporting documents and likewise under Art. 52 §3 as regards non-EU family members who fail to provide supporting documents. Under, Art. 52 §1, third para., Royal Decree on Immigration, applications submitted by non-EU family members may also be declared inadmissible on the basis that they did not furnish proof of their family relationship. In addition, Art. 51 §2, second para., Royal Decree on Immigration provides a separate basis for refusing an application submitted by EU citizens on the basis that the substantive conditions attached to the right of residence are not met and likewise Art. 52 §4, fifth para. as regards refusing an application submitted by non-EU family members.

594 The standard form is contained in Annex 20, Royal Decree on Immigration, as regards a refusal made on the basis of Art. 51 §1, third para. and §2, second para., Royal Decree on Immigration as regards EU citizens and Art. 52 §4, fifth para. 5 as regards non-EU family members. A different form is to be used which is set out at Annex 19quinquies, Royal Decree on Immigration when an application is declared inadmissible either in a situation where an EU citizen is unable to prove their EU citizenship or when a non-EU family does not furnish proof of their family relationship.

595 Art. 62 §2, Belgian Immigration Law requires the decision to contain a statement of reasons for the refusal except where this justified by the interests of State security.

596 Art. 39/57 §1, Belgian Immigration Law. See further Section 7. *Procedural safeguards and appeal rights* in this Chapter.

597 Immigration Office, Syllabus (June 2021), p. 146 (NL) / p. 163 (FR).

598 Interview with Immigration Office, 25 May 2020.

599 Ibid.

600 Valcke (n 19).

601 Art. 14(2), Directive 2004/38, which refers back to the conditions contained in Arts. 7, 12 and 13.

602 Ibid.

603 Ibid. This latter limitation on the powers of verification has not been transposed into Belgian law.

604 Case C-408/03 *Commission v Belgium* EU:C:2006:192; Case C-215/03 *Oulane* EU:C:2005:95.

605 Art. 42bis, Belgian Immigration Law.

606 Art. 42ter, Belgian Immigration Law.

607 Art. 42quater, Belgian Immigration Law.

member) becomes an unreasonable burden on social assistance.<sup>608</sup> According to the CJEU, in such circumstances the right of residence can be subordinated to the legitimate interests of the Member States such as the protection of their public finances.<sup>609</sup>

Under Belgian law, the Immigration Office may therefore terminate the right of residence of EU citizens or their family members because they have become an unreasonable burden on social assistance.<sup>610</sup> Belgian law was originally silent on the factors<sup>611</sup> that should be taken into account to determine if a person has become an unreasonable burden on the Belgian social assistance system.<sup>612</sup> This has now been rectified<sup>613</sup> following the infringement proceedings initiated by the European Commission in 2011.<sup>614</sup>

In order to perform its checks on cases regarding social assistance, the Immigration Office automatically receives information from the Crossroads Bank for Social Security (CBSS)<sup>615</sup> whenever an EU citizen who is registered as a resident has been receiving support from the public authorities. Since 2006, the Immigration Office has progressively been granted access to information contained in the

country's various social security databases.<sup>616</sup> The Belgian authorities have essentially put into place an automated system to check residence entitlements of EU citizens and their family members who claim benefits in Belgium.<sup>617</sup>

From July 2011,<sup>618</sup> the Immigration Office has been receiving monthly data from the Belgian social security institutions with details of all EU citizens who claim benefits.<sup>619</sup> For example, the details of EU citizens who

608 Art. 14(2), Directive 2004/38 read in combination with recital 16.

609 Case C-408/03 *Commission v Belgium* EU:C:2006:192; Case C-140/12 *Brey* EU:C:2013:565.

610 Arts. 42bis, Belgian Immigration Law as regards EU citizens, Art. 42ter as regards family members who are themselves EU citizens and Art. 42quater as regards non-EU family members.

611 Recital 16, Directive 2004/38 specifies that: "The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion".

612 Case C-140/12 *Brey* EU:C:2013:565.

613 Arts. 42bis, 42ter and 42quater, Belgian Immigration Law were amended by the Law of 19 March 2014 (*Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* / *Wet van 19 maart 2014 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 05-05-2014, 36137).

614 Commission, Reasoned Opinion, Case 2011/2033 (21 February 2013) concerning Belgium's incorrect transposition of Directive 2004; see also House of Representatives, Parliamentary Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (9 December 2013) (*Projet de loi portant dispositions diverses en matière d'Asile et de Migration et modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* / *Wetsontwerp houdende diverse bepalingen inzake Asiel en Migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*), Chamber of Representatives, 2013-2014, Doc. No 53 3239/001, p. 7).

615 This refers to the *Banque Carrefour de la Sécurité Sociale / Kruispuntbank van de Sociale Zekerheid*.

616 Sectoral Committee for Social Security and Healthcare, Decision No 06/005 of 17 January 2006 concerning the transfer of personal data to the Immigration Office – DIMONA database and employee records (*Comité sectoriel de la sécurité sociale et de la santé, Délibération n° 06/005 du 17 janvier 2006 relative à la communication de données à caractère personnel à l'Office des étrangers du Service Public Fédéral Intérieur – messages électroniques l850 et l851 (banque de données DIMONA) et l950 (fichier du personnel)*, C/SS/06/008 / *Sectoraal Comité van de Sociale Zekerheid en van de Gezondheid, Beraadslaging nr. 06/005 van 17 januari 2006 m.b.t. de mededeling van persoonsgegevens aan de Dienst Vreemdelingenzaken van de Federale Overheidsdienst Binnenlandse Zaken – elektronische berichten l850 en l851 (DIMONA-gegevensbank) en l950 (personeelsbestand)*, SCSZ/06/008); Decision No 07/036 of 2 October 2007 concerning the transfer of personal data by the Federal Public Programming Service on Social Integration, Fight against Poverty and Social Economy to the Immigration Office concerning students who are EU citizens, (*Délibération n° 07/036 du 2 octobre 2007 relative à la communication de données à caractère personnel par le Service Public de Programmation Intégration sociale, lutte contre la pauvreté et économie sociale (spp is) à l'Office des étrangers (OE) concernant les étudiants citoyens de l'Union européenne*, C/SS/07/122 / *Beraadslaging nr. 07/036 van 2 oktober 2007 met betrekking tot mededeling van persoonsgegevens door de programmatorische Federale Overheidsdienst Maatschappelijke Integratie, armoedebestrijding en sociale economie (POD MI) aan de Dienst Vreemdelingenzaken (DV) met betrekking tot studenten uit de Europese Unie*, SCSZ/07/122); Decision No 09/029 of 2 June 2009, modified on 7 June 2011, concerning the transfer of personal data by the Federal Public Programming Service on Social Integration, Fight against Poverty and Social Economy to the Immigration Office (*Délibération n° 09/029 du 2 juin 2009, modifiée le 7 juin 2011, relative à la communication de données à caractère personnel par le Service Public de Programmation Intégration sociale, lutte contre la pauvreté et économie sociale à l'Office des étrangers*, C/SS/09/041 / *Beraadslaging nr 09/029 van 2 juni 2009, gewijzigd op 7 juni 2011, betreffende de mededeling van persoonsgegevens door de Programmatorische Overheidsdienst Maatschappelijke Integratie, armoedebestrijding en sociale economie aan de Dienst Vreemdelingenzaken*, SCSZ/09/041); Decision No 09/0067 of 3 November 2009 concerning the transfer of personal data contained on the registers of the social security database to the Immigration Office (*Délibération n° 09/067 du 3 novembre 2009 relative à la communication de données à caractère personnel des registres banque carrefour à l'Office des étrangers*, C/SS/09/128 / *Beraadslaging nr 09/067 van 3 november 2009 met betrekking tot de mededeling van persoonsgegevens uit de kruispuntbankregisters aan de Dienst Vreemdelingenzaken*, SCSZ/09/128); Decision No 12/054 of 3 July 2012 concerning the transfer of personal data to the Immigration Office through the DOLSIS web application (*Délibération n° 12/054 du 3 juillet 2012 relative à la communication de certaines données à caractère personnel à l'Office des étrangers au moyen de l'application web DOLSIS*, C/SS/12/201; *Beraadslaging nr. 12/054 van 3 juli 2012 met betrekking tot de mededeling van bepaalde persoonsgegevens aan de Dienst Vreemdelingenzaken door middel van de webtoepassing DOLSIS*, SCSZ/12/201).

617 The Minister for Immigration has explained the purpose of this data exchange: "We cross referred the databases of the Social Integration Service and the Immigration Office. We were able to notice who was here to take advantage of our welfare system. There are also French, Dutch, Spanish, but also Romanians and Bulgarians. It's very important, because we have to avoid that people can take advantage of our welfare system" (authors' translation); see Maggie De Block: "Il faut éviter qu'il y ait des gens qui profitent de notre système social" (We must prevent people from taking advantage of our welfare system), *RTL*, 8 December 2013, <http://www.rtl.be/info/belgique/politique/maggie-de-block-il-faut-eviter-ques-des-gens-profitent-de-notre-systeme-social-video--396658.aspx>.

618 Immigration Office, *Annual Report 2011*, pp. 92-93.

619 Immigration Office, *Annual Report 2012*, p. 13.

claim unemployment benefits are routinely passed on by the Belgian National Employment Office to the Immigration Office,<sup>620</sup> which then proceeds to determine if action can be taken against claimants to put an end to their right of residence. Likewise, since 2011 similar arrangements<sup>621</sup> have been in place with the Social Integration Service<sup>622</sup> as regards EU citizens who receive assistance from a public social assistance centre<sup>623</sup> when they have registered as self-sufficient persons<sup>624</sup> or those enrolled on a course of study.<sup>625</sup> The Immigration Office has also been granted access to databases allowing it to check to the social security records of workers<sup>626</sup> and self-employed persons. More recently, access has been

granted to data concerning the award of some disability allowances<sup>627</sup> to EU citizens.<sup>628</sup>

There have been concerns expressed from a wide variety of quarters<sup>629</sup> as to whether such systematic data transfer arrangements are compatible with the Citizens Rights Directive, given that Belgian law does not provide explicit protection against systematic verification of the right of residence<sup>630</sup> in line with the Directive.<sup>631</sup> However, the Immigration Office emphasises that it always carries out an individual investigation which takes into account the specific circumstances of the case.<sup>632</sup> Nonetheless, it remains to be seen whether such a system would withstand scrutiny by the CJEU,<sup>633</sup> given that the verification of the

620 Decision No 13/051 of 7 May 2013 concerning the transfer of personal data relating to EU citizens from the National Employment Office to the Immigration Office (*Délibération n° 13/051 du 7 mai 2013 concernant la communication de données à caractère personnel relatives à des citoyens de l'Union européenne par l'Office National de l'emploi à l'Office des étrangers*, CSSS/13/117 / *Beraadslaging nr. 13/051 van 7 mei 2013 inzake de mededeling van persoonsgegevens over burgers van de Europese Unie door de Rijksdienst voor Arbeidsvoorziening aan de Dienst voor Vreemdelingenzaken*, SCSZ/13/117).

621 See for example, Sectoral Committee for Social Security and Healthcare, Decision No 18/055 of 8 May 2018 concerning the transfer of personal data by the Social Integration Service to the Immigration Office, (*Délibération n° 18/055 du 8 mai 2018 relative à la communication de données à caractère personnel par le Service Public de Programmation Intégration Sociale à l'office des étrangers*, CSSS/18/097/ *Beraadslaging nr 18/055 van 8 mei 2018 met betrekking tot de mededeling van persoonsgegevens door de Programmatorische Overheidsdienst Maatschappelijke Integratie aan de dienst Vreemdelingenzaken*, SCSZG/18/097).

622 This refers to *Service Public de Programmation Intégration Sociale/ Programmatorische federale Overheidsdienst Maatschappelijke Integratie*.

623 This refers to the *Centre Public d'Action Sociale (CPAS) / Openbaar Centrum voor Maatschappelijk Welzijn (OCMW)*.

624 Sectoral Committee for Social Security and Healthcare, Decision No 11/044 of 7 June 2011, concerning the transfer of personal data by the Federal Public Programming Service on Social Integration, Fight against Poverty and Social Economy to the Immigration Office relating with a view to determining the existence of sufficient resources underlying their right of residence of more than three months and on the criterion of an unreasonable burden on social assistance (*Délibération n° 11/044 du 7 juin 2011 relative à la communication de données à caractère personnel par le Service Public De Programmation Intégration sociale, lutte contre la pauvreté et économie sociale à l'Office des étrangers en vue de lui permettre de statuer sur l'existence ou non de la qualité invoquée (ressources suffisantes) à la base de son droit de séjour de plus de trois mois et sur le critère de la charge déraisonnable pour le système d'aide sociale du Royaume*, CSSS/11/070 / *Beraadslaging nr 11/044 van 7 juni 2011 betreffende de mededeling van persoonsgegevens door de Programmatorische Overheidsdienst Maatschappelijke Integratie, armoedebestrijding en sociale economie aan de Dienst Vreemdelingenzaken zodat die kan oordelen over het al dan niet bestaan van de hoedanigheid (voldoende bestaansmiddelen) die ingeroepen werd om een verblijfsrecht van meer dan drie maanden te verkrijgen en over het criterium van onredelijke belasting van het socialebijsstandsstelsel van het Rijk*, SCSZ/11/070).

625 Sectoral Committee for Social Security and Healthcare, Decision No 11/045 of 7 June 2011, concerning the transfer of personal data by the Federal Public Programming Service on Social Integration, Fight against Poverty and Social Economy to the Immigration Office relating to students and their family members (*Délibération n° 11/045 du 7 juin 2011 relative à la communication de données à caractère personnel par le Service Public de Programmation Intégration sociale, lutte contre la pauvreté et économie sociale à l'Office des étrangers concernant les étudiants citoyens de l'union européenne et les membres de leurs familles*, CSSS/11/070 / *Beraadslaging nr 11/045 van 7 juni 2011 met betrekking tot mededeling van persoonsgegevens door de Programmatorische Federale Overheidsdienst Maatschappelijke Integratie, armoedebestrijding en sociale economie aan de Dienst Vreemdelingenzaken met betrekking tot studenten die burger zijn van de Europese unie en hun familieleden*, SCSZ/11/070).

626 Decision No 06/005 (n 616); Decision No 12/054 (n 616).

627 These refer to income replacement allowance (*allocation de remplacement de revenus/ inkomensvervangende tegemoetkoming*) and integration allowance (*allocation d'intégration/integratie tegemoetkoming*) awarded under the Law of 27 February 1987 relating to allowances for disabled persons (*Loi du 27 février 1987 relative aux allocations aux personnes handicapées / Wet van 27 februari 1987 betreffende de tegemoetkomingen aan [personen met een handicap, MB/BS 01-04-1987, 4832]*).

628 Decision No 18/057 of 8 May 2018 concerning the transfer of personal data from the Directorate General for Disabled Persons of the Social Security Service to the Immigration Office (*Délibération n° 18/057 du 8 mai 2018 relative à la communication de données à caractère personnel par la Direction Générale personnes handicapées du Service Public Fédéral Sécurité Sociale à l'Office des étrangers*, CSSS/18/099 / *Beraadslaging nr. 18/057 van 8 mei 2018 met betrekking tot de mededeling van persoonsgegevens door de Directie-Generaal personen met een handicap van de Federale Overheidsdienst Sociale Zekerheid aan de Dienst Vreemdelingenzaken*, SCSZG/18/099).

629 Myria (2016), *2015 Migration in figures and rights (2015 La Migration en chiffres et droits)*, pp. 127-129; Bailleux, A. et al., "Libre circulation des citoyens européens: du mauvais usage par la Belgique de ses banques de données sociales", *La Libre Belgique*, 5 February 2015, <http://www.lalibre.be/debats/opinions/libre-circulation-des-citoyens-europeens-du-mauvais-usage-par-la-belgique-de-ses-banques-de-donnees-sociales-54d36df135701001a18fe98b>; complaint submitted to the European Commission by INCA-CGIL, ABVV-FGTB, the EU Rights Clinic and Bruxelles Laïque registered under CHAP (2014)3546; complaint submitted to the European Commission the EU Rights Clinic under CHAP (2018)3481; Valcke (n 19).

630 Milieu (n 10), pp. 39-40.

631 Article 14(2) of Directive 2004/38 provides that "where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically".

632 Interview with the Immigration Office, 25 May 2020. See also Question No 390 from Benoit Hellings, Chamber of Representatives (16 December 2015) (*Question n° 390 de monsieur le député Benoit Hellings du 16 décembre 2015 (Fr.) au secrétaire d'État à l'Asile et la Migration, chargé de la Simplification administrative, adjoint au ministre de la Sécurité et de l'Intérieur / Vraag nr. 390 van de heer volksvertegenwoordiger Benoit Hellings van 16 december 2015 (Fr.) aan de staatssecretaris voor Asiel en Migratie, belast met Administratieve Vereenvoudiging, toegevoegd aan de minister van Veiligheid en Binnenlandse Zaken, 2014-2019, Doc. QRVA 54 060, 396*).

633 While Article 14(2) of the Directive 2004/38 has yet to be the subject of detailed interpretation by the CJEU, in Case C-308/14 *Commission v UK*, EU:C:2016:436, at para. 84, the Court indicated that "the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence" in circumstances where it is "carried out systematically" would consequently be "contrary to the requirements of Article 14(2) of the directive". In that case, Advocate General had opined that this provision requires that "checks on whether claimants satisfy the conditions laid down in Directive 2004/38 to be granted the right of residence are not carried out in every single case, something which (...) is prohibited by Article 14(2) of that directive"; see Opinion of Advocate General Cruz Villalón in Case C-308/14 *Commission v UK* EU:C:2015:666, para. 93).

existence of a right of residence appears to be carried out systematically in respect of all EU citizens and family members who claim benefits in Belgium.

### 5.7.3 Termination of residence rights on public policy or public security grounds

The Citizens Rights Directive allows the host Member State to terminate residence rights on the grounds of public policy or public security.<sup>634</sup> Where an EU citizen (or their family members) engages in conduct contrary to public policy or national security, the Immigration Office may take a decision to terminate their right of residence<sup>635</sup> where their personal conduct constitutes a present, genuine and sufficiently serious threat affecting the fundamental interests of Belgian society.<sup>636</sup>

### 5.7.4 Withdrawal of residence rights on grounds of fraud or abuse

Where an EU citizen (or their family member) commits fraud or abuse,<sup>637</sup> the host state is entitled to take necessary measures to refuse, terminate or withdraw any right conferred by the Citizens Rights Directive.<sup>638</sup> Under Belgian law, the Immigration Office has accordingly been empowered to withdraw residence rights where recognition of a right of residence has been obtained under false pretences by providing false or misleading information or using forged or falsified documents or otherwise resorting to fraud or other unlawful means.<sup>639</sup>

634 Arts. 27 and 28, Directive 2004/38,

635 Arts. 43 §1, 2° and 44bis §1, Belgian Immigration Law.

636 Art. 45 §2, third para., Belgian Immigration Law.

637 A specific mention should be made on marriages of convenience and legal cohabitations of convenience, which have not been covered by the survey. According to the European Commission's guidelines (n 25) an investigation into a marriage can only take place where there are reasonable doubts about its genuineness. The European Commission also highlights that the burden of proof must remain with the national authorities and, as such, married couples cannot be asked for proof that their marriage is not abusive. Nevertheless, if there are well-founded suspicions regarding the genuineness of a marriage, which are supported by evidence (such as conflicting information provided by the spouses), they can invite the couple to produce further relevant documents or evidence. In Belgium, in case of serious suspicion about the authenticity of a marriage or legal cohabitation, the relevant official at the town hall can decide to postpone a wedding or legal cohabitation, which potentially extends to family members of EU citizens

638 Art. 35 and recital 28 of Directive 2004/38. It is also important mentioning Case C-557/17 *Y. Z. and others* EU:C:2019:203 regarding third country nationals, but potentially applicable to the family reunification rules of EU citizens *mutatis mutandis*. In this ruling, the CJEU held that where family reunification has been authorised or long-term resident status has been granted to third-country nationals on the basis of falsified documents, the fact that those nationals did not know of the fraudulent nature of those documents does not preclude the Member State concerned from withdrawing that authorisation or status. The withdrawal of residence rights on grounds of fraud has not been covered by the survey.

639 Arts. 43 §1, 1° and 44 §1, Belgian Immigration Law. The latter provision replaced the former art. 42septies.

## 5.7.5 Termination of residence rights and issuance of expulsion orders

EU law allows for the host Member State to take action to order the expulsion of EU citizens and family members who do not or no longer have a right of residence.<sup>640</sup>

Until October 2017, any decision taken by the Belgian authorities to refuse, terminate or withdraw the residence rights of EU citizens and their family members was systematically accompanied by an order to leave the territory.<sup>641</sup> However, following a ruling of the Belgian Council of State,<sup>642</sup> the Immigration Office issued a letter of instruction to municipalities informing them that an order to leave the territory should no longer be issued in respect of any decision taken to refuse or terminate the residence rights of EU citizens and their family members until such a time as the 30-day deadline for appealing such a decision has passed.<sup>643</sup>

Nonetheless, the law still explicitly provides for the possibility to issue an expulsion order. Whenever an EU citizen (or their family member) does not have or no longer has a right to reside in Belgium, an expulsion order may be issued against the person concerned.<sup>644</sup> The time allowed to leave the territory will usually be no less than one month,<sup>645</sup> except in cases of urgency.<sup>646</sup> Until this deadline has expired, the person concerned can be subject to precautionary measures to prevent absconding.<sup>647</sup>

640 Case C-408/03 *Commission v Belgium* EU:C:2006:192; Case C-215/03 *Oulane* EU:C:2005:95. See further, on the powers of Member States to expel EU citizens and their family members, see further, Niamh Nic Shuibhne, "Derogating from the Free Movement of Persons: When can EU Citizens be Deported?" (2006) *Cambridge Yearbook of European Legal Studies* 8, pp. 187-227; Solange Maslowski, "The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice" (2015) *Central and Eastern European Migration Review* 4(2), pp. 61-85; Eleanor Spaventa, "Once a foreigner always a foreigner: who does not belong here anymore? Expulsion measures" in H. Verschuere (ed), *Residence, employment and social rights of mobile persons. On how EU law defines where they belong?* (2016 Intersentia), pp. 89-110; Sandra Mantu et al, *EU Citizenship and Expulsion* (2017) Nijmegen Centre for Migration Law Working Paper 2017/02.

641 Art. 51 §2, second para. as regards EU citizens and Art. 52 §4, fifth para. as regards non-EU family members.

642 Council of State, judgment No 238 170 of 11 May 2017 which held that insofar as Art. 39/79 §1, Belgian Immigration Law provides that, during the period of time specified for bringing an appeal against any decision refusing or terminating residence rights of EU citizens and their family members, no expulsion measure may be taken, the individual concerned is not unlawfully present during that period, and as a result the Immigration Office cannot take an expulsion measure on the basis of Art. 7, Belgian Immigration Law.

643 Association du Droit des Étrangers (2017) *Newsletter* n° 136, p. 8.

644 Arts. 7, first para. 1 and 44ter §1, Belgian Immigration Law.

645 Art. 44ter § 2, Belgian Immigration Law.

646 *Ibid.* This is in line with Art. 30(3), Directive 2004/38.

647 Art. 44quater, second para., Belgian Immigration Law. Although Directive 2004/38 is silent on this issue, the CJEU recognised that detention can be justified on grounds of public policy, public security or public health in Case C-215/03 *Oulane*, EU:C:2005:95.

## 5.8 Statistical data on the refusal, termination and withdrawal of residence rights



Following amendments made to the immigration law in 2017<sup>648</sup> which apply specifically to EU citizens and their family members, such measures may include detention for renewable periods of up to two months,<sup>649</sup> provided that their detention cannot exceed five months.<sup>650</sup> After expiry of the deadline to leave Belgian territory, an expulsion order may be enforced and the person concerned may be forcibly removed from Belgium.<sup>651</sup>

An expulsion order may also be supplemented by an entry ban of up to five years on grounds of public policy, public security or public health,<sup>652</sup> although this may be longer if the person constitutes a serious threat to public policy or national security.<sup>653</sup> It should be noted that the Belgian transposition appears to go beyond what is permitted by Article 32 of Directive 2004/38, insofar as the latter does not foresee the possibility to issue an entry ban on public health grounds.<sup>654</sup>

While the powers to terminate or withdraw residence rights could be considered to have been correctly transposed into Belgian law,<sup>655</sup> concerns have been expressed as to whether their application in practice comply with the EU legal framework.<sup>656</sup> These aspects were not covered by the survey but would nonetheless merit further research.

Although the survey conducted for his study did not examine the practice of the Immigration Office in respect of the post-registration verification of residence rights, it is worth observing that there are some available statistical data which have been published by the Immigration Office. These statistics relate to decisions consisting in the termination of residence rights when an EU citizen no longer meet the conditions governing the right of residence beyond three months or when an EU citizen becomes an unreasonable burden on social assistance<sup>657</sup> (Table 1.7).

Table 1.7 - Annual number of decisions terminating residence rights<sup>658</sup>

	2014	2015	2016	2017	2018	2019
Number of decisions taken as measured by number of "Annex 21" forms issued to EU citizens	2,042	1,702	1,845	1,878	1,350	600

648 Law of 24 February 2017 (*Loi du 24 février 2017 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 24 februari 2017 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het doel de bescherming van de openbare orde en de nationale veiligheid te versterken*, MB/BS 19-04-2017, 51890). For media coverage relating to these amendments, see "Ook EU-burgers kan toegang tot België worden ontzegd" ("EU citizens can now be denied entry to Belgium"), *De Morgen*, 16 July 2016, <https://www.demorgen.be/nieuws/ook-eu-burgers-kan-toegang-tot-belgie-worden-ontzegd-b48e5d00>; "België kan EU-burgers die zich misdragen voortaan inreisverbod geven" (Belgium can now issue entry bans against EU citizens who misbehave), *Het Nieuwsblad*, 7 February 2017, [https://www.nieuwsblad.be/cnt/dmf20170209\\_02721214](https://www.nieuwsblad.be/cnt/dmf20170209_02721214).

649 Art. 44septies, Belgian Immigration Law.

650 Art. 44septies, third para., Belgian Immigration Law.

651 Art. 44quinquies, Belgian Immigration Law.

652 Art. 44nonies, Belgian Immigration Law.

653 Art. 44nonies §2, Belgian Immigration Law.

654 Art. 44decies, Belgian Immigration Law otherwise correctly transposes the requirements of Art. 32, Directive 2004/38.

655 See for example, Jean-Yves Carlier and Jean-Pierre Jacques *Report on the Free Movement of Workers in Belgium in 2008-2009* (2009) European Network on the Free Movement of Workers, p. 8, who consider that Directive 2004/38 was on the whole "well transposed".

656 Valcke (n 19), pp. 166-183.

657 These relate to so-called "Annex 21" decisions which terminate residence rights on the basis of Art. 42bis, Belgian Immigration Law as regards EU citizens, Art. 42ter as regards family members who are EU citizens and or Art. 42quater as regards family members who are third-country nationals.

658 Immigration Office, Annual reports 2014-2019.

In terms of occupational status,<sup>659</sup> it is surprising to see that those most affected have been EU citizens who registered as self-employed persons, workers and job-seekers (Table

1.8), given that Article 14(4) of the Citizens Rights Directive is intended to prevent the expulsion of precisely such categories of EU citizens.

Table 1.8 - Annual number of decisions terminating residence rights – by occupation<sup>660</sup>

	2014	2015	2016	2017	2018	2019
Number of decisions taken as measured by number of “Annex 21” forms issued to:	2,042	1,702	1,845	1,878	1,350	600
workers	31%	24%	18%	18%	18%	25%
self-employed persons	46%	41%	53%	55%	51%	45%
jobseekers	7%	8%	11%	11%	13%	11%
family members	11%	19%	11%	8%	10%	7%
others	6%	8%	6%	8%	8%	12%

From the time that the Belgian measures giving effect to the Citizens Rights Directive came into force in 2008 until 2013, there had been a sharp year-on-year increase in the number of decisions terminating residence rights as illustrated by Table 1.9. This can be attributed to the fact that the Immigration Office started having had recourse to

computer-assisted verification of the right of residence of EU citizens and their family members using data collated from the Belgian social security institutions.<sup>661</sup> This peaked in 2013 and since then the numbers have gone back down to what they were a decade ago.

Table 1.9 - Annual number of decisions terminating residence rights (2008-2013)<sup>662</sup>

	2008	2009	2010	2011	2012	2013
Number of decisions taken as measured by number of “Annex 21” forms issued to EU citizens	8	61	502	1,542	2,470	2,712

It should be noted that the published statistics on decisions terminating residence rights do not relate to enforced removals, for which statistics are less readily available. Furthermore, such statistics do not include cases relating to the withdrawal of residence rights on the basis of fraud or abuse which are tallied separately. Table 1.10 shows

the number of instances in which the use of forged or falsified documents that were used to fraudulently claim EU citizenship was detected, as well as instances where the existence of a marriage of convenience was identified although the nationalities were not further identified. These represent less than 0.1% of applications per year.

Table 1.10 - Annual number of decisions taken in respect of fraud and abuse<sup>663</sup>

	2014	2015	2016	2017	2018	2019
Number of cases in which forged or falsified documents were used	44	59	51	27	35	50
Number of marriages of convenience identified	56	77	19	61	5	2

<sup>659</sup> Data on occupational status is only available for the period 2014 to 2018.

<sup>660</sup> Immigration Office, Annual Reports 2014-2019.

<sup>661</sup> Immigration Office, Annual Report 2011, p. 92. For further discussion see Section 5. *Refusal, termination and withdrawal of residence rights*, Subsection 5.7.2 *Termination of residence rights due to being a burden on social assistance* in this Chapter.

<sup>662</sup> Immigration Office, Annual Reports 2008-2013.

<sup>663</sup> Immigration Office, Annual reports 2014-2019.

During the course of parliamentary debates,<sup>664</sup> it has also become apparent that the annual reports published by the Immigration Office do not contain comprehensive statistical data concerning expulsions orders<sup>665</sup> issued against EU citizens. The following table suggests that the total number of expulsion orders is significantly higher

than the number of decisions terminating residence rights cited by the Immigration Office in its annual reports (Table 1.11). No information for the period since 2016 is available and a parliamentary question submitted to that effect in 2018 remains unanswered.<sup>666</sup>

Table 1.11 - Annual number of decisions expulsion orders<sup>667</sup>

	2014	2015	2016	2017	2018	2019
Number of expulsions orders issued to EU citizens	4601	5209	5558	n/a	n/a	n/a

Although the reason for this discrepancy is not readily apparent, the greater numbers reported in the Belgian parliament appear to include expulsion orders issued on grounds of public policy or public security as indicated by the comments made by the Secretary of State at the time.<sup>668</sup>

and jobseekers – and the verification of residence rights through automation of personal data transfers to determine whether such practices are conducted in full compliance with EU law.

What still remains unclear, however, is whether these figures are comprehensive and reflect the total number of expulsion orders issued to EU citizens, whatever their legal basis may be, including decision taken against EU citizens who no longer meet the conditions governing the right of residence beyond three months, those who become an unreasonable burden on social assistance, and those who allegedly used fraud or false pretences.

Indeed, this raises the wider point of the incomplete availability of data concerning involving the residence rights of EU citizens and their family members. In order to ensure the effective monitoring of the legal framework, there is a need for greater transparency as regards the availability and scope of statistics involving the residence rights of EU citizens and their family members. In this respect it is worth noting that in its 2020 policy note, the federal government has acknowledged the existence of data “blind spots” and emphasised the need to collect and publish complete and accurate data to be published on an “accessible website.”<sup>669</sup>

In view of the above data, there is a need to delve deeper into the Immigration Office’s practices which underlie this statistical information relating to termination of the rights of residence of EU citizens – in particular workers

664 Question No 323 from Denis Ducarme, Chamber of Representatives (26 October 2015) (*Question n° 323 de monsieur le député Denis Ducarme du 26 octobre 2015 (Fr.) au secrétaire d’État à l’Asile et la Migration, chargé de la Simplification administrative, adjoint au ministre de la Sécurité et de l’Intérieur / Vraag nr. 323 van de heer volksvertegenwoordiger Denis Ducarme van 26 oktober 2015 (Fr.) aan de staatssecretaris voor Asiel en Migratie, belast met Administratieve Vereenvoudiging, toegevoegd aan de minister van Veiligheid en Binnenlandse Zaken, 2015-2016, Doc. QRVA 54 0054, 357-358*); Question No 492 from Denis Ducarme, Chamber of Representatives (27 January 2016) (*Question n° 492 de monsieur le député Denis Ducarme du 27 janvier 2016 (Fr.) au secrétaire d’État à l’Asile et la Migration, chargé de la Simplification administrative, adjoint au ministre de la Sécurité et de l’Intérieur / Vraag nr. 492 van de heer volksvertegenwoordiger Denis Ducarme van 27 januari 2016 (Fr.) aan de staatssecretaris voor Asiel en Migratie, belast met Administratieve Vereenvoudiging, toegevoegd aan de minister van Veiligheid en Binnenlandse Zaken, 2015-2016, Doc. QRVA 54 0083, 361-362*).

665 This refers to an *ordre de quitter le territoire/bevel om het grondgebied te verlaten*.

666 Question No 1339 from Benoît Lutgen, Chamber of Representatives (8 January 2018) (*Question n° 1339 de monsieur le député Benoît Lutgen du 08 janvier 2018 (Fr.) au secrétaire d’État à l’Asile et la Migration, chargé de la Simplification administrative, adjoint au ministre de la Sécurité et de l’Intérieur / Vraag nr. 1339 van de heer volksvertegenwoordiger Benoît Lutgen van 08 januari 2018 (Fr.) aan de staatssecretaris voor Asiel en Migratie, belast met Administratieve Vereenvoudiging, toegevoegd aan de minister van Veiligheid en Binnenlandse Zaken, 2014-2019, Doc. QRVA 54 0145, 68*).

667 Immigration Office, Annual reports 2014-2019.

668 Question No 492 by Denis Ducarme (n 664), p. 481.

669 General Policy Note (n 481), p. 11.

# 6. Obtaining permanent residence in Belgium

The Citizens Rights Directive introduced a new right of permanent residence for the benefit of all EU citizens and their family members,<sup>670</sup> which benefits not only former workers or self-employed persons as was previously the case under former instruments.<sup>671</sup>

This section will provide an overview of the main conditions which apply, before examining the application process, the documentation which may be required, deadlines that apply, the fees which may be imposed and the validity of permanent residence documentation.

## 6.1 Conditions of eligibility

According to the Citizens Rights Directive, EU citizens and their family members acquire permanent residence after having legally resided for a continuous period of five years in the host Member State.<sup>672</sup>

Temporary absences do not interrupt the five-year period if they do not exceed a total of six months a year or absences of a longer duration for compulsory military service.<sup>673</sup> The Directive also permits one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or outside the EU.<sup>674</sup>

Once permanent residence is acquired, EU citizens no longer have to demonstrate that they work in the host Member State or otherwise meet the conditions for having

a right of residence of more than three months.<sup>675</sup> Once it is acquired, permanent residence can only be lost following an absence from the host Member State for a period exceeding two consecutive years.<sup>676</sup>

The Directive provides for some exceptions to the general five-year requirement for the benefit of persons no longer working in the host Member State<sup>677</sup> and their family members.<sup>678</sup> This essentially covers three categories of former workers. The first category concerns persons having reached retirement age or having taken early retirement provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.<sup>679</sup> A second category covers persons who have become permanently incapacitated from work provided they have resided continuously in the host Member State for more than two years.<sup>680</sup> The condition concerning length of residence in the first two categories will not apply in case the former worker's spouse or registered partner holds the nationality of the host Member State. A third category benefits persons who become frontier workers or self-employed persons in another Member State and who retain their place of residence in the host Member State, provided they have accumulated three years of continuous employment and residence in the host Member State.<sup>681</sup> For these categories of former workers, the right of permanent residence in the host Member State is acquired before completion of a continuous period of five years. Further exceptions also apply to family members in the event of the death of their EU relative during their working lifetime.<sup>682</sup>

The provision of the Directive covering the general right of permanent residence of EU citizens has been almost literally transposed in the Belgian Immigration Law.<sup>683</sup>

670 Art. 16 and recital 17, Directive 2004/38.

671 Until adoption of Directive 2004/38, permanent residence was previously only granted under EU law to workers and the self-employed under Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24 and Council Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L14/10.

672 Art. 16(1), Directive 2004/38 as regards EU citizens and Art. 16(2) as regards their non-EU family members.

673 Art. 16(3), Directive 2004/38.

674 Ibid.

675 Art. 16(1), second sentence, Directive 2004/38.

676 Art. 16(4), Directive 2004/38.

677 Art. 17(1), Directive 2004/38.

678 Art. 17(3), Directive 2004/38.

679 Art. 17(1)(a), Directive 2004/38. The interpretation of this complex provision has been examined in Case C-32/19 *AT v Pensionsversicherungsanstalt* EU:C:2020:25.

680 Art. 17(1)(b), Directive 2004/38.

681 Art. 17(1)(c), Directive 2004/38.

682 Art. 17(4), Directive 2004/38.

683 Art. 42quinquies, Belgian Immigration Law. It should be observed that Belgian legislation used to be more favourable in its transposition in that it granted the right to permanent residence after three years of continuous residence. However, the Law of 28 June 2013 (*Loi-programme du 28 juin 2013 / Programmawet van 28 juni 2013, MB/BS 01-07-2013, 41480*) amended this provision to increase this requirement to five years of continuous residence, in line with the Citizens Rights Directive. The aim of this increase in the qualifying period of residence was to align it with the revised longer period of residence required for the acquisition of Belgian nationality, which is also five years under the Belgian nationality code (*Code de la nationalité belge / Wetboek van de Belgische nationaliteit, MB/BS 12-07-1984, 10100*).

However, Belgian legislation has only partially transposed the exceptions to the general five-year requirement for acquiring permanent residence<sup>684</sup> and has omitted the third category benefiting frontier workers.<sup>685</sup>

It is worthwhile noting that the integration requirements set out by the various regions<sup>686</sup> and by federal legislation<sup>687</sup> do not apply to EU citizens and their non-EU family members who exercise their rights of free movement according to the Citizens Rights Directive. However, it should be noted that the federal rules on integration do not appear to exclude other family members falling under Article 3(2) of the Citizens Rights Directive and Article 47/1 of the Belgian Immigration Law from their scope. This means that theoretically the residence cards of such other family members could be withdrawn if they do not demonstrate sufficient integration efforts.<sup>688</sup> However, such action would be likely to fall foul of the Directive because the latter does not explicitly allow for this possibility.

## 6.2 Overview of the procedure



The application procedure governing applications for recognition of the right of permanent residence is not laid down in detail in the Citizens Rights Directive and therefore leaves some leeway for the exercise of discretion by the host Member State. The Directive only provides that, following the submission of an application, EU citizens must be issued with a document certifying permanent residence as soon as possible<sup>689</sup> after verifying duration of residence,<sup>690</sup> whereas non-EU family members must be issued with a permanent residence card within six months of submitting their application.<sup>691</sup>

While there is no obligation on EU citizens to apply for a document certifying permanent residence,<sup>692</sup> the Directive

does require non-EU family members to apply for a permanent residence card before expiry of the residence card issued in respect of their first five years of residence.<sup>693</sup> Failure to do so can only be the subject of proportionate sanctions.<sup>694</sup>

In Belgium, the procedure for submitting an application for permanent residence for EU citizens<sup>695</sup> and for non-EU family members of EU citizens<sup>696</sup> is similar to the procedure which applies for registration of residence as examined above.<sup>697</sup>

In order to apply for a permanent residence document (EU+ card), EU citizens and their family members must submit an application at the local municipality of their place of residence.<sup>698</sup> Family members must apply for a permanent residence card (F+ card) before expiry of their residence card (F card).<sup>699</sup> In theory, an administrative fine of €200 may be imposed as a penalty for failing to do so.<sup>700</sup> In the event that their residence card (F card) expires while their application for a permanent residence card is pending, the expired card must be handed back and a temporary residence permit (Annex 15) will be issued to them.<sup>701</sup>

An application for permanent residence needs to be made in person<sup>702</sup> at the local municipality, which will issue a certificate of application (Annex 22) to the EU citizen or their family member.<sup>703</sup> This certificate of application should be issued on the spot by a municipal official at the time the application is made. The application will then be forwarded to the Immigration Office for a decision to be made.

In the event that an application is submitted without a continuous period of five years having been completed,<sup>704</sup> the municipality will declare the application inadmissible if it is considered incomplete due to the absence of evidence establishing fulfilment of an exemption for

684 Belgian Immigration Law, art. 42sexies.

685 Milieu (n 14), p. 12.

686 Flemish Decree of 7 June 2013 (*Decreet van 7 juni 2013 betreffende het Vlaamse integratie- en inburgeringsbeleid*, BS 26-07-2013, 47310), Brussels Decree 11 May 2017 (*Ordonnance du 11 mai 2017 concernant le parcours d'accueil des primo-arrivants / Ordonnantie van 11 mei 2017 betreffende het inburgeringstraject voor de nieuwkomers*, MB/BS 30-05-2017, 60204), and Walloon Decree of 27 March 2014 (*Décret du 27 mars 2014 remplaçant le livre II du Code wallon de l'Action sociale et de la Santé relatif à l'intégration des personnes étrangères ou d'origine étrangère*, MB 18-04-2014, 33880).

687 Art. 1/2, Belgian Immigration Law.

688 Art. 1/2 §3, Belgian Immigration Law.

689 Article 19(2) of Directive 2004/38.

690 Article 19(1) of Directive 2004/38.

691 Article 20(1) of Directive 2004/38.

692 Case C-123/08 *Wolzenburg* EU:C:2009:616.

693 Art. 20(2), Directive 2004/38.

694 Art. 36, Directive 2004/38. For a discussion, see further Section 4. *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities* in this Chapter.

695 Art. 55, Royal Decree on Immigration.

696 Art. 56, Royal Decree on Immigration.

697 See Section 5. *The registration process in Belgium*, Subsection 5.2. *Application* phase in this Chapter.

698 Art. 55, first para., Royal Decree on Immigration, as regards EU citizens and Art. 56, first para., as regards non-EU family members.

699 Art. 42quinquies §4, Belgian Immigration Law.

700 Art. 42quinquies §6, third para., Belgian Immigration Law.

701 Art. 56, fourth paragraph, Royal Decree on Immigration.

702 Ibid. This is also the actual practice.

703 Art. 55, first para., Royal Decree on Immigration as regards EU citizens and Art. 56, first para., as regards non-EU family members.

704 This should be considered subject to the shorter periods allowed under Art. 17, Directive 2004/38 on exemptions for persons no longer working in the host Member State and their family members, which is only partially transposed by Art. 42sexies, Belgian Immigration Law.

persons no longer working in the host Member State and their family members.<sup>705</sup> In such a case, the municipality must issue a decision of inadmissibility through issuance of a standard form (Annex 23).<sup>706</sup>

While this requirement was deleted from the Belgian Immigration Law,<sup>707</sup> the Royal Decree on Immigration continues to require that the period of five years of continuous residence must have been completed in accordance with the Belgian rules that give effect to the Directive.<sup>708</sup> It should be noted in this respect that the CJEU has ruled that continuous periods of residence of a duration of five years completed before the deadline for transposition of the Citizens Rights Directive<sup>709</sup> (30 April 2006) and in accordance with the earlier EU law instruments, must be taken into account for the purposes of the acquisition of permanent residence under the Directive.<sup>710</sup>

The Belgian rules<sup>711</sup> also provide that the five-year period is to be calculated from the date of on which an EU citizen was registered on the register of pending applications,<sup>712</sup> or from the date on which a certificate of application was issued to their non-EU family member.<sup>713</sup> The conformity of this requirement can be called into question given that the issuance of residence documents to EU citizens and their family members is not constitutive of rights.<sup>714</sup> As a result, EU citizens and their family members should remain at liberty to prove that their period of residence began before the date on which they first submitted an application for registration of their residence.

## 6.3 Documentary requirements



The Citizens Rights Directive does not provide for any documentary requirements as regards permanent residence and only requires Member States to verify duration of residence.<sup>715</sup> As a result, the documentation which may be requested must be limited to the purpose of verifying duration and continuity of residence<sup>716</sup> in the host Member State and whether the residence has been in accordance with the provisions of the Directive.<sup>717</sup> It also follows that the host Member States is not entitled to request documents which it would not be able to request from an EU citizen or their family member for the purposes of their original registration. Although the Citizens Rights Directive emphasises that continuity of residence may be attested by any means of proof in use in the host Member State,<sup>718</sup> this provision has not been transposed into Belgian law.<sup>719</sup>

The provisions of Belgian law related to the required documentation are relatively open-ended. Belgian law only requires that applicants for permanent residence should provide evidence that they meet the conditions relating to permanent residence.<sup>720</sup> However, it is not specified whether it is sufficient to prove an uninterrupted period of presence in Belgium for the relevant five-year period or whether the Belgian authorities are entitled to request additional evidence such as proof of work during that period. Where permanent residence is being claimed on the basis of Article 17, an applicant has to provide the relevant evidence as to their former work, being a family member of a former worker.<sup>721</sup>

705 Art. 17, Directive 2004/38 on exemptions for persons no longer working in the host Member State and their family members, which is only partially transposed by art. 42sexies of the Belgian Immigration Law.

706 Art. 55, second para., Royal Decree on Immigration as regards EU citizens and Art. 56, second para. as regards non-EU family members.

707 The words “in accordance with the provisions of the current chapter” were deleted from Art. 42quinquies, Belgian Immigration Law by Art. 22, Law of 19 March 2014 (*Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 19 maart 2014 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 05-05-2014, 36137).

708 Art. 55, first para., Royal Decree on Immigration as regards EU citizens and Art. 56, first para. as regards non-EU family members.

709 Art. 40(1), Directive 2004/38.

710 Case C-162/09 *Lassal* EU:C:2010:592; Case C-325/09 *Dias* EU:C:2011:498.

711 Art. 55, second para., Royal Decree on Immigration as regards EU citizens and Art. 56, second para. as regards non-EU family members.

712 Art. 55, second para., Royal Decree refers to the date on which the EU citizen in question was registered on the *registre d'attente/ wachtregister*.

713 Art. 56, second para., Royal Decree on Immigration refers to the date on which the Annexe 19ter was issued.

714 Art. 25, Directive 2004/38. For a discussion, see further Section 4. *EU law relating to registration formalities*, Subsection 4.1 *The nature of registration formalities* in this Chapter.

715 Art. 19(1), Directive 2004/38.

716 See to that effect Case C-378/12 *Onuekwere* EU:C:2014:13 as regards periods of imprisonment affecting continuity of residence; Case C-758/18 *RyanAir* EU:C:2020:478 where the CJEU held that the issue of a permanent residence card implies that the host Member State has necessarily verified, in advance, that the family member concerned has that status.

717 See to that effect Case C-325/09 *Dias* EU:C:2011:498 as regards periods of residence which do not meet the conditions of the Directive.

718 Art. 21, Directive 2004/38.

719 Valcke (n 19), p. 167.

720 Art. 55, first para., Royal Decree on Immigration as regards EU citizens and Art. 56, first para. as regards non-EU family members.

721 Art. 55, second para., Royal Decree on Immigration as regards EU citizens and Art. 56, second para. as regards non-EU family members.

## 6.4 Decision-making

Regarding the timeline for decision-making, the Citizens Rights Directive simply states that after having verified the duration of residence a document certifying permanent residence must be issued “as soon as possible”.<sup>722</sup> For family members who are third-country nationals, the deadline for the issuance of the EU card is of six months.

According to Belgian law, the Immigration Office is required to take a decision within five months after the application is declared admissible by the municipality and sent over for decision-making.<sup>723</sup> Where no decision is taken within five months, Belgian law provides that the application should be deemed accepted and the relevant permanent residence document issued to the applicant.<sup>724</sup> It is not clear whether this provision has also been earmarked for deletion by the Belgian government<sup>725</sup> in view of the CJEU’s ruling in *Diallo*.<sup>726</sup>

It should also be noted that this five-month deadline within which an application for permanent residence must be decided when submitted by an EU citizen does not appear to comply with the obligation under EU law to issue the document certifying permanent residence “as soon as possible”.<sup>727</sup> Nonetheless, the five-month deadline for making a decision when an application for permanent residence has been submitted by a non-EU family member is more generous than the six-month deadline foreseen by the Directive.<sup>728</sup>

Where the application is approved, the EU citizen in question will be issued with a document certifying permanent residence (also known as EU+ card).<sup>729</sup> In the case of non-EU family members they will be issued with a permanent residence card (Annex 9bis, also known as F+ card).<sup>730</sup>

The format of permanent residence documents was amended by the Royal Decree of 12 June 2020<sup>731</sup> which entered into force in May 2021.<sup>732</sup> The registration certificate (Annex 8bis) will no longer be issued in paper format. Pending the issue of their residence documents, a paper-based temporary residence document (Annex 8quater) will be issued. The title of the registration certificate changed from “E+ card” to “EU+ card” and now includes an explicit reference to Article 19 of Directive 2004/38.<sup>733</sup> The physical appearance of the EU+ card is also different from the other types residence cards.

As regards permanent residence cards for family members of EU citizens (“F+ card”), the title of the EU card remains unchanged, but now incorporates the label “*Familielid EU / Membre famille UE*”, includes a reference to Article 20 of Directive 2004/38 and is issued in the uniform format of residence permits laid down by Regulation 1030/2002.<sup>734</sup>

An application may only be refused if the conditions relating to permanent residence are not met,<sup>735</sup> in which case the applicant will be issued with a standard form (Annex 24).<sup>736</sup> Such a decision may be appealed.<sup>737</sup>

## 6.5 Fees for permanent residence documents

Belgian law foresees the possibility for municipalities to decide what fees to charge to EU citizens and their family members in order to cover the administrative costs of issuing residence documentation.<sup>738</sup> In line with the Directive,<sup>739</sup> this fee cannot exceed the fee imposed

722 Art. 19, Directive 2004/38.

723 Art. 55, fifth para., Royal Decree on Immigration as regards EU citizens and Art. 56, sixth para. as regards non-EU family members.

724 Ibid.

725 General Policy Note (n 481), p. 28.

726 Case C-246/17 *Diallo* EU:C:2018:499.

727 Art. 19(2), Directive 2004/38.

728 Art. 20(1), Directive 2004/38, which requires a permanent residence card within six months of an application being submitted.

729 Royal Decree, art. 55, fifth paragraph. The Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration (n 29) foresees that an Annex 8bis will no longer be issued in paper format. Instead, a new Annex 8quater will be issued as a provisional residence document until the permanent residence card is issued. The title of the permanent residence card will also change from E+ card to EU+ card.

730 Art. 56, sixth para., Royal Decree on Immigration.

731 Royal Decree of 12 June 2020 modifying Royal Decree on Immigration (n 29).

732 Ministerial Decree of 27 April 2020 on modernising residence documents issued to citizens of the European Union (*Arrêté ministériel du 27 avril 2021 relatif à la modernisation des documents de séjour délivrés aux citoyens de l’Union européenne / Ministerieel besluit van 27 april 2021 betreffende de modernisering van de verblijfsdocumenten die aan burgers van de Europese Unie uitgereikt worden*, MB/BS 06-05-2021, 46473).

733 The latter change is required by Art. 6, Regulation 2019/1157 (n 370).

734 These changes are mandated by Art. 7, Regulation 2019/1157.

735 Art. 55, fourth para. Royal Decree on Immigration as regards EU citizens and Art. 56, fifth para. as regards non-EU family members.

736 Ibid.

737 Arts. 39/2 §2 and 39/79 §1, 7°, Belgian Immigration Law.

738 Art. 2, Law of 14 March 1968 (n 208).

739 Art. 25(2), Directive 2004/38. For further discussion on fees, see Section 6. EU law relating to registration formalities, Subsection 4.7 Fees in this Chapter.

on Belgian nationals when delivering Belgian identity documents.<sup>740</sup>

## 6.6 Validity of permanent residence documents

There is no time limit imposed by the Citizens Rights Directive as regards the validity of a document certifying permanent residence issued to EU citizens.

The period of validity of permanent residence documents in Belgium was recently increased from five to ten years by the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration<sup>741</sup>, which came into force in May 2021.<sup>742</sup>

EU law requires automatic renewal of the permanent residence card every ten years.<sup>743</sup> Belgian legislation does not guarantee this.<sup>744</sup>

## 6.7 Statistical data on permanent residence applications

Although the Immigration Office regularly publishes data on EU residence rights in its annual reports, none of them specifically relate to permanent residence. Nevertheless, some data are made publicly available in separate in statistical report on residence documents.<sup>745</sup>

### 6.7.1 Overall stock of permanent residence documentation issued to EU citizens and their family members

As at 1<sup>st</sup> January 2020, there were 418,301 EU citizens in possession of an E+ card,<sup>746</sup> representing 48% of the total number of EU citizens who held some form of residence document issued by the Belgian authorities.<sup>747</sup> As regards non-EU family members, 57,327 third-country nationals held a permanent residence card (F+ card),<sup>748</sup> comprising 40% of the third-country nationals who hold residence documents issued to family members of EU citizens.<sup>749</sup> However, the statistics do not specify what proportion of minors under the age of 12 holding a child's document<sup>750</sup> have acquired permanent residence in their capacity as family member of an EU citizen.<sup>751</sup>

### 6.7.2 Applications for permanent residence documentation submitted by EU citizens and non-EU family members

The Immigration Office was unable to provide statistics on the number of applications for permanent residence documentation submitted by EU citizens or their non-EU family members as measured by the number of "Annex 22" forms issued. This information is not currently published in its annual reports.

The Belgian Court of Audit has reported that 7,170 applications for F+ cards were submitted by non-EU family members of EU citizens and Belgian nationals in 2018.<sup>752</sup> The Court of Audit noted that none of these applications were the subject of an explicit decision by the Immigration Office and were therefore deemed accepted following expiry of the five-month deadline for the Office to reach a decision.<sup>753</sup>

740 Art. 55, sixth para., Royal Decree on Immigration as regards EU citizens and Art. 56, seventh para., as regards non-EU family members. The fees for the issuance of Belgian identity cards varies according to municipality and can be consulted on the following website of the Federal Public Service for Home Affairs <https://www.ibz.rnm.fgov.be/fr/documents-didentite/eid/tarifs>.

741 Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration (n 29).

742 Ministerial Decree of 27 April 2020 on modernising residence documents issued to citizens of the European Union (*Arrêté ministériel du 27 avril 2021 relatif à la modernisation des documents de séjour délivrés aux citoyens de l'Union européenne / Ministerieel besluit van 27 april 2021 betreffende de modernisering van de verblijfsdocumenten die aan burgers van de Europese Unie uitgereikt worden*, MB/BS 06-05-2021, 46473).

743 Art. 20(1), Directive 2004/38.

744 Art. 42quinquies, Belgian Immigration Law and Art. 56, Royal Decree are both silent on the period of validity of residence cards.

745 Immigration Office, 2019 statistical report on residence certificates (n 552).

746 Immigration Office, 2019 statistical report on residence certificates (n 552), Table 1.13, p. 13.

747 Ibid; as at 1<sup>st</sup> January 2020, 876,408 EU citizen held a residence document issued by the Belgian authorities.

748 Immigration Office, 2019 statistical report on residence certificates (n 552), Table 1.13, p. 13.

749 Ibid; as at 1<sup>st</sup> January 2020, 144,834 third-country nationals held a residence document issued to family members of EU citizens (F card or F+ card).

750 Ibid; as at 1<sup>st</sup> January 2020, 112,240 EU minors and 83,820 non-EU minors held a special document for children issued by the Belgian authorities.

751 Ibid.

752 Belgian Court of Audit, Report on the processing of registration requests from family members by the Belgian Immigration Office (n 554), section 3.4.2.

753 For examination of the five-month deadline, see Subsection 6.4 *Decision-making* above.

Following a request of information, the Immigration Office provided us with the total number of permanent residence documents issued in the past year (Table 1.12).

Table 1.12 - Annual number of E+ cards and F+ permanent residence cards issued to EU citizens and their family members<sup>754</sup>

	2014	2015	2016	2017	2018	2019
Number of E+ cards issued by municipalities to EU citizens during the course of the year	n/a	n/a	n/a	n/a	n/a	97,342
Number of F+ cards issued by municipalities to non-EU family members during the course of the year	n/a	n/a	n/a	n/a	n/a	18,186

Again, the release of the above statistics by the Immigration Office were accompanied by a warning that this data is of relatively limited use because it does not distinguish between permanent residence documents issued for the first time and those which are issued as renewals following their expiry or replacements following their loss. As a result, the data is unlikely to provide a basis for meaningful analysis.

The Immigration Office also provided the following information on the number of refusal decisions taken in respect of applications for permanent residence documents submitted by EU citizens and their family members (Table 1.13). The data show that relatively few decisions for permanent residence have been rejected in the past two years.

Table 1.13 - Annual number of decisions refusing permanent residence issued to EU citizens and their family members<sup>755</sup>

	2014	2015	2016	2017	2018	2019
Number of refusal decisions taken as measured by number of "Annex 24" forms issued to EU citizens	n/a	n/a	n/a	n/a	12	19
Number of refusal decisions taken as measured by number of "Annex 24" forms issued to non-EU family members	n/a	n/a	n/a	n/a	29	54

The relative scarcity of statistical data available on permanent residence does not allow for any conclusions to be drawn on how the rules relating to permanent residence are applied in practice by the Belgian authorities.

<sup>754</sup> Immigration Office, data not publicly available.

<sup>755</sup> Immigration Office, data not publicly available.

# 7. Procedural safeguards and appeal rights

## 7.1 Procedural safeguards

The Citizens Rights Directive requires that any decision taken on public policy grounds by the national authorities to restrict the residence rights of EU citizens and their family members must be notified in writing in such a way that the recipient is able to comprehend the content of the decision and its implications.<sup>756</sup> The notification must also specify the court or administrative authority before which an appeal can be lodged and the time limit for the appeal. The Directive extends these safeguards to any decision affecting the residence rights of EU citizens and their family members which is taken on grounds other than public order or public security.<sup>757</sup>

Belgian law requires administrative decisions to contain a statement of reasons that allow the person concerned to understand the motivation for the decision.<sup>758</sup> This is in addition to the general requirement under Belgian law that administrative acts must contain an adequate statement of the underlying facts and law.<sup>759</sup>

## 7.2 Appeal rights

Article 31 of the Citizens Rights Directive requires that a right of judicial appeal must be available against any decision taken by the national authorities to limit residence rights of EU citizens and their family members on public policy grounds. This right to judicial review must involve an examination of the legality of the decision, as well as the facts and circumstances on which a measure to restrict free movement rights is based. The Directive also extends the right to a judicial appeal to any decision

affecting residence rights on grounds other than public policy.<sup>760</sup>

The right of appeal under the Directive must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter of Fundamental Rights of the European Union which implies that EU citizens and their family members must have available to them an effective judicial remedy against a decision, permitting a review of the legality of that decision as regards matters of both fact and law in the light of EU law.<sup>761</sup> The authorities must also ensure that the decision in question is not disproportionate.<sup>762</sup>

In Belgium, since 2006 there is no longer a right to request an administrative review of decisions taken against EU citizens and their family members.<sup>763</sup> This has been replaced by a judicial review system under the Belgian Immigration Law<sup>764</sup> which established a specialised administrative tribunal, the Council for Alien Law Litigation (CALL).<sup>765</sup>

### 7.2.1 Nature of judicial review

In respect of the enforcement of EU residence rights, the CALL has been endowed with the power to review the legality of decisions taken by the Immigration Office.<sup>766</sup>

Under the Citizens Rights Directive, Member States have to ensure that their judicial appeal procedures allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and ensure that the contested decision is not disproportionate.<sup>767</sup>

Judicial review proceedings before the CALL only involve a control of legality of the contested measure<sup>768</sup> – the decision to terminate a right of residence and to order expulsion – to ensure it complies with the law and has followed national procedural safeguards. However, it has no power to remake these decisions, unlike the situation which applies in respect of decisions relating to international protection taken by the Commissioner General for Refugees and Stateless Persons.<sup>769</sup>

<sup>756</sup> Art. 30, Directive 2004/38.

<sup>757</sup> Art. 15, Directive 2004/38.

<sup>758</sup> Art. 62 §2, Belgian Immigration Law.

<sup>759</sup> Arts. 2 and 3, Law of 29 July 1991 on the formal motivation of administrative acts (*Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs / Wet van 29 juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen*, MB/BS 12-09-1991, 19976).

<sup>760</sup> Art. 15, Directive 2004/38.

<sup>761</sup> Case C-89/11 *Banger* EU:C:2018:570.

<sup>762</sup> C-94/18 *Chenchooliah* EU:C:2019:693.

<sup>763</sup> Arts. 64-66 (repealed), Belgian Immigration Law.

<sup>764</sup> Arts. 39/2 to 39/85, Belgian Immigration Law.

<sup>765</sup> This refers to *Conseil du Contentieux des Etrangers / Raad van Vreemdelingenbetwistingen*.

<sup>766</sup> Arts. 39/2 §2 and 39/81, Belgian Immigration Law.

<sup>767</sup> Art. 31(3), Directive 2004/38.

<sup>768</sup> Ibid.

<sup>769</sup> Arts. 39/2 §1, Belgian Immigration Law.

Even though both the Belgian Constitutional Court<sup>770</sup> and the Council of State<sup>771</sup> have ruled that Belgian law complies with the Directive in this respect, doubts have been expressed as to whether the Belgian Immigration Law complies with the provisions of the Citizens Rights Directive<sup>772</sup> and the principle of effective judicial protection in EU law.<sup>773</sup>

At present the CALL's procedural rules<sup>774</sup> operate in such a way that no new evidence can be presented before the CALL that was not already submitted to the Immigration Office before it made its decision.<sup>775</sup> This matters in situations where, for example, municipal officials may wrongly inform applicants that there is no need to submit supporting documentation concerning their right of residence in Belgium. The absence of such document on the administrative file may lead to a decision by the Immigration Office to refuse to recognise their right of residence. In the event such a refusal is appealed, the CALL will simply dismiss the appeal on the basis that the burden of proving a right of residence rests on the citizen and as a result the Belgian Immigration Office cannot be reproached for failing to take into account documents that do not feature on the administrative file. The CALL will also refuse to take this supporting documentation into account. Such a procedural rule is arguably contrary to the Court of Justice's case law in *Orfanopoulos* and *Cetinkaya*.<sup>776</sup>

In this respect the inability of the CALL to refer to new evidence that may have arisen after a decision was taken by the Immigration Office was the subject of a request for a preliminary ruling by the Court of Justice.<sup>777</sup> Although the CJEU ultimately did not rule on this point, the Advocate General did consider that the Directive<sup>778</sup> and the principle of effectiveness under EU law, must be interpreted as meaning that the courts of the host Member State, when examining the legality of a decision refusing the right of residence for more than three months of an EU citizen who is seeking employment, must have regard to any change of circumstances in the jobseeker's situation occurring subsequent to the decision by the competent authorities restricting that person's right of residence and that the courts must disapply, if necessary, the national procedural

provisions if that change of circumstances shows that the jobseeker did enjoy such a right of residence.<sup>779</sup>

There is therefore lingering doubt as to whether the judicial review proceedings before the CALL provide for an effective judicial remedy.

## 7.2.2 Deadline and procedure

In accordance with the principle of procedural autonomy,<sup>780</sup> in the absence of EU rules governing court proceedings, the rules of procedure governing judicial appeals in EU residence cases remain governed by national law.

In case a decision is taken to refuse or terminate residence rights, the deadline for lodging a judicial appeal is 30 days from the date of notification of the decision.<sup>781</sup> This goes in hand-in-hand with the requirement contained in the Citizens Rights Directive that, in the event EU citizens or their family members are being ordered to leave the territory following a refusal or termination or withdrawal of residence rights,<sup>782</sup> the time allowed to depart must be not less than one month from the date of notification of the decision.<sup>783</sup>

An appeal before the CALL must be lodged by registered post.<sup>784</sup> Although at present, it is not possible to file appeals electronically before the CALL, the government has stated its intention to adopt legislation providing for the filing of appeals using electronic means.<sup>785</sup>

The appeal brief must be submitted in writing and must include all required details and must attach all supporting documentation.<sup>786</sup> All individuals filing an appeal must elect an address for service in Belgium.<sup>787</sup> The use of a lawyer is not obligatory.<sup>788</sup> There is a court fee of 186€ payable for bringing an appeal before the CALL except for person who benefit from legal aid.<sup>789</sup>

770 Constitutional Court, judgment No 81/2008 of 27 May 2008.

771 Council of State, judgment No 216.419 of 23 November 2011.

772 Arts. 15 and 31, Directive 2004/38.

773 Valcke (n 18), p. 35; Valcke (n 19), pp. 185-186.

774 Art. 39/81, Belgian Immigration Law.

775 See for example, CALL, judgment No 217 849 of 1 March 2019 citing Council of State, judgment No 210.548 of 23 September 2003.

776 Case C-482/01 *Orfanopoulos*, EU:C:2004:262; Case C-467/02 *Cetinkaya*, EU:C:2004:708.

777 Case C-710/19 *G.M.A.* EU:C:2020:1037, which was referred to the CJEU by the Belgian Council of State (*Conseil d'État/Raad van State*) by judgment No 245.426 of 12 September 2019.

778 Arts. 15 and 31, Directive 2004/38.

779 Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* EU:C:2020:739.

780 See for example, Case C-550/07 P *Akzo Nobel* EU:C:2010:512; Case C-93/12 *Agrokonsulting* EU:C:2013:432; Case C-567/13 *Baczó* EU:C:2015:88. It is only recently that the CJEU has explicitly referred to this principle in such terms in its case law, even though the principle was established in Case 33/76 *Rewe* EU:C:1976:188 and Case 45/76 *Comet* EU:C:1976:191.

781 Art. 39/57, Belgian Immigration Law.

782 For further discussion, see Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

783 Art. 30(3), Directive 2004/38.

784 Art. 39/57-1, Belgian Immigration Law.

785 General Policy Note (n 481), p. 14.

786 Arts. 39/69 and 39/78, Belgian Immigration Law.

787 Art. 39/58, Belgian Immigration Law.

788 Art. 39/56, Belgian Immigration Law.

789 Art. 39/68-1, Belgian Immigration Law.

Upon filing of an appeal the Immigration Office will be notified and then has eight days to provide the administrative file of the appellant together with its defence.<sup>790</sup> The CALL may then invite the appellant to file a rebuttal which must then contain a summary of all arguments made.<sup>791</sup> While the procedure is primarily written in nature, a hearing will usually be called to give the parties an opportunity to make final remarks but new arguments cannot be invoked which were not raised in the appeal brief.<sup>792</sup> Failure to attend a hearing will result in the appeal being dismissed.<sup>793</sup>

In theory, the CALL should hand down its judgment within three months of an appeal being submitted, but there is no sanction prescribed in case the deadline is not met.<sup>794</sup> A further appeal may be taken on points of law only before the Council of State.<sup>795</sup>

### 7.2.3 Suspensive effect of appeal

The lodging of an appeal has the effect of suspending the administrative decision which is being challenged. However, this view does not appear fully shared by the Immigration Office for reasons which will become apparent.

Belgian law provides that, during the period of time specified for bringing an appeal against any decision refusing or terminating residence rights of EU citizens and their family members and for as long as any appeal may be pending, no expulsion measure may be forcibly enforced.<sup>796</sup> The Belgian Council of State has previously confirmed that as a result no expulsion measure can be taken against foreign nationals for as long as an appeal having suspensive effect is pending against a decision to refuse or withdraw their right of residence, or until the expiry of the appeal period if no appeal has been brought.<sup>797</sup> The Council of State explicitly held that during this time the person concerned cannot be considered to be unlawfully present in Belgium.<sup>798</sup> This view has also been

endorsed by the Belgian Supreme Court<sup>799</sup> in a judgment concerning alternatives to detention.<sup>800</sup>

However, this ruling has generated questions as to the precise residence status of EU citizens and their family members while an appeal is pending.

In cases where a decision is taken against an EU citizen or their family member which includes an order to leave the territory, the person should be issued with a temporary document - a so-called Annex 35 - which confirms their right to remain in Belgium. Nonetheless, a previous circular<sup>801</sup> issued by the Immigration Office considers that the lodging of an appeal before the CALL does not suspend a decision taken by the Immigration Office to refuse or terminate a right of residence. This view appears to be squarely contradicted by the case law of the CALL which has held consistently that an appeal brought against a decision refusing or terminating the residence rights of EU citizens and their family members has suspensive effect.<sup>802</sup>

Instead, according to the Immigration Office, the lodging of an appeal merely has the effect of preventing any expulsion measure from being forcibly enforced against the person concerned during the deadline for lodging an appeal and for as long as an appeal remains pending.<sup>803</sup> The Council of State has confirmed that an Annex 35 does not amount to an authorisation of residence, even though the individual concerned cannot be considered to be unlawfully present in Belgium.<sup>804</sup>

As a result, the Immigration Office therefore considers that – because an appeal does not have suspensive effect – as soon as a decision has been taken to refuse, terminate or withdraw a right of residence, the individual concerned no longer has a right of residence and as a result must have their entry deleted from the register.<sup>805</sup> The Immigration Office has issued instructions to municipalities to proceed with deletion of the affected person's entry from the national register<sup>806</sup> from the moment that a decision has been taken to refuse or withdraw their right of residence

790 Art. 39/81, Belgian Immigration Law.

791 Ibid.

792 Art. 39/60, Belgian Immigration Law.

793 Art. 39/59 §2, Belgian Immigration Law.

794 Art. 39/76 §6, Belgian Immigration Law.

795 Art. 39/67, Belgian Immigration Law.

796 Art. 39/79 §1, Belgian Immigration Law.

797 Council of State, judgment No 238.170 of 11 May 2017 which held that insofar as Art. 39/79 §1, Belgian Immigration Law provides that, during the period of time specified for bringing an appeal against any decision refusing or terminating residence rights of EU citizens and their family members, no expulsion measure may be taken, the individual concerned is not unlawfully present during that period, and as a result the Immigration Office cannot take an expulsion measure on the basis of Art. 7, Belgian Immigration Law.

798 Ibid.

799 This refers to the *Cour de Cassation / Hof van Cassatie*.

800 Supreme Court, judgment of 26 April 2017, No P.17.0375.F.

801 Circular of 30 August 2013 (n 464).

802 See for example, CALL, judgment No 70 893 of 29 November 2011; CALL, judgment No 81801 de 29 May 2012; CALL, judgment No 96 269 of 31 January 2013; CALL, judgment No 129 307 of 15 September 2014; CALL, judgment No 144 628 of 30 April 2015; CALL, judgment No 169 939 of 16 June 2016; CALL, judgment No 190 518 of 8 August 2017; CALL, judgment No 219 109 of 28 March 2018; CALL, judgment No 220 915 of 9 May 2019; CALL, judgment No 248 554 of 2 February 2021.

803 Circular of 30 August 2013 (n 464).

804 Council of State, judgment No 240.911 of 6 March 2018.

805 Circular of 30 August 2013 (n 464).

806 This leads to the deactivation of their personal identification number of EU citizens and their family members on the national population register.

with the issue of an Annex 20<sup>807</sup> or Annex 21<sup>808</sup> on the basis that they are no longer lawfully resident.<sup>809</sup>

The circular<sup>810</sup> and the instructions<sup>811</sup> are contrary to the rulings of the Council of State and the Supreme Court insofar as they are based on the incorrect premise that an EU citizen or their family member is no longer lawfully resident from the moment a decision is taken to refuse or terminate their right of residence, rather than for as long as an appeal may be pending before the CALL.

## 7.3 Statistical data on appeals



The CALL does not publish specific data on appeals concerning EU citizens and their family members in its annual reports. In response to a request for information made in connection with this study, the CALL confirmed that its database does not enable it to generate statistical data on appeals against decisions to refuse recognition of the residence rights of EU citizens and their family members or against decisions terminating or withdrawing their right to reside.

# 8. Conclusion

Overall, following successive legislative changes, Belgium has now transposed the large majority of the provisions of the Citizens Rights Directive. This does not mean there are no issues, as the transposing measures do not follow the same structure as the Directive, leaving the transposing measures complicated to read and understand.

In addition, there are still several areas where transposition remains incomplete. First, as regards deadlines, while EU law provides that registration certificates for EU citizens must be issued immediately, Belgian law provides that such a registration certificate must be issued within a deadline of six months. Likewise, EU law requires for a permanent residence document to be issued to EU citizens as soon as possible after it has been requested, whereas the Belgian rules provide that it should be issued within five months of an application being submitted. Secondly, concerning the requirements for permanent residence status, Belgian legislation has not transposed the exemption to the requirement of five years stay for former workers who take up work in another Member State while retaining their place of residence in Belgium as provided by Article 17(1)(c) of the Directive, and has omitted the third category benefiting frontier workers. Thirdly, Belgium has not transposed a number of key ancillary provisions of the Citizens Rights Directive, namely Article 21 on attesting continuity of residence and Article 25(1) which prohibits possession of a residence document as being a precondition for the exercise of a right or completion of an administrative formality. Fourthly, Belgian law does not provide that permanent residence cards issued to non-EU family members are to be automatically renewable every ten years.

Furthermore, there are some examples where Belgian law adds conditions not foreseen by the Citizens Rights Directive. First, the Belgian Immigration Law has created a further category of family members of an EU citizen, namely partners who have entered into a registered partnership (legal cohabitation) which is not considered to be equivalent to marriage in Belgium. For this category, additional conditions are imposed. It remains unclear whether this is in line with the Directive. In any case, the current list of registered partnerships (legal cohabitation) which are considered to be equivalent to marriage in Belgium needs to be brought up to date. Secondly, under Belgian law, the five-year requirement for permanent residence is to be calculated from the date on which an EU citizen was initially registered or from the date on which a certificate of application was issued by their non-EU

807 Annex 20, Royal Decree on Immigration. This is the standard form used to take a decision to refuse recognition of a right of residence beyond three months.

808 Annex 21, Royal Decree on Immigration. This is the standard form used to take a decision to withdraw a right of residence beyond three months.

809 Immigration Office, Syllabus, (June 2021), pp. 158 - 159 (NL) / pp. 175 - 176 (FR). For a discussion of the consequences, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status* as regards the deletion from the national register following a refusal to recognise a right of residence on the basis that the EU citizen did not provide sufficient proof of their status within three months of submitting an application (Annex 20); Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

810 Circular of 30 August 2013 (n 464).

811 Immigration Office, Syllabus, (June 2021), pp. 158 - 159 (NL) / pp. 175 - 176 (FR).

family member, even though as a matter of EU law the existence of residence rights cannot be made conditional on compliance with registration formalities.

Moreover, administrative practices continue to raise conformity issues. First, Belgian administrative guidelines impose a restrictive condition as regards the minimum number of hours which must be worked on a weekly basis (i.e. minimum 12 hours) in order for an EU citizen to qualify as a worker. Secondly, Belgian administrative practice appears to follow a restrictive interpretation of the concept of a genuine chance of being engaged in order to qualify for a right of residence as a jobseeker. Third, on the procedural side, the application phase is often prolonged because the municipality will request the local municipal police to perform an effective verification of domicile check before processing registration further. Fourth, a circular of 2016 indicates that persons seeking to register without a valid identity card or passport may be fined 200 EUR, even though this is not applied in practice.

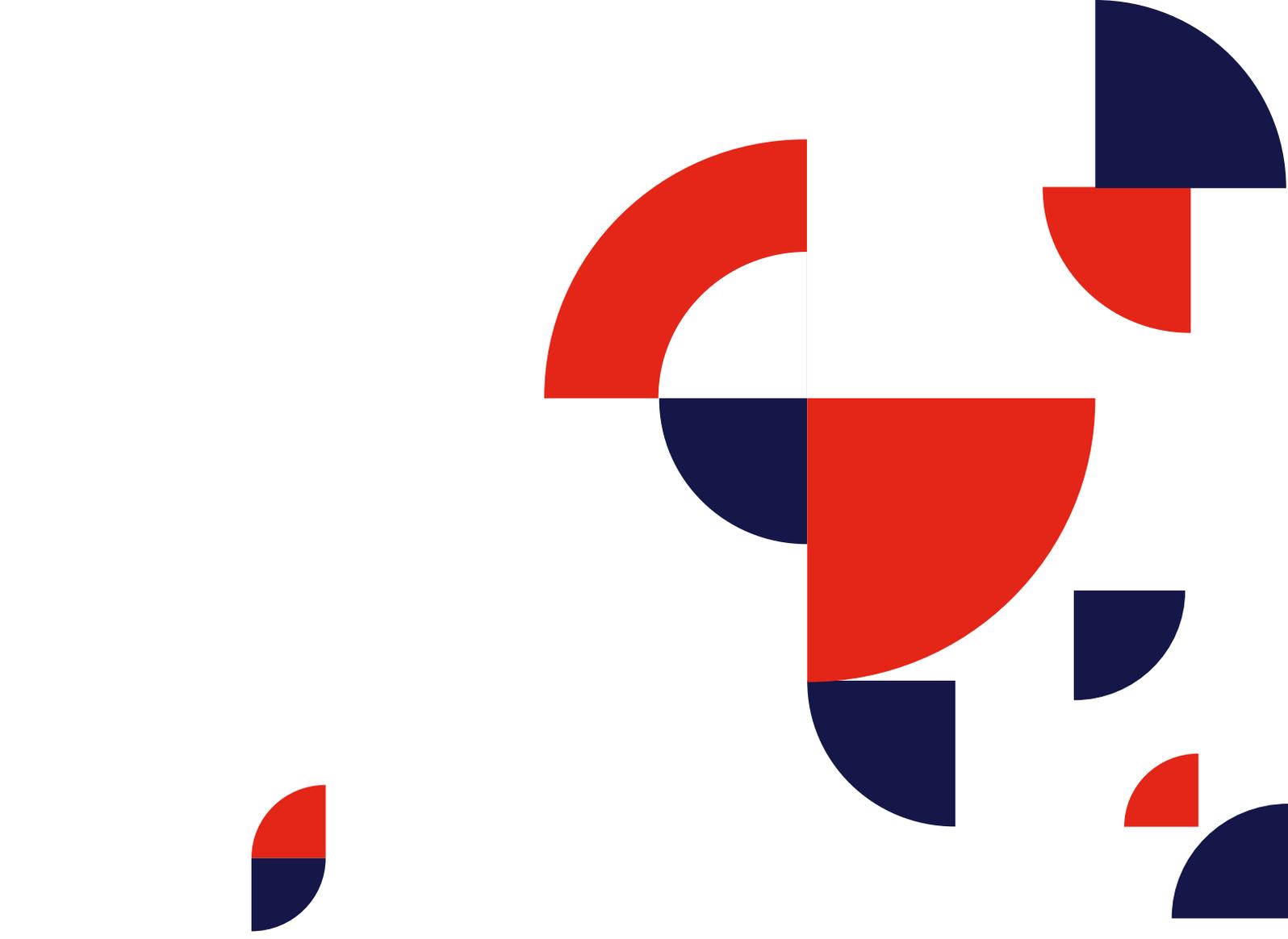
Some issues relating to appeal rights may also be mentioned. First, while the Belgian rules do provide for a right of appeal in case of a negative verification of domicile by the police, citizens are not provided with sufficient information on this possibility. More importantly, doubts have been expressed as to whether the judicial review by the CALL of negative decisions relating to residence rights of EU citizens and their non-EU family members, which is limited to a review of their legality, complies with the provisions of the Citizens Rights Directive and the principle of effective judicial protection in EU law.

On the other hand, there are several instances where Belgian Immigration Law proves to be more generous than the Directive. First, Belgian law provides that the failure to comply with deadlines for the issuance of residence documents results in the application being deemed accepted and the obligation to issue documents. While this legal provision provides safeguards against excessive delay by the administrative authorities, the CJEU has regrettably ruled this provision to be incompatible with the Directive. This provision will therefore need to be amended in the future as indicated by the Belgian federal government. Secondly, Belgian law provides for a *right* to reside – as opposed to a mere right to facilitation – to the categories of “other family members” falling within the scope of Article 3(2) of the Citizens Rights Directive, namely partners with whom the EU citizen has a durable relationship, family members who are dependents or whom are part of the household of the EU citizen in their country of origin, and family members who require the personal care of their EU relative on serious health grounds. Finally, the five-month deadline for making a decision when an application for permanent residence has been submitted by a non-EU family member is more generous than the six-month

deadline foreseen by the Directive. However, it can be argued that because it takes 2-3 weeks for the EU card to be issued, the five-month deadline for the decision is calculated so as to comply with the EU deadline of six months.

On a final point, there is a gap in terms of the availability of data concerning the residence rights of EU citizens and their family members. This needs to be addressed in order to ensure that there is a sufficient knowledge base that will allow for effective monitoring of the application of the fundamental right of free movement.





## Chapter 2

**Analysis of municipal practices  
regarding residence formalities  
for EU citizens and their family  
members**





# Chapter 2

## Analysis of municipal practices regarding residence formalities for EU citizens and their family members



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**Note** that this study was conducted prior to the entering into force of the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration. As a consequence of this modification, some of the titles of the residence certificates for EU citizens as well as the residence cards for their non-EU family members have been modified from 10 May 2021 onwards. The registration certificate for EU citizens (Annex 8 or so-called “E card”) has been changed to the “EU card” and the format of the residence card for non-EU family members (so-called “F card”) follows that of the uniform format for residence permits as laid down by Regulation 1030/2002. Furthermore, when it concerns the issuance of documents attesting to permanent residence, the title of residence certificate for EU citizens attesting to permanent residence (Annex 8bis or so-called “E+ card”) has changed to “EU+ card”. The format of the residence card for non-EU family members attesting to permanent residence (so-called “F+ card”) has changed to follow that of the uniform format for residence permits laid down by Regulation 1030/2002.

Three data collection methods were employed, in order to ensure triangulation.<sup>812</sup> Firstly, the websites of the municipalities were analysed to assess if information about the registration procedure is available online and whether this information is accurate and up-to-date. Secondly, these municipalities were asked to complete an extensive survey spanning the entire registration process – from the pre-application phase to the notification of appeal rights in case of a negative decision – as well as the process to apply for permanent residence. Thirdly, semi-structured interviews were conducted with about one third of the municipalities which filled out the survey, to probe for the experiences and views of municipal officials on the registration procedure. The interviews carried out with key stakeholders (see Introduction) complemented and contextualised the information obtained. In order to guarantee confidentiality, the municipal respondents have been allocated pseudonyms.

The findings from these data collection methods are discussed in an integrated way, following the different phases of the registration procedure: preparatory phase, application phase, verification of domicile, registration phase<sup>813</sup>, applications for permanent residence<sup>814</sup> and notification of appeal rights. This is followed by a section on the general functioning of the key actors in the registration procedure, namely the municipalities and the Immigration Office, which introduces some general findings on the way in which they function with regard to the processing of registration requests. Each of the three data collection methods have analysed various aspects of the registration procedure to a greater or lesser extent (see Table 1).

# 1. Methodology

This chapter aims to provide an insight into municipal practices in relation to the processing of requests for registration received from EU workers, self-employed persons and jobseekers as well as their family members under the Belgian rules which give effect to the Citizens Rights Directive (Directive 2004/38). The study focuses on the perspective of municipalities with regard to the practical application of residence formalities. Hence, the experiences of EU citizens and their family members with the municipal registration procedure are not included in the analysis.

In order to capture a variety of practices, 33 Belgian municipalities were selected, situated in the Brussels-Capital Region, Flanders and Wallonia. These municipalities were chosen based upon, amongst others, the geographical distribution of EU citizens, EU workers and EU self-employed persons.

812 Rothbauer, P., “Triangulation” in Given, L. (ed.), *The Sage Encyclopedia of Qualitative Research Methods* (Sage publications 2008), pp. 892-894.

813 Namely, the issuance of registration certificates to EU citizens (Annex 8 or so-called “E card”) and residence cards to non-EU family members (Annex 9 or so-called “F card”). Note that the title of the “E card” will change to “EU card” and the format of the “F card” will change to follow that of the uniform format for residence permits laid down by Regulation 1030/2002 when the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration comes into force. See further Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

814 Namely, the issuance of documents attesting to permanent residence (Annex 8bis or so-called “E+ card”) and permanent residence cards to non-EU family members (Annex 9bis or so-called “F+ card”). Changes will also be made to these cards whenever the Royal Decree of 12 June 2020 (n 2) comes into force. The title of the “E+ card” will change to “EU+ card” and the format of the “F+ card” will change to follow that of the uniform format for residence permits laid down by Regulation 1030/2002. In addition, both cards will be valid for ten years. See further Chapter 1, Section 6 *Obtaining permanent residence in Belgium*, Subsection 6.4 *Decision-making* and Subsection 6.6 *Validity of permanent residence documents*.

	Website research	Survey	Interviews
2. Preparatory phase	Dark red	Dark red	Dark red
3. Application phase	Light red	Dark red	Dark red
4. Verification of domicile	White	Dark red	Dark red
5. Registration phase	Light red	Dark red	Dark red
6. Applications for permanent residence	Light red	Dark red	Light red
7. Notification of appeal rights	Dark red	Dark red	Light red
8. General functioning of key actors	White	Light red	Dark red

Table 1 - Overview of aspects covered by the different data collection methods (white: not covered; light red: moderately covered; dark red: extensively covered)

## 1.1 The selection of the municipalities



Myria proposed a list of 33 municipalities that were to be included in the analysis of municipal practices.

Four parameters were taken into account to produce a longlist of 40 municipalities based on the full list of Belgium's 581 municipalities. These parameters relate to the following numbers of EU citizens who are registered in each municipality:

- The number of EU citizens holding the nationality of a Member State at birth by 1 January 2017 (Statbel)<sup>815</sup>;
- The number of EU citizens currently holding the nationality of a Member State (National Register)<sup>816</sup>;
- The number of EU citizens registered as employees (CBSS)<sup>817</sup>; and
- The number of EU citizens registered as self-employed persons (CBSS).

In this longlist, municipalities were ranked by order of importance, taking into account absolute numbers. This selection was then weighed for the importance of the

regional spread that was found within the longlist. It was decided to select:

- 9 municipalities from the Walloon region;
- 10 municipalities from the Brussels region;
- 11 municipalities from the Flanders region.

The following principles were then taken into account to make the selection:

1. At least one municipality per province was selected.
2. For each province, the highest ranking municipality was included in the sample. In the case of provinces without a municipality in the longlist, the highest ranking municipality in the full list was selected.
3. For further selection, a ranking of importance of provinces was made based on the number of municipalities present in the longlist. Provinces with a higher number of municipalities were then prioritized.
4. The list of 30 municipalities generated in this way was supplemented with one extra municipality per region, where either the number of employees or the number of self-employed persons featured in the top 40, even if the general population of the municipality was too small to have it included in the longlist of 40 municipalities. This concerned three smaller municipalities.

## 1.2 Website research



The website research consisted in an analysis in 2019 of the information on residence registration procedures for EU workers, self-employed persons, jobseekers and their family members that was available on the websites of the selected municipalities.<sup>818</sup>

The study assessed the user-friendliness of the websites, the completeness of the information provided, as well as the accuracy of the information on the required documentation. In addition, the different languages in which the information is made available was noted, as well as whether the websites provide links to external sources for more information and regarding means of redress (see Box 1).

815 This refers to the Belgian Statistical Office (*Office Belge de Statistique/ Belgisch Statistiekbureau*) <https://statbel.fgov.be/en>.

816 This refers to the national population register (*Registre national/ Rijksregister*) <https://www.ibz.rnm.fgov.be>.

817 This refers to the Crossroads Bank for Social Security (*Banque Carrefour de la Sécurité Sociale / Kruispuntbank van de Sociale Zekerheid*) <https://ksz-bcss.fgov.be>.

818 The authors thank Helena Bael, Jeanne De Potter, Lien Van de Voorde and Loise Waithira for their assistance in the website research and Simon Mourisse and Lauren Rosseel for the transcription of interviews.

### Criteria for website analysis

1. User-friendliness
2. Completeness
3. Information on required documentation
4. Available languages
5. Further sources of information and assistance
6. Further sources on means of redress .

Box 1 - Criteria used to analyze municipal websites

The websites were graded for each of these criteria and their composite elements, applying a score ranging from 1 (low/not much present/not accurate) to 3 (high/very much present/accurate).

In addition, the websites of the Immigration Office, the Agency for Integration and Civicism (*Agentschap voor Integratie en Inburgering – AgII*) and the Association for Foreigners' Rights (*L'Association pour le droit des étrangers – ADDE*) were analysed following the same criteria. References to the latter data are not included in the overall statistics, but presented separately where relevant.

## 1.3 Survey



The 33 initially selected municipalities were invited to complete a survey (in Dutch or French) regarding their practices in respect of the registration of EU workers, self-employed persons, jobseekers as well as their family members. The survey was sent to the head of the population department of each selected municipality by 21 May 2019. Municipalities had one month to submit their response to the survey.

The survey was structured on the basis of the various phases of the registration process and consisted of 158 questions. A total of 32 municipalities completed the survey over a period of approximately 5 months (May – October 2019), thus leading to a response rate of 97%. For 28 municipalities, the submitted responses were formally approved by the respective head of civil affairs.

These survey results indicate *how municipal officials perceive and report* on their practices in respect of the

registration of EU workers, self-employed persons, jobseekers and their family members. It was beyond the scope of this study to try to ascertain the actual practice of municipal officials in the handling of applications for registration or the actual experiences of EU citizens and their family members who register.

### Variables used for survey analysis

1. Population\*
2. Number of EU citizens\*
3. Number of EU workers\*
4. Number of EU self-employed\*
5. Region (Wallonia, Brussels, Flanders)

\*per municipality

Box 2 - Variables used for survey analysis

In addition to a general analysis, the survey results were analysed based on five variables – population per municipality, number of EU citizens, number of EU workers, number of EU self-employed persons, and region – in order to identify possible correlations (see Box 2). For instance, is any relationship discernible between the number of EU citizens in a given municipality and the range of languages in which information is made available?

The variables were selected on the basis of the availability of data as well as their supposed relevance to the study subject. The data on population per municipality was derived from the Ministry of Interior Affairs, dating from 1 July 2018. The data on the number of EU citizens per municipality was obtained through Statbel and represents the number of persons holding the nationality of one of the 27 EU Member States<sup>819</sup> registered in each municipality on 1 January 2018. The data on the number of EU workers and self-employed per municipality were obtained through the Crossroads Bank for Social Security. The number of EU workers per municipality represents the number of EU salaried workers as well as EU workers with other forms of occupation whose salaried employment consists in their main activity. The number of EU self-employed persons represents the number of EU self-employed persons as well as EU salaried workers whose self-employment represents their main activity. Both variables on EU workers and EU self-employed persons refer to persons who are aged 18 years and older.

819 This list of 27 EU Member States does include the United Kingdom and does not include Belgium.

## 1.4 Interviews with municipal officials

Following the survey, 10 municipalities were contacted for follow-up interviews. The interviews had a two-fold objective: on the one hand, to obtain further insight into the particular municipal registration procedure of EU workers, self-employed persons, jobseekers and their family members and, on the other, to identify good practices, challenges and recommendations.

To keep a geographical balance, 3 to 4 municipalities were selected per region: 3 in Wallonia, 3 in the Brussels-Capital Region and 4 in Flanders.<sup>820</sup> A combination of larger and smaller municipalities was strived at. Finally, preference was given to municipalities which had added particular observations in the survey and/or had indicated that their practice was more nuanced than could be reported in the survey.<sup>821</sup> All but one of the contacted municipalities agreed to participate in the interviews.

The interviews were conducted in December 2019 and January 2020, using a semi-structured format. Prior to the interviews, the municipalities received their survey submission so that they could prepare their input. The municipalities themselves selected the persons who participated in the interview. In most cases, 2 to 3 municipal officials participated (e.g. a front desk officer and the head of department). This allowed to obtain a comprehensive view on municipal registration processes, from the practical to the more strategic and policy level. The interviews lasted between 1 and 2 hours; they were taped and transcribed.

The information retrieved was contextualised and triangulated with the information which was gained in interviews with key institutional actors as well as during a workshop “Loket Vrij Verkeer – Guichet Libre Circulation” organised by Myria on 6 July 2021.<sup>822</sup>

<sup>820</sup> Since the number of Flemish municipalities included in the survey slightly exceeded the number of Brussels and Walloon municipalities, an additional Flemish municipality was selected for the interviews.

<sup>821</sup> It must be noted that not all municipalities which made particular observations in the survey could be interviewed. To follow-up on certain survey responses, certain other municipalities were contacted by e-mail and/or telephone with specific questions.

<sup>822</sup> See Introduction.

## 2. Preparatory phase

This section addresses the availability of information prior to the submission of an application for registration.<sup>823</sup> Firstly, the different means used by municipalities to inform EU citizens and their family members about the registration procedure are discussed. Secondly, this section analyses the languages in which municipalities can be contacted by applicants. Lastly, the survey inquired into other information provided to applicants prior to submitting an application for registration.

### 2.1 Availability of information

To start, the survey aimed to identify to what extent information about residence formalities is available to EU citizens and their family members through the following information channels: the municipality’s website, information leaflets/brochures and the municipal front desk. Out of these three information channels, information at the municipal front desk was available in all cases, followed by information provided on the municipality’s website (94%) and information leaflets (38%). In the majority of municipalities in this study, these three information channels are available in French and/or Dutch only, depending on their geographical location. However, in 66% of the municipalities, information provided at the front desk is also available in English. The majority of municipalities indicated that the information they provide is updated more than once a year.

#### Inaccurate translations

One municipal website provided information in languages other than Dutch or French using an automated translation tool plugin, causing significant mistakes in the translations. Providing information in another language in an inaccurate manner can lead to much confusion for applicants and should ideally be avoided at all times.

*Box 3 - Questionable practice: inaccurate translations of information on website*

<sup>823</sup> As confirmed in Art. 34 of Directive 2004/38, both national and local authorities are obliged to inform EU citizens and their family members about their rights and obligations relating to free movement in the EU.

The website research showed, however, that only a very small proportion of municipal websites provide sufficient information on the registration procedure for EU workers, self-employed persons, jobseekers and their family members. Hence, some municipalities which indicated in the survey that they provide information on their website may do so, but in an insufficiently detailed manner. For example, a municipality may provide information on registration requirements for EU workers, but not for jobseekers and/or (non)-EU family members. Information offered in languages other than Dutch or French was not always accurate (see Box 3).

During the interviews, some municipalities indicated that it is a conscious decision not to provide elaborate information on their website.<sup>824</sup> Due to the fast evolution of legislation and case law as well as the complexity of some registration applications, these municipalities prefer to inform applicants in person about the registration possibilities and requirements on a case-by-case basis. Maintaining an up-to-date website also requires a significant investment of human resources. At present, the dissemination of information is dispersed among the municipalities which represents a considerable duplication of efforts.

Currently, some municipal websites refer applicants to the website of the Immigration Office for information regarding the registration procedure (34%). Unfortunately, this website is currently not clearly organised<sup>825</sup> and only available in French<sup>826</sup> and Dutch<sup>827</sup> - but not in the third national language, German - which makes it difficult for an applicant to find the relevant information (see Box 4). The Immigration Office indicated that improvements to this website are envisaged to be made in the near future, including making the information available in English<sup>828</sup> and improving the accessibility of information.<sup>829</sup> The update of the national website of the Belgian Immigration Office is foreseen to occur separately from the development

of the Single Digital Gateway,<sup>830</sup> which is an EU initiative that aims to provide EU citizens with centralised access to national sources of information about exercising their free movement right in the different EU Member States through the “Your Europe” portal<sup>831</sup> maintained by the European Commission.<sup>832</sup>

Four municipal websites (13%) refer to the website of the Agency for Integration and Civicism (*Agentschap voor Integratie en Inburgering – AgII*).<sup>833</sup> The information provided there is very comprehensive and clearly organised, but at the moment it is only available in Dutch (see Box 4). During the interviews, AgII’s website was mentioned as a valuable source of information for municipal officials.<sup>834</sup>

None of the municipalities refer applicants to EU assistance services such as the Your Europe Portal or SOLVIT. This situation may change with the implementation of the Single Digital Gateway, which should give greater visibility to such assistance services.<sup>835</sup>

In conclusion, there seems to be a clear need for a central website with up-to-date user-friendly information about the registration procedure of EU citizens and their family members, including a comprehensive indicative listing of required documents.<sup>836</sup> Such a website could provide the information in languages other than Dutch and French as well, with English as a minimum. This would be resource-efficient, as municipalities would be able to refer applicants to this central website and would no longer need to provide and update the general information on their own website. The website of the Immigration Office could fulfil this role, once updated in line with the recommendations above. The opportunities offered by the Single Digital Gateway should be fully explored, particularly as regard making use of the possibility to request the European Commission to provide the translation of information

824 Interview with municipality C, 13 December 2019; municipality I, 5 December 2019; municipality K, 27 January 2020.

825 For example, while the guide to procedures (*guide des procédures / gids van de procedures*) is displayed on the left-hand side menu on the homepage of the Dutch version of the website <https://dofi.ibz.be/sites/dvzoe/NL/Pages/home.aspx>, this link is missing from the menu featured on the French version of the website <https://dofi.ibz.be/sites/dvzoe/FR/Pages/home.aspx> (last accessed 29 January 2021).

826 See *Le droit de séjourner* [https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures/Pages/Le\\_droit\\_de\\_sejourner.aspx](https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures/Pages/Le_droit_de_sejourner.aspx) (last accessed 5 June 2020). It should be noted there is no link to this from the home page.

827 See *Onthaal > Gids van procedures > Recht op verblijf* [https://dofi.ibz.be/sites/dvzoe/NL/Gidsvandeprocedures/Pages/Recht\\_op\\_verblijf.aspx](https://dofi.ibz.be/sites/dvzoe/NL/Gidsvandeprocedures/Pages/Recht_op_verblijf.aspx) (last accessed 5 June 2020).

828 At present there is very limited information available on the English version of the Immigration Office’s website <https://dofi.ibz.be/sites/dvzoe/EN/Pages/home.aspx> (last accessed 23 July 2020)

829 Interview with Immigration Office, 25 May 2020. See Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.1 *Preparatory phase*.

830 Interview with Immigration Office, 10 December 2020.

831 In 2020, the Immigration Office provided information for the Belgian profile on this website (Myria workshop “*Loket Vrij Verkeer – Guichet Libre Circulation*” with municipalities and stakeholders, 6 July 2021).

832 Regulation (EU) No 2018/1724 of the European Parliament and of the Council of 2 October 2018 [2018] OJ L 295 p 1. establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services; see further [https://ec.europa.eu/growth/single-market/single-digital-gateway\\_en](https://ec.europa.eu/growth/single-market/single-digital-gateway_en).

833 See *Home > Verblijfsrecht, Uitwijzing & Reizen* [agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/verblijfsrecht-uitwijzing-reizen](https://agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/verblijfsrecht-uitwijzing-reizen) (last accessed 5 June 2020).

834 Interview with municipality C, 13 December 2019; municipality I, 5 December 2019; municipality K, 27 January 2020; interview with VVSG, 3 April 2020.

835 Regulation 2018/1724 (n 21) foresees Your Europe Advice and SOLVIT forming part of the gateway in order to ensure that all potential users can find them.

836 This would also be in line with Objective 12 of the Global Compact on Migration: “Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral”.

relating to residence formalities into another official EU language.<sup>837</sup>

On their own websites, municipalities could then focus on the particularities that apply to the registration procedure within their jurisdiction, such as whether an appointment is necessary and how it can be arranged and the possibility to submit the application for registration online.

### Website analysis of other relevant actors

#### › Immigration Office

At the time of the website analysis in 2019, the website of the Immigration Office contained a lot of information. However, the information was not clearly structured which made it difficult to find the relevant information. Furthermore, the website was only available in French and Dutch, with very limited information available in English. Whenever indicated, information did not seem to have been recently updated (with much of the information dating back to 2018 or earlier), which raises concerns as regards its accuracy with the fast-paced developments in relevant legislation and case law.

When it comes to information provided for the various categories of EU citizens, the website did not address the situation of atypical EU workers, such as cross-border workers, posted workers and posted self-employed persons who reside in Belgium. Furthermore, while the page on jobseekers did indicate on what basis an application will be assessed, this page also inaccurately stated that applications for registration by jobseekers will not result in a residence document (“*U ontvangt geen verblijfsdocument*”/ “*Vous ne recevez pas de document de séjour*”).

Lastly, the website identified the various categories of (non-)EU family members and lists the general documentary requirements which apply to them. When using the search function, information could be found on requirements with regards to translation and legalization of foreign documents, albeit this was presented briefly without reference to EU Regulation 2016/1191 on public documents.

In 2021, the website of the Immigration Office is being updated, so little information is available.

#### › Agency for Integration and Civic Integration (AgII)

The website of the AgII contains a lot of information that is clearly organized by theme and is relatively easily accessible. However, a major limitation is that the website is only available in Dutch.

The website clearly describes the procedures and lists the documentary requirements according to the category of EU citizen and family member. The information is presented in an accessible yet detailed manner, for example referring to the relevant case law of the ECJ. As regards jobseekers, the website provides examples of means of proof of a genuine chance of being. Lastly, requirements regarding legalization and translation of foreign documents are clearly indicated, although there is no explicit reference to EU Regulation 2016/1191 on public documents which abolished the legalization requirement for documents issued by the Member States.

#### › Association for Foreigners’ Rights (ADDE)

Information on the website of the ADDE is accessible and clearly structured, yet not always up-to-date (which is indicated on the pages) or complete.

The website of ADDE provides examples of documents that jobseekers can provide to prove a genuine chance of being engaged. However, specific information on atypical workers (such as frontier workers, posted workers and part-time workers) is absent. Certain requirements, such as proof of enrolment with a social security institution for self-employed workers, are not mentioned. Lastly, requirements regarding translation and legalization of foreign documents are clearly indicated, although again no explicit reference is made to EU Regulation 2016/1191 on public documents.

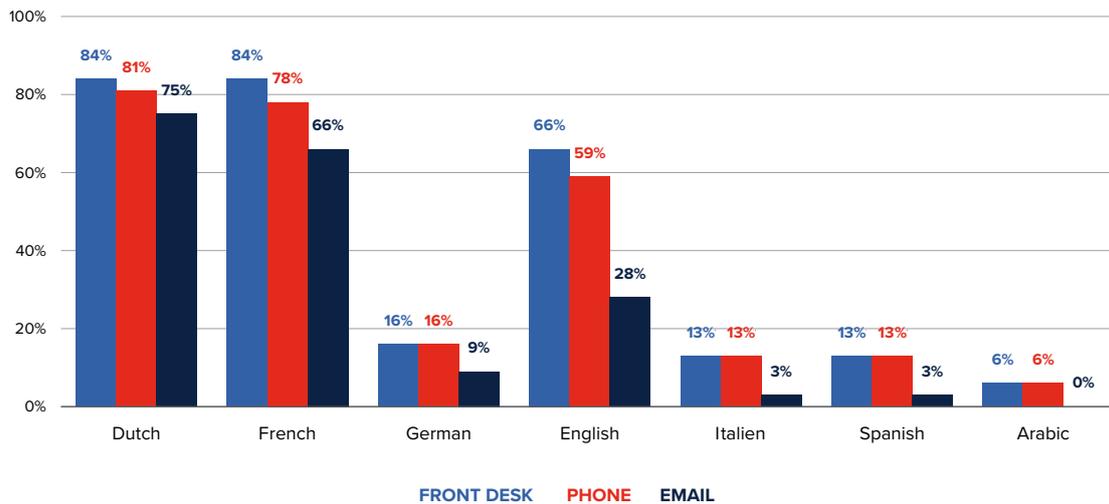
#### › Common observations

All three websites address registration requirements for primary carers of EU minors and cover the acquisition of permanent residence. Lastly, while all three websites state the deadline to appeal a negative decision, signposting to other relevant organisations – in particular the legal aid service of the Bar Associations – is lacking. The websites of AgII and ADDE do refer to their own legal service, but they do not have the mandate to represent applicants in any appeal.

<sup>837</sup> Regulation 2018/1724 (n 832), Art. 12(1) provides the possibility for a Member State to request the Commission to provide translations of information relating administrative procedures into an official language of the Union broadly understood by the largest possible number of cross-border users, which includes residence formalities by virtue of Article 2(2)(a) read in combination with Annex III, Part D, point 4 of Regulation 2018/1724.

Box 4 - Website analysis of the Immigration Office, AgII and ADDE

## 2.2 Communication between applicants and municipalities



Graph 1 - Languages in which municipalities can be contacted

All municipalities indicated that they are available to provide information in various languages whenever applicants approach them for information by phone, email or at the front desk (see Graph 1). The three main languages available are Dutch, French and English. The availability of services and/or communication channels in German is very limited across the country. The availability of other languages appears to be dependent on the language skills of officials who are available at any given time.<sup>838</sup>

When analysing the results per region, clear differences can be observed as to the availability of languages, in particular Dutch, French and English. Generally, Brussels municipalities indicated in the survey that their website and other communication channels (phone, email and front desk) are available in both Dutch and French, and sometimes in English as well.<sup>839</sup> The Walloon municipalities reported that all their services and communication channels are available in French as well as some in Dutch and English. Lastly, the Flemish municipalities indicated that all their services and communication channels are

available in Dutch, as well as some in French and English. Municipalities with a relatively small population size tend to be less multilingual than municipalities with a relatively large population size, especially with regards to languages other than French, Dutch, English and German.

According to ABRA<sup>840</sup>, an umbrella organisation for relocation agencies,<sup>841</sup> certain Flemish municipalities<sup>842</sup> hold the view that they are not allowed to use English when communicating with applicants, referring to a circular of the Flemish regional government in this respect.<sup>843</sup> Given

840 Interview with ABRA, 27 May 2020.

841 ABRA is the Association for Belgian Relocation Agents <https://abra-relocation.com>.

842 This does not necessarily refer to the municipalities which participated in the survey, as the identities of the participating municipalities were not disclosed to ABRA.

843 Circular BA 97/22 of 16 December 1997 concerning the use of languages in municipal governance of the Flemish language area (*Omzendbrief BA 97/22 van 16 december 1997 betreffende het taalgebruik in gemeentebesturen van het Nederlandse taalgebied*) <https://www.docu.vlaamserand.be/node/8389> (last accessed 23 July 2020). Similar findings emerged from interviews with companies and relocation agencies regarding their settling-in policies towards non-EU migrant workers, in the context of the "Pilot Project Addressing Labour Shortages Through Innovative Labour Migration Models" (PALIM) project: "It is strange that foreigners can't be assisted in English at the immigration desk of the municipality. It's a shame when we assist our clients and the person behind that desk understands everything what the clients says in English but we still have to come along and translate everything to our clients." Interview with FRS Relocation, 19 December 2019. Geertrui Daem, "Welcome policies of companies and relocation services for migrant workers", UGent (2021), p. 23 <https://biblio.ugent.be/publication/8700311> (last accessed 22 April 2021).

838 Other languages in which a few municipalities can be contacted are Vietnamese, Polish, Chinese, Romanian, Turkish and sign language.

839 6 out of the 10 Brussels municipalities that were included in this study indicated that some or all of their communication channels (i.e. website, phone, email and desk services) were available in English. During the Myria workshop on 6 July 2021, one stakeholder commented that - in their experience - the municipalities in Brussels only communicate in French, with very few exceptions.

the specific and complex legal framework that applies to the use of languages by public administrations in Belgium, the legal restrictions that apply to the use of languages by municipalities in their interactions with EU citizens and their family members would no doubt benefit from a separate more in-depth study to examine whether these may constitute an obstacle to their right of free movement.<sup>844</sup>

Relatively few municipalities indicated that they use an online helpdesk platform (16%) and/or social media (22%) to assist applicants with queries regarding the application for registration. One municipality confirmed during the interview that they can be reached through social media (i.e. Facebook) but reported that this communication channel has never been used by applicants to obtain further information regarding the application procedure.<sup>845</sup>

## 2.3 Deadline to apply for registration



Regarding the deadline for EU citizens and their family members to submit an application for registration of their residence<sup>846</sup>, only 13% of the surveyed municipal websites indicated that such an application must be submitted within three months following arrival in Belgium. Nevertheless, most municipalities in this study (75%) inform EU citizens about this deadline upon their first contact with the municipality.

The analysis of the municipal websites indicates that there is some confusion about the specific deadline within which EU citizens and their family members must register (see Box 5), which can be attributed to the existence of different deadlines that apply to EU citizens and non-EU nationals (see Table 2 *Overview of deadlines on notification of presence (short stay) and application for registration (long stay)* Table 2).

Table 2 - Overview of deadlines on notification of presence (short stay) and application for registration (long stay)

	Short stay (< 3 months)	Residence (> 3 months)
Nature of obligation	Obligation to notify one's presence	Obligation to apply for registration
EU citizens and family members	Within 10 working days <sup>847</sup>	Within 3 months <sup>848</sup>
Non-EU nationals	Within 3 working days <sup>849</sup>	Within 8 working days <sup>850</sup>

The consequences of failing to meet the deadline to apply for registration appear to vary between municipalities. Whereas two thirds (66%) stated in the survey that there are no consequences in case of a late submission, 16% of the municipalities will contact the Immigration Office for further instructions. One municipality indicated that it only contacts the Immigration Office if the application concerns a non-EU family member. Another municipality indicated that it will start a registration procedure, even for persons who are irregularly residing in Belgium at the time of the application. A third municipality noted that the applicant will receive an Annex 20 (decision to

<sup>844</sup> It should be noted in this respect that the Court of Justice has previously ruled in Case C-202/11 *Las* ECLI:EU:C:2013:239 that the Decree of 19 July 1973 on the use of languages in relations between employers and employees (*Decreet van 19 juli 1973 tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers*) constituted an unjustified restriction on the free movement of workers contrary to Article 45 TFEU. In the same way, the Court of Justice has ruled that Belgian rules which required that invoices issued by businesses established in the Flanders region and which engage in cross-border transactions must be drawn up exclusively in the Dutch language amounted to a measure having equivalent effect to a quantitative restriction on exports in Case C-15/15 *New Valmar* EU:C:2016:464.

<sup>845</sup> Interview with municipality K, 27 January 2020.

<sup>846</sup> Art. 42 §4, Belgian Immigration Law.

<sup>847</sup> Art. 41bis, Belgian Immigration Law. This obligation only applies to the extent EU citizens and their family members are not staying in a "lodging house subject to passenger control legislation" (authors' own translation of Art. 41bis).

<sup>848</sup> Art. 42 §4, Belgian Immigration Law.

<sup>849</sup> Art. 5, Belgian Immigration Law. This obligation only applies to the extent non-EU nationals are not staying in a "lodging house subject to passenger control legislation" (authors' own translation of Art. 5).

<sup>850</sup> Art. 12, Belgian Immigration Law.

refuse recognition of their right of residence beyond three months) if the decision-making falls within its discretion<sup>851</sup>. In this municipality, a failure to comply with the deadline for registration may thus have far-reaching consequences for an applicant even though a late submission would not be a legitimate basis for refusing their application.<sup>852</sup>

### Inaccurate or incomplete online information on deadlines for registration

The deadline of three months for EU citizens and their family members to apply for registration of their residence is not always correctly identified.

Sometimes reference is made to the deadline for registration for third country nationals who have been authorised to stay in Belgium for *more than three months*, namely eight working days. One municipal website refers to the requirement for *EU citizens* to notify the municipality of their presence within ten working days of arrival, but does not specify that this applies only to those who intend on staying in Belgium for *less than three months* (short stay) and who are not staying in a hotel or other touristic establishment. In some further cases, websites incorrectly refer to the obligation for *third country nationals* to notify the municipality of their presence within three working days of arrival, which similarly applies during a short stay and when not staying in a hotel or other touristic establishment.

On most websites (81%), however, the information is incomplete: either they mention the obligation for EU citizens and their family members to register their residence, but do not specify the deadline, or they do not provide information on the deadline for registration at all.

*Box 5 - Questionable practice: Inaccurate or incomplete online information on deadline for registration*

Almost all municipalities in this study (97%) inform EU citizens and their family members that the maximum duration of the registration procedure is 6 months. Most municipalities provide the information about this legal

<sup>851</sup> This refers to the situations where the municipality has the power to recognise a right of residence and issue a registration certificate in accordance with Royal Decree on Immigration, Art. 51 §3. For further discussion, see Chapter 1, Decision-making, section 5.4.2.

<sup>852</sup> Belgian Immigration Law, Art. 42 §4 only foresees the imposition of an administrative penalty of 200 EUR in case of a failure to register within the three-month deadline. For further discussion, see Chapter 1, Failure to comply with registration formalities, section 5.1.2.

deadline<sup>853</sup> prior to issuing a certificate of application in the form of Annex 19/19ter (50%) or, alternatively or in addition, upon the issuance of an Annex 19/19ter (84%).

## 3. Application phase

### 3.1 Appointment system and issuance of Annex 19

As part of the application phase, the survey assessed the personal effort and time that are required of EU workers, self-employed persons, jobseekers and their family members to undertake the registration process. It also inquired about the application procedure as implemented in the municipalities included in this study.

Firstly, almost all municipalities in this study (97%) require EU citizens and their family members to appear in person to submit an application for registration. ABRA indicated that their members had preferential treatment with some municipalities and could bypass the first visit in person and instead initiate the process online.<sup>854</sup> An overview of such a more flexible registration procedure is provided in Box 6.

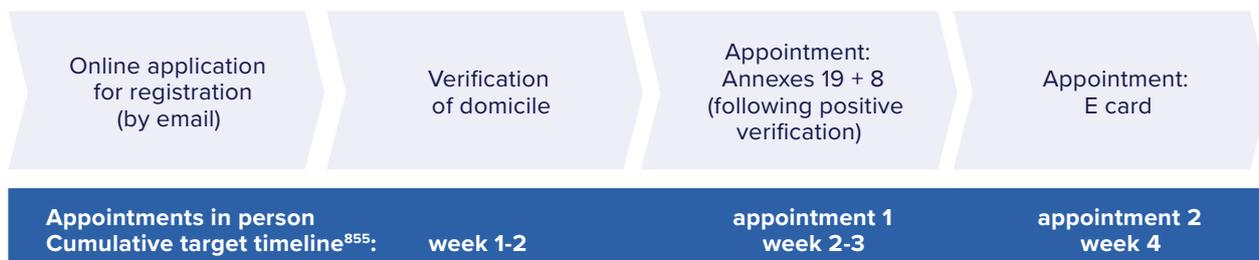
In 41% of the municipalities, an appointment is needed. In more than half of these municipalities, applicants can make an appointment either by phone, online or in person.

<sup>853</sup> For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.1 *Overview of the procedure* and Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

<sup>854</sup> Interview with ABRA, 27 May 2020. This was corroborated in interviews with companies regarding their settling-in policies towards third-country national migrant workers, in the context of the PALIM project: One large company explained having a direct agreement with the municipality for registration of its foreign employees: "When signing the contract at our premises, the foreign employee has to fill in an arrival form. We - instead of the municipality - ask the foreign employee to provide the passport, the visa, and we start the registration process via a specialised email-address. The city (...) is familiar with this workflow. Once this process is started, the police officer will visit his home to check whether the employee actually lives at the indicated address. We receive feedback regarding the residence check. As soon as the residence check is positive, we send an email to the employee to contact the municipality. We invite him to pick up the A card at the town hall. (...) So they don't need to book an appointment at the counter of the municipality. This agreement with the city (...) exists 6 years." Daem (n 843) p. 10.

Especially in Brussels and Flanders, the municipalities work with an appointment system. The average waiting time for a first appointment is 2.5 weeks, with waiting times ranging from less than 1 week to up to 10 weeks.

### Municipality C (expat counter)



#### Implementation of the appointment system – using digitalisation to aim for a more efficient procedure

In municipality C, the “expat counter” provides applicants with the opportunity to submit their application for registration and documents via email, after which the verification of domicile is intended to be carried out in an expedited manner. If the verification of domicile is positive, applicants will then be invited to present themselves in person at the municipality to receive both the certificate of application (Annex 19) and registration certificate (Annex 8 / EU card). Hence, this will be the first time that the applicant is required to appear in person. An Annex 19 is only issued at that time because the municipality does not dispose yet of the applicant’s verified digital signature and Annex 19 requires both an applicant’s handwritten signature as well as a signature from the municipality. The Annex 19 will state the date on which the applicant submitted their application for registration via email. The date of first registration in the National Register will also correspond to the date on which an application was first made by email. In case the applicant wishes to obtain an electronic E card, they will be required to appear in person at the municipality for a second time in order to retrieve the card.

The term “expat” is interpreted widely as covering any “labour migrant”, including all EU salaried workers (but not self-employed persons). Even though the

information about this “expat counter” is available online, the service is mostly used by “intermediaries” such as relocation agencies; the municipality assessed that only about 30% of applications originate directly from EU migrants themselves. The additional advantages of the “expat counter” include greater flexibility in the scheduling of appointments which takes into account the availability of applicants and the identification of a fixed person of contact whom the applicant may contact with any queries. It is anticipated to move from applications being submitted by e-mail to an online application system in the near future.

Municipality C has adopted this practice from a perspective of user-friendliness, by aiming to make the application procedure as efficient as possible for the applicant and limiting the number of in-person appointments to two. The ambition is to be a welcoming and international city, which is open towards labour migrants. Although applicants do not receive a certificate of application (Annex 19) upon submission of their application for registration via email, the procedure does save time and effort from the perspective of applicants, which is generally considered by the municipality as a positive practice. The ombudsman service at the municipal level did not report any concerns related to this delay in obtaining an Annex 19. According to the municipality, the Immigration Office is aware of this practice and has not formulated any objections.

Box 6 - Potentially promising practice: Implementation of the appointment system – aiming for a more efficient procedure

855 Interview with municipality C, 23 June 2020.

## Municipality H: general practice for EU workers



**Note:** The applications for registration of EU workers (and self-employed persons) can be decided by the municipality, which will usually result in a faster processing time than when the Immigration Office should make the decision

(such as with EU jobseekers as well as EU family members). Hence, the processing time of applications for registration from EU citizens other than workers or self-employed persons is likely to take longer than indicated above.

## Municipality H: general practice for non-EU family members of EU citizens



**Note:** As explained in Box 7, the verification of domicile of non-EU applicants will take place before the first appointment to obtain an Annex 19ter is scheduled. This practice appears to deviate from the GemCom instructions of October 2020, which indicate that the verification of domicile should be conducted after the Annex 19ter has been issued<sup>858</sup>.

Furthermore, these applications must be decided by the Immigration Office, meaning that these applications are unlikely to be processed before the maximum deadline of 6 months (from the day of issuance of Annex 19ter).<sup>859</sup>

## Municipality H: “relocation desk” for EU workers



856 Based on survey submission.

857 Based on survey submission.

858 As stipulated in Art. 52 of the Royal Decree on Immigration.

859 See Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.1 *Overview of the procedure* and Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

860 Interview with municipality H, 18 September 2020.

### Implementation of the appointment system – a practice causing excessive delays

In municipality H, all EU applicants can initiate their application for registration online and submit any relevant documents. They will then need to book an appointment to obtain a certificate of application (Annex 19) in person.\* However, there is often a long waiting time to secure this first appointment. Following the first appointment, the verification of domicile will be carried out and, in case of a positive verification, applicants will be invited to present themselves at the municipality for a second time to receive a registration certificate (Annex 8/EU card).\*\* If the applicant wishes to obtain an E card, they will need to return a third time to pick up this electronic version of the Annex 8/ EU card.

Next to the standards online registration procedure, a “relocation desk” is available to both non-EU and EU workers who wish to apply for residency through a relocation agency. The relocation agency can approach the municipality through a special email address and acquire direct access to the municipal system to consult the applicant’s file and schedule appointments. Due to this direct access to the system, a first appointment can be scheduled within a week after submitting the application for registration. The applicant will receive the Annex 19 during this first appointment.\* The verification of domicile is then carried out\*\*, usually within 3 weeks, after which the relocation agency can make a second appointment so that the applicant can obtain the Annex 8/EU card. If the applicant wishes to obtain an E card, a third appointment will be required.

It should be noted that this procedure is more often used by non-EU workers since EU workers usually are able to navigate themselves through the standard registration procedure.

The procedure via the relocation desk is thus significantly faster than the standard procedure for applicants who submit their application without the assistance of a relocation agency, since they usually experience a waiting time of several weeks before obtaining the Annex 19/19ter and additional waiting times to obtain the Annex 8/9 and the E card (EU card)/F card if the applicant wishes to do so.

The ombudsman service of municipality H reports that complaints regarding the waiting time for applicants to obtain a certificate of application (Annex 19) are the most prevalent, even though the overall number of complaints regarding the registration process of EU citizens and their family members is relatively limited.

\* During the COVID-19 pandemic, the Annex 19/19ter are provided to the applicant via email. The fact that a signature of the applicant and the mayor is required, is resolved by providing an official letter stating that the Annex 19/19ter is a valid document considering the circumstances. This practice was accepted by the Immigration Office for the period from March 2020 until 6 June 2021.

\*\* In case of non-EU applicants, the verification of domicile will be carried out before the first appointment is scheduled to receive the Annex 19ter. This practice appears to deviate from the GemCom instructions of October 2020, which indicate that the verification of domicile should be conducted after the Annex 19ter has been issued.

*Box 7 - Questionable practice: Implementation of the appointment system – causing excessive delays*

Diverging practices were identified concerning the practical implementation of an appointment system, which also point to different underlying attitudes towards applications for registration (see Box 6 and Box 7). An appointment system creates the potential for delays, thereby constituting an obstacle to obtaining a certificate of application (Annex 19 for EU citizens and Annex 19ter for non-EU family members) within a reasonable period of time (see Box 7).<sup>861</sup>

If obtaining an appointment takes considerable time, this may be at odds with the obligation under Article 8(2)

of the Citizens Rights Directive to issue a certificate of registration “immediately” to EU citizens.<sup>862</sup> As mentioned in Chapter 1, the Immigration Office considers that by issuing a certificate of application immediately, Belgium complies with this obligation (although the registration certificate itself must, under Belgian law, only be issued within a deadline of six months).<sup>863</sup> However, if a certificate of application is only received several weeks after having first made contact with the municipality, due to the considerable delays in securing an appointment to submit

<sup>861</sup> See also Myria, *Étranger en sa commune / Vreemdeling in zijn gemeente*, MyriaDoc 7, 2018, p. 6-7 [https://www.myria.be/files/180903\\_MyriaDoc\\_7\\_Vreemdeling\\_in\\_zijn\\_gemeente\\_FR.pdf](https://www.myria.be/files/180903_MyriaDoc_7_Vreemdeling_in_zijn_gemeente_FR.pdf) / [https://www.myria.be/files/180903\\_MyriaDoc\\_7\\_Vreemdeling\\_in\\_zijn\\_gemeente\\_NL.pdf](https://www.myria.be/files/180903_MyriaDoc_7_Vreemdeling_in_zijn_gemeente_NL.pdf).

<sup>862</sup> Interview with VVSG, 3 April 2020 and the federal ombudsman, 5 June 2020.

<sup>863</sup> See Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.1 *Overview of the procedure* and Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

an application in person, this raises additional questions as to compliance with EU law.<sup>864</sup>

Moreover, a more expeditious procedure is sometimes available for EU (and non-EU) workers, via an expat counter or a relocation desk (see Box 6 and Box 7). In this regard, questions arise from the perspective of equality and non-discrimination. First, workers are treated in a preferential way compared to other applicants for registration. Second, in one municipality, the access to the relocation desk was restricted to workers whose application is being handled by a relocation agency. The latter practice risks exacerbating differences between the “haves” and the “have-nots”.

In almost all municipalities (94%), EU citizens and their family members will receive a certificate of application at their first appointment, when they are submitting their application for registration. Subsequently, 88% of the municipalities register EU workers, self-employed persons, jobseekers and their family members in the register for pending applications<sup>865</sup> after the latter have received an Annex 19/19ter.

It should be noted that the COVID-19 pandemic has led numerous municipalities to temporarily shift to an online application system for registration (see Box 8). This system continues to operate at present. This illustrates that it might be possible to move to a system where the registration process can be initiated online or by email by EU citizens and their family members.<sup>866</sup>

On the basis of these observations, it is recommended that municipalities should invest in the digitalisation of the first step of the registration procedure, enabling the applicant to submit their application for registration online. The experiences with online applications for registration during the COVID-19 pandemic (see Box 8) have shown that such an online system should be developed with care, with special attention to accessibility and user-friendliness (see footnote 868). Under such a digitised application process, after submitting proof of identity as well as other required documents, an applicant would receive the certificate of application (Annex 19 or Annex 19ter) by email. This would require a legislative change

to the standard format of the certificate of application<sup>867</sup> to make it possible to issue Annex 19 and Annex 19ter electronically. A possibility to submit the application for registration in person should be maintained in parallel, for applicants who do not have access to the online system or are not digitally literate. In this case, the applicant should be able to obtain an appointment within 2 weeks to submit their application for registration, in order to ensure immediate issuance of a certificate of application (Annex 19 or Annex 19ter).

Finally, it is important that the online application procedures are user-friendly and accessible. Current practices have appeared to cause confusion at times among applicants, for example regarding the selection of the appropriate status (e.g. student, worker, self-employed), the documents required for their application as well as the different steps of the registration procedure.<sup>868</sup>

### Impact of COVID-19 on digitalization of the application procedure

Due to the COVID-19 pandemic, municipalities were temporarily unable to process in person applications submitted by EU citizens and their family members. As a result, municipalities were forced to look for alternative ways to continue processing registration requests. Some municipalities shifted to a temporary online application system, where applicants could submit their application online and receive their certificate of application (Annex 19 for EU citizens or Annex 19ter for non-EU family members) by email. These municipalities have expressed the desire to maintain this digitalization of the application phase of registration. Other municipalities may have delayed registrations due to the COVID-19 pandemic, closing their registration desks rather than moving this service online.

*Box 8 - Impact of COVID 19 on digitalization of the application procedure*

864 See also Myria, *Étranger en sa commune / Vreemdeling in zijn gemeente* (n 861), p. 6-7.

865 For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.6 *Issuance of a certificate of application*.

866 The Immigration Office distributed a note on 4 June 2021, instructing that digital applications may only be carried out for extensions of A, C and D cards and for applications for permanent residence (Myria workshop, 6 July 2021).

867 This would involve removing the requirement that an applicant has to provide their handwritten signature on the certificate of application which is currently foreseen as regards both Annex 19 for EU citizens and Annex 19ter for non-EU family members.

868 Based on practical experience by law firm Fragomen as well as the interview with municipality H on 17 December 2019. This point was once more addressed by two municipalities during the Myria workshop on 6 July 2021, where they emphasized the challenges that they face with regards to the online registration of EU citizens and their family members due to the COVID-19 measures. Applicants have difficulty identifying the status that they would like to register under and challenges arise with regards to the quality of documents that are sent as part of the application for registration. For example, documents are missing or incorrect, documents are not readable or miss the required translation or legalization. It was therefore reiterated that an online registration system can work but that a lot of attention should be paid to the accessibility and user-friendliness of the system.

## 3.2 Processing of the application for registration



When analysing the processing of application requests in respect of each relevant category – namely EU workers, self-employed persons, jobseekers and their family members – some significant discrepancies can be observed. This is particularly noticeable in respect of the registration of various different categories of EU workers, where municipal practices tend to vary greatly.

### 3.2.1 Workers

#### 3.2.1.1 Full-time workers

All municipalities in this study confirmed that an EU citizen would be registered as a worker whenever the EU citizen concerned provides an employment contract with either an unlimited duration or for a fixed term of six or twelve months (see Graph 2). However, when an EU citizen provides a fixed-term employment contract with

a duration of 3 months, the EU citizen will be registered as a worker in only about two thirds of the surveyed municipalities (69%). Another 8 municipalities will register this category of EU workers as a jobseeker (25%). One municipality responded that it would not register this category of EU worker at all (3%), while another indicated not knowing how this category would be registered (3%). If the EU citizen provides a fixed-term employment contract of less than 3 months in duration, few municipalities will register the EU citizen as a worker (25%), the majority of municipalities will register the person as a jobseeker (59%) or they will not register the EU citizen at all (16%). The latter category of EU workers is more likely to be registered as a worker in municipalities with a relatively low number of residing EU nationals. However, it should be emphasised that neither Belgian nor European legislation impose a threshold on the required duration of an employment contract,<sup>869</sup> meaning that all the categories of EU workers mentioned above should receive an Annex 19 as workers by the municipalities.<sup>870</sup> Here, a restrictive interpretation of the concept of worker can be observed, where EU workers with a contract of a fixed-term duration of less than 6 months might not necessarily be registered as a worker, and those presenting a fixed-term employment contract with a duration of less than 3 months will in most cases be refused recognition of their worker status.



Graph 2 - Status under which full-time workers are registered by municipalities

<sup>869</sup> For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.1 *Workers*.

<sup>870</sup> In accordance with Royal Decree on Immigration, art. 51 §3, a municipality has the power to recognise a right of residence of workers and issue them with a registration certificate. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

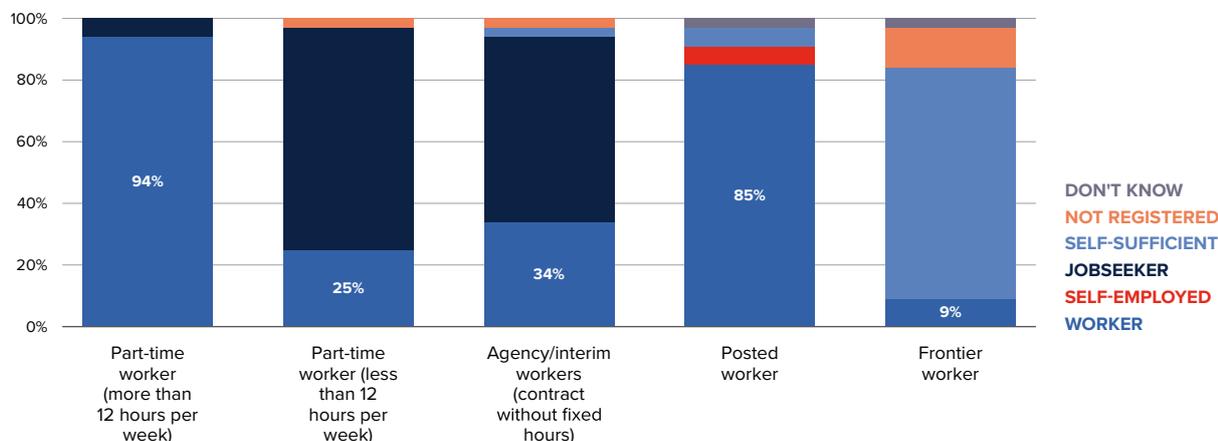
### 3.2.1.2 Part-time workers

When analysing the registration of part-time EU workers (see Graph 3), a large majority of the studied municipalities (94%) confirmed that a part-time worker who works more than 12 hours per week will be registered as a worker. However, part-time workers who work less than 12 hours per week are most likely to receive an Annex 19 as jobseekers (72%). These results confirm the use of a threshold of 12 working hours per week as an administrative practice for the determination of worker status.<sup>871</sup> Workers with an interim agency without a fixed number of working hours are most often registered as jobseekers (60%) but some municipalities register them as workers (34%). Hence, even though EU legislation does not provide a clear definition of the notion of worker, it can be observed that EU workers with part-time or atypical work are less likely to be registered as EU workers. It is interesting to note, however, that part-time workers (less than 12 hours per week) and agency or interim workers are more likely to be registered as EU workers in municipalities with a relatively low number of residing EU nationals, including workers and self-employed persons.

### 3.2.1.3 Posted workers and frontier workers

Furthermore, when analysing the registration of posted workers and frontier workers (see Graph 3), there is also some divergence in approach between municipalities. Posted workers – employees who are sent by their employer to work in Belgium on a temporary basis – will be registered as a worker in most municipalities (85%) as was instructed by the Immigration Office until 20 May 2021.<sup>872</sup> However, two municipalities indicated they will register posted workers as self-sufficient persons (6%) and a further two surprisingly mentioned that such workers would be registered as self-employed persons (6%)<sup>873</sup> while one municipality was unsure how to register posted workers (3%).

Frontier workers – namely EU citizens residing in Belgium but working in another EU Member State as a salaried worker<sup>874</sup> – are correctly registered as self-sufficient persons by the majority of municipalities included in this study (75%). However, it is worrying that four municipalities indicated that frontier workers would not be registered despite having their domicile in Belgium (13%), while another indicated not knowing how frontier workers should be registered (3%).



Graph 3 - Registered status of part-time workers, posted workers and frontier workers

871 As mentioned in Chapter 1, applications for registration from EU citizens that work less than 12 hours per week are forwarded to the Immigration Office for a decision. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.1 *Workers* and Section 5 *The registration process in Belgium*, Subsection 5.5 *Documentary requirements*, Paragraph 5.5.1 *Specific provisions on documentary requirements: workers*.

872 Since 20 May 2021, the Immigration Office is instructing municipalities to register posted workers and posted self-employed persons as self-sufficient, arguing that these persons make use of the right to free movement of services rather than the free movement of persons. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.2 *Posted workers*.

873 After follow-up by email, one municipality clarified that, because “posted worker” is not a possible status option provided on the Annex 19, these applicants are registered as self-employed but will be asked to provide a form A1 as well as a Limosa certificate. Hence, the applicant will be registered as a self-employed but will need to provide different documents than an actual self-employed applicant.

874 For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.3 *Frontier workers*.

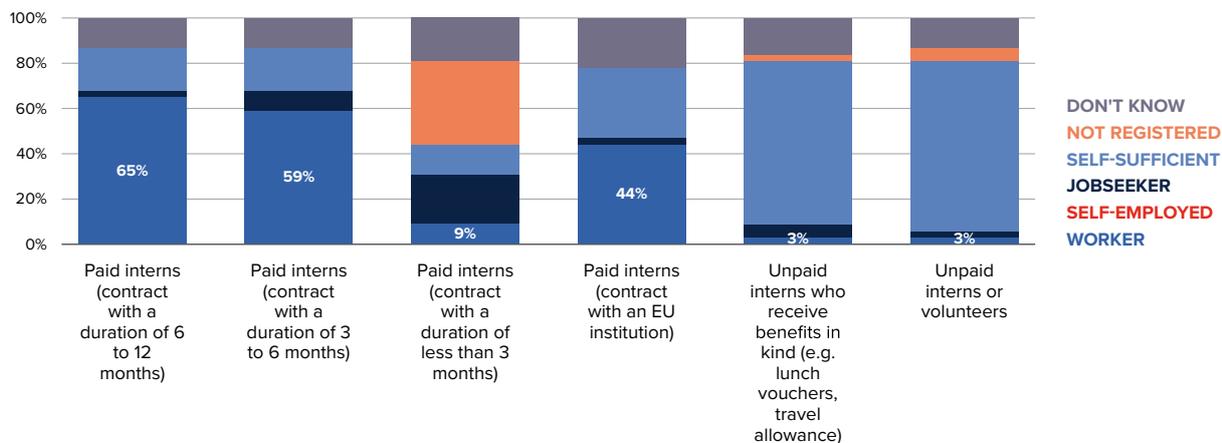
### 3.2.1.4 Interns

Lastly, more than half of the studied municipalities will register paid interns – engaged under a contract with a duration of 3 to 12 months – as workers (see Graph 4). It is also interesting to note that paid interns with a contract with an EU institution are mostly registered as workers (44%) or as self-sufficient persons (31%). As shown below in Table 3, the majority of municipalities that will register paid interns who are engaged by an EU institution as workers are located in Brussels, which can evidently be explained by their experience with this particular type of employment and the fact that several EU institutions have their seat in the capital. Unpaid interns, who receive benefits in kind or volunteer, are registered as self-sufficient persons by the majority of municipalities (72%). The majority of municipalities that were unsure how to register interns were municipalities with a relatively low number of residing EU workers and self-employed persons.

It should be noted that, under certain conditions, unpaid interns may be qualified by the Immigration Office as students. For example, when the internship forms part of a person’s school curriculum. Since the registration formalities for students fall outside the scope of this study, the registration of interns as students was not assessed in the survey (see Graph 4). However, it is worth mentioning that in practice there is sometimes uncertainty about whether an unpaid intern should be registered as a student or as a worker, which will necessarily have different consequences with regards to the registration requirements.<sup>875</sup>

### 3.2.1.5 Comparison by region

When assessing these results on a regional basis, there are noticeable differences in the registration of various categories of EU workers. Municipalities in Brussels and Wallonia are more likely to register under the status of jobseekers the following categories of workers: full-time workers with a contract of less than 3 months” duration, part-time workers with a contract of less than 12 hours per week and interim workers (see Table 3). On the other hand, Flemish municipalities are more likely to register such categories as workers. Municipalities in Brussels and Flanders are more likely to register paid interns with a contract with a duration of 3-6 months or 6-12 months as workers, whereas municipalities in Wallonia are more likely to register paid interns as self-sufficient persons. In case of paid interns at EU institutions, only municipalities in Brussels have indicated as registering these EU citizens as workers. As previously observed, this can most likely be explained by the limited experience of municipalities in Flanders and Wallonia in dealing with this particular type of employment.



Graph 4 - Status under which interns are registered by municipalities

875 Interview with municipality C, 22 October 2020.

	Region	Worker	Jobseeker	Self-sufficient	Don't know	Not registered
Full-time worker (contract with a duration of less than 3 months)	Brussels		<b>100%</b>			
	Flanders	<b>67%</b>	8%			25%
	Wallonia		<b>80%</b>			20%
Part-time (contract with a duration of less than 12 hours per week)	Brussels		<b>100%</b>			
	Flanders	<b>67%</b>	25%			8%
	Wallonia		<b>100%</b>			
Interim worker	Brussels		<b>90%</b>	10%		
	Flanders	<b>92%</b>				8%
	Wallonia		<b>100%</b>			
Paid intern (contract with a duration of 6-12 months)	Brussels	<b>100%</b>				
	Flanders	<b>67%</b>		8%	25%	
	Wallonia	30%	10%	<b>50%</b>	10%	
Paid intern (contract with a duration of 3-6 months)	Brussels	<b>80%</b>	20%			
	Flanders	<b>67%</b>		8%	25%	
	Wallonia	30%	10%	<b>50%</b>	10%	
Paid intern (EU institutions)	Brussels	<b>80%</b>		10%	10%	
	Flanders	<b>33.3%</b>		<b>33.3%</b>	<b>33.3%</b>	
	Wallonia	20%	10%	<b>50%</b>	20%	

Table 3 - Processing of certain categories of EU workers per region (% out of surveyed municipalities per region: 10 Wallonia; 10 Brussels; 12 Flanders)

### 3.2.2 Self-employed persons

All municipalities included in this study indicated that EU self-employed persons with a business registration in Belgium will be registered as self-employed persons. However, EU self-employed persons with a business registration in another EU Member State are correctly registered as self-sufficient persons in 27 municipalities (85%), while two municipalities will register this category as self-employed. In the 3 remaining municipalities, the applicant would not be registered (1), or officials did not know how to register this category of applicants (2).

### 3.2.3 Jobseekers

As regards jobseekers, 94% of the surveyed municipalities confirmed they would accept applications for registration from this category of EU citizens without any further requirements. The remaining two municipalities (6%) would only accept applications from EU jobseekers if they provide proof of registration with a public employment agency (e.g. Actiris, Forem or VDAB). This suggests that the vast majority of municipalities are aware of the documentary requirements contained in Belgian law<sup>876</sup>, which may be provided as part of the application for

registration (to receive the annex 19) or within a 3-month period following the application for registration (see also section 5.3.4).

### 3.2.4 EU family members

More than half of the studied municipalities (59%) accept applications for registration by all categories of family members who are themselves EU citizens, including both “close” family members who have an automatic right to reside with their sponsor<sup>877</sup> and “other family members” who under EU law only have a right to request the facilitation of their residence, but in respect of whom Belgian law grants them a *right* to reside<sup>878</sup>. Within these categories of EU family members, “registered partners” as well as “family members dependent on the EU citizen

<sup>877</sup> This refers to the family members falling within the scope of Directive 2004/38, Art. 2(2) as transposed by Belgian Immigration Law, Art. 40bis, namely spouses, registered partners, descendants under the age of 21 or who remain dependent and dependent ascendants. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 Family members.

<sup>878</sup> This refers to other family members falling within the scope of Directive 2004/38, Art. 3(2) as transposed by Belgian Immigration Law, Art. 47/1, namely unmarried partners and other family members who are dependents on an EU citizen, or who are members of an EU citizen's household, or who require personal care by an EU citizen on serious health grounds. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.7 Other family members.

<sup>876</sup> Art. 50 §2, 3°, Royal Decree on Immigration.

(on health grounds)” are categories in respect of which several municipalities either do not accept applications for registration (6%; 9%) or do not know how to deal with them (16%; 13%). As discussed in Chapter 1, all categories of EU family members have a right to submit an application for registration of their residence.<sup>879</sup> Such applications should therefore be accepted by municipalities. This practice shows that awareness of the various categories of EU family members who should be allowed to apply for registration in Belgium is somewhat lacking.

### 3.2.5 Non-EU family members

Over half of the municipalities included in this study (59%) accept applications for registration submitted by all categories of family members<sup>880</sup> who do not hold the nationality of an EU Member State. However, the categories of non-EU family members of EU citizens from whom an application for registration is least accepted by municipalities are: “registered partners”, unmarried partners in “a durable relationship” as well as other family members who are part of the EU citizen’s household. Applications for registration submitted by these categories of non-EU family members are either not accepted by municipalities<sup>881</sup> to (6%; 16%; 16%) or municipalities do not know how to deal with such applications (12%; 6%; 6%). Again, as observed in Chapter 1, all categories of non-EU family members have a right to apply for registration<sup>882</sup> and Belgian municipalities should be accepting applications for registration from such family members. However, only a relatively small majority of the surveyed municipalities (56% or 18 in total) reported doing so in practice.

## 3.3 Proof of identity



As prescribed by law<sup>883</sup>, almost all municipalities accept both expired EU passports and identity cards from EU workers, self-employed persons, jobseekers and their EU family members, as part of the application for registration. When it concerns temporary EU passports, 72% of studied municipalities confirm that they accept this type of identity documentation for this purpose. This practice is in accordance with EU law which allows for other means of proof of identity to be used.<sup>884</sup>

As regards the forms of identity which are accepted from non-EU family members, 66% of the municipalities responded that they accepted expired non-EU passports; and 53% accepted temporary non-EU passports as part of the application for registration. Again, it should be observed that this practice would be in line with EU law.<sup>885</sup>

Whenever non-EU family members are not able to provide identity documents for a legitimate reason (e.g. due to civil conflict in the country of origin), some municipalities listed the following documents as examples of accepted proof of identity: *laissez-passer*, national identity cards, Annex 26,<sup>886</sup> rental contract, orange card,<sup>887</sup> driving license or expired passport. Additionally, various municipalities indicated that the accepted documents will depend on the case at hand and that the Immigration Office will be contacted for further instructions.

A few municipalities indicated that they require additional documentation to be provided as part of the initial application phase, such as a birth certificate, marriage certificate (or equivalent) or proof of relationship, in addition to a non-EU passport, as part of the application for registration. Such requirements are discussed in the next sub-section.

879 Royal Decree on Immigration, Art. 50 §2, 6° as regards family members and Art. 58 as regards other family members.

880 This refers to the family members falling within the scope of Directive 2004/38, Art. 2(2) as transposed by Belgian Immigration Law, Art. 40bis, as well as other family members falling within the scope of Directive 2004/38, Art. 3(2) as transposed by Belgian Immigration Law, Art. 47/1.

881 The Immigration Office confirms that in their instructions, trainings and communication, other family members of EU citizens are always included as having a facilitated right to reside in Belgium. The Immigration Office has confirmed they never received complaints about this (Myria workshop, 6 July 2021).

882 Royal Decree on Immigration, Art. 52 as regards family members and Art. 58 as regards other family members.

883 Art. 46, Royal Decree on Immigration.

884 CJEU, Case C-215/03 *Oulane* EU:C:2005:95. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.2 *Initial documents required: proof of identity*.

885 CJEU, Case C-459/99 *MRAX* EU:C:2002:461. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.2 *Initial documents required: proof of identity*.

886 This document would be issued to a person who applies for international protection at the Immigration Office in Brussels or to a person who applies for international protection with the Belgian border police (art. 71/4 of the Royal Decree).

887 This is a temporary residence document (*attest van immatriculatie/ attestation d’immatriculation*) issued, among others, to non-EU family members of EU citizens who are awaiting a final decision on their application. For further discussion see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

## 3.4 Documents required from non-EU family members



When submitting an initial application for registration, EU citizens are solely required to provide proof of their EU citizenship<sup>888</sup> in order to obtain an Annex 19 (certificate of application), after which other supporting documents for their application for registration (including proof of a family relationship) can be submitted within three months following the date of submission of their application for registration.<sup>889</sup> The required documents for EU family members are addressed separately in section 5 of this chapter.

However, non-EU family members will be asked to provide proof of their relationship to the EU citizen from whom they derive their right of residence upon submission of their application for registration, in order to receive an Annex 19ter (certificate of application).<sup>890</sup> As a result, this section will cover the documentation which non-EU family members are required to submit at the time of submitting an application in addition to proof of their identity.

In the survey, all municipalities included in this study were asked which documents are required as part of the application for registration of non-EU family members.<sup>891</sup> Municipalities could indicate whether the document was either “necessary”, “optional” or “not necessary” for the purposes of registering. The respondents also had the possibility to answer “don’t know”. Municipalities were provided with a list of documents and could also indicate any other documents that are required from non-EU family members.

In this respect, it should be observed that a general requirement to produce civil status documents proving a family relationship would be in accordance with the Directive<sup>892</sup> and the Belgian implementing rules.<sup>893</sup> However, this is subject to the provision that municipalities cannot insist on civil status documents being submitted

in all cases and they must allow other documentary proof of the existence of a family relationship to be adduced<sup>894</sup>.

As observed in Chapter 1<sup>895</sup>, official certificates which are issued by administrations abroad are generally required to be legalised (unless exempted<sup>896</sup>) and accompanied by an official translation. According to ABRA, there are significant differences between municipalities in terms of the documentation that is being accepted – in particular as regards non-EU family members – and in the requirements being imposed as to legalisation and translation. This divergence in administrative practices creates uncertainty and practical challenges.<sup>897</sup>

### 3.4.1 Visa requirements

Various municipalities indicated that a visa is required to be held by non-EU family members of EU workers, self-employed and jobseekers as part of the registration process: 19% of the municipalities require a short-stay category C visa, whereas 16% require a long-stay category D visa.<sup>898</sup> It was interesting to note that such visa requirements tend to be imposed by municipalities with a relatively small population size. These requirements do not appear to be in conformity with EU law.<sup>899</sup>

For this question, the survey did not distinguish between non-EU “family members” in the sense of Article 2(2) of the Citizens Rights Directive, who have a right to reside with their related EU citizen, on the one hand, and non-EU “other family members” as referred to in Article 3(2) of the Directive, whose residence rights should only be facilitated, on the other. With respect to these non-EU “other family members”, the Council for Alien Law Litigation (CALL)<sup>900</sup> has recently held that a visa can be

888 Art. 50 §1, Royal Decree on Immigration.

889 Art. 50 §2, Royal Decree on Immigration.

890 Art. 52 §1, Royal Decree on Immigration.

891 Art. 44, Royal Decree on Immigration.

892 Art. 10(2)(b), Directive 2004/38. For further discussion, see Chapter 1, Section 4 *EU law relating to registration formalities*, Subsection 4.4 *Documentary requirements*.

893 Art. 52 §1, Royal Decree on Immigration. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.3 *Initial documents required: proof of relationship for non-EU family members*.

894 Art. 44, Royal Decree on Immigration. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.3 *Initial documents required: proof of relationship for non-EU family members*.

895 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.5 *Initial documents required: legalisation and translation formalities*.

896 Since 16 February 2019, official documents from other EU Member States can be presented without legalisation and also without official translation when issued with a multilingual standard form. For further discussion, see Chapter 1, Section 4 *EU law relating to registration formalities*, Subsection 4.4 *Documentary requirements*.

897 Interview with ABRA, 27 May 2020.

898 Myria has been informed that other municipalities, which were not included in the survey, also require a visa for non-EU “other” family members.

899 For further discussion, see Chapter 1, Family members, section 3.6 and Initial documents which should not be required: entry visa for non-EU family members, section 5.2.4. See also CJEU Case C-127/08 *Metock and others v. Minister for Justice, Equality and Law Reform* EU:C:2008:449, paras. 65-67.

900 This refers to the *Raad voor Vreemdelingenbetwistingen / Conseil du Contentieux des Etrangers* (RvV/CCE).

required.<sup>901</sup> The CALL distinguishes these cases from the case law of the Court of Justice,<sup>902</sup> according to which non-EU family members who join or accompany an EU citizen cannot be required to produce an entry visa when applying for a residence card, on the basis that this case law (which predates the adoption of the Citizens Rights Directive) only applies to family members covered by Article 2(2) of the Directive. However, the case law is far from consistent<sup>903</sup> and it remains to be seen whether this approach would withstand scrutiny by the Court of Justice.<sup>904</sup>

### 3.4.2 Spouses and partners

All surveyed municipalities confirmed that non-EU spouses need to provide a marriage certificate in order to prove their relationship with an EU worker, self-employed person or jobseeker, as part of their application for registration (see Table 4). However, not all municipalities indicated that they require a registered partnership certificate from recognised registered partners<sup>905</sup> (81%) and other registered partners<sup>906</sup> (63%).

A significant number of municipalities require proof of prior cohabitation from recognised registered partners (31%) as well as registered partners (44%). According to Belgian law, proof of prior cohabitation is one of the ways for registered partners to prove that they have a “durable and stable relationship duly attested.”<sup>907</sup> However, the existence of such a relationship can also be proven in other ways (for example, by maintaining regular contact or having a child in common).<sup>908</sup> Moreover, no such requirement of prior cohabitation is contained in the law in respect of recognised registered partners<sup>909</sup>, for whom

a registered partnership certificate should suffice as is the case for spouses.

As far as unmarried (and unregistered) partners are concerned, the Belgian rules allow such partners to provide proof of the durable nature of their relationship by any appropriate means.<sup>910</sup> Some municipalities indicated having specific requirements in this respect, such as proof of prior cohabitation (28%) or witness statements from third parties (13%).

In addition to providing proof of their relationship, the non-EU spouse or partner will also be required to provide proof of identity.<sup>911</sup> Even though this is not explicitly prescribed by the law,<sup>912</sup> some municipalities also require the non-EU family member to provide proof of identity of their EU spouse or partner (44%; 41%; 38; 31%).<sup>913</sup>

901 RvV/CCE, judgment No 235 170 of 15 April 2020; RvV/CCE, judgment No 235 273 of 17 April 2020; RvV/CCE, judgment No 246 767 of 23 December 2020. See also RvV/CCE, judgment No. 223 830 of 9 July 2019 which concerned a family member covered by Article 2(2) of the Directive, although it should be noted that the requirement to hold a visa was not explicitly challenged on the basis of EU law in the latter case.

902 CJEU, Case C-459/99 *MRAXEU*:C:2002:461 and Case C-508/03 *Commission v. Spain* EU:C:2006:287.

903 There is at least one instance of another ruling in which the opposite position appears to have been taken; see RvV/CCE, judgment No 236 793 of 20 June 2020.

904 For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members* and Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.4 Initial documents which should not be required: entry visa for non-EU family members.

905 This refers to registered partners whose union is recognized as being equivalent to marriage and who fall within the scope of Belgian Immigration Law, Art. 40bis §2, 1°. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

906 Ibid. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

907 Art. 40bis §2, 2°, a), Belgian Immigration Law.

908 Ibid. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

909 Art. 40bis §2, 1°, Belgian Immigration Law.

910 Art. 47/3 §1, Belgian Immigration Law.

911 Art. 52 §2, 1°, Royal Decree on Immigration.

912 From a practical perspective, the EU citizen’s identity should either be already known if they have registered before their family member or this would be confirmed at the time of registration if the EU citizen and their family member register at the same time.

913 44% (spouse); 41% (recognised registered partner); 38% (registered partner); 31% (unregistered partner in durable relationship).

Table 4. - Documentation required by municipalities for non-EU spouses and partners

	Identity card/ Passport of EU citizen	Passport of non-EU family member	Marriage certificate	Registered partnership certificate	Proof of prior cohabitation	Witness statements from third parties	Other documents
Spouse				NA	NA	NA	<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Birth certificate (of children)</li> <li>&gt; Proof of health insurance</li> <li>&gt; History of civil status</li> </ul>
Recognised registered partnership			NA				<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of a durable relationship</li> <li>&gt; Birth certificate</li> </ul>
Registered partnership			NA				<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of a durable relationship</li> <li>&gt; Overview of members of household</li> </ul>
Unmarried and unregistered durable relationship			NA				<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of a durable relationship</li> </ul> <p>* One municipality indicated registration is only possible on the basis of partnership or legal cohabitation.</p>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

### 3.4.3 Descendants and dependent ascendants

Almost all municipalities included in this study confirmed that the non-EU descendants of EU citizens (or those of their spouse or partner) can prove their relationship by providing a birth certificate of the descendant in question (see Table 5). Additionally, the majority of municipalities (62%) will require proof of dependency from descendants over 21 years of age who are dependent on the EU citizen or their spouse or partner. While this requirement should not apply to descendants who are less than 21 years old<sup>914</sup>, some municipalities (19%; 16%)<sup>915</sup> indicated that they also require proof of dependency for this category of non-EU family members. The majority of municipalities (53%; 50%)<sup>916</sup> will also require proof of identity of the EU citizen, even though the latter requirement is not explicitly prescribed by law either.<sup>917</sup>

While dependent ascendants should be required to provide proof of their dependency under the law<sup>918</sup>, only a small majority of surveyed municipalities (62%; 59%)<sup>919</sup> ask for documentary proof of this in practice (see Table 6). This may have as a consequence that the application will be refused by the Immigration Office.<sup>920</sup> In addition, the majority of municipalities will require a birth certificate of the EU sponsor (94%; 75%)<sup>921</sup> – which should establish the family relationship. However, the evidentiary purpose of requiring a birth certificate from the non-EU dependent ascendant is not clear (34%; 41%).<sup>922</sup>

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914 Art. 50 §2, 6°, b), Royal Decree on Immigration.

915 19% (descendants of EU citizen); 16% (descendants of spouse/partner of EU citizen).

916 53% (descendants of EU citizen); 50% (descendants of spouse/partner of EU citizen).

917 Art. 50 §2, 6°, b), Royal Decree on Immigration.

918 Royal Decree on Immigration, art. 50 §2, 6°, b) by reference back to Belgian Immigration Law, Art. 40bis §2, 4°. This requirement is also permitted by Art. 10(2)(d) of Directive 2004/38.

919 62% (ascendants of EU citizen); 59% (ascendants of spouse/partner of EU citizen).

920 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

921 94% (ascendants of EU citizen); 75% (ascendants of spouse/partner of EU citizen).

922 34% (ascendants of EU citizen); 41% (ascendants of spouse/partner of EU citizen).

Table 5 - Documentation required by municipalities for non-EU descendants

	Identity card/Passport of EU citizen	Passport of non-EU family member	Birth certificate non-EU family member	Proof of dependency	Other documents
Descendant of EU citizen (under 21)					<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> <li>&gt; Permission from other parent sharing parental responsibility</li> <li>&gt; Marriage certificate</li> </ul>
Descendant of EU citizen (21 years or older)					<ul style="list-style-type: none"> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> <li>&gt; Permission from other parent sharing parental responsibility</li> <li>&gt; Marriage certificate</li> </ul>
Descendant of EU spouse/partner (under 21)					<ul style="list-style-type: none"> <li>&gt; Permission from other parent sharing parental responsibility</li> <li>&gt; Proof of relationship (partnership/marriage)</li> </ul>
Descendant of EU spouse/partner of 21 years					<ul style="list-style-type: none"> <li>&gt; Proof of relationship (partnership/marriage)</li> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of health insurance</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

### 3.4.4 Other family members

According to the law, other non-EU family members who are part of the household of the EU citizen<sup>923</sup> or are dependent upon them for their material needs<sup>924</sup> or for serious health reasons<sup>925</sup> are allowed to apply for registration upon proof of their situation.<sup>926</sup> However, in practice, only a part of the municipalities will require these applicants to prove their membership of the household (38%) or dependency on the EU family member for material needs (66%) or health reasons (56%) when applying for registration (see Table 6). The failure to request such proof then leads to a risk that the Immigration Office as the competent decision-maker<sup>927</sup> will refuse the application. As required by law, a strong majority of municipalities (88%; 85%; 81%)<sup>928</sup> will require proof of identification of the non-EU family member.<sup>929</sup>

An additional category of non-EU family members concerns non-EU parents who are the primary carer of a dependent EU minor.<sup>930</sup> Three out of four surveyed municipalities (75%) will require the birth certificate of the EU minor. While dependency of the EU minor on the non-EU parent is prescribed by law as the basis for this residence right,<sup>931</sup> only 38% of municipalities will request proof of this dependency. Again, this creates a risk of rejection of the application by the Immigration Office.<sup>932</sup>

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923 Art. 47/1 2°, Belgian Immigration Law.

924 Ibid.

925 Art. 47/1 3°, Belgian Immigration Law.

926 Belgian Immigration Law, Art. 47/3 § 2 as regards other family members who are dependents on the EU citizen or form part of their household, and Art. 47/3 § 3 as regards other family members who require the personal care of the EU citizen on serious health grounds.

927 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

928 88% (member of household); 85% (dependent for material needs); 81% (dependent for health reasons).

929 Art. 52 §2, 1°, Royal Decree on Immigration.

930 Art. 40bis § 2, 5°, Belgian Immigration Law. This category relates to so-called “Chen carers” named after the CJEU ruling in Case C-200/02 *Zhu and Chen* EU:C:2004:639. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

931 Ibid.

932 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

Table 6 - Documentation required for non-EU ascendants and other family members

Category	Passport of EU family member	Passport of non-EU family member	Birth certificate EU family member	Birth certificate non-EU family member	Proof of dependency	Other documents
Dependent EU citizen						<ul style="list-style-type: none"> <li>&gt;&gt; Proof of sufficient resources</li> <li>&gt;&gt; Proof of health insurance</li> <li>&gt;&gt; Marriage certificate</li> </ul>
Dependent spouse/partner of EU citizen						<ul style="list-style-type: none"> <li>&gt;&gt; Marriage certificate/ proof of partnership</li> <li>&gt;&gt; Birth certificate (spouse/partner)</li> <li>&gt;&gt; Proof of sufficient resources</li> <li>&gt;&gt; Proof of health insurance</li> </ul>
Other family member that is dependent on the EU citizen's household						<ul style="list-style-type: none"> <li>&gt;&gt; Proof of relationship</li> <li>&gt;&gt; Birth certificate</li> <li>&gt;&gt; Proof that non-EU family member was part of household</li> <li>&gt;&gt; Proof of sufficient resources</li> <li>&gt;&gt; Proof of health insurance</li> </ul>
Other family member that is dependent on EU citizen						<ul style="list-style-type: none"> <li>&gt;&gt; Proof that non-EU family member was dependent in home country/was member of household in home country</li> <li>&gt;&gt; Proof of relationship</li> </ul>
Other family member that is dependent on EU citizen (on health grounds)						<ul style="list-style-type: none"> <li>&gt;&gt; Proof of relationship</li> <li>&gt;&gt; Proof of health grounds/ medical certificate</li> </ul>
Primary carer of an EU minor						<ul style="list-style-type: none"> <li>&gt;&gt; Consent of other parent</li> <li>&gt;&gt; Proof of sufficient resources</li> <li>&gt;&gt; Proof of sickness insurance</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

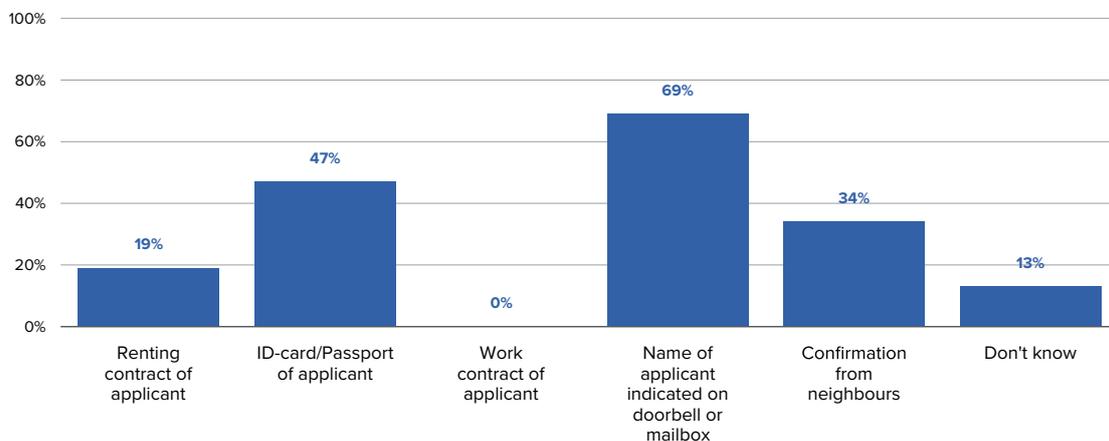
## 4. Verification of domicile

Once an EU worker, self-employed or jobseeker has submitted an application for registration and received a certificate of application (Annex 19), their details will be entered on the register for pending applications (*wachtregister/ registre d'attente*).<sup>933</sup> Non-EU family members are only issued with a certificate of application (Annex 19ter) without their details being entered on this register.<sup>934</sup> At this stage of the process, following the lodging of their application, the law requires that the domicile of applicants for registration is verified.<sup>935</sup>

Following coverage of the application phase, this section of the survey inquired into the verification of domicile that is carried out by the municipal police at the request of the municipality. This examined the impact of the verification of domicile on the registration process.<sup>936</sup>

### 4.1 Requirements for the verification of domicile

The methods for the verification of domicile are not prescribed by law. It is apparent from the survey responses that the evidence which is required by the local police as part of the verification of domicile varies greatly between municipalities. As Graph 5 illustrates, in most surveyed municipalities the name of the EU citizen and (if applicable) their family members must be indicated on the doorbell or mailbox (69%). This requirement is mostly used in the Brussels region. Additionally, municipalities may require a rental contract (19%), identity card or passport (47%) and/or confirmation from neighbours (34%). The confirmation from neighbours is mostly required in Flanders and Wallonia. Furthermore, a few municipalities commented that the applicant must be personally encountered by the police officer at their residence as part of the verification process.



Graph 5 - Requirements for the verification of domicile<sup>936</sup>

<sup>933</sup> For further discussion, see Chapter 1, Section 5 The registration procedure in Belgium, Subsection 5.3 Verification of domicile.

<sup>934</sup> Ibid.

<sup>935</sup> Royal Decree on Immigration, Art. 50 §1, para. 2, as regards EU citizens and EU family members and Art. 52 §1, para. 2, as regards non-EU family members. For further discussion, see Chapter 1, Section 5 The registration procedure in Belgium, Subsection 5.3 Verification of domicile.

<sup>936</sup> Two municipalities did not answer this question, stating that the verification of residence is the police's competence.

## 4.2 Processing of the verification of domicile



Following the verification of domicile, the local police will send a report to the municipality. There is some variation in the time elapsing between the date of the application for registration and the date that the municipality receives the police report. In most municipalities, the average waiting time varies between two weeks (19%), three weeks (38%) and four weeks (22%). However, two municipalities reported that the waiting time can be as little as one week, while three other municipalities reported a waiting time of one or two months. In municipalities with a lower number of EU citizens, the waiting time is generally shorter than in those with a higher number of EU citizens. The country-wide average processing time for the verification of domicile to take place has previously been reported to be around one month.<sup>937</sup> The varying waiting times across municipalities may partly be explained by the different approaches taken when verifying domicile. While some police may visit an address up to five times before reporting a positive or negative verification of domicile, in other municipalities the police may already file a positive or negative report on the basis of one (attempted) visit only.<sup>938</sup>

Two municipalities clarified during the interview that the verification of domicile in their city is conducted prior to the first visit to the municipality made in person by the EU citizen and their family members (see Box 6 and 7).<sup>939</sup> The municipalities evaluated this practice positively since it can reduce the processing time for registration. In this way, the confirmation of the verification of domicile (conducted by the police) has already been received by the time of the first appointment with the EU citizen and/or their family members when an application is submitted.

For EU citizens, this means that they are at times able to receive their certificate of registration (Annex 8/EU card) at their first appointment with the municipality (see also Box 6). For non-EU family members, their request can be sent to the Immigration Office more quickly, which will then make a decision on the registration request.

However, the potential downside of such a practice is that this may engender further delays if the police does not undertake a verification of the applicant's domicile in a timely fashion. This may accentuate delays in obtaining a first appointment at the municipality. Furthermore, during this time applicants will not be in a possession of a certificate of application (Annex 19 or Annex 19ter as the case may be) to prove they have complied with residence formalities, which may be a particular concern for non-EU family members who would not be able to prove their lawful status. Moreover, the mainstreaming of such a practice would require a change to the Royal Decree on Immigration. The change in rules would have to be compliant with the Citizens Rights Directive, particularly as regards the obligation to issue a certificate of application immediately to non-EU family members.<sup>940</sup>

Furthermore, two municipalities confirmed during the interviews that they make use of an online platform to submit their request for verification of domicile to the police. Once the verification of domicile has been completed, they also receive the report from the police through this online platform. It is important to note that these municipalities established these online platforms upon their own initiative, each making use of a different online product. Both municipalities consider this practice to be a positive development since it enables them to carry out the verification of domicile in a more efficient manner.<sup>941</sup> The digitalisation of communications between the police and the municipality has been previously suggested by the Comité P<sup>942</sup> and this recommendation is to be endorsed in this study as well.<sup>943</sup> Moreover, all means of proving one's residence should be foreseen, such

937 Permanent Police Oversight Committee, report on the verification of domicile (2014) (*Comité P, Toezichtsonderzoek "Domiciliëringen", Dossiernummer 62605, Beeldvorming van de wijze waarop de lokale politiekorpsen de woonstcontrole uitvoeren*, pp. 10, 33 [https://comitep.be/document/onderzoeksrapporten/2014-12-11 Beeldvorming van de wijze waarop lokale politiekorpsen de woonstcontrole uitvoeren.pdf](https://comitep.be/document/onderzoeksrapporten/2014-12-11%20Beeldvorming%20van%20de%20wijze%20waarop%20lokale%20politiekorpsen%20de%20woonstcontrole%20uitvoeren.pdf) / *Comité P, Enquête de contrôle "Domiciliations", Numéro de dossier 62605, Image globale de la manière dont les corps de police locale exécutent le contrôle domicile*, pp. 10, 33 [https://comitep.be/document/onderzoeksrapporten/2014-12-11 Image globale de la manière dont les corps de police locale exécutent le contrôle domicile.pdf](https://comitep.be/document/onderzoeksrapporten/2014-12-11%20Image%20globale%20de%20la%20maniere%20dont%20les%20corps%20de%20police%20locale%20exécutent%20le%20contrôle%20domicile.pdf)).

938 Interview with municipality C, 22 October 2020. This practice was confirmed by a municipality during the Myria workshop on 6 July 2021, indicating that a negative verification of domicile may be given if the name is not indicated on the doorbell while this is not a legitimate and legal requirement (on the basis of the right to privacy).

939 Interview with municipality C, 13 December 2019; municipality H, 17 December 2019.

940 Art. 10(1), Directive 2004/38.

941 Interview with municipality C, 13 December 2019; municipality H, 17 December 2019.

942 This refers to the Permanent Police Oversight Committee (*Vast Comité van Toezicht op de politiediensten/ Comité permanent de contrôle des services de police*).

943 In its report on verification of domicile (n 937), the Comité P has recommended that "in consultation with the municipal services, the processing times should be reduced by means of the digital transfer of all requests and reports made in respect of the verification of domicile between the municipal services and the police" (*Comité P, Toezichtsonderzoek "Domiciliëringen", p. 39: aanbeveling dat "in overleg met de gemeentelijke diensten de uitvoeringstermijnen worden verkort door middel van een digitale overdracht van de opdrachten en de resultaten van de woonstcontroles tussen de gemeentelijke diensten en de politie" / Comité P, Enquête de contrôle "Domiciliations", p. 33: recommandation "que les délais de traitement soient réduits en concertation avec les services communaux par le biais du transfert numérisé des missions et des résultats des contrôles du domicile entre les services communaux et la police"*).

as acceptance of digital confirmation of the submission of a registered lease.

Since the interviews with municipalities were conducted, the so-called WOCODO app was developed, to facilitate digital communication between the local police and municipal officials concerning the verification of domicile. While the development of this app is generally well received, the one municipality earlier identified in this study as already using such a system, shared that they themselves make adjustments again to the software that the app provides. Compared to the systems that were already in place, the app did not provide all features that were used in the municipality, possibly indicating a poor consultative process in the development of this app.

After the police have issued a positive report on the verification of domicile, the municipality will proceed to register EU citizens and non-EU family members on the register of foreigners.<sup>944</sup> For EU applicants (69%) as well as non-EU family members (69%), the majority of the surveyed municipalities responded that they register these categories of applicants within approximately two weeks following receipt of the police report. However, in some municipalities, the registration in the register of foreigners can take as much as five weeks or more to be processed.

After the details of non-EU family members have been entered on the register of foreigners, they will be issued with a temporary residence permit in the form of a so-called “orange card”<sup>945</sup>, attesting to their temporary residence status while their application for registration is being processed. In more than half of the municipalities included in this study (59%), this permit is issued within two weeks following receipt of the police report. Some municipalities also indicated that the waiting time will depend on when the applicant attends the municipality for a follow-up appointment to receive the “orange card”.

<sup>944</sup> Royal Decree on Immigration, Art. 50 §1, para. 2, as regards EU citizens and EU family members and Art. 52 §1, para. 2, as regards non-EU family members. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

<sup>945</sup> *Attest van Immatriculatie/Attestation d'Immatriculation*. See Art. 52 §1, para. 2, Royal Decree on Immigration. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

## 5. Registration phase

This section of the survey assesses the registration phase in which EU workers, jobseekers and self-employed persons as well as their family members are required to provide further documentation to prove their right of residence and obtain a residence document.<sup>946</sup> Based on the survey results, almost all municipalities indicated that the applicant has to appear in person in order to obtain a registration certificate for EU citizens (Annex 8 or so-called E card/EU card) (100%), a temporary residence permit for non-EU family members (so called “orange card”) (100%), a residence card for non-EU family members (Annex 9 or so-called “F card”) (100%) or a decision to refuse recognition of a right of residence (Annex 20) (91%). Some municipalities also require the applicant to appear in person to submit documentation as part of the registration procedure (25%) or to receive information regarding their file (6%).

### 5.1 Information about required documents as part of the application for registration



The majority of surveyed municipalities (78%) provide the applicant with a list of documents that are required for the purposes of registration. Other municipalities indicated they do not provide such a list since the required documentation is indicated on the certificate of application (Annex 19 for EU citizens or Annex 19ter for non-EU family members) (16%), or because applications are too complicated to provide a generic list of required documents (6%).

About two thirds of municipalities reported that it is the officials at the front desk who decide which documents are required as part of the application for registration (69%). Interestingly, all municipalities indicated that officials from the legal department are not involved in the

<sup>946</sup> Namely a registration certificate for EU citizens (Annex 8 or so-called E card/EU card) and a residence card for non-EU family members (Annex 9 or so-called “F card”).

determination of document requirements for registration of residence.

More than half of the municipalities included in this study confirmed that the Immigration Office provides a list of required documents that municipalities are asked to obtain from the applicant as part of their application for registration (59%). Others reported that the list of required documents is based on instructions from their own municipality (22%). As examined further in section 8 of this Chapter, various municipalities indicated during interviews that they have developed their own guidance documents that are (internally) available to assist their officials in their daily practice.

The majority of studied municipalities reported that the applicant will be informed about the required documents when they are issued with a certificate of application<sup>947</sup> (75%). Most municipalities indicated that the applicant is informed about this in person (94%). Other municipalities may also inform the applicant by email (84%), by telephone (81%) or refer them to their website (19%). However, based on the analysis of municipal websites, we can conclude that out of the six municipalities that refer applicants to their website for more information, only two of these municipalities provide any kind of online information on the documents which are required for the registration of EU workers, self-employed persons, jobseekers and their family members.

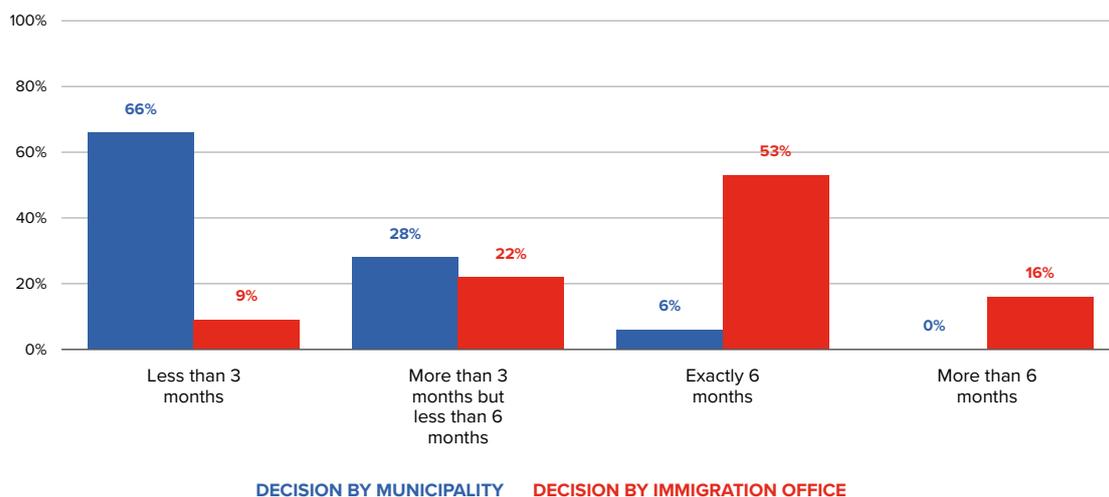
## 5.2 Decision-making on applications for registration of residence



### 5.2.1 Division of competences and duration of registration procedure

When municipalities have the power to make a decision on an application for registration<sup>948</sup>, most surveyed municipalities indicated that this decision is taken by the officials working at the front desk (84%). None of the municipalities report that this decision is taken by officials of their legal department. In two municipalities, all applications for registration are passed on to the Immigration Office for a decision. However, as indicated in Chapter 1, the Immigration Office calls upon the municipalities to make maximum use of their competences in its GemCom Instructions.<sup>949</sup>

As shown in Graph 6, most municipalities included in this study report that the average duration of the registration procedure is shorter than the legal deadline of six months when the decision on the application for registration



Graph 6 - Average duration of the registration procedure from the date of the application until the date of decision according to decision-making authority

947 Annex 19 for EU citizens and Annex 19ter for non-EU family members.

948 According to Art. 51 §3 of the Royal Decree on Immigration, municipalities may take a decision on straightforward cases, including applications received from workers and self-employed persons, as well as some EU family members. For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

949 Ibid.

is taken by the municipalities themselves. When the decision is taken by the Immigration Office, 53% of the municipalities report that the waiting time is exactly six months. Also during the interviews, the municipalities indicated that the waiting time for decisions by the Immigration Office tends to reach or exceed the legal deadline of six months.<sup>950</sup>

### Towards automatic registration?

Some municipalities suggested during the interviews that the automatic registration of EU citizens may be more efficient in light of the delayed response from the Immigration Office. This working method would imply instituting a system of *ex post facto* checks by the Immigration Office, which could then take action to investigate and if needed, terminate the right of residence in case EU citizens or their family members fail or cease to meet the requirements. However, such a system is likely to prove difficult to reconcile with the CJEU judgment in Diallo. This suggestion and other options for reform are further discussed in Chapter 6.

*Box 9 - Potential practice: automatic registration with ex post assessment by the Immigration Office*

The fact that municipalities themselves are only authorised to take decisions in certain cases<sup>951</sup>, places a considerable burden on the Immigration Office. As a consequence, applications that fall within the exclusive decision-making remit of the Immigration Office<sup>952</sup> are often not decided within the legal deadline of six months, meaning that these registration requests should be deemed accepted upon expiry of the legal deadline.<sup>953</sup> The consequence of this reported frequent failure of the Immigration Office to take a decision within the legal deadline of six months is that residence documentation is issued to EU citizens and their family members<sup>954</sup> without the file being assessed

on its merits.<sup>955</sup> However, this document may later be withdrawn if it is discovered that the applicant did not meet the requirements for having a right of residence in the first place.<sup>956</sup>

Moreover, due to the internal reorganisation of the Immigration Office in June 2019 and the reduced staff available for files of EU citizens (see section 8.2.2), the Immigration Office announced in the GemCom instructions of 18 June 2019 a change in casework practice: even though the legal requirements for the residence of an EU citizen have not changed, the focus in enforcement has now shifted from taking action to refuse applications at the registration stage (Annex 20 decisions) to the post-registration verification of case files with a view to taking action to terminate the residence rights of EU citizens and their family members (Annex 21 decisions).<sup>957</sup>

Priority is now being given to the files of EU citizens who are suspected of being a burden on the social assistance system,<sup>958</sup> constituting a threat to the public order, or having engaged in fraud or abuse. In order to perform its checks on cases regarding social assistance, the Immigration Office automatically receives information from the Crossroads Bank for Social Security<sup>959</sup> whenever an EU citizen who is registered as a resident has been receiving support from a Public Social Welfare Centre<sup>960</sup> for a period of at least three months. The systematic nature of this control may raise questions in light of European legislation<sup>961</sup>, even though the Immigration Office emphasises that it always carries out an individual investigation, taking into account the specific circumstances of the case.<sup>962</sup>

950 For further discussion on deadlines, see Chapter 1, Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

951 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

952 Ibid.

953 For further discussion on deadlines, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

954 For further discussion on the consequences of failing to meet the six-month deadline for a decision, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

955 Similar findings have been highlighted by the Belgian Court of Audit (*Cour des Comptes / Rekenhof*) which published a report on the processing of registration requests from family members by the Belgian Immigration Office in January 2020 (*Office des étrangers : traitement des demandes de regroupement familial / Dienst Vreemdelingenzaken: Behandeling van aanvragen voor gezinshereniging*). The report highlights the practice of the Immigration Office to focus on residence applications from family members that will be refused which will be actively assessed and replied to within the legal deadline of six months. However, other applications are not assessed and will be deemed accepted when the legal deadline of six months is reached. Even though exact numbers are not available, the assumption is that the number of automatic positive decisions have increased, based on an assessment by the Court of Audit of a sample of applications from 2019.

956 For further discussion on the termination or withdrawal of residence rights, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

957 GemCom Instructions.

958 Ibid.

959 This refers to *Kruispuntbank van de Sociale Zekerheid / Banque Carrefour de la Sécurité Sociale*.

960 This refers to the *Openbaar Centrum voor Maatschappelijk Welzijn (OCMW) / Centre Public d'Action Sociale (CPAS)*.

961 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

962 Interview with the Immigration Office, 25 May 2020. It was noted during the Myria workshop on 6 July 2021 that the Immigration Office does not investigate every file that they receive of residents that seek recourse to social assistance for more than 3 months, due to a shortage of staff.

During the interviews, some municipalities suggested instituting a system where EU citizens are automatically registered but subject to an *ex post facto* assessment (see Box 9). However, the establishment of such a system is complicated by the recent ruling of the Court of Justice which found that the Belgian rules that provide for the automatic grant of a residence card to a non-EU family member when no decision has been made within the deadline of six months contravenes EU law.<sup>963</sup> In that case, the Court explicitly ruled that the Citizens Rights Directive precludes a residence card from being automatically issued to a non-EU family member of an EU citizen who does not necessarily meet the requirements for its issuance.<sup>964</sup> This therefore suggests that whatever registration system is put in place, it must provide for an assessment to be made to ensure that the issuance of a residence document is conditional upon EU citizen and their family members meeting the requirements of the Directive. Nonetheless, the option of instituting an immediate (as opposed to automatic) registration system is further discussed in Chapter 6 as one of a number of possible options for reform.

Alternatively, various municipalities that were interviewed, would also be in favour of benefiting from further autonomy when it comes to decision-making, so that they would be authorised to take decisions in respect of a wider range of applications for registration submitted by EU citizens and their family members, thereby decreasing the burden placed on the Immigration Office.<sup>965</sup> This would require expanding the circumstances in which the municipality is empowered to decide to recognise a right of residence of more than three months.<sup>966</sup> The option of endowing municipalities with further decision-making powers is further discussed among a number of different options for reform in Chapter 6.

## 5.2.2 Specific issues: deletion from National Register and change of status

When EU citizens have not provided the necessary documents within the initial three-month period following the application for registration, they will receive a refusal decision (in the form of an Annex 20 without an order to

leave the territory) and have an additional period of one month to submit the documentation.<sup>967</sup>

According to the GemCom Instructions, the applicant should at this point be removed from the National Register, because of the loss of their residence right.<sup>968</sup> The removal of a person from the National Register will lead to suspension of any contributory social security benefit, regardless of how long that person has been contributing to the Belgian social security system.<sup>969</sup> Likewise, removal from the National Register may imply that any social support claimed at that time by the EU citizen concerned or their family member from the Public Social Welfare Centre<sup>970</sup> will be automatically withdrawn.<sup>971</sup>

During the interviews, it became clear that some municipalities do not follow the instructions from the Immigration Office on this point, because this particular instruction has in their view no legal basis. These municipalities only remove an applicant from the National Register<sup>972</sup> after the second Annex 20 has been issued.<sup>973</sup> In this respect it should be observed that the course of action suggested by this instruction is not explicitly required by the Royal Decree on Immigration,<sup>974</sup> while the rules relating to the National Register only require the removal of foreigners following the termination or loss of their residence right, which necessarily implies that a definitive decision has been taken.<sup>975</sup>

According to the Association of Flemish Cities and Municipalities<sup>976</sup> (VVSG), this is an example of an instruction that has not been checked in terms of its compatibility with municipal practices (see section 8.7), given that deletion from the foreigners' register – following the issuance of a refusal decision in the form of a first Annex 20 – may make it very difficult if not impossible

963 CJEU, Case C-246/17 *Diallo* EU:C:2018:499. For further discussion see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

964 *Ibid.*

965 Interview with municipality E, 11 December 2019; municipality F, 3 December 2019; municipality G, 4 December 2019; municipality J, 14 January 2020.

966 Art. 51 §3, Royal Decree on Immigration.

967 Art. 51 §1, para 2, Royal Decree on Immigration. For further discussion see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

968 GemCom instructions, p. 14.

969 See also Chapter 3, Section 4 *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Subparagraph 4.3.1.1 *Impact of registration formalities on residual social assistance in general*.

970 This refers to the *Openbaar Centrum voor Maatschappelijk Welzijn* (OCMW) / *Centre Public d'Action Sociale* (CPAS)

971 See also Chapter 3, Section 4 *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Subparagraph 4.3.1.1 *Impact of registration formalities on residual social assistance in general*.

972 Namely the register of foreigners. See further Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

973 Interview with municipality C, 13 December 2019; interview with VVSG, 3 April 2020.

974 Art. 51 §1, Royal Decree on Immigration.

975 Royal Decree of 16 July 1992 concerning the population registers and the foreigners' register, art. 12, 5° (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers/ Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister*).

976 This refers to the *Vereniging van Vlaamse Steden en Gemeenten*.

for the applicant to still submit the necessary proof in the additional one-month period.<sup>977</sup> For example, deletion from the foreigners' register sometimes leads to the deactivation of their personal identification number which in turn means they are unable to obtain any certificates from social security institutions which may be needed to support an application for registration.<sup>978</sup> It is therefore recommended to amend the GemCom Instructions, to ensure that EU citizens and their family members are not removed from the foreigners' register during the additional one-month period for submission of documents.

Another issue concerns the change of status. According to the GemCom Instructions, if an EU citizen changes their status (e.g. from worker to self-employed, or from jobseeker to worker) within three months following the submission of an application for registration, then the certificate of application (Annex 19) should simply be amended accordingly.<sup>979</sup> However, according to the GemCom Instructions,<sup>980</sup> if a change of status occurs more than three months after the application was submitted but before a decision is taken, a new application should be submitted – starting a new deadline of six months.<sup>981</sup> It is therefore recommended to amend the GemCom Instructions, to require municipalities to inform applicants about the consequences of a change of status. For example, if an applicant decides to a change of status on the certificate of application (Annex 19), the applicant should be clearly explained how much time is left to collect the required documentation. Here, the applicant should also be explained the consequences of submitting an incomplete file. At the same time, the applicant should be informed about the consequences of the alternative option; restarting the registration procedure. In that case, the applicant will have more time to collect the required documents but a new (more recent) date of application will be set, which pushes back the starting date of the

residence period in Belgium.<sup>982</sup> Hence, the applicant should be given both options, to change their status on the certificate of registration (Annex 19) or re-start the registration procedure, to make an informed decision.

It is questionable whether this complies with EU law, given that that the three-month deadline for the submission of supporting documents is not foreseen in EU law, that EU citizens should immediately be issued with a registration certificate and that such a document only has declaratory value.<sup>983</sup> The VVSG highlighted that this instruction to require a new application to be filed can have significant consequences for legal deadlines, social rights, as well as the possible registration of family members.<sup>984</sup> Even though this particular issue was not raised during interviews with municipalities, various municipalities did confirm that in such cases it is common practice for EU citizens and their family to submit a new application, rather than submitting an appeal following a negative decision.<sup>985</sup>

## 5.3 Documents required for registration of residence



We will now turn to an analysis of the documents which are required in respect of each category of EU worker, self-employed person and jobseeker as well as EU family members as part of the registration procedure. This essentially relates to the documentation which is required to establish whether a person qualifies as a worker, self-employed person, jobseeker or family member.

Since non-EU family members are required to provide these documents earlier in the registration procedure, the analysis of document requirements for non-EU family members can be found in Section 3 relating to the application phase.<sup>986</sup>

977 Interview with VVSG, 3 April 2020.

978 See for example, as regards a self-employed person, RvV/CCE, judgment No 190 518 of 8 August 2017. See for further discussion Chapter 3, Section 4 *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Subparagraph 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

979 One municipality has indicated that, arguably due to an increase in social fraud, the Immigration Office has put additional requirements into place before a municipality is authorized to make amendments to the Annex 19. Namely, an identity check by the local police and an examination of the employment contract or a check with the Crossroads Bank for Enterprises by an official of the Immigration Office. Until these verifications have been executed, the EU citizen is given an Annex 3ter (Myria workshop, 6 July 2021).

980 Immigration Office, Syllabus (3 June 2021), p. 150 (NL) / p. 167 (FR).

981 Ibid.

982 The date of application will mark the start of the residence period in Belgium, which is relevant for a potential future application for permanent residence. Hence, if the starting date of the application for registration is re-set, the applicant may "lose" the months that have passed up until that point.

983 For a discussion on this point, see Chapter 1, Section 4 *EU law relating to registration formalities*, Subsection 4.1 *The nature of registration formalities*.

984 Interview with VVSG, 3 April 2020.

985 Interview with municipality C, 13 December 2019; municipality H, 17 December 2019; municipality I, 5 December 2019.

986 See Sub-section 3.4 of this Chapter.

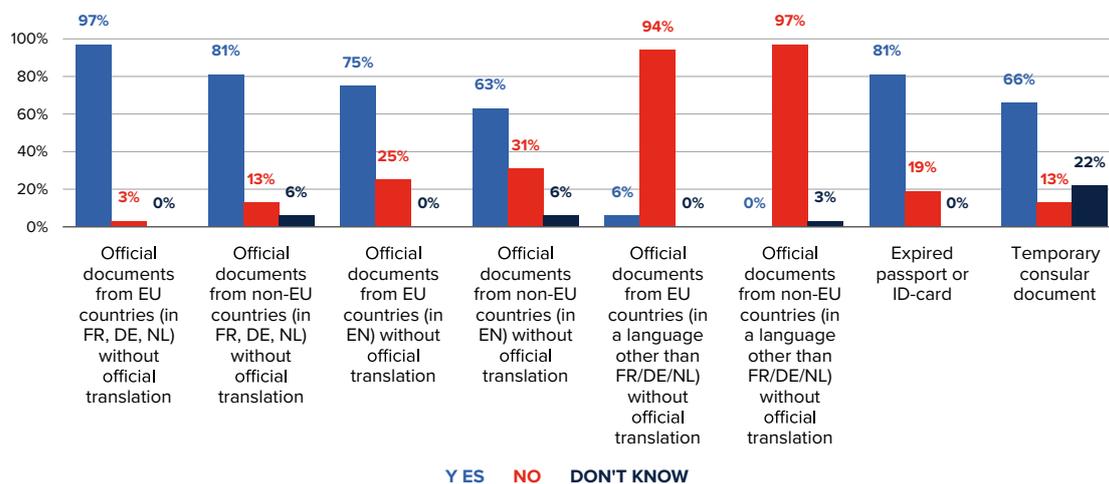
### 5.3.1 Type of documents accepted by municipalities as part of the registration procedure

As explained in Chapter 1 of this report,<sup>987</sup> official certificates which are issued by administrations abroad are generally required to be legalised (unless exempted) and accompanied by an official translation.

When analysing whether official documents are accepted as part of the application for registration (see Graph 7), almost all municipalities included in this study (97%) accept such documents when they are issued by public authorities of the other Member States in French, Dutch or German without needing an official translation. Official documents issued in these languages by third countries are accepted by 81% of the municipalities. Official documents issued in English, without an official translation, are also accepted by the majority of municipalities when issued by EU Member States (75%) as well as third countries (63%). Whenever official documents are submitted in a language other than Dutch, French, German or English few municipalities will accept these from EU Member States without an official translation (6%) and none will accept such documents without an official translation from third countries. Lastly, most municipalities accept expired identity cards or passports (81%) and temporary consular documents (66%).

### 5.3.2 Documents required from workers

The majority of surveyed municipalities confirmed that an employment contract or certificate of employment (Annex 19bis) is required from all categories of EU workers (see Table 7), as foreseen by the law<sup>988</sup>. Furthermore, the majority of municipalities confirm that payslips are either optional or not necessary to submit with the application for registration; Belgian rules indeed do not include such a requirement for EU workers. Documentary requirements seem to be interpreted more strictly by municipalities whenever it concerns EU workers with an employment contract of limited duration (<3 months), limited working hours (<12 hours) or an employment contract without fixed hours. These deviating responses may be explained by the findings in Section 3.1 of this Chapter relating to the processing of applications, where municipalities displayed a tendency to register such categories of EU workers under the status of jobseeker rather than worker. One municipality indicated in the survey that workers with an employment contract of up to 3 months will not be registered but they will receive a so-called temporary “BIS number”<sup>989</sup> and be issued with a declaration of presence



Graph 7 - Documents accepted by municipalities as part of the registration procedure (in order to obtain an Annex 8 (EU card)/9)

987 For further discussion on decision-making, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

988 Art. 50 §2, 1°, Royal Decree on Immigration.

989 The BIS number is a unique identification number for individuals who are not registered in the National Register, but who still have a relationship with the Belgian authorities and enables a person’s social security information to be tracked; see further BOSA Federal Public Service: <https://dtservices.bosa.be/fr/services/fsb/catalogue/personservices-s034/information-personservices-s034#Le%20Registre%20BIS> (last accessed 29 January 2021).

(Annex 3ter).<sup>990</sup> This does not appear to be in keeping with the EU rules given that the status of worker does not place any requirements as regards the minimum duration of an employment relationship.<sup>991</sup> The worker concerned will also not be able to prove their residence status in Belgium which might be a source of difficulties in their interactions with private service providers such as banks.

As regards frontier workers<sup>992</sup>, who live in Belgium but work in another Member State (see Table 8), it was somewhat surprising to observe that a majority of studied municipalities did not consider it appropriate to ask for any certificate of affiliation to the social security system (Form A1)<sup>993</sup> in the Member State of work (66%) or for a certificate attesting to healthcare coverage in the Member State of work (Form S1)<sup>994</sup> (63%). This may indicate a lack of awareness of the harmonised documentation issued under the EU rules on the coordination of social security. Nonetheless, it should be emphasised that there is no legal requirement under the Citizens Rights Directive for frontier workers to provide this documentation given that they would be assessed as self-sufficient persons possessing sufficient resources and comprehensive sickness insurance for which no means of proof are specified.<sup>995</sup>

As regards posted workers<sup>996</sup>, who are sent to work in Belgium in order to perform a service on behalf of their employer on a temporary basis, a majority of municipalities (56%) will require them to provide an employment contract or Annex 19bis. Only 31% of municipalities will require a posted worker to provide a Form S1<sup>997</sup>, while 88% will require the posted worker to provide Form A1.<sup>998</sup> Again, these findings may indicate that there is a lack of awareness of the harmonised documentation issued

under the EU rules on the coordination of social security. As far as EU workers are concerned, the Immigration Office indicated that it received most questions from municipalities on the documentary requirements for posted workers.<sup>999</sup>

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990 An Annex 3ter is issued under Art. 48 of the Royal Decree on Immigration in respect of EU citizens and their family members who are required to notify the municipality of their presence under Art. 41bis of the Belgian Immigration Law, when staying in Belgium for a period of no more than three months and not staying in a hotel or other touristic establishment. It is also issued to frontier workers who work in Belgium but reside in another Member State.

991 For further discussion on workers, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.1 *Workers*.

992 For further discussion on frontier workers, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.3 *Frontier workers*.

993 Under the EU rules on the coordination of social security, proof of affiliation with the social security system of another Member State is established by furnishing Portable Document A1 (statement of applicable legislation) which is issued by the social security system to which the frontier and/or posted worker is affiliated.

994 Portable Document S1 (registering for healthcare cover) is a certificate of entitlement to healthcare confirming which Member State is responsible for meeting the healthcare costs of the frontier and/or posted worker in question and allows that person to register with the Belgian healthcare system.

995 See further Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.3 *Frontier workers*.

996 For further discussion on posted workers, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.2 *Posted workers*.

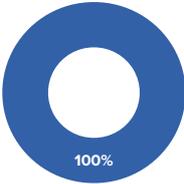
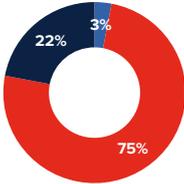
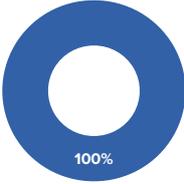
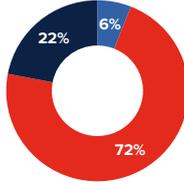
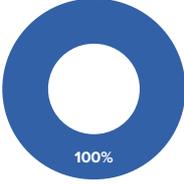
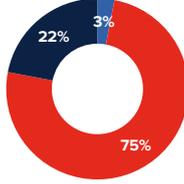
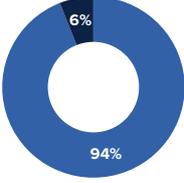
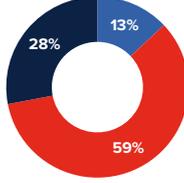
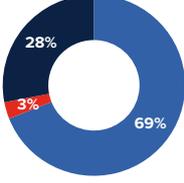
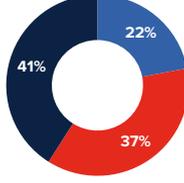
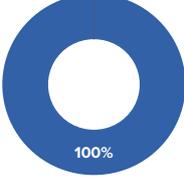
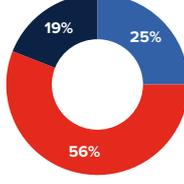
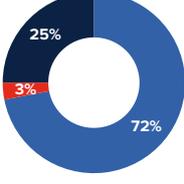
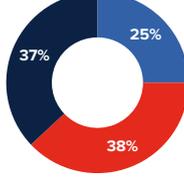
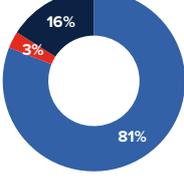
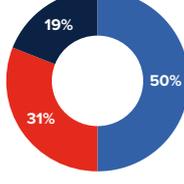
997 For an explanation, see n 994.

998 For an explanation, see n 993.

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999 Interview with Immigration Office, 25 May 2020.

Table 7 - Documents required from EU workers

	Employment contract or Annex 19bis	Payslip(s)	Other documents
Full-time worker (permanent contract)			NA
Full-time worker (contract with a duration of 1 year or more)			NA
Full-time worker (contract with a duration of 6 months)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment</li> </ul>
Full-time worker (contract with a duration of 3 months)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment</li> </ul>
Full-time worker (contract with a duration of less than 3 months)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment</li> </ul>
Part-time worker (more than 12 hours per week)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment</li> <li>› Proof of number of working hours per week</li> </ul>
Part-time worker (less than 12 hours per week)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment or new employment</li> <li>› Proof of number of working hours per week</li> <li>› Proof of sufficient resources</li> </ul>
Agency/interim workers (contract without fixed hours)			<ul style="list-style-type: none"> <li>› Proof of possible prolongation of employment or new employment</li> <li>› Proof of number of working hours per week</li> <li>› Proof of registration as jobseeker or with a job agency</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

As far as interns are concerned (see Table 8<sup>1000</sup>), the majority of surveyed municipalities require remunerated interns to provide an employment contract or Annex 19bis to be registered, as is the case for all other EU workers under the law.<sup>1001</sup> However, about a quarter of municipalities will also require payslip(s), even though this is not a legal requirement. One municipality indicated to either register interns as a worker or a self-sufficient person, based on their circumstances.<sup>1002</sup> Hence, in this case, interns will be asked to provide a contract or Annex 19bis as well as proof of EU citizenship (when registered as a worker) or proof of comprehensive sickness insurance, sufficient resources and proof of EU citizenship (when registered as a self-sufficient). As previously discussed in Section 3.1 of this Chapter (see also Graph 4), there is significant divergence between municipalities as to how they will process interns, as not all municipalities will consider them to be EU workers. These findings also explain the reason that at least one municipality indicated they required additional documents from interns, such as proof of comprehensive sickness insurance or proof of sufficient resources.

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1000 One municipality did not complete the question on required documents for the various categories of interns listed in the survey, therefore the data of required documentation for interns applying for residence represents the answers of 31 rather than 32 municipalities.

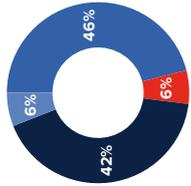
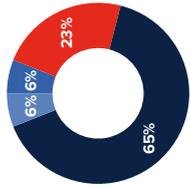
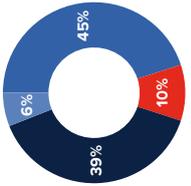
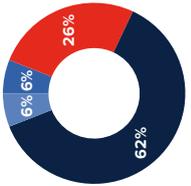
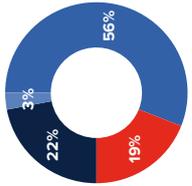
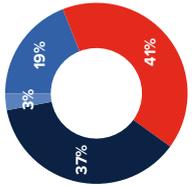
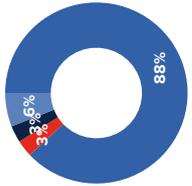
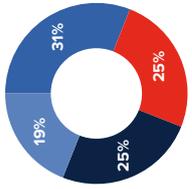
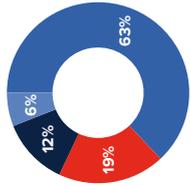
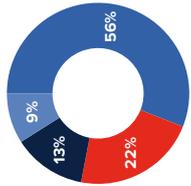
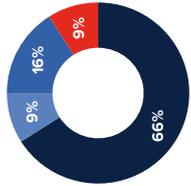
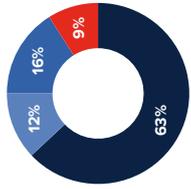
1001 Art. 50 §2, 1°, Royal Decree on Immigration.

1002 As a result, the data on required documentation of interns in Table 8 represents the results of 31 municipalities, instead of the usual 32 respondents.

Table 8 - Documents required from interns (out of 31 municipalities), posted workers and frontier workers

	Work contract or Annex 19bis	Payslip(s)	Form A1	Form S1	Other documents
Paid interns (contract with a duration of 6 to 12 months)			NA	NA	<ul style="list-style-type: none"> <li>&gt; Internship contract</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>
Paid interns (contract with a duration of 3 to 6 months)			NA	NA	<ul style="list-style-type: none"> <li>&gt; Internship contract</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>
Paid interns (contract with a duration of less than 3 months)			NA	NA	<ul style="list-style-type: none"> <li>&gt; Internship contract</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> <li>&gt; Proof of employment upon completion of internship</li> </ul>
Paid interns (contract with an EU institution)			NA	NA	<ul style="list-style-type: none"> <li>&gt; Internship contract</li> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>

**NECESSARY** **OPTIONAL** **NOT REQUIRED** **DON'T KNOW**

	Work contract or Annex 19bis	Payslip(s)	Form A1	Form S1	Other documents
Unpaid interns who receive benefits in kind (e.g. lunch vouchers, travel allowance)			NA	NA	<ul style="list-style-type: none"> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>
Unpaid interns or volunteers			NA	NA	<ul style="list-style-type: none"> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>
Posted workers					<ul style="list-style-type: none"> <li>&gt; Limosa certificate<sup>1003</sup></li> </ul>
Frontier workers					<ul style="list-style-type: none"> <li>&gt; Proof of health insurance</li> <li>&gt; Proof of sufficient resources</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

<sup>1003</sup> This is a compulsory notification which employers are required to make in respect of any posting of workers in Belgium. For further discussion, see Chapter 1, Posted workers, section 3.2.

### 5.3.3 Documents required from self-employed persons

All municipalities included in this study indicated that they will register EU self-employed persons with a business registration in Belgium under the category of self-employed. According to Belgian legislation, EU self-employed persons need to provide proof of business registration and proof of enrolment with a social security institution in Belgium.<sup>1004</sup>

The survey results confirm that municipal practice is in line with these rules, given that all municipalities confirmed they require proof of business registration with the Belgian business registry (*Kruispuntbank voor ondernemingen/Banque-carrefour des entreprises*). The majority of municipalities also require proof of enrolment with a social security institution in Belgium (97%), which is provided directly by the social insurance fund to the municipality.<sup>1005</sup> While the Immigration Office requires the proof of enrolment with a social security institution to be provided directly by the institution itself<sup>1006</sup>, the law does prescribe that this document is to be provided by the applicant.<sup>1007</sup> For EU self-employed persons whose business is registered in Belgium, municipalities confirm that they do not require additional documents.

The survey results indicate that EU citizens who work in a self-employed capacity in Belgium but who have their business registration in another Member State will have to provide additional documentation as part of their application for registration compared to EU citizens who work as self-employed persons in Belgium with their business registration in Belgium (see Table 9).

There are two distinct situations where an EU self-employed person may seek to register while retaining their business registration in another Member State.<sup>1008</sup> One situation concerns cross-border self-employed persons who wish to take up residence in Belgium while continuing to physically work in another Member State. In such a case, the person should be registered as a self-sufficient person. The other possibility concerns posted self-employed persons who undertake a posting to Belgium lasting up to two years. In this latter situation, until 20 May 2021, the person needed to be registered as a self-employed person.<sup>1009</sup>

As far as EU self-employed persons with their business registration in another EU member state are concerned, about two thirds of municipalities (66%) will require them to provide proof of their business registration. However, only 38% of municipalities will ask for proof of enrolment with a social security institution in another EU Member State<sup>1010</sup> and only 41% will require a certificate of entitlement to healthcare in another EU Member State.<sup>1011</sup> This is surprising when we consider that both cross-border and posted self-employed persons remain affiliated with the social security system of another Member State. Such a practice can partly be explained by the survey results discussed in section 3.2.2 regarding the status under which these categories of EU workers are registered, given that a large majority of the municipalities (85%) will register EU self-employed persons with business registration in another EU Member State as self-sufficient persons.

Furthermore, when looking at the remaining documents that may be requested from EU self-employed persons, it is evident that those with their business registration in another EU Member State will often be asked to provide additional documents such as recent invoices (47%), recent bank statements (44%), proof of enrolment with a Belgian healthcare insurance fund (53%), other company registration documents (12%) or tax declarations (31%).<sup>1012</sup>

1004 Art. 50 § 2<sup>2</sup>, Royal Decree on Immigration.

1005 Interview with municipality G, 4 December 2019.

1006 GemCom instructions.

1007 Art. 50 § 2, 2<sup>o</sup>, Royal Decree on Immigration.

1008 See also Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.4 *Self-employed persons*.

1009 Since 20 May 2021, the Immigration Office has instructed municipalities to register posted self-employed persons as self-sufficient. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.4 *Self-employed persons*.

1010 Portable Document A1 (statement of applicable legislation) which is issued by the social security system to which a self-employed person is affiliated.

1011 Portable Document S1 (registering for healthcare cover) is a certificate of entitlement to healthcare confirming which Member State is responsible for meeting the healthcare costs of the frontier worker in question and allows that person to register with the Belgian healthcare system.

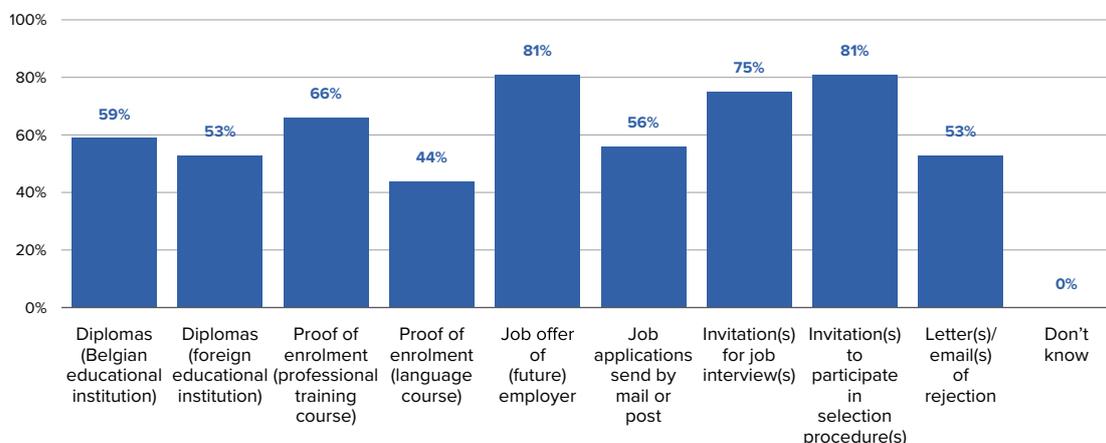
1012 For further discussion, Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.4 *Self-employed persons*.

Table 9 - Documents required from EU self-employed (business registration in Belgium/other EU MS)

	Business registration in Belgium	Business registration in other EU MS
<p><b>In Belgium:</b>  <b>Registration with business registration (<i>Kruispuntbank voor ondernemingen/Banque-carrefour des entreprises</i>)</b></p> <p>In other EU MS:                      Registration with business registration in another EU member state</p>		
<p><b>In Belgium:</b>  <b>Proof of enrolment with social security institution</b></p> <p>In other EU MS:                      Proof of enrolment with social security institution in another EU member state (form A1)</p>		
Invoices issued for past months		
Bank statements for past months		
Other EU MS: Proof of health insurance in another EU member state (form S1)	NA	
Other EU MS: Proof of health insurance in Belgium	NA	
(Other) company registration documents		
Tax declaration		

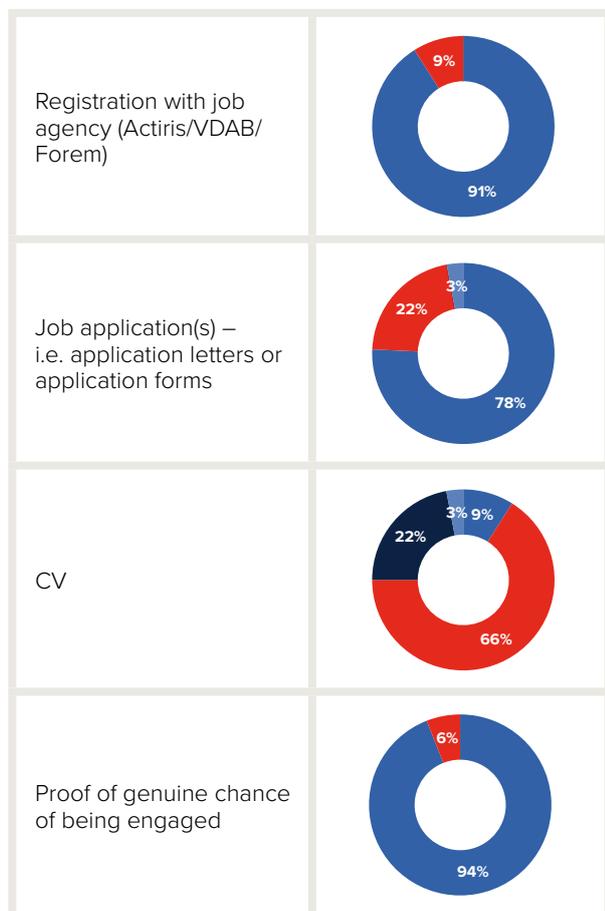
NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

### 5.3.4 Documents required from jobseekers



Graph 8 - Documents accepted by municipalities to prove a genuine chance of being engaged

Table 10 - Documents required from EU jobseekers



NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

All surveyed municipalities confirm that jobseekers are able to register for residence beyond three months (see section 3.2.3). Almost all municipalities require both registration with a public employment agency (91%), proof of job applications (78%) as well as proof of a genuine chance of being engaged (94%), in line with legal requirements (see Table 10).<sup>1013</sup> It should be noted that municipalities were unable to specify in the survey whether either proof of registration with a public employment agency or proof of job applications is required, as prescribed by the Royal Decree on Immigration.<sup>1014</sup>

As shown in Graph 8, the studied municipalities accept<sup>1015</sup> a wide variety of documents to prove the existence of a genuine chance of being engaged. Most municipalities (81%) confirm to accept job offers from (future) employers as well as invitations to take part in selection procedures as proof of a genuine chance of being engaged. Also, invitations for job interviews (75%) as well as proof of enrolment in a professional training course are accepted by the majority of municipalities (66%). It is interesting to note here that municipalities with a lower number of residing EU nationals were less likely to accept the listed documents as proof of a genuine chance of being

<sup>1013</sup> Art. 50 §2, 3°, Royal Decree on Immigration.

<sup>1014</sup> Ibid.

<sup>1015</sup> Municipalities gather the documents for the application for registration of jobseekers and may advise them on what documents to provide. However, the application will be assessed on the merits by the Immigration Office, who decides on the application for registration of jobseekers.

engaged.<sup>1016</sup> It should also be observed that the rules on the registration of jobseekers will have to be amended in light of the recent ruling of the Court of Justice which suggests that proof of a genuine chance of being engaged cannot be required when jobseekers register.<sup>1017</sup>

### 5.3.5 Documents required from EU family members

As far as concerns the spouses and partners of an EU citizen who themselves hold the nationality of a Member State, great diversity can be observed at the municipal level as to the documents which are required for registration (see Table 11).

The majority of municipalities included in this study indicate that a registered partnership certificate will be required from recognised registered partners (97%) and registered partners whose union is not considered equivalent to marriage (69%). Likewise, all municipalities confirm that a marriage certificate is required from EU spouses.<sup>1018</sup>

Even though the law does not require such proof to be furnished<sup>1019</sup>, four municipalities indicated that documents proving prior cohabitation were required from registered partners whose union is recognised as equivalent to marriage. One municipality indicated to require witness statements by third parties from registered partners whose union is recognised as equivalent to marriage. By contrast, these proofs could legitimately be requested from registered partners whose union is not recognised as equivalent to marriage<sup>1020</sup> as well as from unmarried partners<sup>1021</sup> in order to establish the durable and stable nature of their relationships.

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1016 At least one municipality in the interviews expressed the wish to receive more guidance from the Immigration Office as to what “proof of a genuine change of being engaged” can consist of (Interview with municipality I).

1017 Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037; see further Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.5 *Jobseekers*.

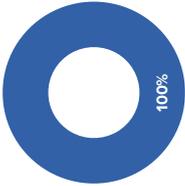
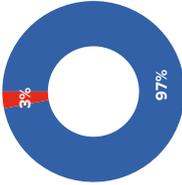
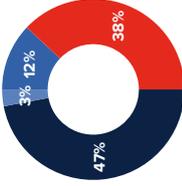
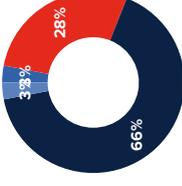
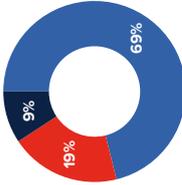
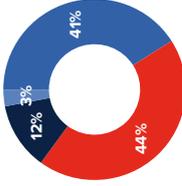
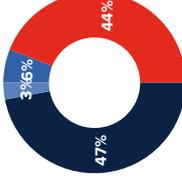
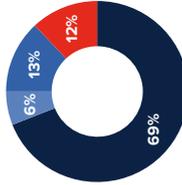
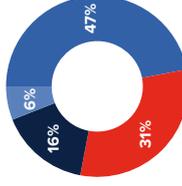
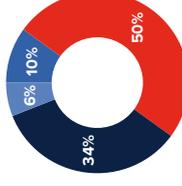
1018 Art. 50 §2, 6°, a), Royal Decree on Immigration.

1019 Art. 40bis §2, 1°, Belgian Immigration law.

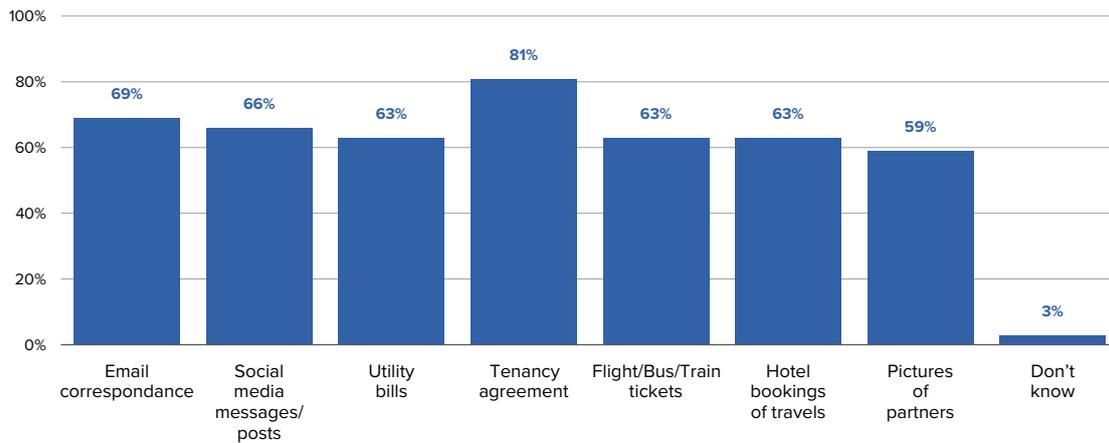
1020 Art. 40bis §2, 2°, Belgian Immigration law. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

1021 Art. 47/3 §1, Belgian Immigration law. For further discussion, see Chapter 1, Section 3 *Personal scope of the study*, Subsection 3.6 *Family members*.

Table 11 - Documents required from EU family members

	Marriage certificate	Registered partnership certificate	Proof of prior cohabitation	Witness statements from third parties	Other documents
Spouse		NA	NA	NA	NA
Recognized registered partner (a partner with registered partnership considered equivalent to a marriage in Belgium)	NA				NA
Registered partner (a partner with registered partnership not considered equivalent to a marriage in Belgium)	NA				<ul style="list-style-type: none"> <li>&gt; Proof of a durable relationship</li> <li>&gt; Birth certificate of child in common (if applicable)</li> </ul>
Unmarried and unregistered partner in a <u>durable relationship</u>	NA				<ul style="list-style-type: none"> <li>&gt; Proof of a durable relationship</li> <li>&gt; Birth certificate of child in common (if applicable)</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW



Graph 9 - Documents accepted by municipalities to prove prior cohabitation

In line with legal requirements,<sup>1022</sup> municipalities accept a wide variety of documents to prove prior cohabitation (see Graph 9). Nevertheless, surveyed municipalities with a lower number of resident EU citizens tend to accept fewer documents as proof of prior cohabitation than municipalities with a higher number of EU citizens.

A similar diversity in municipal practices can be observed when analysing the documents which are required from other family members of EU citizens who also hold the nationality of a Member State (see Table 12). In accordance with legal requirements<sup>1023</sup>, the majority of municipalities included in this study require proof of dependency from descendants of the EU citizen (81%) or those of their partner or spouse (88%) when the descendant in question is over the age of 21 years. Additionally, all surveyed municipalities require a birth certificate from the EU family member as proof of relationship.<sup>1024</sup>

In similar fashion, the majority of municipalities also require dependent ascendants of the EU citizen (81%) or those of their spouse or partner (88%) to provide proof of dependency. Likewise, most municipalities will require other EU family members who are dependent on the EU citizen (91%), who form part of the EU citizen's household (59%), or those who rely on the personal care of an EU citizen on serious health grounds (72%) to provide proof

of their dependency. These requirements appear to be in line with the Belgian rules.<sup>1025</sup>

The analysis of survey results discussed in Section 3.2.4 of this Chapter has already shown that some municipalities do not accept applications for registration to be submitted by other family members who are EU citizens and who either are dependent on an EU citizen, or form part of the EU citizen's household, or are dependent on the EU citizen on health grounds. Some respondents indicated not knowing whether their municipality accepts applications from these categories of EU family members. These results may partially explain the divergent approach taken by municipalities as regards documentary requirements which apply to these categories of other EU family members.

<sup>1022</sup> For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.5 *Documentary requirements*, Paragraph 5.5.4 *Specific provisions on documentary requirements: family members*.

<sup>1023</sup> Art. 40bis §2, 3° and 4° and Art. 47/1, 4°, Belgian Immigration law.

<sup>1024</sup> Art. 8 (5) (b), Directive 2004/38, and Art. 40bis §2, 3, Belgian Immigration Law.

<sup>1025</sup> Art. 40bis and Art. 47/3, Belgian Immigration Law.

Table 12 - Documents required from EU family members

	Birth certificate of the EU sponsor	Birth certificate of family member	Proof of dependency	Other documents
Descendant of EU citizen (under 21)	NA			<ul style="list-style-type: none"> <li>› Permission from other parent</li> </ul>
Descendant of EU citizen (21 years or older)	NA			NA
Descendant of spouse/partner of EU citizen (under 21)	NA			<ul style="list-style-type: none"> <li>› Permission from other parent</li> <li>› Marriage certificate or other proof of relationship</li> </ul>
Descendant of spouse/partner of EU citizen (21 years or older)	NA			<ul style="list-style-type: none"> <li>› Marriage certificate or other proof of relationship</li> <li>› Permission from other parent</li> <li>› Income EU sponsor</li> </ul>
Dependent ascendant of EU citizen				<ul style="list-style-type: none"> <li>› Income EU sponsor</li> </ul>
Dependent ascendant of spouse/partner of EU citizen				<ul style="list-style-type: none"> <li>› Marriage certificate or other proof of relationship</li> <li>› Income EU sponsor</li> </ul>
Other family member that is dependent on the EU citizen's household				<ul style="list-style-type: none"> <li>› Proof of relationship</li> <li>› Proof of membership household</li> <li>› Proof of custody</li> </ul>
Other family member that is dependent on EU citizen				<ul style="list-style-type: none"> <li>› Proof of relationship</li> <li>› Income EU sponsor</li> <li>› Proof of membership household</li> </ul>
Other family member that is dependent on EU citizen (on health grounds)				<ul style="list-style-type: none"> <li>› Medical certificate</li> <li>› Proof of relationship</li> </ul>

NECESSARY    OPTIONAL    NOT REQUIRED    DON'T KNOW

### 5.3.6 Accelerated procedure to obtain a decision

None of the municipalities indicated the existence of an accelerated procedure leading to an expedited decision as such. However, one municipality confirmed that part of the procedures can be accelerated, for example for pregnant women. In this case, the application for registration (to obtain an Annex 19/19ter) can be completed within 5 working days, after which the verification of domicile will be conducted.<sup>1026</sup> Yet another municipality reported that the police can be contacted to request a rapid verification of domicile, to speed up the registration procedure.<sup>1027</sup> Practical experience from immigration law practitioners does suggest that informal follow-up with the Immigration Office, after submitting a complete application file, may sometimes lead to accelerated processing of the registration request.<sup>1028</sup> However, this is not standard practice and accelerated processing is not guaranteed and remains at the discretion of the authorities.

Finally, two examples were given above where municipalities offer registration services through an “expat counter” or “registration desk”. In practice, registration through these services are usually dealt with in an accelerated manner, compared to the regular registration procedure (see Box 6 and Box 7).

### 5.3.7 Costs and accelerated procedure to obtain issuance of a residence document

All municipalities confirmed that an Annex 8 (EU card) in paper version can be obtained free of charge. Municipalities charge between 18 and 28 euros for the electronic versions of the Annex 8 (E card/EU card) and Annex 9 (F card). It should be noted that municipalities have a discretion as to the amount that is charged.<sup>1029</sup>

The majority of surveyed municipalities (94%) confirmed that it is possible to request the expedited issuance of residence documents through an accelerated procedure once a decision has been taken to accept an application and register an EU citizen or their family member as the case may be. The analysis of municipal websites showed that most municipalities provide sufficient online information in this regard. Websites usually indicate the costs for an E card or F card as well as information about

the possibility (and additional costs) to obtain this card through an accelerated procedure.

The standard process for the issuance of an E card or F card usually takes between 2 to 3 weeks from the date on which the E or F card has been ordered, which can be done once a decision has been taken to register the EU citizen or their family member (or following its deemed acceptance if no decision is taken within the six-month deadline). The foreign national can opt for the urgent procedure whereby the card can be issued within 1 to 2 working days. However, the costs are significantly higher compared to the ordinary process, approximately 150 euros.<sup>1030</sup>



## 6. Applications for permanent residence

EU citizens, as well as their family members, who have resided in Belgium for five consecutive years, can apply for a permanent residence document.<sup>1031</sup> All municipalities included in this study provide this information upon request by phone, email or in person. However, few municipalities actively provide this information, for instance during the first appointment for registration (16%) or upon issuing a certificate of application (Annex 19 or Annex 19ter) (13%) or residence document (paper-based Annex 8, electronic E card/EU card or F card) (28%). Some municipalities do however act proactively: one municipality indicated sending an email and six municipalities confirmed sending a letter to the EU citizens and their family members once they have resided in Belgium for five consecutive years (see Graph 10).

<sup>1026</sup> Interview with municipality G, 4 December 2019.

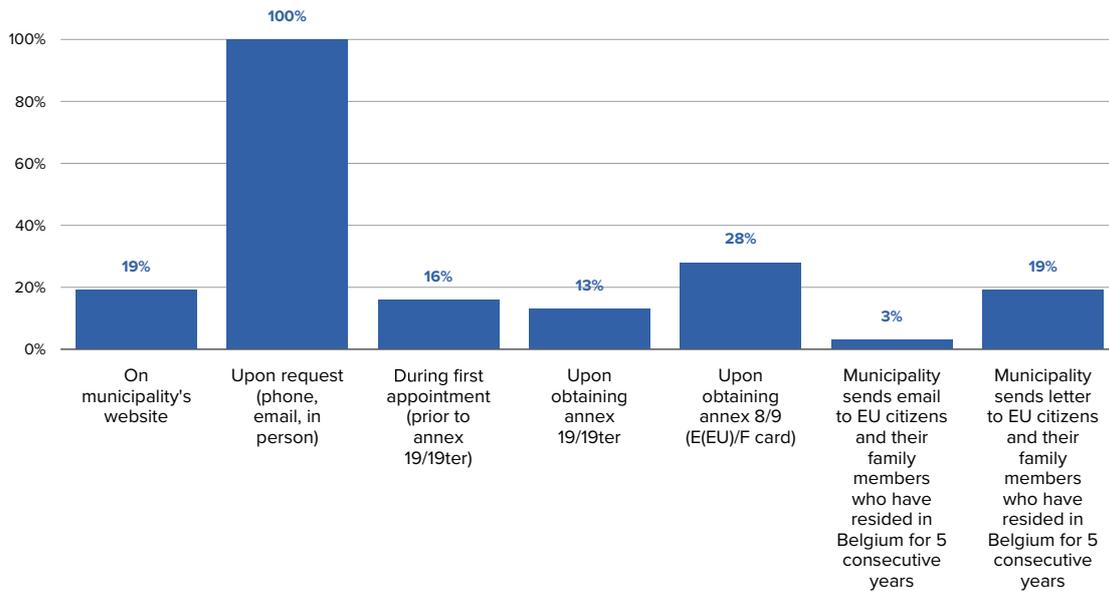
<sup>1027</sup> Interview with municipality J, 14 January 2020.

<sup>1028</sup> This informal practice has been confirmed by law firm Fragomen.

<sup>1029</sup> See further Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.4 *Fees for residence documents*.

<sup>1030</sup> Based on survey responses, website research and practical experience from law firm Fragomen.

<sup>1031</sup> Art. 42quinquies, Belgian Immigration Law.



Graph 10 - Information provided about the right to permanent residence and the right to obtain an Annex 8bis/E+ card (EU+ card) or an Annex 9bis/F+ card

## 6.1 Documents required for permanent residence

Upon receiving an application for permanent residence, 66% of surveyed municipalities will not require additional documents to be submitted if the national register shows that the applicant has resided in Belgium for five consecutive years. Almost one third of municipalities require a copy of a valid passport or identity card (31%); only one municipality indicated it will ask the applicant to provide supplementary documents, in addition to the information contained on the national register (3%).

## 6.2 Processing of applications for permanent residence

The average waiting time for EU citizens to obtain an Annex 8bis (E+ card/EU+ card) and for non-EU family members to obtain an Annex 9bis (F+ card) in most

surveyed municipalities is exactly five months (91%), which corresponds to the legal deadline under Belgian law<sup>1032</sup>. As noted in Chapter 1, however, this legal deadline does not appear to comply with the obligation under EU law to issue the document certifying permanent residence to EU citizens “as soon as possible”.<sup>1033</sup> This may cause a particular problem for non-EU family members in this regard, as during the time they are awaiting a decision to be made they will only be provided with a temporary residence document (Annex 15) which does not entitle them to travel outside of Belgium.

In all municipalities included in this study, an Annex 8bis (EU+ card) in paper format can be obtained free of charge. The costs for both the E+ card/EU+ card and F+ card range from 18 to 28 euros depending on the municipality. Only three municipalities reported that there is an accelerated procedure available in order to obtain a permanent residence document in paper version (Annex 8bis), the majority of municipalities indicated that there is an accelerated procedure to obtain an E+ card/EU+ card or F+ card (75%). This accelerated procedure applies to the issuance of permanent residence documentation once a decision has been taken to accept an application for permanent residence. Similar to the accelerated procedure to obtain an E/F card, an additional fee (of

<sup>1032</sup> For further discussion, see Chapter 1, Section 6 *Obtaining permanent residence in Belgium*.

<sup>1033</sup> Art. 19(2), Directive 2004/38.

approximately 150 euros) is charged for an urgent request to obtain an E+/F+ card.<sup>1034</sup>

## 7. Notification of appeal rights

The survey also inquired about the information provided by municipalities following a negative decision. In case of rejection of an application for registration, the Citizens Rights Directive requires EU citizens and their family members to be informed of their right of appeal and the deadlines for doing so.<sup>1035</sup>

All municipalities reported that they inform applicants about the possibility to appeal a negative decision. The municipalities inform applicants of their right of appeal at the time when an applicant is notified of a negative decision. One municipality noted that it also provides such information upon request. Another municipality also provides this information at an earlier stage, during the application for registration. The majority of surveyed municipalities inform applicants of their right of appeal either during an appointment in person or by telephone (75%) or by means of a so-called Annex 20 (97%), which is the standard-form used when issuing a decision to refuse recognition a right of residence beyond three months.<sup>1036</sup> One municipality indicated that it makes use of an informational leaflet to inform the applicant about the possibility to appeal, which is sent together with the negative decision.

Furthermore, 63% of the municipalities included in this study reported that they also inform applicants about the possibility to receive legal assistance, all of which do so during an appointment in person or by telephone. One municipality indicated that it sends an explanatory flyer with the negative decision, to inform the applicant about the right to appeal. Most surveyed municipalities inform applicants about the possibility to receive legal assistance from a lawyer (59%), two municipalities refer applicants to the Immigration Office (6%), while twelve municipalities refer them to “other organisations” (38%) in case they require further assistance.

<sup>1034</sup> Based on survey responses, website research and practical experience from law firm Fragomen.

<sup>1035</sup> For further discussion, see Chapter 1, Section 7 *Procedural safeguards and appeal rights*.

<sup>1036</sup> Art. 51, Royal Decree on Immigration.

The survey also inquired what organisations and institutions the applicant would be referred to by their municipality. Over a third of municipalities (38%) refer the applicant to the local bar association. None of the municipalities indicated that they were aware of EU-wide initiatives - such as Your Europe Advice<sup>1037</sup> or SOLVIT<sup>1038</sup> - or local initiatives such as the EU Rights Clinic’s Expulsion Helpdesk<sup>1039</sup>. Municipalities had the possibility to indicate which local or national organisations they would refer applicants whose application was refused. In this respect, 31% indicated that applicants who requested further assistance would be directed to contact organisations such as ADDE<sup>1040</sup>, SAMPA asbl<sup>1041</sup> and Ciré<sup>1042</sup> as well as other local organisations providing legal services. The inclusion of the Immigration Office as an option in the survey relating to sources of further legal assistance in case of a negative decision, was based on the researchers’ prior experience that some municipalities were actually engaging in this practice - and was thus intended to verify this.

The Immigration Office indicated that these questions could give the impression that it provides legal assistance to (EU) citizens and emphasised that a refusal decision (Annex 20) contains the information which is required by law as regards the court where the appeal may be filed and the deadline for doing so. In this respect, the Immigration Office emphasised that it is not within its role or mandate to provide legal assistance to applicants whose applications are refused. The Immigration Office also explained that there is no specific legal obligation incumbent upon the Immigration Office to refer applicants whose decisions have been refused to organisations which may be able to assist them in bringing an appeal.<sup>1043</sup> Nonetheless, it should also be observed there is nothing contained in Belgian law which would prevent the Immigration Office from providing links to other organisations on its website.

<sup>1037</sup> Your Europe Advice is an independent EU advisory service which provides free legal information to the public on their rights under EU law: <http://europa.eu/youreurope/advice>.

<sup>1038</sup> SOLVIT is the problem-solving network set up under the auspices of the Commission that aims to resolve instances of misapplication of EU law by the national administrative authorities: <http://ec.europa.eu/solvit>.

<sup>1039</sup> The EU Rights Clinic operates a helpdesk for EU citizens and their family members who have had their residence right refused or terminated: <http://www.europe4people.org/en/expulsion-helpdesk>.

<sup>1040</sup> L’Association pour le droit des étrangers: <http://www.adde.be>.

<sup>1041</sup> Service d’accompagnement des primo-arrivants <http://www.molenbeek-irisnet.be/fr/je-vis/social-sante/social/Molenbeek-Vivre-Ensemble-%28MOVE%29>.

<sup>1042</sup> Coordination et initiatives pour réfugiés et étrangers: <https://www.cire.be>.

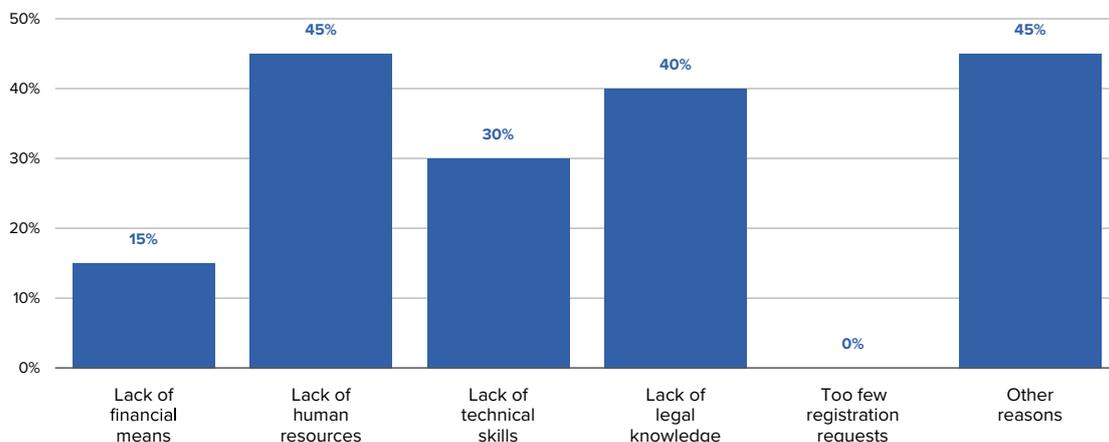
<sup>1043</sup> Interview with Immigration Office, 25 May 2020; written communication from Immigration Office, 26 May 2020.

# 8. General functioning of key actors in the registration procedure

Both the survey and the interviews provided invaluable insights into the functioning of municipalities concerning the registration of EU workers, self-employed persons, jobseekers and their family members. This part aims to provide a general overview of the challenges encountered, paying particular attention to human resources, online infrastructure, assistance and training for municipal officials. Where relevant, the functioning of actors at the federal level (most importantly the Immigration Office) is also considered. This section thus provides relevant background information, which helps to contextualise the analysis of the preceding sections of this Chapter.

## 8.1 Overview of challenges encountered at the municipal level

At the end of the survey, the municipalities were asked to reflect in a general way on the registration procedure



Graph 11 - Nature of the challenges at municipal level concerning the processing of registration requests

concerning EU workers, self-employed persons, jobseekers and their family members. The respondents were given various statements and could indicate whether they fully disagreed, disagreed, neither agreed nor disagreed, or agreed, or fully agreed with the statement (see Table 13); they could also add additional remarks. The statements with respect to human resources and training are discussed in the respective sections below (section 8.2 and section 8.5).

Table 13 - Reflections on municipal practices regarding the processing of registration requests for EU workers, self-employed persons, jobseekers and their family members



| FULLY DISAGREE
| DISAGREE
| NEITHER AGREE, NOR DISAGREE  
| AGREE
| FULLY AGREE

Three quarters of surveyed municipalities (75%) either agreed or fully agreed with the statement that their own practice concerning the processing of registration requests is in line with Belgian and European legislation. The remaining municipalities (25%) neither agreed nor disagreed with this statement. Out of the 75% which

agreed or fully agreed with the statement, 46% are Flemish municipalities, 29% are Brussels municipalities and 25% are Walloon municipalities. Nevertheless, throughout this Chapter, various non-compliant practices have been identified.

20 municipalities (63%) reported that they face challenges when it comes to processing applications for registration (see Graph 11). These 20 municipalities mostly reported a lack of human resources (45%) as well as a lack of legal knowledge (40%) as being the cause of most challenges at the municipal level. Other reasons were also mentioned, such as a lack of support or guidance from the Immigration Office and the complex nature of some applications.

When analysing the overall responses of municipalities to these statements,<sup>1044</sup> one can conclude that most Brussels municipalities gave a neutral reply (“neither agree, nor disagree”) to the statements while most Flemish municipalities agreed (“agree” or “fully agree”) with the statements. The Walloon municipalities represented a combination of various answers.

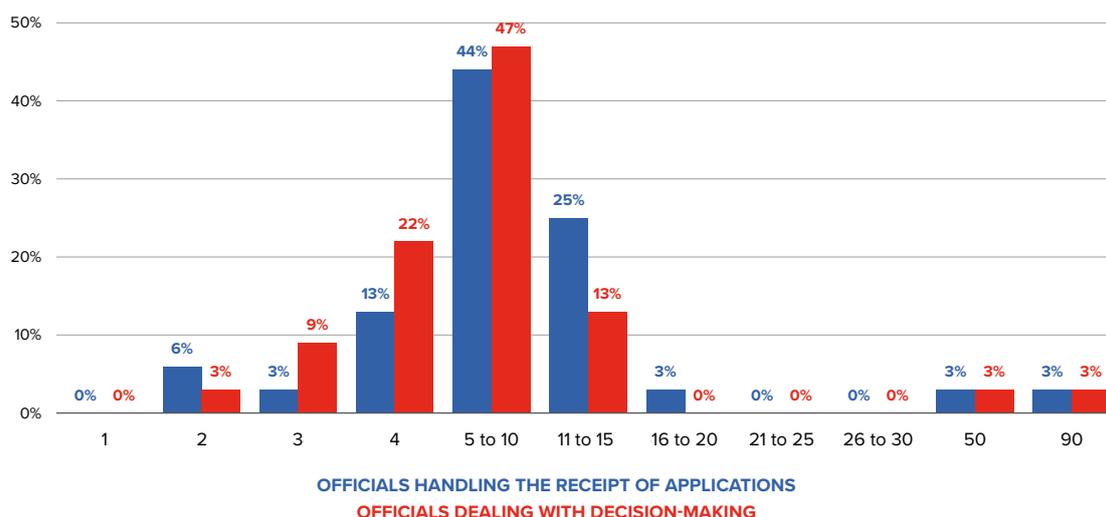
## 8.2 Human resources



### 8.2.1. At the municipal level

Almost half of the 32 surveyed municipalities (44%) have between 5 and 10 officials who are working at the front desk to receive applications for registration from EU workers, self-employed persons, jobseekers and their family members. Similarly, 47% of all municipalities have between 5 and 10 officials who are involved in making decisions on these applications for registration (see Graph 12). Many municipalities have a similar number of officials available for both the reception and the processing of these applications. This was confirmed during the interviews, in which various municipalities indicated that (some of) their staff are trained to work on all aspects of the registration process.<sup>1045</sup>

When looking at this data in light of the population size per municipality, it is not surprising that the number of officials who work on receiving and deciding applications for registration is generally higher in municipalities with a bigger resident population. Similarly, smaller municipalities tend to report a lower number of officials who are available to handle registration requests received from EU citizens and their family members.



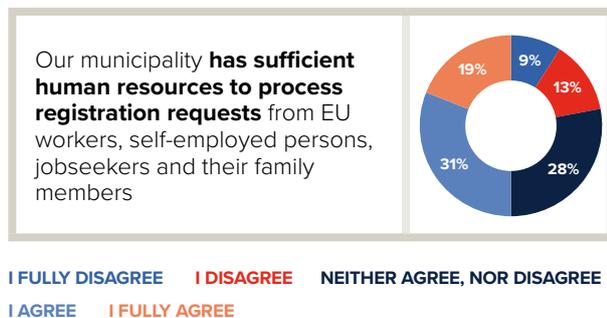
Graph 12 - Number of officials per municipality working on the registration procedure of EU workers, jobseekers, self-employed as well as their family members

<sup>1044</sup> Including the statements on human resources and training, as discussed in sections 8.2 and 8.5 respectively.

<sup>1045</sup> Interview with municipality A, 9 December 2019; municipality B, 10 December 2019; municipality G, 4 December 2019; municipality K, 27 January 2020.

During the interviews<sup>1046</sup>, various municipalities reported to have increased the level of educational background that is required for officials involved in processing registration requests from EU citizens and their family members. Due to the fast-paced developments in legislation and administrative guidelines on the registration of EU citizens, the task of processing registration requests has become increasingly demanding. The resulting raise in the educational prerequisites for staff handling the registration of EU citizens and their family members from grade C<sup>1047</sup> (secondary school diploma) to grade B<sup>1048</sup> (university bachelor's degree) staff is considered by municipalities to have led to improvements in the overall efficiency and quality of the registration process.

Table 14 - Assessment of human resources to process registration requests of EU workers, self-employed persons, jobseekers and their family members



Half of the surveyed municipalities (50%) either agreed or fully agreed with the statement that they have sufficient human resources in order to process the registration requests (see Table 14). Seven municipalities indicated that they considered themselves not being equipped with sufficient human resources to process applications for registration (22%).<sup>1049</sup> This indicates that municipalities have different perceptions as to whether they are sufficiently staffed to be able to handle applications for registration submitted by EU citizens and their family members.

1046 Interview with municipality C, 13 December 2019; municipality I, 5 December 2019.

1047 This corresponds to the grade of administrative assistant (*assistant administratief/ administratief assistent*).

1048 This corresponds to the grade of administrative secretary (*secrétaire administratief/ administratief secretaris*).

1049 Similarly, out of the 20 municipalities who reported challenges with regard to the processing of applications for registration, nine municipalities (45%) indicated insufficient human resources as a challenge (see section 8.1 and Graph 11).

## 8.2.2. At the federal level

Applications for registration by jobseekers, which are the competence of the Immigration Office (and applications by workers and self-employed which are forwarded by the municipalities)<sup>1050</sup>, are dealt with by the EU Bureau of the Immigration Office. In order to deal with the increasing number of applications for single permits received from third country nationals, the EU Bureau was incorporated in the Long Stay Department on 6 June 2019.<sup>1051</sup> This implied the reassignment of about half of the officials of the EU Bureau to the processing of single permit applications,<sup>1052</sup> and a shift in focus towards the post-registration verification of the residence rights of EU citizens rather than handling applications for registration (see also section 5.2.1 of this Chapter).

As this merger added to a pre-existing lack of human resources, the Immigration Office confirmed that, as a consequence, the merged Long Stay Department is currently not in the position to process all applications for registration of EU citizens – even though it would ideally want to.<sup>1053</sup> This lack of human resources also explains why the Immigration Office in its most recent GemCom instructions called upon the municipalities to make maximum use of their decision-making competence.<sup>1054</sup>

The applications for registration by EU family members for which the Immigration Office is competent (i.e. family members who are not spouses, recognized registered partners or children), as well as the applications by non-EU family members, are processed by the Family Reunification Bureau within the Immigration Office. The Immigration Office also indicated not to have the capacity to deal with all applications submitted by EU family members (even though relatively fewer applications are received within this category), but that the decision-making period for non-EU family members currently is between five and six months and so within the six-month legal deadline.<sup>1055</sup>

1050 For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

1051 GemCom Instructions.

1052 Interview with the Immigration Office, 25 May 2020.

1053 Interview with the Immigration Office, 25 May 2020.

1054 For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

1055 Ibid.

## 8.3 Online infrastructure



### 8.3.1. At the municipal level

A noticeable obstacle for municipalities, as identified in the interviews, is the development of online platforms that can be used for the processing of registration requests and (at times) for the exchange of information and guidelines regarding the registration process. Due to the absence of a national platform that can be used across municipalities and regions, some municipalities have their own online system, which is usually based on software packages developed with the help of private service providers. This practice has resulted in a diversity of municipal online platforms that are generally incompatible and do not allow for communication between or across online platforms. As a consequence, the exchange of documents between municipalities, for instance when a person is moving, is often inefficient.<sup>1056</sup> This unnecessary replication of comparable but incompatible online platforms is neither a cost-effective nor time-efficient practice.

Furthermore, an issue has been signalled with regards to the work-flow charts used in these online platforms. The software for these platforms is developed by private service providers, which have integrated work-flow charts in respect of various registration procedures into the software for the purpose of enhancing user-friendliness. However, the information included in these work-flow charts is not always accurate and up-to-date<sup>1057</sup>, which is problematic given that many municipalities now rely on such work-flow charts as the main source of information due to their integration into their processing systems. Hence, any national platform which might be developed should contain user-friendly, yet up-to-date, information contained in work-flow charts about the various registration procedures, including the different requirements as well as possible exceptions to the main registration practices. A national platform would allow for regular software updates, based on new legislation and case law, to make sure that all municipalities apply the same information in their daily registration practices.<sup>1058</sup>

Various municipalities suggested that these different online platforms should be replaced by a national platform,

<sup>1056</sup> One municipality indicated that it still works with paper files, despite its relatively large population size (>100.000 citizens), meaning that any exchange of files requires manual scanning of the documents. Based on interview conducted with municipality E, 11 December 2019.

<sup>1057</sup> It has been noted that, as a result of the increased use of online platforms due to the COVID-19 pandemic, the legal accuracy of the workflow charts has increased. Inaccuracies in the system are solved more quickly and new regulations are incorporated more swiftly into the workflow systems (Myria workshop, 6 July 2021).

<sup>1058</sup> Interview municipality C, 22 October 2020.

to which all municipalities and the Immigration Office could have access.<sup>1059</sup> Some municipalities emphasised that the exchange of information and advice in person is very much valued and should not be completely replaced by an online system to process the applications for registration.<sup>1060</sup>

An alternative would be for the Immigration Office and Federal Public Service for Internal Affairs to work together with municipalities to develop detailed compulsory technical specifications that would enable communication between platforms on a nation-wide basis and which municipalities would be required to include as part of the procurement tendering procedures.

### 8.3.2. At the federal level

Currently, the communication between the Immigration Office and the municipalities on the registration procedure takes place via email.<sup>1061</sup> All certificates of application (Annexes 19 and 19ter) including supporting documents and as well as refusal decisions (Annex 20) are currently sent by municipalities to the Immigration Office by email, including when an application for registration falls within the decision-making competence of the municipalities.<sup>1062</sup> The Immigration Office indicated that this imposes a heavy logistical burden, and that it is considering - for the longer term - to develop a new internal database to be able to handle applications more efficiently and communicate with all municipalities in this way.<sup>1063</sup>

<sup>1059</sup> Similar recommendations were made in a study conducted by the Koning Boudewijn Stichting (see Nathalie Cobbaut & Jan Verstraete, *Family reunification. In practice at the municipal administration (Gezinshereniging. In de praktijk bij de gemeentelijke administratie)*, 2015).

<sup>1060</sup> Interview with municipality A, 9 December 2019; municipality E, 11 December 2019.

<sup>1061</sup> Concerns were raised with regard to the GDPR compliance of this practice (Myria workshop, 6 July 2021).

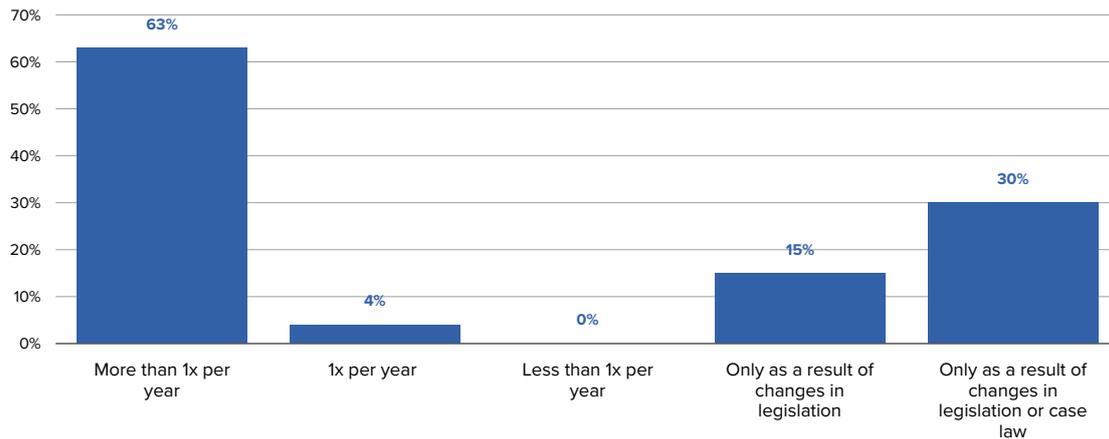
<sup>1062</sup> See GemCom Instructions.

<sup>1063</sup> Interview with Immigration Office, 25 May 2020.

## 8.4 Support for municipal officials



### 8.4.1 Instructions of the Immigration Office



Graph 13 - Perception of municipalities regarding updates of the Immigration Office's guidelines

The majority of municipalities included in this study (84%) confirmed that the Immigration Office publishes official guidelines concerning the processing of registration requests of EU workers, self-employed persons, jobseekers and their family members (“the GemCom instructions”). These instructions aim to provide practical guidance to municipalities on the application of the legal framework.<sup>1064</sup>

The GemCom instructions are made available to municipalities in pdf-format; the same information is also included on the GemCom portal<sup>1065</sup> (an online platform<sup>1066</sup> that all municipalities have access to for further information regarding the registration of non-Belgian citizens). Furthermore, a so-called “Syllabus” is also made available to municipalities comprising a physical manual to provide municipalities with instructions regarding the registration of non-Belgian citizens. The Syllabus is updated twice a year and any new GemCom instructions<sup>1067</sup> published by the Immigration Office are included in the Syllabus as well.<sup>1068</sup> This may explain why municipalities referred to different publication dates of these instructions in the survey, either referring to the instructions, publications in the GemCom portal or

updated version of the Syllabus. It became apparent in the interviews that municipalities consider the instructions and GemCom portal as helpful, but that there is still a clear demand for more guidance and support from the Immigration Office.<sup>1069</sup>

The GemCom instructions are updated twice a year.<sup>1070</sup> More than half of the respondents confirmed that the instructions are updated more than once a year (63%) in order to reflect changes in legislation and case law (see Graph 13). Additionally, the Immigration Office developed extensive guidelines on the use of electronic residence cards and residence documents.<sup>1071</sup>

It should be observed that the fact that these guidelines are not made available publicly raises concerns as regards the obligation of transparency which rests on administrative authorities.<sup>1072</sup>

<sup>1064</sup> Interview with Immigration Office, 25 May 2020.

<sup>1065</sup> Written communication of Immigration Office, 26 May 2020.

<sup>1066</sup> The GemCom portal is made available online <https://gemcom.ibz.be>.

<sup>1067</sup> The Immigration Office indicated during their interview that they aim to update the online GemCom instructions more regularly in order to ensure harmonized municipal practices across the country. Based on interview with Immigration Office, 10 December 2020.

<sup>1068</sup> Interview with municipality C, 22 October 2020.

<sup>1069</sup> Interview with municipality A, 9 December 2019; municipality C, 13 December 2019; municipality E, 11 December 2019; municipality H, 17 December 2019; municipality I, 5 December 2019; municipality K, 27 January 2020. See also section 8.4.3.

<sup>1070</sup> Interview with Immigration Office, 25 May 2020.

<sup>1071</sup> This document was last updated on 10 May 2021 in light of the foreseen implementation of the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration. See the general instructions of 10 May 2021 (*Algemene instructies over de elektronische vreemdelingenkaarten en bepaalde verblijfsdocumenten/Instructions générales relatives aux cartes électroniques pour étrangers et à certains documents de séjour*).

<sup>1072</sup> The law of 11 April 1994 on transparency of the administration (*Loi du 11 avril 1994 sur la publicité de l'administration en Belgique/ Wet van 11 april 1994 betreffende de openbaarheid van bestuur*).

### 8.4.2 Guidance by the municipalities

According to the survey results, the municipalities do not publish official guidelines themselves. However, interviews did reveal that various municipalities develop guidance intended for internal use.<sup>1073</sup> These documents are either destined to serve officials, providing guidance on how to process different types of registration requests, or may be intended to be shared with applicants to inform them about the different phases of the registration process and documents which are required. While these efforts pursue worthwhile objectives of informing both citizens and officials, they do indicate an unnecessary duplication of work which concerns a process that should ideally be harmonised across Belgium given that the legal framework which give effect to the Citizens Rights Directive is laid down at federal level. The use of different internal guidance on the registration of EU citizens and their family members might also exacerbate divergent registration practices across Belgium. The development of guidance documents that are made publicly available for use across Belgium could therefore result in more efficient and coherent practices when it comes to the processing of applications for registration submitted by EU citizens and their family members.

### 8.4.3 Communication with and support from the Immigration Office

The Immigration Office indicated during the interview that it strives to provide as much support as possible to municipalities. Concretely, the EU Bureau provides an email and telephone helpdesk (2 mornings per week in Dutch; 3 mornings per week in French<sup>1074</sup>).<sup>1075</sup> In addition, the External Partners Bureau is available 4 days per week by email and telephone to answer general questions of the municipalities in relation to migration law and procedure.<sup>1076</sup> The GemCom portal is a unilateral communication tool provided by the Immigration Office and aimed towards the municipalities.<sup>1077</sup> The Office indicated that the large diversity among municipalities (e.g. as to size, organisation, number of resident foreigners)

constitutes a challenge in the provision of adequate support.<sup>1078</sup>

Survey results confirmed that the Immigration Office functions as the main source of information for municipalities in case of queries concerning the processing of applications for registration submitted by EU workers, self-employed persons, jobseekers and their family members. However, information collated during follow-up interviews suggest that municipalities are experiencing difficulties in obtaining a response from the Immigration Office for the queries that they may have concerning the registration of EU citizens and their family members. As stated by one municipal official: *“There is very little supervision [from the Immigration Office]. You send a file to the Immigration Office, but you will never find out whether you applied the procedure correctly. You may be doing something wrong for years and only find out during a training day that your way of working is actually incorrect.”* Since the re-organisation of the Immigration Office in the first half of 2019, which led to the merger of the EU Bureau with the Long Stay Department, municipalities have reported that problems in responsiveness have become more notable.<sup>1079</sup> This was confirmed by the Immigration Office.<sup>1080</sup>

One municipality from Wallonia mentioned that the Immigration Office used to organise meetings twice every year, but that this was no longer taking place. This municipality did confirm that such opportunities for exchange were considered useful and that they would be in favour of reconvening in a similar way.<sup>1081</sup> Another official held: *“Any tool that would allow us to improve communication with the Immigration Office is considered useful.”*<sup>1082</sup> The perceived inability to rely on the Immigration Office for assistance appears to cause many challenges at the municipal level, which is likely to make the processing of complicated applications particularly problematic.

### 8.4.4 Communication among municipalities

Due to the perceived lack of assistance from the Immigration Office, bigger municipalities increasingly appear to function as an information point for smaller municipalities, which generally have less experience with

1073 Interview with municipality C, 13 December 2019; municipality H, 17 December 2019.

1074 In the course of this study, the availability of the EU bureau has been increased to 3 mornings per week in Dutch and 4 mornings per week in French (Myria stakeholder meeting, 6 July 2021).

1075 It should be observed that the EU Bureau cannot be reached directly by EU citizens. A general infodesk will refer the citizen to the site of the Immigration Office or to the competent municipality. Interview with Immigration Office, 25 May 2020.

1076 The Immigration Office also issues four newsletters per year. Interview with Immigration Office, 25 May 2020.

1077 The Immigration Office indicated that it is considering to include a forum on a renewed version of the GemCom website, so that municipalities could communicate among each other. Interview with Immigration Office, 25 May 2020.

1078 Interview with Immigration Office, 25 May 2020.

1079 Interview with municipality B, 10 December 2019; municipality C, 13 December 2019; municipality E, 11 December 2019; municipality F, 3 December 2019; municipality I, 5 December 2019; municipality K, 27 January 2020.

1080 Interview with Immigration Office, 25 May 2020; see also section 8.2.

1081 Interview with municipality E, 11 December 2019.

1082 Interview with municipality B, 10 December 2019.

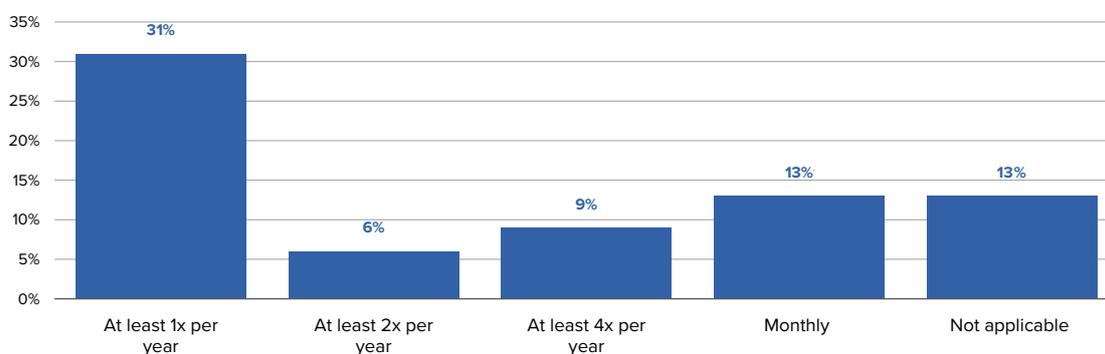
the registration of EU citizens and their family members and may reach out to nearby cities for further assistance.<sup>1083</sup>

In Flanders, some municipalities participate in the “Civil Affairs and Foreigners Working Group” (*Werkgroep Burgerzaken en Vreemdelingen*), which was established by the Association of Flemish Cities and Municipalities (VVSG) in 2010.<sup>1084</sup> This working group meets 3 to 4 times a year, with the aim of exchanging best practices with respect to challenges at the municipal level, among others in relation to the registration of EU citizens and their family members.<sup>1085</sup> At the suggestion of participating municipalities, two representatives of the Immigration Office now also participate in these meetings.<sup>1086</sup> Due to capacity restraints, the Working Group is not open to additional municipalities. Even though the minutes of the meetings are shared with “passive” members, namely municipalities who are unable to participate because the working group is full, this may lead to discrepancies in the dissemination of knowledge between “full” members, “passive” members and non-members.<sup>1087</sup> No similar initiatives seem to exist in the Brussels-Capital and Walloon region.<sup>1088</sup>

## 8.5 Training of municipal officials



When it comes to the training of municipal officials (see Graph 14), 19 municipalities (88%) indicated that their officials receive training on how to process applications for registration submitted by EU workers, self-employed persons, jobseekers and their family members. In 10 municipalities (31%), such trainings take place at least once a year. A few municipalities responded that trainings are only organised either when there are changes in legislation and regulations, or upon initiative of the Immigration Office. The majority of municipalities receive this training from the Immigration Office,<sup>1089</sup> but some municipalities provide the training themselves. Additionally, some municipalities indicated, both in the survey and during the interviews, that other organisations and private entities also provide such training to their officials (e.g. AgII, ADDE, Pivo, Inovant and Vanden Broele). Only one municipality indicated its familiarity with the E-learning tool developed by the European Commission.<sup>1090</sup>



Graph 14 Training provided to municipal officials

1083 Interview with municipality B, 10 December 2019; municipality C, 13 December 2019; municipality H, 17 December 2019; municipality I, 5 December 2019.

1084 Interview with VVSG, 3 April 2020.

1085 Overall, the Working Group consists of 30 to 35 municipalities, the Agency for Integration and Civic Integration, two representatives of the Immigration Office and (currently one) Public Centre for Social Welfare (*Openbaar centrum voor maatschappelijk welzijn* (OCMW). Interview with VVSG, 3 April 2020.

1086 Interview with municipality C, 13 December 2019.

1087 For instance, officials from one municipality indicated to be “on the waiting list” to become a member of this working group (interview with municipality K, 27 January 2020). The VVSG indicated to be working on an online platform, in order to share the minutes from the working group with a broader (controlled) audience (Interview with VVSG, 3 April 2020).

1088 Brulocalis, the Association of the City and the Municipalities of the Brussels-Capital Region (*Association de la Ville et des Communes de la Région de Bruxelles-Capitale/ Vereniging van de Stad en de Gemeenten van het Brussels Hoofdstedelijk Gewest*) indicated not to be able to participate in an interview, since they indicated not having relevant information to share on the topic of this study.

A majority of the surveyed municipalities (69%) agreed with the statement that their municipal officials receive sufficient training in order to process applications for registration submitted by EU workers, self-employed persons, jobseekers and their family members (see Table 15). On the other hand, some municipalities (see Graph 11) that indicated that they face challenges reported that this was partly due to a lack of technical skills (30%) or a lack of legal knowledge (40%). Here as well, it can be

1089 The Immigration Office organises a basic training on asylum and migration law for new municipal officials in the provinces (Leuven, Gent, Antwerp, Luik, Namen, Mons and Brussels), as well as workshops who delve deeper into a particular procedure. Interview with the Immigration Office, 25 May 2020.

1090 This can be accessed from the European Commission’s website [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=51219](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51219) (last accessed 29 January 2021).

observed that municipalities hold different perceptions as to whether their staff are equipped with the necessary knowledge and skills to handle residence applications.

Table 15 - Assessment by municipalities of training received by municipal officials to process registration requests of EU workers, self-employed persons, jobseekers and their family members



## 8.6 Monitoring of and complaints regarding the registration procedure

### 8.6.1 Monitoring by the Immigration Office of municipal registration practices

In addition to its supportive function (see section 8.4), the Immigration Office also performs a monitoring over municipalities. The Immigration Office indicated that it carries out audits based on a sample of files, for instance to check whether municipalities require more documents than what is legally foreseen.<sup>1091</sup> Until 2016, the audits were conducted chronologically, but since then the order of municipalities to be audited has been determined on the basis of a risk assessment.<sup>1092</sup> The audits are not envisaged to be sanctioning exercises, but aim to support municipalities in the correct handling of applications for registration. In case of multiple errors, an action plan is drafted and municipal officials are encouraged – yet not obligated – to participate in trainings.<sup>1093</sup> However, from

1091 In addition, audits involve an analysis of the register of Model A paper booklets, so-called “orange cards”, which are issued to non-EU family members during the registration procedure. Interview with the Immigration Office, 25 May 2020. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

1092 Indicators in this risk assessment list include the total number of foreigners registered in the foreigners’ register of the municipality, the percentage foreigners of the total municipal population and the results of previous audit reports. Interview with the Immigration Office, 25 May 2020.

1093 Interview with the Immigration Office, 25 May 2020.

the perspective of one municipality, it was not clear to what extent the audits are still being carried out.<sup>1094</sup> Two more municipalities confirmed during the interview that they had been subjected to such an audit, one municipality confirmed that these were considered useful whenever constructive feedback was provided by the Immigration Office.<sup>1095</sup>

### 8.6.2 Complaints at the municipal level

In some of the surveyed municipalities, a local ombudsperson has been appointed. In municipality C, the ombudsperson indicated not to receive complaints on the registration procedure from EU workers, self-employed persons, jobseekers and their family members.<sup>1096</sup> In municipality H, the relatively small number of complaints which were received have mostly related to the waiting time before a first appointment could be obtained (see also Box 7).<sup>1097</sup>

### 8.6.3 Complaints at the federal level

The Federal Ombudsman is competent to receive and handle complaints regarding the functioning of federal administrative authorities, such as the Immigration Office.<sup>1098</sup>

The Federal Ombudsman observes that – in contrast with other federal administrative authorities – the Immigration Office does not always provide an effective first-line complaints<sup>1099</sup> handling system.<sup>1100</sup> The Federal Ombudsman is in many cases flexible when the complaint concerns the functioning of the Immigration Office.<sup>1101</sup>

The Federal Ombudsman and the Immigration Office have a monthly working meeting to discuss files concerning long stay and family reunification. However, complaints regarding the registration of EU workers, self-employed persons, jobseekers and their family members were qualified by the Federal Ombudsman as being “very exceptional”.<sup>1102</sup> Exact figures on the number of complaints

1094 Interview with municipality K, 27 January 2020.

1095 Interview with municipality G, 4 December 2019; interview with municipality J, 14 January 2020.

1096 Interview with ombudsperson of municipality C, 23 June 2020.

1097 Interview with ombudsperson of municipality H, 23 June 2020.

1098 <http://www.federaalombudsman.be/homepage>

1099 The website on the complaints system of the Immigration Office states: “A complaint about the content of a decision ... is only examined if no specific appeal procedure is provided for this in a regulation. Administrative or legal disputes also do not fall within the scope of complaint management.” <https://ibz.be/nl/klachten>.

1100 Interview with Federal Ombudsman, 5 June 2020.

1101 Article 8 Law of 22 March 1995 establishing the federal ombudsmen (*Wet van 22 maart 1995 tot instelling van de federale ombudsmannen / Loi du 22 mars 1995 instaurant des médiateurs fédéraux*).

1102 Interview with Federal Ombudsman, 5 June 2020.

could not be provided, as the keyword “Union citizens” within the complaint system covers more categories (including self-sufficient persons and students) than those covered by this study (workers, self-employed persons, jobseekers and their family members).

The most recurring complaints received by the Federal Ombudsman in relation to the topic of this study, concern a lack of knowledge among applicants and/or municipalities as to the status under which to register and the required documentation. This corroborates the findings of the website research, the survey and the interviews with municipalities (see sections 2, 3 and 5 of this Chapter). In these cases, the Federal Ombudsman indicated that contact with the Immigration Office usually suffices to clarify or resolve the issue – except in some family reunification cases, where the proof of dependency may cause problems.<sup>1103</sup> However, there is no official internal administrative review mechanism that would enable EU citizens and their family members to request a reconsideration of any decision to refuse their application.<sup>1104</sup>

## 8.7 Participation in policy development

Municipalities are not formally consulted when new policies or guidelines are developed in connection with the registration procedure for EU citizens and their family members. As a consequence, any potential incompatibility of new policies with the municipalities’ daily practices is only discovered upon implementation.<sup>1105</sup> The Immigration Office recognises that the Civil Affairs and Foreigners Working Group of the Association of Flemish Cities and Municipalities (VVSG) is an interesting platform to capture the concerns of municipalities. Nevertheless, it was suggested by other interviewees that the Immigration Office could consult more structurally with, for instance, this Working Group, prior to the adoption of new policies or guidelines.<sup>1106</sup> Ideally, a similar platform would also exist in Wallonia and Brussels or at the federal level. Additionally, when introducing new policies or guidelines, municipalities should be given a reasonable amount of time to prepare for the implementation of such changes.<sup>1107</sup>

1103 Interview with Federal Ombudsman, 5 June 2020.

1104 For a discussion on the abolition of the administrative review process, see Cross-reference to Chapter 1, Section 7 *Procedural safeguards and appeal rights*, Subsection 7.2 *Appeal rights*.

1105 Interview with VVSG, 3 April 2020.

1106 Interview with municipality I, 5 December 2019; interview with VVSG, 3 April 2020.

1107 Interview with municipality C, 22 October 2020.

# 9. Conclusion

This section summarises some of the most relevant findings emerging from the analysis of municipal practices concerning the processing of registration requests from EU workers, self-employed persons and jobseekers as well as their family members. The actual policy recommendations can be consulted more comprehensively in Chapters 5 and 6.

Regarding the application phase, most municipalities included in this study provide very limited information about the registration procedure on their website; they often only refer to contact details of their local foreigners’ office (see Sub-section 2.1). Both online and in-person information is mostly only available in Dutch, French and, to a lesser extent, English.

For various municipalities, it is a conscious decision not to provide extensive information about the registration procedure on their website. Due to the fast developments in legislation and case law and the complexity of certain registration requests, they prefer to give information in person, in order to ensure the accuracy of the information provided. One way to address this lack of information would be to create a central website containing complete and accurate information on the registration procedure for EU citizens and their family members in various languages to which all municipalities could link. The website of the Immigration Office could fulfil such a function, if updated and reorganised to be made more user-friendly. Municipalities could then provide a link to that website and limit content on their own websites to provide practical information regarding the registration procedure in their town or city (e.g. on the need to make an appointment to submit an application for registration).

Additionally, none of the municipalities refer applicants to sources such as the Your Europe Portal or the Belgian SOLVIT office (see Sub-section 2.1). Familiarisation and incorporation of these tools in municipal registration practices can improve the availability of (online) information and services for EU workers, self-employed persons, jobseekers and their family members and help to ensure a registration practice that is fully compliant with EU law. It would also support the objectives of the Single Digital Gateway.

During the application phase, the appointment system may cause delays in the issuance of a certificate of application (Annexes 19 and 19ter), which impedes effective compliance with EU law (see Sub-section 3.1). The experience gained during the COVID-19 pandemic, with the electronic processing of applications for

registration and the issuance of Annexes 19 and 19ter by email, should be capitalised upon when exploring ways to digitalise the registration procedure, at the very least in respect of the submission of applications for registration (see Box 8).

An analysis of the application process shows that municipalities apply varying practices when it comes to the registration of, for example, part-time and atypical workers. This means that part-time workers or atypical worker (e.g. interim workers without fixed hours) will in some municipalities be registered as workers, while other municipalities will register these applicants as jobseeker or self-sufficient or not register the applicant at all (see Sub-section 3.2.1.2). A comparison of registration practices across regions (see Sub-section 3.2.1.5) also reveals some remarkable differences in the registration of various categories of EU workers. For example, municipalities in Brussels and Wallonia are more likely to register certain types of workers with short-term contracts or atypical work under the status of jobseekers, while Flemish municipalities are more likely to register such applicants as workers.

The analysis of document requirements for non-EU family members shows that some municipalities will require proof of identity of the EU citizen, even though this is not prescribed by law (see Sub-section 3.4.2 and 3.4.3). Additionally, proof of dependency is sometimes not required for the right categories of non-EU family members (see Sub-section 3.4.3 and 3.4.4). Failing to provide proof of dependency may result in a negative decision from the Immigration Office. Alternatively, requiring such proof from categories of non-EU family members who do not need to meet such a requirement (i.e. dependent descendants – of the spouse/partner – of the EU citizen who is under 21 years old), is not in line with Belgian and EU law and creates an excessive burden on applicants.

The requirements for the verification of domicile vary greatly between municipalities, mostly requiring an indication of the applicant's name on the doorbell or mailbox, as well as an ID card or passport, confirmation by neighbours and requiring the applicant to be at home – at times imposing unnecessary burdens. Furthermore, in some municipalities the verification of domicile is causing serious delays in the registration process (see Sub-section 4.2). While the verification of domicile should be conducted within 15 working days and reported back to the municipality within one month, some municipalities reported a processing time beyond the legal deadlines. Two municipalities recently introduced the use of an online platform to submit requests for verification of domicile to the police and receive completed police reports. This practice has been evaluated positively as it

speeds up the verification process, thereby shortening the processing time of the registration request.

The registration phase unveils variations regarding the documentation required, the format, the language and the possible need for legalisations. These differences may partly be explained by the observation that different municipalities seem to register certain categories of EU citizens under different statuses (see Sub-section 3.2). This is particularly the case as far as it concerns EU workers with part-time or atypical work (for example, interns or employment contracts of limited duration) as well as EU family members, where practices appear to be inaccurate or overly restrictive at times (see Sub-section 5.3). Again, proof of dependency is sometimes not required for the right categories of EU family members (see Sub-section 5.3.5). Failing to provide proof of dependency may result in a negative decision from the Immigration Office. Alternatively, requiring such proof from categories of EU family members who do not need to meet such a requirement is not in line with Belgian and EU law and creates an excessive burden on applicants.

Furthermore, the analysis shows a possible lack of awareness of the harmonised documentation issued under EU rules on the coordination of social security. This observation was made based on the analysis of required documentation of posted workers (see Sub-section 5.3.2) and EU self-employed persons (see Sub-section 5.3.3).

Especially when it concerns applications for registration from applicants who's application falls under the discretion of the Immigration Office, processing time of the application for registration will always reach the 6-month deadline that is legally imposed (see Sub-section 5.2.1). Surpassing the 6-month deadline will imply an automatic positive decision, a practice which is arguably in contradiction with the *Diallo* judgement whenever it concerns an application for registration from non-EU family members of EU citizens.

In addition, the Immigration Office's instructions are not always in full compliance with the underlying legal framework (see Sub-section 5.2.2). Registration practices would benefit from greater alignment, which could be achieved with more detailed and practice-oriented guidelines provided by the Immigration Office that are in line with EU legislation and case law.

Information on the possibility to obtain permanent residence, after having resided in Belgium for five consecutive years, is not pro-actively shared by municipalities. In most surveyed municipalities the average processing time will be exactly five months, the legal deadline under Belgian law. This does not appear to comply with the EU law requirement that a document

certifying permanent residence should be granted “as soon as possible” (see Section 6).

All municipalities inform applicants about their right to appeal a negative decision. However, information on how to exercise this right to appeal is limited (see Section 7). About half of the municipalities will inform the applicant about the possibility to receive legal advice from a lawyer. Some municipalities might direct the applicant towards (local) organisations that provide legal services, none of the municipalities indicated to be familiar with EU-wide initiatives such as SOLVIT, Your Europe Advice or the EU Rights Clinic.

The Immigration Office was reported to be unable to meet the current demand for support and assistance from the municipalities that participated in this study (see Sub-section 8.4.3). Communication with the Immigration Office is perceived as inefficient and insufficient, which seems to be attributable to a lack of human resources within the Immigration Office. Municipalities are requesting better communication with the Immigration Office in order to be able to accurately process applications for registration submitted by EU citizens and their family members. Municipalities also exchange information amongst themselves and lend support to each other. In Flanders, some municipalities gather regularly in a working group of the VVSG to exchange best practices, challenges and information on issues relating to the registration of EU citizens and their family members.

Various municipalities raise the challenge of establishing an online platform, to process applications for registration and exchange information among colleagues (see Sub-section 8.3.1). Currently, no such platform exists at the national level. This leads to inefficient ways of working when it comes to the exchange of information and documentation among municipalities as well as between the municipalities and the Immigration Office. It was noted that the software packages (developed by private companies) that are currently used by some municipalities, sometimes contain out-dated or inaccurate information about the registration requirements of EU citizens and their family members (see Sub-section 8.3.1), which again can lead to (incorrect) divergent practices across Belgium. Establishing such an online platform at national level could improve the efficiency of working practices. The alternative would be to lay down compulsory technical specifications which providers must adhere to in order to allow for communication between platforms and accurate workflow charts. Nevertheless, some municipalities emphasised that they very much value the availability of personal assistance from the Immigration Office, in addition to having such an online platform.

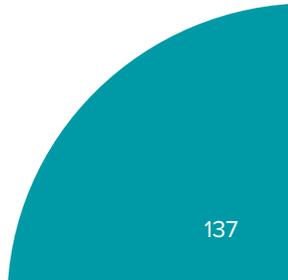
Lastly, a lack of awareness of European information and training tools was also apparent. Only one municipality confirmed familiarity with the E-learning tool of the European Commission (see Sub-section 8.5).





# Chapter 3

**Analysis of the impact of registration formalities on access to employment, conditions of employment, social security and fiscal benefits**





# Chapter 3

## Analysis of the impact of registration formalities on access to employment, conditions of employment, social security and fiscal benefits



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# 1. Introduction

This Chapter analyses the interaction between the registration process in Belgium and its impact on access to employment, conditions of employment, healthcare, social welfare and fiscal benefits. In other words, it consists in an investigation into whether the completion of the registration procedure must be considered as a precondition and can therefore have an impact on the exercise of certain rights.

The principle of non-discrimination on the basis of nationality, which is laid down in Article 18 TFEU, forms a crucial component of the freedom of movement within the European Union. The principle of equal treatment is given further expression by Article 24 of the Citizens Rights Directive,<sup>1108</sup> which lays down the conditions and limitations which apply to the free movement of persons in general.<sup>1109</sup>

According to the Citizens Rights Directive,<sup>1110</sup> registration formalities for EU citizens may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. The Citizens' Rights Directive interacts, however, with other EU acts intended to regulate specific aspects of the free movement of persons.

With respect to workers exercising their right to free movement and their family members, the Treaty rules on the free movement of workers<sup>1111</sup> confer substantial rights for the exercise of this fundamental freedom. Article 45 TFEU gives further expression to the general prohibition of discrimination on grounds of nationality contained in Article 18 TFEU in the area of freedom of movement for workers.<sup>1112</sup> This entails the abolition of any discrimination based on nationality as regards to employment, remuneration and other conditions of work and employment. This provision also prohibits Member States from creating or maintaining obstacles to the free movement of workers.<sup>1113</sup> These rights are further specified in Regulation 492/2011.<sup>1114</sup> Directive

2014/54<sup>1115</sup> has been adopted in order to facilitate the free movement of workers and their family members, as well as to enhance the effective and uniform application of the rights conferred by Article 45 TFEU and Regulation 492/2011. Directive 2014/54 applies to the following matters in the area of freedom of movement for workers: a) access to employment; b) conditions of employment and work (including as regards remuneration, dismissal, health and safety at work) and in case of unemployment, reinstatement or re-employment, c) access to social and tax advantages, among the various matters falling within the scope of Articles 1 to 10 of Regulation 492/2011.<sup>1116</sup>

In addition, the right of free movement of self-employed persons is derived directly from the Treaty rules concerning the freedom of establishment.<sup>1117</sup> The right of establishment includes the right to take up and pursue activities as a self-employed person and to set up and manage undertakings under the same conditions as those laid down by the law of the Member State concerned regarding establishment for its own nationals.<sup>1118</sup> The freedom of establishment implies the exercise of a permanent activity of a stable and continuous nature by self-employed individuals in a Member State other than their State of origin.<sup>1119</sup>

This can be distinguished from the rules on the temporary provision of cross-border services, which prohibit restrictions on the freedom to provide services in respect of EU citizens who are established in one Member State and who provide their services to recipients who reside in another Member State.<sup>1120</sup> Given that this Chapter focuses on workers and self-employed persons who fall within the scope of the Citizens Rights Directive, the situation of posted workers and posted self-employed persons will only be briefly touched upon. In addition, and wherever relevant, this Chapter also encompasses the Belgian application of Regulation 883/2004 on the coordination of social security<sup>1121</sup> and Regulation 593/2008 (Rome I)<sup>1122</sup> on the law applicable to contractual obligations.

1108 Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597.

1109 Art. 21 TFEU.

1110 Art. 25, Directive 2004/38.

1111 Art. 45 TFEU.

1112 Case C-703/17 *Krah* EU:C:2019:850; Case C-181/19 *JD* EU:C:2020:794.

1113 Case C-527/06 *Renneberg* EU:C:2008:566; Case C-379/09 *Casteels* EU:C:2011:131. For commentary, see Catherine Barnard, *The Substantial Law of the EU: The Four Freedoms* (4th ed, 2014 OUP) pp. 260-268.

1114 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/01.

1115 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/08.

1116 Art. 2, Directive 2014/54.

1117 Art. 49 TFEU.

1118 *Ibid.*, second para.

1119 Case C-55/94 *Gebhard* EU:C:1995:411; Case C-171/02 *Commission v Portugal* EU:C:2004:270.

1120 Art. 56 TFEU.

1121 Regulation 883/2004 on the coordination of social security systems [2004] OJ L 166/01. This regulation aims to coordinate the application of social security rules of the EU Member States in respect of cross-border mobility within the EU, including in relation to EU workers, self-employed persons, jobseekers and their family members who take up residence in an EU Member State. The regulation is built upon the principles of non-discrimination, the application of one single national social security scheme, the aggregation of insurance periods completed within the EU Member States and the exportability of benefits and acquired rights within the EU.

1122 Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

## 2. Impact of registration formalities on access to an occupation

Regulation 492/2011 contains specific rules governing the freedom of movement for workers. In particular, this Regulation provides that any national of a Member State shall, irrespective of their place of residence, have the right to take up and pursue activities as an employed person in the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.<sup>1123</sup> As a result, no residence condition may legitimately be imposed on EU citizens seeking to gain access to employment in Belgium.

Freedom of establishment includes the right for self-employed persons to take up and pursue economic activities in a stable and continuous way in another Member State, and this under the same conditions as those laid down for its own nationals by the law of the Member State where such establishment is effected.<sup>1124</sup> In theory, registration formalities should therefore not impact the right for EU citizens to take up and pursue activities as a self-employed person in Belgium.

### 2.1 Registration as a precondition?

As mentioned above, according to Regulation 492/2011, no residence condition should apply for EU citizens to have access to employment in Belgium.<sup>1125</sup> In addition, the Citizens Rights Directive precludes the exercise of a right or completion of an administrative formality from being conditional upon possession of a residence document.<sup>1126</sup> To verify whether this is the case in practice, an analysis will be made with regard to the possible impact of registration formalities on the conditions for EU citizens to seek work or enter into an employment relationship, as well as to start a self-employed activity in Belgium.

<sup>1123</sup> Art. 1, Regulation 492/2011.

<sup>1124</sup> Art. 49 TFEU.

<sup>1125</sup> Art. 1, Regulation 492/2011.

<sup>1126</sup> Art. 25, Directive 2004/38.

#### 2.1.1 Workers

Taking up activities as an employed person requires the EU citizen to enter into an employment relationship with an employer. According to the Belgian rules on employment contracts,<sup>1127</sup> the following four constitutive elements need to be fulfilled for an employment relationship to exist in Belgium: there must be (i) a contract pursuant to which a worker agrees (ii) to provide work (iii) in exchange for remuneration (iv) under the authority of an employer.

When hiring non-Belgian workers to work in Belgium, employers need to ensure the former have a right to work.<sup>1128</sup> As a rule, this implies that workers who are not EU citizens need to be in possession of a work and residence permit in order to be legally entitled to work in Belgium.<sup>1129</sup> EU workers have access to the Belgian labour market simply by virtue of their nationality and irrespective of their residence status.<sup>1130</sup> The Belgian rules on the unlawful employment of foreign workers<sup>1131</sup> do not provide for the imposition of any sanction on an employer who hires an EU citizen who has not yet complied with registration formalities.

While the law on employment contracts<sup>1132</sup> is silent with regard to any residence condition that might be applicable to EU workers who wish to enter into an employment relationship in Belgium, the Belgian rules on declaration

<sup>1127</sup> Arts. 2 and 3, Law of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail / Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten*, MB/BS 22-08-1978, 9277).

<sup>1128</sup> Art. 6, Law of 9 May 2018 on the employment of foreigners who are in a specific residence situation (*Loi du 9 mai 2018 relative à l'occupation de ressortissants étrangers se trouvant dans une situation particulière de séjour / Wet van 9 mei 2018 betreffende de tewerkstelling van buitenlandse onderdanen die zich in een specifieke verblijfsituatie bevinden*, MB/BS 08-06-2018, 48071).

<sup>1129</sup> Ibid.

<sup>1130</sup> Art. 4, Royal Decree of 2 September 2018 implementing the law of 9 May 2018 on the employment of foreigners who are in a specific residence situation, hereafter "Royal Decree of 2 September 2018" (*Arrêté royal du 2 septembre 2018 portant execution de la loi du 9 mai 2018 relative à l'occupation de ressortissants étrangers se trouvant dans une situation particulière de séjour / Koninklijk besluit van 2 september 2018 houdende de uitvoering van de wet van 9 mei 2018 betreffende de tewerkstelling van buitenlandse onderdanen die zich in een specifieke verblijfsituatie vinden*, MB/BS 17-09-2018, 72187). This also includes workers from Iceland, Norway, Liechtenstein and Switzerland. UK nationals and their family members who are beneficiaries of the Withdrawal Agreement are covered by Art. 4/1, Royal Decree of 2 September 2018.

<sup>1131</sup> Art. 175/1, Criminal Labour Code of 6 June 2010, hereafter "Criminal Labour Code" (*Code pénal social du 6 juin 2010 / Sociaal strafwetboek van 6 juni 2010*, MB/BS 01-07-2010, 43712).

<sup>1132</sup> Law of 3 July 1978 on employment contracts (n 1127).

of employment for social security purposes<sup>1133</sup> do impose a specific requirement upon an employer when hiring a new worker, which could be considered as indirectly imposing a residence condition on EU workers who intend to conclude an employment contract in Belgium.

In particular, when hiring a new worker, an employer is required to notify the new hire to the Belgian National Office for Social Security Office<sup>1134</sup> by submitting a declaration of employment, so-called “DIMONA”<sup>1135</sup> notification.<sup>1136</sup> The submission of a DIMONA notification requires an employer to notify details of every newly-hired worker including their personal identification number for social security purposes.<sup>1137</sup> However, EU citizens who have not initiated the process to register their residence in Belgium are not included in the national population register, and will therefore not be in possession of such national identification number.

To remedy this situation, in the event the worker concerned does not hold a national identification number, the Belgian rules explicitly foresee the possibility for an employer to include specific personal details of the worker in question.<sup>1138</sup> In practice, in such a case, an employer will need to obtain a so-called “BIS-number”<sup>1139</sup> via

SIGEDIS,<sup>1140</sup> in order to enable the employer to register the employment contract and declare the recruitment of the worker to the National Office for Social Security.<sup>1141</sup> As from that moment, an EU citizen will be allowed to work, even if the residence formalities have not yet been fulfilled.

Taking this into account, it can be considered that the fulfilment of registration formalities for EU citizens is indirectly a pre-condition to start working as an employee affiliated to the Belgian social security system. However, due to the possibility for the employer to obtain a BIS-number via SIGEDIS, the non-compliance with the registration formalities by the worker does not impact their access to employment.

As mentioned above, remuneration of a worker in return for their work is another key element of an employment relationship.<sup>1142</sup> It is therefore appropriate to examine whether the payment of wages is conditional upon a worker having complied with registration formalities.

In theory, an employer can initiate payroll administration in respect of an EU worker even if the latter has not yet begun registration formalities by making use of a BIS-number obtained through SIGEDIS. Likewise, payroll administration can also be initiated without having the DIMONA notification in place. In practice however this will depend on the systems used by the specific payroll agency that is used by the employer as to whether the use of a BIS-number will be accepted in practice.<sup>1143</sup>

In addition, it is also important to mention that EU citizens whose residence is not yet registered are reported to encounter increasing difficulties in opening a bank account.<sup>1144</sup> This may in turn have a practical impact on the ability of EU citizens to obtain remuneration in respect of their employment, given that having a bank account is often a requirement for workers to receive payment of their

1133 Art. 4, Royal Decree of 5 November 2002 introducing an immediate declaration of employment, in accordance with Article 38 of the Law of 26 July 1996 modernising social security and safeguarding the viability of the statutory pension schemes, hereafter “Royal Decree of 5 November 2002” (*Arrêté royal du 5 novembre 2002 instaurant une déclaration immédiate de l’emploi, en application de l’article 38 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions / Koninklijk Besluit van 5 november 2002 tot invoering van een onmiddellijke aangifte van tewerkstelling, met toepassing van artikel 38 van de wet van 26 juli 1996 tot modernisering van de sociale zekerheid en tot vrijwaring van de leefbaarheid van de wettelijke pensioenstelsels*, MB/BS 20-11-2002, 51778). In accordance with Art. 181, Criminal Labour Code, in case of non-compliance an employer may face relatively severe penalties including an administrative fine of €300-€3000 or a sentence of imprisonment of between six months to three years and a criminal fine of €600-€6000.

1134 This refers to the *Office National de Sécurité Sociale / Rijksdienst voor de Sociale Zekerheid* (ONSS/RSZ).

1135 This abbreviation stands for “*Déclaration immédiate - Onmiddellijke Aangifte*”.

1136 Art. 4, Royal Decree of 5 November 2002.

1137 *Ibid.* This is the same as the personal identification number which is used to register a person in the national population register. This personal identification number should be generated whenever an EU citizen applies for their residence and they are issued with a certificate of application (Annex 19) and at which point their details will be entered into the register of pending applications. See further Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.6 *Issuance of a certificate of application*.

1138 Art. 4, 2°, Royal Decree of 5 November 2002. These details include the worker’s surname, name, date and place of birth and their place of residence.

1139 The BIS number is a unique identification number for individuals who are not registered in the national population register, but who still have a relationship with the Belgian authorities and enables a person’s social security information to be tracked; see further BOSA Federal Public Service: <https://dtservices.bosa.be/fr/services/fsb/catalogue/personservices-s034/information-personservices-s034#Le%20Registre%20BIS> / <https://dtservices.bosa.be/nl/services/service-integrator-fsb/catalogue-service-integrator/personservices-s034/informatie#Het%20%20BIS-register>.

1140 This refers to “*Sociale Individuele Gegevens - Données Individuelles Sociales*” and is a public non-profit organisation which manages the collection and storage of personal data relating to workers in its database which is made available to the Belgian social security institutions for the purposes of carrying out their missions.

1141 Further information on the details which employers must provide when making a DIMONA notification can be found on the Belgian government’s website relating to social security matters

[https://www.socialsecurity.be/employer/instructions/dmfa/fr/latest/instructions/obligations/obligations\\_nsso/dimona/principaldata.html](https://www.socialsecurity.be/employer/instructions/dmfa/fr/latest/instructions/obligations/obligations_nsso/dimona/principaldata.html) / [https://www.socialsecurity.be/employer/instructions/dmfa/nl/latest/instructions/obligations/obligations\\_nsso/dimona/principaldata.html](https://www.socialsecurity.be/employer/instructions/dmfa/nl/latest/instructions/obligations/obligations_nsso/dimona/principaldata.html).

1142 Arts. 2 and 3, Law of 3 July 1978 on employment contracts (n 1127).

1143 For example, it could be the case that the IT systems used by some payroll agencies may not recognise a BIS-number and may flag it up as an encoding error. A BIS-number adds 40 or 20 to the person’s month of birth depending on whether the person’s gender is known when the request is made to SIGEDIS.

1144 *Milieu Ltd, Obstacles to the right of free movement and residence for EU citizens and their family members: country report for Belgium*, Study for European Parliament’s Civil Liberties Committee (2016), p. 21; Myria, 2015 Migration in figures and rights (2016) (*La Migration en chiffres et droits 2015 / Migratie in cijfers en in rechten 2015*), pp. 202-203.

wages, depending upon the collective agreement which may be in force in the sector concerned.<sup>1145</sup>

## 2.1.2 Posted workers

A "posted worker" is an employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis.<sup>1146</sup> In such a case, a posted worker is entitled to remain subject to their home country's social security scheme for up to two years<sup>1147</sup> and will accordingly not be subject to affiliation with the Belgian social security system.<sup>1148</sup>

An employer which posts workers to Belgium is not required to make a DIMONA-notification, provided that the workers are not subject to the Belgian social security scheme during their employment in Belgium.<sup>1149</sup> However, in such cases, an employer is under an obligation to notify the posting no later than on the starting date of the posting, as allowed by the Posted Workers Enforcement Directive.<sup>1150</sup> This involves the employer submitting a so-called "LIMOSA" declaration<sup>1151</sup> to the Belgian liaison office.<sup>1152</sup> This formality does not require the national

identification number of the posted worker.<sup>1153</sup> As a result, in the event that an EU posted worker has not completed the registration formalities in Belgium, this would therefore not have an impact on the employer's ability to comply with the obligation to file a LIMOSA declaration.

Where a posted worker remains subject to the social security scheme of their home Member State, they will also need to obtain Form A1 from their home social security institution.<sup>1154</sup> Form A1 is a certificate which confirms that a worker remains affiliated with the social security scheme of the country from they are being posted.<sup>1155</sup> Form A1 creates a presumption that the worker concerned is properly affiliated to the social security scheme of the Member State whose competent institution has issued the certificate<sup>1156</sup> and that therefore no liability exists in Belgium. The application form for obtaining Form A1 requires a worker to provide their address of residence in the host country if already available. However, the fact that the registration formalities have not been completed by the EU worker in Belgium should not have an impact on the possibility to obtain a Form A1 from the social security institution of the home Member State.

## 2.1.3 Self-employed persons

In Belgium, a person can take up self-employed activities either as an individual or by setting up a company or other corporate entity.<sup>1157</sup> The taking up of activities as a self-employed person consequently requires the fulfilment of certain formalities, which differ depending on the activity and the form under which the person wishes to pursue their self-employed activities. EU citizens who take up self-

1145 Law of 12 April 1965 on the protection of workers' remuneration (*Loi du 12 avril 1965 concernant la protection de la rémunération des travailleurs / Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers*, MB/BS 30-04-1965, 4710). It should also be noted that, in theory, payment could be made in the bank account of the EU worker held in their home Member State, in the event the worker in question holds such an account.

1146 Art. 2(1), Directive 96/71 concerning the posting of workers [1996] OJ L 18/01 as amended by Directive 2018/957 [2018] OJ L 173/16, hereafter the "Posted Workers Directive".

1147 Art. 12, Regulation 883/2004.

1148 Art. 3, Law of 27 June 1969 revising the Law-Decree of 28 December 1944 on the social security of workers (*Loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs / Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders*, MB/BS 25-07-1969, 7258).

1149 Johan Put, Vanessa Verdeyen and Yves Stevens, *Praktijkboek sociale zekerheid* (Wolters Kluwer 2019), p. 131.

1150 Art. 9, Directive 2014/67 on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services [2016] OJ L 159/11.

1151 Arts. 138-139, Program Law (I) of 27 December 2006 (*Loi-programme (I) du 27 décembre 2006 / Programmawet (I) van 27 december 2006*, MB/BS 28-12-2006, 75178) and Arts. 1-13, Royal Decree of 20 March 2007 relating to the prior notification for posted workers and posted self-employed persons (*Arrêté royal du 20 mars 2007 pris en exécution du Chapitre 8 du Titre IV de la loi-programme (I) du 27 décembre 2006 instaurant une déclaration préalable pour les travailleurs salariés et indépendants détachés / Koninklijk besluit van 20 maart 2007 tot uitvoering van het Hoofdstuk 8 van Titel IV van de programmawet (I) van 27 december 2006 tot voorafgaande melding voor gedetacheerde werknemers en zelfstandigen*, MB/BS 28-03-2007, 16975). For further information on the "Limosa" notification process, see [https://www.international.socialsecurity.be/working\\_in\\_belgium/en/limosa.html](https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html).

1152 This is currently located within the Federal Public Service for Employment, Labour and Social Dialogue: <https://employment.belgium.be/en/themes/international/posting/liaison-offices-and-labour-inspectorate>

1153 Further information on the "Limosa" notification process can be found on the Belgian government's website relating to social security matters [https://www.international.socialsecurity.be/working\\_in\\_belgium/en/limosa.html](https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html). It is important to note that the Limosa notification triggers the automatic issuance of a national identification number to a posted worker.

1154 Art. 15, Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems [2009] OJ L 204/01.

1155 Further information on Form A1 can be found on the Your Europe portal [https://europa.eu/youreurope/citizens/work/social-security-forms/index\\_en.htm](https://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm).

1156 Case C-17/19 *Bouygues travaux publics* EU:C:2020:379.

1157 The most common form is a limited liability company (*Société à Responsabilité Limitée / Besloten Vennootschap*) among a number of different corporate entities <https://economie.fgov.be/en/themes/enterprises/starting-business/steps-starting-business/forms-companies>.

employed activities are exempted from the need to obtain authorisation to work in the form of a professional card.<sup>1158</sup>

A brief analysis has been made of the impact which registration requirements may have on the fulfilment of the following administrative formalities relating to access to and pursuit of self-employed activities on an individual basis by an EU citizen in Belgium, namely (i) opening a local bank account, (ii) registration with the Belgian business register, the so-called Crossroads Bank for Enterprises,<sup>1159</sup> (iii) registration with the tax authorities, and (iv) registration with a social insurance fund.

These conditions were selected for further consideration as they are the main steps required to undertake self-employed activities as an individual in Belgium.<sup>1160</sup>

One of the requirements that need to be fulfilled is the opening of a local bank account.<sup>1161</sup> It has been reported that EU citizens who have not completed registration formalities relating to their residence are encountering increasing difficulties in opening a bank account in Belgium.<sup>1162</sup> This hurdle is likely to have an effect on the ability of EU citizens to take up self-employed activities in Belgium.

A second obligation applicable to the pursuit of self-employed activities requires the EU citizen to register with the Crossroads Bank for Enterprises.<sup>1163</sup> Following their registration, the applicant will receive a unique business identification number,<sup>1164</sup> which needs to be

used in all business dealings<sup>1165</sup> and must be stated on all official business documents (invoices, letters, etc.).<sup>1166</sup> There is no residence requirement which applies when registering with the Crossroads Bank for Enterprises.<sup>1167</sup> If the applicant is not yet in possession of a national identification number, a BIS-number will need to be created to complete the registration process.<sup>1168</sup> The creation of such BIS-number only requires the following data to be provided by an EU citizen: name and surname, birth date and place, gender, residence address abroad. This implies that an EU citizen does not need to have initiated the registration of their residence in Belgium in order to register as a self-employed person with the Crossroads Bank for Enterprises.<sup>1169</sup>

A third set of obligations relates to taxation. In case the applicant is subject to VAT,<sup>1170</sup> the EU citizen will need to activate their unique business identification number for VAT purposes with the Belgian tax authorities.<sup>1171</sup> Once the business identification number has been activated as a VAT registration number, the first invoices can be issued and expenses can be incurred by a self-employed person. The activation of the unique business identification number as a VAT registration number with the Belgian tax authorities can only be achieved once registration has been made with the Crossroads Bank for Enterprises. This does not require the applicant's national number, nor is a Belgian residential address required. Where a person has no residential address in Belgium, they may provide the address of an administrative representative in Belgium, which is considered as sufficient for this purpose.

The final set of requirements relates to social security. A specific social security scheme applies to self-employed

1158 Art. 1,1°, Royal Decree of 3 February 2003 exempting certain categories of foreigners from the obligation to hold a professional card for the exercise of a self-employed professional activity, hereafter the "Royal Decree of 3 February 2003" (*Arrêté royal du 3 février 2003 dispensant certaines catégories d'étrangers de l'obligation d'être titulaires d'une carte professionnelle pour l'exercice d'une activité professionnelle indépendante / Koninklijk besluit van 3 februari 2003 tot vrijstelling van bepaalde categorieën van vreemdelingen van de verplichting houder te zijn van een beroepskaart voor de uitoefening van een zelfstandige beroepsactiviteit, MB/BS 04-03-2003, 10517*). This also includes workers from Iceland, Norway and Liechtenstein. UK nationals and their family members who are beneficiaries of the Withdrawal Agreement are covered by Art. 1, 14°, Royal Decree of 3 February 2003. However, the rules are silent on the situation of Swiss nationals and their family members.

1159 This refers to *Banque-carrefour des entreprises / Kruispuntbank voor ondernemingen*. The Crossroads Bank for Enterprises (CBE) is a database operated by the FPS Economy which contains the business registration details of self-employed persons, companies and their business units.

1160 These steps are identified on the website of the FPS Economy <https://economie.fgov.be/en/themes/entreprises/starting-business/steps-starting-business>.

1161 Depending on the nature of their activity or profession it may be a legal obligation for self-employed individuals to open a separate business bank account as confirmed by the website of the FPS Economy <https://economie.fgov.be/en/themes/entreprises/starting-business/steps-starting-business/opening-current-account>.

1162 Milieu (n 1144), p. 21.

1163 Art. III.16, Code of Economic Law (*Code de droit économique du 28 février 2013 / Wetboek van economisch recht van 28 februari 2013, MB/BS 29-03-2013, 19975*).

1164 Art. III.22, Code of Economic Law.

1165 Art. III.23, Code of Economic Law.

1166 Art. III.25, Code of Economic Law.

1167 For an explanation of the BIS-number, see n 1139.

1168 Royal Decree of 24 June 2003 relating to the rules on the attribution, composition and means of transfer of a business identification number and establishment unit number by the Crossroads Bank for Enterprises (*Arrêté royal du 24 juin 2003 fixant les règles d'attribution, la composition et les modalités de transfert du numéro d'entreprise et du numéro d'unité d'établissement dans la Banque-Carrefour des Entreprises / Koninklijk besluit van 24 juni 2003 tot vaststelling van de toekenningsregels, de samenstelling en de overdrachtsmodaliteiten van het ondernemingsnummer en het vestigingseenheidsnummer in de Kruispuntbank van Ondernemingen, MB/BS 30-06-2003, 34933*).

1169 Written confirmation received by the legal service of Securex retained on file by the authors.

1170 Art. 4, Belgian VAT Code (*Loi du 3 juillet 1969 créant le Code de la taxe sur la valeur ajoutée / Wet van 3 juli 1969 tot invoering van het Wetboek van de belasting over de toegevoegde waarde, MB/BS 17-07-1969, 7046*). Pursuant to Art. 56bis, Belgian VAT Code, the threshold for VAT registration in Belgium is €25.000 and a self-employed with annual sales below this does not need to charge VAT.

1171 This refers to the *Administration générale de la Fiscalité / Algemene Administratie van de Fiscaliteit*.

persons in Belgium.<sup>1172</sup> Under this scheme self-employed persons are obliged to register with a social insurance fund of their choice<sup>1173</sup> and to pay social security contributions on a quarterly basis.<sup>1174</sup> This requirement applies to the exercise of self-employed activities established in Belgian territory, irrespective of nationality.<sup>1175</sup>

While no residence requirement applies for registering with a social insurance fund as such, an EU citizen will need a personal identification number or BIS-number in order to be able to do so.

In practice, it would appear that some social insurance funds will not issue a certificate of affiliation until the person concerned has been issued with a certificate of application (Annex 19). This is likely to constitute a breach of the provision of the Citizens Rights Directive which provides that completion of an administrative formality cannot be made conditional upon a person producing a certificate of application.<sup>1176</sup> In this respect, it should also be noted that, in the event an EU citizen fails to provide the supporting documentation – including a certificate of affiliation – which is necessary for the registration of their residence as a self-employed person<sup>1177</sup> within the three-month deadline,<sup>1178</sup> this will lead to their application being refused. Although the EU citizen concerned will have a further month to submit the required documentation,<sup>1179</sup> their entry on the register of foreigners will be deleted, which can make it more difficult to obtain any certificate of affiliation from the social insurance fund.<sup>1180</sup> If the EU citizen is unable to give any supporting documentation relating to their activities, the registration of their residence could eventually be the subject of a definitive refusal on

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1172 A self-employed person is defined as “any natural person who carries out a professional activity in Belgium by virtue of which he is not bound by an employment contract or by a statute” under Art. 3, Royal Decree No 38 of 27 July 1967 on the social status of self-employed persons, hereafter “Royal Decree on the status of self-employed persons” (*Arrêté royal n° 38 du 27 juillet 1967 organisant le statut social des travailleurs indépendants / Koninklijk Besluit nr. 38 van 27 juli 1967 houdende inrichting van het sociaal statuut der zelfstandigen*, MB/BS 29-07-1967, 8071).

1173 Art. 10, Royal Decree on the status of self-employed persons. A list of the recognised social insurance funds can be found on the website of the National Institute of Social Insurance for the Self-Employed (*Institut national d’assurances sociales pour travailleurs indépendants (INASTI) / Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen (RSVZ)*) <https://www.inasti.be/fr/caisses-d-assurances-sociales> / <https://www.rsvz.be/nl/socialeverzekeringsfondsen>.

1174 Art. 15, Royal Decree on the status of self-employed persons.

1175 Arts. 3 and 10, Royal Decree on the status of self-employed persons. See further Put, Verdeyen and Stevens (n 1149), p. 730.

1176 Art. 25, Directive 2004/38.

1177 For a discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.5 *Documentary requirements*, Paragraph 5.5.3 *Specific provisions on documentary requirements: self-employed persons*.

1178 Art. 50 §2, Royal Decree on Immigration. See further Chapter 1, Section 5. The registration process in Belgium, Subsection 5.4 Registration phase, Paragraph 5.4.1 Overview of the procedure

1179 Art. 51 §1, second para., Royal Decree on Immigration.

1180 See for example, CALL judgment No 190 518 of 8 August 2017. For further discussion, Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status*.

the basis of a failure to prove their right of residence as a self-employed person<sup>1181</sup>, given that the certificate of affiliation is a required document<sup>1182</sup> to support an application for registration.

Besides the reported difficulties in the opening of a local bank account by EU citizens whose residence is not registered in Belgium,<sup>1183</sup> it can be concluded that the registration formalities do not appear to negatively impact the ability of EU citizens to access to self-employed activities in Belgium.

As regards posted self-employed persons, in accordance with the EU rules on the coordination of social security, a self-employed person who is posted to Belgium from another EU Member State continues to remain affiliated to the social security system of their home country.<sup>1184</sup> Such an arrangement can last up to two years.<sup>1185</sup> In such a situation the posted self-employed person is required to notify their home country’s social security institution<sup>1186</sup> and obtain Form A1.<sup>1187</sup> Registration formalities in Belgium should have no impact on the ability of the self-employed person to obtain Form A1 from their home country’s social security institution.

In addition, it should be noted that self-employed persons who are working in the construction, meat or cleaning industry sectors and posted to Belgium for a temporary period, which are considered as presenting a high risk of evasion from social security obligations,<sup>1188</sup> are obliged to submit a LIMOSA notification.<sup>1189</sup> The submission of a LIMOSA notification does not require a posted self-employed person to provide a national identification number, which would imply that, in the event the EU citizen concerned has not registered their residence in Belgium, this would not impact the ability of the self-employed person to fulfil their obligation to filing such a notification.

## 2.1.4 Jobseekers

EU jobseekers do not need to have been issued with a residence document in order to be able to register as

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1181 CALL judgment No 190 518 of 8 August 2017.

1182 Art. 50 §2, 2°, Royal Decree on Immigration.

1183 Milieu (n 1144), p. 21.

1184 Art. 12(2), Regulation 883/2004.

1185 Ibid. For a further discussion, see Chapter 1, Section 3. *Personal scope of the study*, Subsection 3.4 *Self-employed persons*.

1186 Art. 15, Regulation 987/2009.

1187 This is a certificate concerning the social security legislation which applies to its holder, which confirms the self-employed person’s continued affiliation to their home social security institution.

1188 Art. 2, Royal Decree of 20 March 2007 relating to the prior notification for posted workers and posted self-employed persons (n 1151).

1189 Art. 137, 6°, Program Law (1) of 27 December 2006 (n 1151).

looking for work with a public employment agency.<sup>1190</sup> However, they will need to be physically present in Belgium in order to be able to register as a jobseeker with a public employment agency in Brussels or Wallonia,<sup>1191</sup> although this does not appear to be necessary in Flanders or the German-speaking community.<sup>1192</sup>

## 2.1.5 Family members of EU citizens

As a general rule family members of EU citizens have the right to work.<sup>1193</sup> In Belgium, such family members who are not EU citizens are exempt from the need to hold a work permit<sup>1194</sup> or professional card<sup>1195</sup> and therefore have direct access to the labour market as a worker or self-employed person. This applies to close family members in the sense of Article 2(2) of the Citizens Rights Directive and the registered partner<sup>1196</sup> who have the right to work as an employee or as a self-employed person from the moment they begin the registration process and receive their certificate of application (Annex 19ter).<sup>1197</sup>

However, non-EU “other family members” who fall within the scope of Article 3(2) of the Directive, with the exclusion of the registered partner<sup>1198</sup>, will only have the right to work from the moment their right of residence has been facilitated, namely from the moment they have been issued with a residence card (F card)<sup>1199</sup> or permanent residence card (F+ card).<sup>1200</sup> An Annex 19ter does not suffice for this purpose.<sup>1201</sup>

In addition, it should be noted that non-EU “other family members” do not have access to the labour market during

the time that their application for a residence card is pending. In order to have the right to work during the time that their application is being processed, such “other family members” would need to apply under the ordinary procedure which applies to the issue of a single permit to third country nationals.<sup>1202</sup> This requires an application to be made via an employer from abroad<sup>1203</sup> – thus prior their arrival in Belgium and the start of their registration – unless the strict regional conditions can be met for the purposes of applying from within Belgium for a work permit for a maximum period of 90 days.<sup>1204</sup>

Moreover, in order to be able to exercise self-employed activities in Belgium, non-EU “other family members” must first obtain a professional card even after they have had their residence facilitated and been issued with a residence card.<sup>1205</sup> This does not appear in keeping with the right of work which all family members are granted under the Citizens Rights Directive.<sup>1206</sup>

1190 See for example the website of Actiris, the public employment agency for the Brussels region <https://www.actiris.brussels/fr/citoyens/pas-de-nationalite-belge-mais-residant-belge/>, the website of VDAB, for Flanders <https://www.vdab.be/inschrijving>, the website of Forem, the public employment agency for Wallonia <https://www.leforem.be/particuliers/accompagnement-ressortissants-etranagers.html> and the website of ADG, for the German-speaking community [http://www.adg.be/desktopdefault.aspx/tabid-5635/9204\\_read-50048](http://www.adg.be/desktopdefault.aspx/tabid-5635/9204_read-50048).

1191 Ibid.

1192 In Flanders, the VDAB appears to allow online registration of non-residents on its website <https://www.vdab.be/mlb/register/noinszregister>; likewise registration by email appears possible with the ADG in the German-speaking community [http://www.adg.be/fr/desktopdefault.aspx/tabid-5635/9204\\_read-50048](http://www.adg.be/fr/desktopdefault.aspx/tabid-5635/9204_read-50048).

1193 Art. 23, Directive 2004/38.

1194 Arts. 14-17, Royal Decree of 2 September 2018 (n 1130).

1195 Art. 1, 1°, Royal Decree of 3 February 2003 (n 1158).

1196 This corresponds to family members covered by Art. 40bis, Belgian Immigration Law.

1197 Art. 16, Royal Decree of 2 September 2018 (n 1130). This is implicit as regards family members taking up self-employment under Art. 1, 1°, Royal Decree of 3 February 2003 (n 1158).

1198 This corresponds to “other family members” covered by Art. 47/1, Belgian Immigration Law.

1199 Art. 14, Royal Decree of 2 September 2018 (n 1130).

1200 Art. 15, Royal Decree of 2 September 2018 (n 1130).

1201 Art. 16, Royal Decree of 2 September 2018 (n 1130) is limited to close family members covered by Art. 40bis, Belgian Immigration Law as well as family members of Belgian nationals covered by Art. 40ter, Belgian Immigration Law.

1202 Arts. 61/25-1 to 61/25-7, Belgian Immigration Law.

1203 Art. 4 §2, Law of 30 April 1999 on the employment of foreign workers (*Loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers / Wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*, MB/BS 21-05-1999, 17800). The Belgian Supreme Court has clarified that the provisions of this law remains applicable to the regions as long as they have not been repealed in accordance with Art. 94, Special Law of 8 August 1980 on institutional reforms (*Loi spéciale du 8 août 1980 de réformes institutionnelles / Bijzondere wet van 8 augustus 1980 tot hervorming der instellingen*, MB/BS 15-08-1980, 9434) in a ruling concerning the imposition of sanctions for the unauthorised employment of foreign workers (Cass., judgment No P.19.1308.F of 9 September 2020).

1204 Art 5, Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers / Koninklijk besluit van 9 juni 1999 houdende de uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*, MB/BS 26-06-1999, 24162) as regards the Brussels region and the German-speaking community; Art 7, Royal Decree of the Flemish government of 7 December 2018 implementing the Law of 30 April 1999 on the employment of foreign workers (*Arrêté du Gouvernement flamand du 7 décembre 2018 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers / Besluit van de Vlaamse Regering van 7 december 2018 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*, MB/BS 21-12-2018, 101763) as regards Flanders; Art. 2 §2°, Royal Decree of the Walloon government of 16 May 2019 on the employment of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Arrêté du Gouvernement wallon du 16 mai 2019 relatif à l'occupation des travailleurs étrangers et abrogeant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers / Besluit van de Waalse regering van 16 mei 2019 betreffende de tewerkstelling van buitenlandse werknemers en tot opheffing van het koninklijk besluit van 9 juni 1999 houdende de uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*) as regards Wallonia.

1205 The three categories of “other family members” listed in Art. 47/1, Belgian Immigration Law are not included among the family members who are covered by the exemption from the obligation to hold a professional card under Art. 1, 1°, Royal Decree of 3 February 2003 (n 1158).

1206 Art. 23, Directive 2004/38. See to that effect Case C-423/12 *Reyes* EU:C:2014:16.

## 2.2 Conclusion on access to employment

Overall, it can be concluded that the completion of registration formalities is not a precondition for EU citizens to access employment in Belgium as workers, posted workers or self-employed persons nor is it a precondition for registering as a jobseeker.

The opening of a local bank account by EU citizens whose residence is not registered in Belgium has however been flagged as a difficulty which may impact the ability of EU citizens to access employment or to engage in self-employed activities in Belgium.

In addition, non-EU family members of EU citizens will have to hold a certificate of application (Annex 19ter) or residence card (F card) or permanent residence card (F+ card) in order to be able to prove their right to work to prospective employers or to be able to register as self-employed. Furthermore, non-EU “other family members” of EU citizens, will not have the right to take up employment until their registration formalities have been completed and they have been issued with a residence document (F card or F+ card) nor can they exercise a self-employed activity on Belgian soil, unless a professional card has been applied for.

## 3. Impact of registration formalities on conditions of employment

EU law confers substantial rights on workers who exercise the right of free movement,<sup>1207</sup> which entails the abolition of any discrimination based on nationality as regards to employment, remuneration and other conditions of work and employment.<sup>1208</sup> The right to equal treatment in respect of employment conditions is further spelled out in Regulation 492/2011, in particular as regards remuneration, dismissal, as well as reinstatement or re-

<sup>1207</sup> Art. 45 TFEU.  
<sup>1208</sup> Art. 45(2) TFEU.

employment following unemployment.<sup>1209</sup> The inclusion of discriminatory clauses in collective agreements is also prohibited.<sup>1210</sup> In addition, Directive 2014/54 on the facilitation of the free movement of workers<sup>1211</sup> explicitly provides it applies to conditions of employment and work.<sup>1212</sup>

In Belgium, conditions of employment are not only embedded in legislation, but also in collective bargaining agreements. These collective bargaining agreements are entered into either on industry level between the unions and employer organisations or on company level between the unions and an individual employer.<sup>1213</sup> There is a relatively large amount of legislation governing the conditions of employment in Belgium, including rules on remuneration, rest and working time and maternity leave,<sup>1214</sup> the right to paid holidays,<sup>1215</sup> and the protection of wages<sup>1216</sup> among other matters.

Conditions of employment are thus linked to the existence of an employment relationship and consequently only applicable to salaried workers.

## 3.1 Registration as precondition?

As mentioned in the previous Section, the impact which residence formalities can have on the ability of EU citizens to access employment in Belgium, and thus more specifically on the possibility for EU nationals to conclude an employment contract in Belgium, is relatively limited.

Given that employment conditions are linked to the existence of a relation of employment, the question remains to what extent workers, who have signed an employment contract but who have not yet fulfilled their registration formalities in Belgium, are able to benefit

<sup>1209</sup> Art. 7(1), Regulation 492/2011.

<sup>1210</sup> Art. 7(4), Regulation 492/2011

<sup>1211</sup> Directive 2014/54.

<sup>1212</sup> Art. 2, Directive 2014/54

<sup>1213</sup> European Foundation for the Improvement of Living and Working Conditions, Belgium country profile : <https://www.eurofound.europa.eu/country/belgium#individual-employment-relations> ; see also the website of the SPF Employment, Labour and Social Dialogue <https://employment.belgium.be>.

<sup>1214</sup> Labour Law of 16 March 1971 (*Loi du 16 mars 1971 sur le travail / Arbeidswet van 16 maart 1971*, MB/BS 30-03-1971, 3931).

<sup>1215</sup> Public Holidays Act of 4 January 1974 (*Loi du 4 janvier 1971 sur les jours fériés / Wet van 4 januari 1974 betreffende de feestdagen*, MB/BS 31-01-1974, 1378).

<sup>1216</sup> *Wage Protection Act of 12 April 1965 (Loi du 12 avril 1965 concernant la protection de la rémunération des travailleurs / Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers*, MB/BS 30-04-1965, 710).

from the right to the protections provided by Belgian employment legislation. In this respect, the so-called Rome I Regulation on the law applicable to contractual obligations<sup>1217</sup> is relevant as well as the Posted Workers Directive.<sup>1218</sup> This matters because the application of the protections afforded under Belgian employment law is generally conditional upon Belgian law governing the employment relationship.

### 3.1.1. Workers

The Rome I Regulation explicitly applies to the determination of the law governing an employment contract and lays down the general principle of freedom of contract, whereby the parties have the right to choose the legislation that is applicable to the employment contract.<sup>1219</sup>

However, based on the assumption that the worker is the economically weaker party in the negotiation of the employment contract, certain restrictions apply with regard to this principle of freedom of choice. As a result, the freedom of the parties to choose the law applicable to the employment contract may not have the result of depriving the worker of the protections afforded under the mandatory provisions of national law that would have been applicable had the parties made no choice.<sup>1220</sup>

Where Belgian law has been chosen by the parties, then the protections under Belgian law will apply to all aspects of the employment relationship, unless it can be shown that this deprives the worker of the protections afforded under the mandatory provisions of national law that would otherwise have been applicable in the absence of the choice of Belgian law by the parties.<sup>1221</sup> Such a limitation adds nuance to the choice of applicable law and is intended to protect the worker.<sup>1222</sup>

In circumstances where the parties have not made an explicit choice as to the applicable law, the Rome I Regulation provides that the employment contract will be determined according to a hierarchy of criteria. In the first place, the law applicable to the employment contract will

1217 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/06, hereafter the “Rome I Regulation”.

1218 Directive 96/71.

1219 Art. 8(1), Regulation 593/2008.

1220 Ibid.

1221 The Belgian Supreme Court has confirmed this in the context of a Belgian worker hired by a Belgian employer who was posted to Spain in respect of a claim against unfair dismissal (Cass., Judgment No S.15.0123.N of 18 June 2018). For comment see, Jurgen Goyaerts, “Het beding van de rechtskeuze in de arbeidsovereenkomst: do’s and dont’s”, Legal News (February 2019) <https://legalnews.be/ondernemingsrecht/sociaal-recht/het-beding-van-rechtskeuze-in-de-arbeidsovereenkomst-dos-and-donts-curia>.

1222 Ibid.

be deemed to be the legislation of the habitual country of employment.<sup>1223</sup> For this purpose, the country where the work is habitually carried out will not be deemed to have changed solely by virtue of the fact that the worker temporarily carries out his work in another country.<sup>1224</sup> In case it is not possible to identify the worker’s habitual country of employment, the law applicable to the employment contract will be deemed to be the legislation of the country where the place of business through which the worker was engaged is situated.<sup>1225</sup> However, a court may, in very exceptional cases, set aside the preceding rules if it finds that the employment contract is “manifestly more closely connected” with another legal system.<sup>1226</sup>

In view of the above, in circumstances where a worker has not completed registration formalities in Belgium, this will not have an impact on the application of Belgian law as the law which governs the worker’s employment contract. In such case, the worker will therefore be able to claim protection under Belgian employment law.

### 3.1.2 Posted Workers

In case of workers posted to Belgium, their situation will be addressed by the Belgian rules<sup>1227</sup> as amended in 2020,<sup>1228</sup> which give effect to the Posted Workers Directive as amended in 2018.<sup>1229</sup> According to these rules, any employer which posts a worker to Belgium is required to comply with the conditions of employment as laid down by Belgian legislation which are subject to criminal law or in the mandatory provisions of collective bargaining agreements,<sup>1230</sup> as regards postings lasting for a period not exceeding 12 months<sup>1231</sup> (or 18 months in case of a motivated notification).<sup>1232</sup>

1223 Art. 8(2), Regulation 593/2008. Relevant case law of the CJEU on where the employee habitually carries out his duties : Case C29/10 Koelzsch EU:C:2011:151; Case Voogsgaard C-384/10 EU:C:2011:842 and Case- 64/12 *Schlecker* EU:C:2013:551.

1224 Ibid.

1225 Art. 8(3), Regulation 593/2008.

1226 Art. 8(4), Regulation 593/2008.

1227 Law of 5 March 2002 on the work, wage and employment conditions in the event of posting workers to Belgium and the compliance therewith, hereafter the “Law of 5 March 2002” (*Loi du 5 mars 2002 concernant les conditions de travail, de rémunération et d’emploi en cas de détachement de travailleurs en Belgique et le respect de celles-ci /Wet van 5 maart 2002 betreffende de arbeids-, loon- en tewerkstellingsvoorwaarden in geval van detachering van werknemers in België en de naleving ervan, MB/BS 13-03-2002, 10638*).

1228 Law of 12 June 2020 containing various provisions on posting of workers (*Loi du 12 juin 2020 portant diverses dispositions concernant le détachement de travailleurs / Wet van 12 juni 2020 houdende diverse bepalingen inzake de detachering van werknemers, MB/BS 18-06-2020, 44578*).

1229 Directive 96/71 concerning the posting of workers (n 39), as amended by Directive 2018/957 [2018] OJ L 173/16.

1230 Art. 5 §1, Law of 5 March 2002.

1231 Art. 5 §1 and §2, Law of 5 March 2002.

1232 Art. 5 §2, para. 4, Law of 5 March 2002.

Given that the majority of Belgian employment legislation is subject to criminal sanctions,<sup>1233</sup> it follows that employers posting workers to Belgium for a period not exceeding 12 months are consequently required to comply with almost all provisions of Belgian employment legislation. On the other hand, longer-term postings to Belgium are subject to the entire corpus of Belgian employment law, irrespective whether the provisions are criminally sanctionable,<sup>1234</sup> with the exception of the rules on conclusion and termination of employment contracts and the supplementary occupational pension schemes.<sup>1235</sup>

In addition, the above does not preclude the application of employment conditions of the home country, in so far as these conditions are more favourable for the posted worker.<sup>1236</sup>

No registration requirements need to be fulfilled as to enable posted workers to claim Belgian employment law protection.

### 3.1.3 Self-employed persons

This section is not applicable to self-employed persons, as conditions of employment are linked to the existence of an employment contract.

### 3.1.4 Jobseekers

This section is not applicable to jobseekers, as conditions of employment are linked to an employment contract which implies the person will be in work and no longer be looking for employment.

### 3.1.5 Family members of EU citizens

The above rules are equally valid as regards the family members of EU citizens who work in Belgium, regardless of their nationality. They benefit from the right to work<sup>1237</sup> and the right to equal<sup>1238</sup> treatment under the Citizens Rights Directive.

## 3.2 Conclusion on conditions of employment



Based on the above, it can be concluded that residence formalities have no impact on the conditions of employment in Belgium. As a consequence, EU workers who have concluded a Belgian employment contract but who have not yet completed their registration formalities will be able to rely on the protections provided by Belgian employment legislation. Likewise, EU workers who are posted to Belgium are entitled to claim protection under Belgian employment law without having fulfilled registration requirements.



## 4. Impact of registration formalities on social welfare benefits

Belgium has put in place three complementary frameworks for the provision of social welfare benefits<sup>1239</sup> namely, (i) contribution-based social security benefits, for which the eligibility depends on a claimant having worked or paid social security contributions for a certain period of time; (ii) non-contributory social assistance, for which eligibility does not depend on whether the claimant has worked or paid social security contributions, but which are granted according to the claimant's needs; and (iii) residual social assistance, which are granted based on a claimant's needs when the person is not eligible for other forms of social assistance.

Although registration formalities do not have an impact on the ability of EU citizens to access an occupation, there is no denying that the opposite would tend to prevail in respect of access to social benefits. In addition to meeting the eligibility conditions that may apply to each category

1233 Criminal Labour Code (n 1131).

1234 Art. 5 §2, Law of 5 March 2002.

1235 Ibid.

1236 Art. 7, Law of 5 March 2002.

1237 Art. 23, Directive 2004/38.

1238 Art. 24, Directive 2004/38.

1239 Denis Feron *Le droit des étrangers à l'usage des CPAS et des services sociaux* (Wolters Kluwer 2012), pp. 1-7.

of benefit, Belgian law requires that where the claimant is not a Belgian national, that person must comply with the applicable Belgian immigration rules<sup>1240</sup> or be registered in the national population register.<sup>1241</sup> Claimants who are EU citizens must therefore generally be able to demonstrate that they have the right to reside in Belgium.<sup>1242</sup>

It should also be observed that in the event that the Belgian Immigration Office terminates or withdraws the right of residence of an EU citizen for whatever reason,<sup>1243</sup> this will also have an impact on their ability to continue to access social security benefits. Whenever a decision is taken to terminate or withdraw a right of residence, this will lead to their details being stricken off<sup>1244</sup> from the national population register due to the loss of their right of residence.<sup>1245</sup> EU citizens will consequently not be able to continue receiving any of the social welfare benefits or allowances.<sup>1246</sup> However, as this study is not intended to delve in detail into the law and practice relating to the termination or withdrawal of residence rights, this issue is only addressed in further detail below whenever particular concerns have been identified.

This section will briefly examine the three frameworks of social benefits and focus on the question whether registration is a precondition to claim benefits under

any of these by reference to some of the key benefits and allowances. Where relevant, this section also deals with provisions related to the EU rules on the coordination of social security systems<sup>1247</sup> as well as those guaranteeing equality of treatment to EU migrant workers<sup>1248</sup> and EU citizens in general.<sup>1249</sup>

## 4.1 Registration as a precondition for contribution-based social security benefits?



The social security system in Belgium is financed by contributions paid by employer and workers, as well as self-employed persons. The entitlement to contribution-based social security benefits is therefore based on the payment of social contributions which are levied on the income generated from work. These social contributions are paid to the National Office for Social Security<sup>1250</sup> in the case of workers or to the relevant social security fund in the case of self-employed persons<sup>1251</sup> and serve to finance the social security system.

For each category of contribution-based social security benefits, a claimant needs to meet certain specific eligibility conditions. As a detailed analysis of each set of eligibility conditions is beyond the scope of this report, this section will focus on whether registration formalities may have an impact on entitlements to healthcare and unemployment benefits.<sup>1252</sup>

In this respect, the Belgian rules will be assessed in terms of their compliance with the right to equal treatment<sup>1253</sup> and the provisions waiving residence requirements<sup>1254</sup> which are contained in the EU rules on the coordination of social security.

1240 For example, regarding unemployment benefit, see Arts. 43 §1 and 69 §1 of the Royal Decree of 25 November 1991 regulating unemployment (*Arrêté royal du 25 novembre 1991 portant réglementation en matière de chômage / Koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering*, MB/BS 31-12-1991, 29888); regarding healthcare benefits, see Art. 32, 15°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits (*Loi relative à l'assurance obligatoire soins de santé et indemnités coordonnée le 14 juillet 1994 / Wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen gecoördineerd op 14 juli 1994*, MB/BS 27-08-1994, 21524).

1241 See, as regards social integration allowance, Article 3, Law of 26 May 2002 on the right to social integration (*Loi du 26 mai 2002 concernant le droit à l'intégration sociale / Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie*, MB/BS 31-07-2002, 33610); as regards disability allowance, Article 4, Law of 27 February 1987 relating to allowances for disabled persons (*Loi du 27 février 1987 relative aux allocations aux personnes handicapées / Wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap*, MB/BS 01-04-1987, page 4832).

1242 Anthony Valcke, *Fitness Check Report for Belgium: A review of the state of compliance of Belgium's implementation of Directive 2004/38 on residence rights of EU citizens and their family members*, FEANTSA study (2018), p. 16. See also Pauline Melin, "Migrants' Access to Social Protection in Belgium" in Jean-Michel Lafleur and Daniela Vintila D. (eds) *Migration and Social Protection in Europe and Beyond (Volume 1)*, IMISCOE Research Series (Springer 2020).

1243 For a further discussion on the circumstances in which the Immigration Office may terminate or withdraw the right of residence of EU citizens and their family members, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

1244 This refers to *radiation des registres / afvoering van de registers*.

1245 Art. 12, 5°, Royal Decree of 16 July 1992 relating to population registers and the register of foreigners (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers / Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister*, MB/BS 15-08-1992, 18028).

1246 Valcke (n 1242), p. 17.

1247 Regulation 883/2004 (n 1121) and Regulation 987/2009 (n 1154).

1248 Regulation 492/2011 (n 1114).

1249 Art. 24, Directive 2004/38

1250 This refers to the *Office National de Sécurité Sociale / Rijksdienst voor de Sociale Zekerheid (ONSS/RSZ)*.

1251 In Belgium, self-employed persons are obliged to register with a social insurance fund of their choice. See further Section 2. *Impact of residence formalities on access to employment*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.3 *Self-employed persons*.

1252 The scope of the study has been limited to healthcare and unemployment benefits, although the other contributory benefits such as family allowances are equally important for consideration.

1253 Art. 4, Regulation 883/2004.

1254 Art. 7, Regulation 883/2004.

## 4.1.1 Workers

As mentioned above,<sup>1255</sup> an employer must declare all newly-hired workers with the social security system by making a DIMONA notification<sup>1256</sup> as soon as employment is taken up in Belgium. This process is not conditional upon an EU worker having completed registration formalities and it is therefore not a precondition for an EU citizen to access employment in Belgium as worker.<sup>1257</sup>

All workers falling within the personal scope of the Belgian social security system<sup>1258</sup> are subject to compulsory affiliation.<sup>1259</sup> Under Belgian law<sup>1260</sup> employed workers are eligible for the following categories of contribution-based social security benefits for: (i) sickness benefits provided in the scope of compulsory health insurance,<sup>1261</sup> (ii) unemployment benefits,<sup>1262</sup> (iii) replacement income in the event of sickness or incapacity from work,<sup>1263</sup> (iv) allowances for accidents at work and occupational

diseases,<sup>1264</sup> (v) family allowances,<sup>1265</sup> (vi) old-age retirement and survivor's benefits,<sup>1266</sup> and (vii) paid leave benefits.<sup>1267</sup>

In this respect, it is important to note that contributory social security benefits are considered as “social advantages” for the purposes of the EU rules on the free movement of workers,<sup>1268</sup> which lay down the principle of equal treatment with regards to access to social security benefits.<sup>1269</sup> EU citizens employed in Belgium together with their family members<sup>1270</sup> should consequently have access to social security benefits, irrespective of any residence requirement, unless this is allowed by EU law.<sup>1271</sup>

### 4.1.1.1 Impact of registration formalities on access to healthcare

The healthcare scheme in Belgium is organised around compulsory affiliation to a healthcare insurance fund.<sup>1272</sup> In order to claim healthcare coverage, all workers who are employed in Belgium and fall within the scope of the Belgian social security system are required to affiliate<sup>1273</sup> with a Belgian healthcare insurance institution<sup>1274</sup> of their choice,<sup>1275</sup> which can be a mutual non-profit-making

<sup>1255</sup> See Section 2. *Impact of residence formalities on access to employment*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.1 *Workers*.

<sup>1256</sup> For explanation see n 1141.

<sup>1257</sup> For a further discussion on the circumstances in which the Immigration Office may terminate or withdraw the right of residence of EU citizens, see Section 2. *Impact of residence formalities on access to employment*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.1 *Workers*.

<sup>1258</sup> As determined by Articles 11-16 of Regulation 883/2004. Generally speaking, all workers who physically perform their work in Belgium will be covered, except for posted workers.

<sup>1259</sup> Law of 27 June 1969 revising the decree-law of 28 December 1944 concerning the social security of workers (*Loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs / Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders*, MB/BS 25-07-1969, 7258)

<sup>1260</sup> Law of 29 June 1981 establishing the general principles of social security for employed workers, hereafter the “Law on social security for employed workers” (*Loi du 29 juin 1981 établissant les principes généraux de la sécurité sociale des travailleurs salariés / Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid*. MB/BS 02-07-1981, 8575).

<sup>1261</sup> Art. 21, 5°, Law on social security for employed workers. This refers to *prestations de santé dues en exécution de l'assurance obligatoire soins de santé et indemnités / geneeskundige verstrekkingen verschuldigd in uitvoering van de verplichte verzekering voor geneeskundige verzorging en uitkeringen*. As a result of the Sixth Belgian State reform, a significant proportion of federal competences in the field of sickness benefits were transferred to the regions from 1 July 2014. After a transition period ending in 1 January 2019, a number of sickness benefits have become the operational responsibility of the regions. Those sickness benefits that were transferred to the regions (including mental health care, and elderly care benefits as well as rehabilitation allowances) are considered as social protection schemes which are complementary to the federal compulsory healthcare insurance and may fall within the scope of Regulation 883/2004 on the coordination of social security.

<sup>1262</sup> Art. 21, 2°, Law on social security for employed workers. This refers to *allocations de chômage / werkloosheidsuitkering*.

<sup>1263</sup> Art. 21, 1°, Law on social security for employed workers. This refers to *revenus de remplacement / vervangingsinkomen*.

<sup>1264</sup> Art. 21, 4°, Law on social security for employed workers. This refers to *indemnités d'incapacité de travail / vergoedingen bij arbeidsongeschiktheid*.

<sup>1265</sup> Art. 21, 6°, Law on social security for employed workers. This refers to *allocations familiales / kinderbijslag*. Since 2014, following the Sixth Belgian State Reform, the award of family allowances fall within the competence of the regions; further information on the respective regional systems can be found on the websites of the relevant social welfare institution, namely Iriscare for the Brussels region [www.iriscare.brussels](http://www.iriscare.brussels), AVIQ for Wallonia [www.aviq.be](http://www.aviq.be) and Agentschap Uitbetalings Groeipakket for Flanders <http://www.groeipakket.be/> as well as the Ministry of the German-speaking community [www.ostbelgienfamilie.be](http://www.ostbelgienfamilie.be).

<sup>1266</sup> Art. 21, 3°, Law on social security for employed workers. This refers to *pensions de retraite / rustpensioenen*, while survivor's benefits are called *pensions de survie / overlevingspensioenen*.

<sup>1267</sup> Art. 21, 7°, Law on social security for employed workers. This refers to *congé payé / betaald verlof*.

<sup>1268</sup> Art. 7(2), Regulation 492/2011.

<sup>1269</sup> Case C-111/91 *Commission v Luxembourg* [; Case C-310/91 *Schmid* EU:C:1993:221;

<sup>1270</sup> *Ibid*; see further on equality of treatment as regards social advantages and family members of workers, see Case 32/75 *Cristini* ECLI:EU:C:1975:120; Case 261/83 *Castelli* EU:C:1984:280; Case 94/84 *Deak* EU:C:1985:264; Case 157/84 *Frasco* EU:C:1985:243; Case C-337/97 *Meeusen* EU:C:1999:284.

<sup>1271</sup> As would be the case in respect of unemployment benefits for example; for a discussion see below Point 4.1.1.2 *Impact of residence formalities on unemployment benefits*.

<sup>1272</sup> Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits (n 1240).

<sup>1273</sup> Arts. 32, 1° and 118, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

<sup>1274</sup> This refers to an *organisme assureur / verzekeringsinstelling*.

<sup>1275</sup> There is an exception as regards employees of the national railway company (SNCB/NMBS) are compulsorily enrolled as members of the health insurance fund of the Belgian national railway company holding, HR-Rail.

healthcare insurance fund<sup>1276</sup> or the regional office of the national public sickness fund.<sup>1277</sup> As part of their healthcare coverage, workers and their dependants are entitled<sup>1278</sup> to the reimbursement of the costs that they incur in obtaining healthcare treatment which falls within the package of compulsory sickness insurance benefits<sup>1279</sup> and any complementary benefits to which they may have additionally subscribed.<sup>1280</sup>

In general, all workers who are subject to compulsory affiliation<sup>1281</sup> are entitled to access the healthcare insurance system.<sup>1282</sup> In addition, all persons who are registered in the national population register are entitled to access the healthcare insurance system, with the exception of foreigners who do not (or no longer) have a right to reside in Belgium.<sup>1283</sup>

In practice, an EU worker who is subject to Belgian social security should be able to affiliate with a healthcare insurance fund as a beneficiary even if the registration of their residence has not been completed.<sup>1284</sup> It should

be noted that a personal identification number,<sup>1285</sup> which also functions as a social security number, will be required to finalise the affiliation with the healthcare insurance fund. In case the worker has not yet initiated residence formalities, a BIS-number<sup>1286</sup> may be used.<sup>1287</sup>

It should be observed that specific rules apply in case of frontier workers.<sup>1288</sup> In the specific case of an EU citizen working in Belgium and living in another Member State, the EU worker will be subject to the Belgian social security legislation.<sup>1289</sup> In this scenario, both the EU worker as well as their family members<sup>1290</sup> are entitled to healthcare in the country of residence at the expense of the Belgian social security system.<sup>1291</sup> In addition, the EU worker will also be entitled to obtain healthcare services in Belgium, their country of work.<sup>1292</sup> In the reverse scenario, where the EU citizen resides in Belgium but works in another EU Member State, both the EU worker as well as their family members<sup>1293</sup> are entitled to healthcare in Belgium at the expense of social security system of the country of employment.<sup>1294</sup> The EU worker must request Form S1<sup>1295</sup> from the social security institution of the country of employment and use it to register with a Belgian healthcare insurance fund of his choice.<sup>1296</sup>

1276 This refers to the *mutualités / ziekenfondsen* established under the Law of 6 August 1990 on healthcare insurance funds and national unions of funds (*Loi du 6 août 1990 relative aux mutualités et aux unions nationales de mutualités / Wet van 6 augustus 1990 betreffende de ziekenfondsen en de landsbonden van ziekenfondsen*, MB/BS 28-09-1990, 18475). When subscribing to most Belgian healthcare insurance funds, an additional contribution will be due according to the health insurance institution's statutes. This compulsory contribution gives entitlement to various complementary healthcare benefits.

1277 This refers to the *Caisse auxiliaire d'assurance maladie invalidité / Hulpkas voor ziekte- en invaliditeitsuitkering*. However, joining the national public sickness fund (*Caisse auxiliaire d'assurance maladie-invalidité / Hulpkas voor Ziekte- en Invaliditeitsverzekering*) only provides coverage for compulsory health insurance benefits and no additional contribution will be due.

1278 Art. 121, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1279 Art. 34, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1280 When subscribing to most Belgian health insurance institutions, an additional contribution will be due according to the health insurance institution's statutes. This compulsory contribution gives entitlement to various complementary healthcare benefits. However, joining the national public sickness fund (*Caisse auxiliaire d'assurance maladie-invalidité / Hulpkas voor Ziekte- en Invaliditeitsverzekering*) only provides coverage for compulsory health insurance benefits and no additional contribution will be due.

1281 Law of 27 June 1969 revising the decree-law of 28 December 1944 concerning the social security of workers (*Loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs / Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders*, MB/BS 25-07-1969, 7258)

1282 Art. 32, 1°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1283 Art. 32, 15°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1284 Kruispunt Migratie-Integratie, *Verblijfsstatuten en gezondheidszorg voor vreemdelingen* (2013), p. 64 [https://www.agii.be/sites/default/files/bestanden/documenten/overzicht\\_verblijfsstatuten\\_en\\_gezondheidszorg\\_nl.pdf](https://www.agii.be/sites/default/files/bestanden/documenten/overzicht_verblijfsstatuten_en_gezondheidszorg_nl.pdf)

1285 A personal identification number is used to register a person in the national population register and should be generated whenever an EU citizen applies for the registration of their residence and is issued with a certificate of application (Annex 19). See further Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.2 *Application phase*, Paragraph 5.2.6 *Issuance of a certificate of application*.

1286 For an explanation of the BIS-number, see n 1139.

1287 Confirmed by the international department of CM Zuid-West Vlaanderen.

1288 Frontier workers are defined by Art. 1(f), Regulation 883/2004 as being workers who are employed in another Member State but are residing in another Member State to which they return daily or at least every weekly.

1289 Art. 11(3)(a), Regulation 883/2004.

1290 According to Art. 1(i)(1)(ii), Regulation 883/2004, for the purposes of healthcare benefits, a family member is any person defined or recognised as such by the legislation of the Member State of residence.

1291 Regulation No 883/2004, Art. 17. In order to access healthcare in the country of residence, the EU citizen and their family member will need to obtain Form S1 from the Belgian health insurance institution and use this to register with the relevant healthcare institution in the country of residence.

1292 Art. 18, Regulation 883/2004.

1293 For this purpose, a person will be recognised as a "family member" of an EU worker by the Belgian legislation on compulsory healthcare insurance as contained in Art. 32, 17° and 20°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits (n 1240), which covers all dependent members of the household and their children. For a discussion of which family members are covered, see further Paragraph 4.1.5 *Family members of EU citizens*.

1294 Art. 17, Regulation 883/2004.

1295 This is a certificate of entitlement to healthcare confirming which Member State is responsible for meeting a person's healthcare costs, which is issued by the social security institution to which the worker is affiliated.

1296 Further information is contained on the Belgian government's website relating to social security matters which allows EU workers to find out information on their specific situation using the application "Coming2Belgium": [https://www.socialsecurity.be/CMS/en/coming\\_to\\_belgium/index.html](https://www.socialsecurity.be/CMS/en/coming_to_belgium/index.html).

#### 4.1.1.2 Impact of registration formalities on unemployment benefits

A former EU worker<sup>1297</sup> seeking to claim unemployment benefits will need to show meeting the condition as to being compliant with Belgian immigration rules which is explicitly contained in Belgian unemployment legislation.<sup>1298</sup> As a result, former EU workers who claim unemployment benefits following the loss of their employment need to demonstrate they are lawfully resident in Belgium.<sup>1299</sup> This implies that they have completed registration formalities and have had their residence right recognised through the issue of a registration certificate in the form of an EU card or Annex 8ter.<sup>1300</sup>

It should be noted in this respect that, when an EU citizen ceases to be employed or to be self-employed, the person concerned may retain the status of a worker and therefore preserve their right of residence in certain circumstances.<sup>1301</sup> However, the provisions of the Citizen Rights Directive on the retention of the status of worker<sup>1302</sup> appear to have been transposed into Belgian law in a more restrictive manner, as this only refers to the retention of the right to reside<sup>1303</sup> which is arguably narrower in scope than the retention of worker status.<sup>1304</sup> Nonetheless, some take the view that this should not matter in practice.<sup>1305</sup>

1297 As opposed to a first-time jobseeker who have never worked in Belgium.

1298 Art. 43 §1 and Art. 69 §1, Royal Decree of 25 November 1991 regulating unemployment (n 1240).

1299 It is unclear whether such a condition of lawful residence would be considered justified. Although the Court of Justice has held in that there is nothing to prevent the award of social benefits to EU citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State (Case C-308/14 Commission v United Kingdom EU:C:2016:436), it is not clear the extent to which such case law is applicable to contributory benefits, where the claimant has previously made social security contributions.

1300 See Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

1301 Art. 7(3), Directive 2004/38.

1302 The rules provide that a person retains their status as a worker in the following situations (i) the EU citizen is temporarily unable to work as the result of an illness or accident; or (ii) the EU citizen is in involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; or (iii) the EU citizen is in 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 which case, the status of worker shall be retained for no less than six months; or (iv) the EU citizen embarks on vocational training and such training is related to the previous employment, unless they were involuntarily unemployed.

1303 Art 42bis §2, Belgian Immigration Law. There is some evidence to suggest that the Immigration Office sometimes refrains from applying this provision for the benefit of EU citizens who should otherwise be entitled to its protection; see for example, CALL, judgment No 140 965 of 13 March 2015 and judgment No 151 491 of 1 September 2015.

1304 Milieu (n 1144), p. 11; Valcke (n 1242), p. 11.

1305 Milieu Ltd and Edinburgh University, *Conformity Study for Belgium. Directive 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*, Study for European Commission (2008), p. 29.

In addition to the condition of lawful residence, the claimant must also have their habitual residence in Belgium and actually reside there.<sup>1306</sup> The National Employment Office<sup>1307</sup> can verify whether this requirement has been met by requesting the claimant to produce a residence document. The Court of Justice has previously ruled that such a residence condition is not contrary to the right of free movement of persons under Article 21 TFEU.<sup>1308</sup>

As regards to unemployment benefits, specific rules also apply in the case of frontier workers.<sup>1309</sup> As a result, a frontier worker who resided in Belgium while working in another Member State and who becomes wholly unemployed should be entitled to claim unemployment benefits from the Belgian authorities.<sup>1310</sup>

#### 4.1.1.3 Impact of refusal or withdrawal of residence rights on social security benefits

As mentioned above,<sup>1311</sup> EU citizens and their family members whose right of residence has been terminated or withdrawn for whatever reason will be unable to continue receiving social security benefits.

As regards access to healthcare, the termination or withdrawal of residence rights by the Immigration Office will result in EU citizens and their family members ceasing to access the healthcare insurance system,<sup>1312</sup> although this should only take effect at the end of the year in which the decision to terminate or withdraw residence rights has been taken.<sup>1313</sup> In such cases, EU citizens and their family members without sufficient means should be eligible to claim urgent medical care.<sup>1314</sup>

The existence of a lawful residence condition as regards unemployment benefits poses a particular problem for workers who become unemployed within a year of starting work in Belgium, given that they can only retain their status as a worker for up to six months.<sup>1315</sup>

1306 Arts. 66 and 66bis, Royal Decree of 25 November 1991 regulating unemployment.

1307 This refers to the *Office national de l'emploi (ONEM) / Rijksdienst voor Arbeidsvoorziening (RVA)*.

1308 Case C-406/04 *De Cuyper* EU:C:2006/491. The Court also pointed out that the waiver of residence clauses contained in Art. 10, Regulation 1408/71 (now replaced by Art. 7, Regulation 883/2004) excludes unemployment benefits from its scope.

1309 Art. 65, Regulation 883/2004

1310 Art. 65(2), Regulation 883/2004.

1311 See introductory text under Section 4. *Impact of residence formalities on social benefits*.

1312 Art. 32, 15°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1313 Arts. 122-123, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1314 See Point 4.3.1.2 *Impact of registration formalities on urgent medical assistance*.

1315 Art. 42bis §2, Belgian Immigration Law.

In such a case, the Belgian Immigration Office could proceed to withdraw a person's right of residence in the event that this person remained unemployed beyond six months, thereby leading to their unemployment benefits being withdrawn as the unemployed person concerned would no longer have a right to reside in Belgium.

This could give rise to a particularly unfair and potentially unlawful situation where an EU worker who becomes unemployed after working in Belgium for a period of more than six months but less than a year will have contributed to the Belgian social security system for more than six months but will only be entitled to receive unemployment benefits for six months.

## 4.1.2 Posted workers

In accordance with the EU rules on the coordination of social security, EU workers who are posted to Belgium can remain subject to their home social security scheme for up to two years and will therefore not be subject to the Belgian social security rules.<sup>1316</sup> As a consequence, posted workers will not be entitled to access Belgian social security benefits in general. However, given that contributory social security benefits fall within the scope of application of Regulation 883/2004,<sup>1317</sup> posted workers should be able to claim such benefits from the relevant social security institution in their home Member State.

### 4.1.2.1 Impact of registration formalities on access to healthcare

An EU worker who is being posted to Belgium remains affiliated to the social security scheme of their home country for up to two years.<sup>1318</sup> The EU worker concerned and their family members will need to obtain Form S1<sup>1319</sup> from the relevant social security institution in their home country and use it to register with a healthcare insurance fund in Belgium of their choice. This will then entitle the posted worker and their family members<sup>1320</sup> to obtain healthcare in Belgium during the period of posting.<sup>1321</sup>

<sup>1316</sup> Art. 12, Regulation 883/2004.

<sup>1317</sup> Art. 3, Regulation 883/2004.

<sup>1318</sup> Art. 12, Regulation 883/2004.

<sup>1319</sup> Art. 24, Regulation 987/2009.

<sup>1320</sup> A person will be recognised as a "family member" in accordance with the Belgian legislation on compulsory healthcare insurance; For a discussion of which family members are covered, see further Paragraph 4.1.5 *Family members of EU citizens*.

<sup>1321</sup> Art. 17, Regulation 883/2004.

### 4.1.2.2 Impact of registration formalities on unemployment benefits

Posted workers who remain subject to their home country's social security scheme will not be entitled to Belgian unemployment benefits. Instead, this category of workers will be able to claim unemployment benefits from their home Member State, whose legislation remains applicable.<sup>1322</sup> To be able to do so, the EU worker concerned will need to register as a jobseeker with the national employment service in their home country and meet the relevant eligibility conditions such as minimum contribution periods.

## 4.1.3 Self-employed persons

As previously indicated, self-employed persons are required to register with a social insurance fund of their choosing<sup>1323</sup> and will have to pay social security contributions on a quarterly basis.<sup>1324</sup> Such obligations apply to the exercise of self-employed activities from a place of establishment on Belgian soil, irrespective of nationality.<sup>1325</sup> It will be recalled that no residence conditions apply to the affiliation of self-employed persons to the Belgian social security system thought their registration with a social insurance fund.<sup>1326</sup>

There is a distinct social security scheme which applies to self-employed persons<sup>1327</sup> and which entitles them to the following specific benefits: (i) healthcare treatment,<sup>1328</sup> (ii) sickness, disability and maternity benefits,<sup>1329</sup> (iii) family allowances,<sup>1330</sup> (iv) bridging allowance in case

<sup>1322</sup> Art. 12, Regulation 883/2004.

<sup>1323</sup> Art. 10, Royal Decree on the status of self-employed persons.

<sup>1324</sup> Art. 15, Royal Decree on the status of self-employed persons.

<sup>1325</sup> Arts. 3 and 10, Royal Decree on the status of self-employed persons. See further, Put, Verdeyen and Stevens (n 1149), p. 730.

<sup>1326</sup> See above Section 2. *Impact of residence formalities on access to an occupation*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.3 *Self-employed persons*.

<sup>1327</sup> Art. 18, Royal Decree on the status of self-employed persons (n 1172).

<sup>1328</sup> Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits (n 1240).

<sup>1329</sup> Ibid.

<sup>1330</sup> General law on family allowances of 19 December 1939 (*Loi générale relative aux allocations familiales du 19 décembre 1939 / Algemene kinderbijslagwet van 19 december 1939, MB/BS 22-12-1939, 8702*) as applicable to the Brussels region and in Flanders; Decree of 18 February on the management and payment of family allowances (*Décret du 8 février 2018 relatif à la gestion et au paiement des prestations familiales / Decreet van 8 februari 2018 betreffende het beheer en de betaling van de gezinsbijslagen, MB/BS 01-03-2018, 18020*) as applicable in Wallonia and (*Dekret von 23. April 2018 über die Familienleistungen / Décret du 23 avril 2018 relatif aux prestations familiales / Decreet van 23 april 2018 betreffende de gezinsbijslagen, MB/BS 12-06-2018, 48705/48719/48734*) as applicable to the German-speaking community.

of insolvency,<sup>1331</sup> (v) old-age retirement and survivor's benefits<sup>1332</sup> and (vi) paid leave benefits.<sup>1333</sup>

In general, compliance with registration formalities is not a precondition for accessing these contributory benefits, given that what matters is their affiliation with the Belgian social security scheme for self-employed persons.

It should also be recalled that, in accordance with the EU rules on the coordination of social security,<sup>1334</sup> self-employed persons who are posted to Belgium from another Member state continue to be subject to the social security system of their home country for a period of up to two years, during which time they are not subject to the Belgian social security for self-employed persons. A posted self-employed person is required to obtain Form A1<sup>1335</sup> as proof of their continued affiliation with their home country's social security institution which also serves as evidence of their exemption from registration under the Belgian social security scheme for self-employed persons.<sup>1336</sup> In such a case, a posted self-employed person does not have any entitlement to claim any benefits under the Belgian social security rules as long as they remain affiliated to their home country's social security system.

#### 4.1.3.1 Impact of registration formalities on access to healthcare

The rules on access healthcare benefits by workers as described above<sup>1337</sup> apply equally to self-employed persons.<sup>1338</sup> Once a self-employed person has registered with a social insurance fund for self-employed persons,<sup>1339</sup> that person is also required to register with a healthcare

insurance fund.<sup>1340</sup> In the absence of any residence condition applying to the affiliation with a social insurance fund, an EU self-employed person who is subject to Belgian social security should be able to affiliate with a healthcare insurance fund as a beneficiary even if the registration of their residence has not been completed, provided that the quarterly social security contributions have been paid.<sup>1341</sup>

A self-employed person who has been posted to Belgium will remain affiliated with the relevant social security institution of their home Member State. A self-employed person and their family members will be entitled to access healthcare during their stay in Belgium at the expense of their home country's institution.<sup>1342</sup> In such a case the self-employed person in question will need to obtain Form S1<sup>1343</sup> from their home institution and submit this document to register with a Belgian healthcare insurance fund of their choice.<sup>1344</sup>

#### 4.1.3.2 Impact of registration formalities on unemployment benefits

This section is not applicable to self-employed persons as they are not eligible for unemployment benefits in Belgium.

For the sake of completeness, it should be mentioned that the conditions which apply to bridging allowances<sup>1345</sup> which self-employed persons may claim in case of insolvency do require the self-employed person concerned to have their habitual residence in Belgium as indicated in the national population register.<sup>1346</sup>

1331 Law of 22 December 2016 establishing a bridging allowance for the benefit of self-employed persons (*Loi du 22 décembre 2016 instaurant un droit passerelle en faveur des travailleurs indépendants / Wet van 22 december 2016 houdende invoering van een overbruggingsrecht ten gunste van zelfstandigen*, MB/BS 06-01-2017, 446).

1332 Royal Decree No 72 of 10 November 1967 on retirement pension and survivor's benefits for self-employed persons (*Arrêté royal no 72 du 10 novembre 1967 relatif à la pension de retraite et de survie des travailleurs indépendants / Koninklijk besluit nr 72 van 10 november 1967 betreffende het rust- en overlevingspensioen der zelfstandigen*, MB/BS 14-11-1967, 11840).

1333 Art. 18bis, Royal Decree on the status of self-employed persons.

1334 Art. 12(2), Regulation 883/2004.

1335 This is a certificate of affiliation issued under the EU rules on the coordination of social security which confirms the single Member State's social security legislation that applies to the self-employed person and which is issued by the social security institution to which the posted self-employed person is affiliated.

1336 See to that effect, Case C-17/19 *Bouygues travaux publics* EU:C:2020:379.

1337 See above Paragraph 4.1.1 *Workers*, Point 4.1.1.1 *Impact of residence formalities on access to healthcare*.

1338 Arts. 32.1° bis and 121, Law of 14 July 1994 on compulsory insurance for medical care and benefits; Art. 129, Royal Decree of 3 July 1996 implementing the Law on compulsory insurance for medical care and benefits, coordinated on 14 July 1994.

1339 See above Section 2. *Impact of residence formalities on access to an occupation*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.3 *Self-employed persons*.

1340 Arts. 32, 1°bis and 118, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

1341 Art. 276 §3, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits (*Arrêté royal du 3 juillet 1996 portant exécution de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994 / Koninklijk besluit van 3 juli 1996 tot uitvoering van de wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen, gecoördineerd op 14 juli 1994*, MB/BS 31-07-1996, 20285).

1342 Art. 17, Regulation 883/2004.

1343 For further explanation, see n 1295.

1344 Further information is contained on the Belgian government's website relating to social security matters which allows EU self-employed persons to obtain tailored information which is relevant to their particular situation using the application "Coming2Belgium": [https://www.socialsecurity.be/CMS/en/coming\\_to\\_belgium/index.html](https://www.socialsecurity.be/CMS/en/coming_to_belgium/index.html).

1345 This refers to the *droit passerelle / overbruggingsrecht*.

1346 Art. 5 §1, 6°, Law of 22 December 2016 establishing a bridging allowance for the benefit of self-employed persons (n 1331).

#### 4.1.4 Jobseekers

As previously mentioned, registration as a (first-time) jobseeker<sup>1347</sup> is not conditional upon having completed registration formalities.<sup>1348</sup> EU jobseekers do not need to have been issued with a residence document in order to be able to register as looking for work with a public employment agency.<sup>1349</sup>

However, the completion of registration formalities will be required in the event a jobseeker wishes to access healthcare.

##### 4.1.4.1 Impact of registration formalities on access to healthcare

While EU jobseekers are not required to register with a social insurance fund during the time they are looking for work, they will need to do so if they wish to have access to healthcare in Belgium.<sup>1350</sup> This is because persons who do not work or exercise a self-employed activity need to be registered in the national population in order to be able to access the healthcare insurance system<sup>1351</sup> and pay the appropriate quarterly contribution.<sup>1352</sup>

It should also be noted that foreigners who do not (or no longer) have a right to reside in Belgium are explicitly excluded from the ability to access the Belgian healthcare insurance system,<sup>1353</sup> although they may nonetheless be eligible for emergency medical treatment. This is a particular source of potential difficulties for EU jobseekers, given the restrictive approach followed by the Immigration Office as regards the residence rights of EU jobseekers.<sup>1354</sup>

<sup>1347</sup> As opposed to an EU citizen who has previously worked in Belgium.

<sup>1348</sup> See Section 2. *Impact of residence formalities on access to an occupation*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.4 *Jobseekers*.

<sup>1349</sup> This refers to the regional public employment agencies, namely Actiris for the Brussels region, VDAB for Flanders, Forem for Wallonia and ADG for the German-speaking region.

<sup>1350</sup> The only exception would be if they were able to export unemployment benefit from their home country under Art. 64, Regulation 883/2004, in which case they would be entitled to receive healthcare in Belgium which becomes necessary on medical grounds during their stay at the expense of their home country's institution under Art. 19, Regulation 883/2004 by presenting their European Health Insurance Card as issued by their home institution.

<sup>1351</sup> Art. 32, 15°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

<sup>1352</sup> Art. 134, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits.

<sup>1353</sup> Art. 32, 15°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

<sup>1354</sup> For a discussion, see Chapter 1, Section 3. *Personal scope*, Subsection 3.5 *Jobseekers* and Chapter 2, Section 5. *Registration phase*, Subsection 5.3 *Documents required for registration of residence*, Paragraph 5.3.4 *Documents required from jobseekers*.

##### 4.1.4.2 Impact of registration formalities on unemployment benefits

EU jobseekers are not entitled to unemployment benefits until such time as they have contributed to social security in Belgium.<sup>1355</sup> They are also not entitled to rely on the right of equal of treatment as regards access to social assistance as long as they are looking for work<sup>1356</sup> and are excluded from the scope of the specific rules<sup>1357</sup> which guarantee equality of treatment to workers as regards social advantages.<sup>1358</sup>

Nonetheless, it should be noted in the interests of comprehensiveness that where a jobseeker is in receipt of unemployment benefits from their home country, they have a right to request its “export” for the purposes of finding work in another Member State.<sup>1359</sup> In such a case, a jobseeker retains their entitlement to receive unemployment benefits for up to three months although this may be extended to six months at the discretion of the home institution.<sup>1360</sup>

Where a jobseeker is allowed to export their unemployment benefits to Belgium, they have to register with the relevant employment office within seven days of their arrival in Belgium. As previously noted, this formality is not conditional upon having completed registration formalities.<sup>1361</sup>

EU jobseekers do not need to have been issued with a residence document in order to be able to register as looking for work with a public employment agency.<sup>1362</sup>

#### 4.1.5 Family members of EU citizens

Unless they work themselves, the family members of EU workers and self-employed persons will only be able to derive the possibility of claiming an entitlement to social security benefits in their capacity as family members.<sup>1363</sup>

<sup>1355</sup> Art. 65, Regulation 883/2004.

<sup>1356</sup> Art. 24(2) of Directive 2004/38.

<sup>1357</sup> Art. 7(2), Regulation 492/2011.

<sup>1358</sup> Case 316/85 *Lebon* EU:C:1987:302.

<sup>1359</sup> Art. 64, Regulation 883/2004.

<sup>1360</sup> *Ibid.*

<sup>1361</sup> See Section 2. *Impact of residence formalities on access to an occupation*, Subsection 2.1 *Registration as a precondition?*, Paragraph 2.1.4 *Jobseekers*.

<sup>1362</sup> This refers to the regional public employment agencies, namely Actiris for the Brussels region, VDAB for Flanders, Forem for Wallonia and ADG for the German-speaking region.

<sup>1363</sup> According to Art. 1(i)(1)(ii), Regulation 883/2004, for the purposes of healthcare benefits, a family member is any person defined or recognised as such by the legislation of the Member State of residence.

#### 4.1.5.1 Impact of registration formalities on access to healthcare

For the purpose of deriving a right to access healthcare in Belgium to an EU worker or self-employed person, a family member needs to be recognised as such under the Belgian legislation on compulsory healthcare insurance, which covers certain dependent family members.<sup>1364</sup>

Belgian law<sup>1365</sup> recognises the following categories of persons as the dependants of a worker or self-employed person: (i) a cohabiting spouse; (ii) the cohabiting person, (iii) a separated spouse who has a child in their care; (iv) their children or their spouse's children - including adopted children as well as any grandchildren - who are under the age of 25; (v) and dependent cohabiting ascendants. The family member must also have an income below a certain amount.<sup>1366</sup>

Those categories of family members who are not included within this list will in principle need to register in their own right and pay the relevant contribution.<sup>1367</sup> This would include, for example, a dependent sibling where their EU relative is a worker with a dependent or a cohabiting spouse.<sup>1368</sup> Another example would include a sibling who, while being the sole cohabiting family member of their EU relative, has an income which exceeds the permitted thresholds.<sup>1369</sup>

In order to be able to invoke the status of dependant for the purpose of access to healthcare, the family member must be registered as living at the same address as the EU worker or self-employed person.<sup>1370</sup> In practice this will

occur when the family member has their details added to the national register (the register of foreigners) following positive verification of their domicile.<sup>1371</sup>

In practice, the dependent children<sup>1372</sup> and the dependent spouse<sup>1373</sup> will be able to initiate the process to enrol with a healthcare insurance fund as a dependant once they have been issued with a certificate of application (Annex 19 or Annex 19ter as the case may be).<sup>1374</sup> The other family members are not entitled to healthcare in Belgium until they have completed the registration formalities and have been issued with a residence document (EU card or F card as the case may be).<sup>1375</sup>

#### 4.1.5.2 Impact of registration formalities on unemployment benefits

Family members are not entitled to unemployment benefits until such time as they have contributed to social security in Belgium.<sup>1376</sup>

## 4.2 Registration as a precondition for non-contributory social assistance?

The Belgian social security system also foresees in non-contributory social assistance, which consist of the following benefits, (i) social integration allowance,<sup>1377</sup> (ii)

<sup>1364</sup> Art. 32, 17° and 20°, Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits (n 1240).

<sup>1365</sup> Art. 123, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits (n 1341).

<sup>1366</sup> The maximum permitted income increases each year; for 2021 this corresponds to a maximum monthly income of €856.03. The amounts can be found on the website of the National institute for healthcare insurance and invalidity benefits (*Institut national d'assurance maladie-invalidité / Rijksinstituut voor ziekte- en invaliditeitsverzekering*) <https://www.inami.fgov.be/fr/themes/cout-remboursement/assurabilite/Pages/personnes-charge-revenus-autorises.aspx> / <https://www.inami.fgov.be/nl/themas/kost-terugbetaling/verzekerbaarheid/Paginas/personen-aste-toegelaten-inkomsten.aspx>.

<sup>1367</sup> Art. 32, 15° Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits; Art. 134, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits.

<sup>1368</sup> Art. 123 §2, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits provides that another cohabiting person may be considered a dependent beneficiary of a worker or other affiliated person only to the extent that the worker is not cohabiting with a spouse.

<sup>1369</sup> Art. 124, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare care and sickness benefits contains a number of different financial thresholds.

<sup>1370</sup> Art. 124 §2, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits. This condition is not applicable to the dependent children.

<sup>1371</sup> See Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*.

<sup>1372</sup> Art. 124 §2, Royal Decree of 3 July 1996 implementing the Consolidated law of 14 July 1994 relating to compulsory healthcare and sickness benefits.

<sup>1373</sup> Circular Letter V.I. nr. 2016/20 - 2480/6 of 19 January 2016 (*Lettre circulaire V.I. nr. 2016/20 - 2480/6 of 19 janvier 2016 / Omzendbrief V.I. nr. 2016/20 - 2480/6 van 19 januari 2016*).

<sup>1374</sup> Kruispunt Migratie-Integratie, (n 1284), p. 41. See also Medimmigrant, "Assurance-maladie en Belgique" / "Ziekteverzekering in België" (11 September 2020) <https://www.medimmigrant.be/fr/infos/intervenants-pour-le-paiement-des-soins/assurance-maladie?lang=fr> / <https://www.medimmigrant.be/nl/info/gezondheidszorg-per-betalingsregeling/ziekteverzekering-in-belgie?lang=nl>.

<sup>1375</sup> Although family members are in principle not entitled to health care in Belgium until such time as they are registered on the register of foreigners, they will however be able to claim reimbursement retroactively once their residence document has been issued.

<sup>1376</sup> Art. 65, Regulation 883/2004.

<sup>1377</sup> Law of 26 May 2002 on social integration allowance (*Loi du 6 mai 2002 concernant le droit à l'intégration sociale / Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie*, MB/BS 31-07-2002, 33610).

allowances for disabled persons,<sup>1378</sup> (iii) old-age income guarantee<sup>1379</sup> and (iv) guaranteed family allowances.<sup>1380</sup>

These supplementary support allowances are not conditional upon having made social security contributions, but are granted on the basis of needs and financed through tax revenues. Social assistance in the form of allowances for disabled persons and old-age income guarantee is also considered by the Belgian authorities as consisting in “special non-contributory benefits” falling within the scope of the EU rules on the coordination of social security,<sup>1381</sup> in respect of which residence conditions are permitted.<sup>1382</sup>

For each category of non-contributory social security assistance, the claimant needs to meet specific eligibility conditions. This section will be limited to the question as to whether completion of registration formalities constitutes a precondition in order to benefit from social integration allowance, allowances for disabled persons or old-age income guarantee.

## 4.2.1 Workers

As a general rule, EU workers and their family members are entitled to equal treatment as regards “social advantages” for the purposes of the EU rules on the free movement of workers,<sup>1383</sup> which include all forms of advantages which are granted to national workers of the host Member State primarily because of their status as workers or because of

their residence on the national territory and which may facilitate the mobility of EU workers.<sup>1384</sup> This potentially includes all forms of social assistance allowances.<sup>1385</sup>

### 4.2.1.1 Impact of registration formalities on social integration allowance

Under the rules governing the grant of social integration allowance,<sup>1386</sup> EU citizens and their family members are required to demonstrate that they have a right to reside in Belgium for more than three months in order to benefit from social integration allowance.

In addition, these rules place a further limitation on EU citizens and their family members and disqualifies them from being able to claim social integration allowances during the first three months of residence in Belgium.<sup>1387</sup>

While this provision may be in line with the Citizens Rights Directive as regards EU citizens who do not work,<sup>1388</sup> it nonetheless excludes the possibility for EU workers, the self-employed and those who retained worker status, together with their family members to claim social integration allowance. This does not comply with the Directive<sup>1389</sup> or the rules guaranteeing equal treatment to EU workers as regards social advantages.<sup>1390</sup>

Following a ruling of the Belgian Constitutional Court,<sup>1391</sup> the FPS Social Integration issued a ministerial circular<sup>1392</sup> which sought to clarify the impact of this judgment – which concerned residual social assistance<sup>1393</sup> – on the

1378 Law of 27 February 1987 relating to allowances for disabled persons (*Loi de 27 février 1987 relative aux allocations aux personnes handicapées / Wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap*, MB/BS 01-04-1987, 4832).

1379 Law of 22 March 2001 establishing an income guarantee for persons in old age (*Loi de 22 mars 2001 instituant la garantie de revenus aux personnes âgées / Wet van 22 maart 2001 tot instelling van een inkomensgarantie voor ouderen*, MB/BS 29-03-2001, 10244).

1380 Law of 20 July 1971 establishing guaranteed family allowances (*Loi de 20 juillet 1971 instituant des prestations familiales garanties / Wet van 20 juli 1971 tot instelling van gewaarborgde gezinsbijslag*, MB/BS 07-08-1971, 9302). In this respect, it is important to note that the Brussels region, Wallonia and German-speaking community have repealed the Law of 20 July 1971 following the regionalisation of the family allowances system instituted by the Sixth Belgian State Reform; see further n 158. The rules on family allowances are now governed by the the Flemish Decree of 27 April 2018 (Decreet van 27 april 2018 tot regeling van de toelagen in het kader van het gezinsbeleid / Decret du 27 avril 2018 réglant les allocations dans le cadre de la politique familiale MB/BS 31-07-2018, 60295), the Ordinance of 25 April 2019 for the Brussels region (*Ordonnance du 25 avril 2019 réglant l'octroi des prestations familiales / Ordonnantie van 25 april 2019 tot regeling van de toekenning van gezinsbijslag*, MB/BS 08-05-2019, 44377), the Decree of 8 February 2018 for Wallonia (*Décret du 8 février 2018 relatif à la gestion et au paiement des prestations familiales / Decreet van 8 februari 2018 betreffende het beheer en de betaling van de gezinsbijslagen MB/BS 01-03-2018, 18020*) and the Decree of 23 April 2018 for the German-speaking community (*Decret von 23. April 2018 über die Familienleistungen / Décret du 23 avril 2018. inimax aux prestations familiales / Decreet van 23 april 2018 betreffende de gezinsbijslagen*, MB/BS 12-06-2018, 48705/48719/48734).

1381 Annex X, Regulation 883/2004.

1382 Art. 70(4), Regulation 883/2004.

1383 Art. 7(2), Regulation 492/2011.

1384 Case 32/75 *Cristini* ECLI:EU:C:1975:120; Case 207/78 *Even* EU:C:1979:144.

1385 Case 249/83 *Hoeckx* EU:C:1985:139 and Case 122/84 *Scrivner* EU:C:1985:145 which both concerned the “minimex” that has now been replaced by social integration allowance; Case 1/71 *Frilli* EU:C:1972:56 and Case 261/83 *Castelli* EU:C:1985:145 which both concerned old-age income guarantee.

1386 Art. 3, 3°, Law of 26 May 2002 on social integration allowance (n 1377). This provision was amended by Art. 21, Programme law of 28 June 2013 (*Loi-programme du 28 juin 2013 / Programmawet van 28 juni 2013*, MB/BS 01-07-2013, 41480).

1387 *Ibid.*

1388 Art. 24(2), Directive 2004/38.

1389 *Ibid.* This provision allows the host Member State to refrain from conferring entitlement to social assistance during the first three months of residence to persons other than workers, self-employed persons, persons who retain such status and their family members.

1390 Art. 7(2), Regulation 492/2011.

1391 Belgian Constitutional Court, judgment No 95/2014 of 30 June 2014.

1392 Circular of 5 August 2014 on the interpretation of Article 3, 3° 2<sup>nd</sup> indent of the Act of 26 May 2002 on the right to social integration and Article 57 quinquies of the Law of July 8 1976 on public social action services, hereafter “Circular of 5 August 2014” (*Circulaire du 5 août 2014 relative à l'interprétation de l'article 3, 3°, 2 e tiret, de la loi du 26 mai 2002 concernant le droit à l'intégration sociale et de l'article 57quinquies de la loi du 8 juillet 1976 organique des centres publics d'action sociale / Omzendbrief van 5 augustus 2014 betreffende de interpretatie van artikel 3, 3°, 2de streepje van de wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie en artikel 57quinquies van de organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn*, MB/BS 08-08-2014, 58165).

1393 See further Point 4.3.1.3 *Impact of withdrawal of residence on residual social assistance*.

interpretation of the rules relating to the grant of social integration allowance.

The ministerial circular seeks to operate a distinction between, on the one hand, the conditions the EU workers and their family members need to fulfil and, on the other hand, those which must be met by EU citizens who do not work and their family members.<sup>1394</sup>

In order to be able to claim social integration benefits, the ministerial circular correctly states that EU citizens who do not work must fulfil a double requirement: they must first demonstrate they have the right to reside in Belgium for a period exceeding three months and secondly they must as well having effectively resided in Belgium for more than three months.<sup>1395</sup>

However, the ministerial circular does not unambiguously state that EU workers and their family members are not excluded from claiming social integration allowance during the first three months of residence. It states that a claimant will have a right to claim social integration allowance where they have the right to reside for more than three months – as demonstrated by possession of an EU card or F card as an EU citizen or their family members as the case may.<sup>1396</sup> The ministerial circular goes on to state that where a claimant does not yet have or no longer has the right to reside for more than three months, then they will have no right to claim social integration allowance.<sup>1397</sup> The ministerial circular explicitly states that a claimant is not entitled to social integration if they hold an Annex 19 (certificate of application for a registration certificate), Annex 19ter (certificate of application for a residence card for family members), Annex 20 (decision to refuse recognition of a right of residence beyond three months), Annex 21 (decision to withdraw a right of residence beyond three months) or Annex 35 (temporary residence document during a pending appeal).<sup>1398</sup>

It follows that an EU worker or their family members will therefore have no right to claim social integration income as long as their right to reside in Belgium has not yet been recognised through the issue of a residence document (EU card or F card), which can potentially take up to six months. The effect of the ministerial circular is therefore to maintain a restriction to the ability of EU workers and their family members to claim social integration allowance within the first three months of residence.<sup>1399</sup>

1394 Circular of 5 August 2014, subsection 2.2.

1395 Ibid, paragraph 2.2.1.

1396 Ibid.

1397 Ibid.

1398 Ibid.

1399 Valcke (n 1242), p. 20.

In view of the above, the residence condition contained in the rules governing social integration allowance<sup>1400</sup> can be considered to be contrary to Article 24(2) of the Citizens Rights Directive.<sup>1401</sup> Additionally, this residence condition also breaches the right of equal treatment which is specifically guaranteed to EU workers<sup>1402</sup> given that social integration can be considered as a “social advantage” for the purposes of those rules.<sup>1403</sup>

An issue which was flagged during the interviews conducted with the Association of Flemish Cities and Municipalities (VVSG)<sup>1404</sup> and a public social assistance centre<sup>1405</sup> concerns the practices related to the change of status during the registration procedure, for example when an EU citizen applies to register as a jobseeker but then seeks to change to the status of a worker after securing employment.<sup>1406</sup> According to the “GemCom” guidelines as contained in the Syllabus,<sup>1407</sup> a change of status can only be done during the first three months of the registration process.<sup>1408</sup> However, if a change of status is requested more than three months after an application has been submitted but before a decision is taken, then the Syllabus states that a new application needs to be submitted.<sup>1409</sup> In this respect it should be emphasised that requiring a new application for registration to be made may not only create further delay<sup>1410</sup> but may also extend the period of time during which EU workers and their family members are not entitled to claim social integration allowance.

#### 4.2.1.2 Impact of registration formalities on allowances for disabled persons

A residence condition also applies to claims for allowances for disabled persons. There are three forms of disability allowances: (i) replacement allowance for disabled

1400 Art. 3, 3°, Law of 26 May 2002 on social integration allowance.

1401 Valcke (n 1242), p. 20.

1402 Art. 7(2), Regulation 492/2011.

1403 Case C-122/84 *Scrimmer* EU:C:1985/145; Valcke (n 1242), p.20.

1404 Interview with VVSG, 3 April 2020.

1405 Interview with public social assistance centre, 26 mei 2020.

1406 For further discussion, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status*.

1407 For a detailed explanation, see Chapter 2, Section 8. *General functioning of key actors in the registration procedure*, Subsection 8.4 *Support for municipal officials*, Paragraph 8.4.1 *Instructions of the Immigration Office*.

1408 Immigration Office, Syllabus (29 October 2020), p. 137 (NL) / pp. 155-156 (FR).

1409 Ibid.

1410 For further discussion, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status*.

persons,<sup>1411</sup> (ii) integration allowance<sup>1412</sup> and (ii) old-age mobility allowance.<sup>1413</sup> Under the rules governing such allowances,<sup>1414</sup> any person claiming such allowances needs to be resident in Belgium.

As far as replacement allowance for disabled persons is concerned, such a residence condition appears compatible with the EU rules on coordination of social security, which states that certain special non-contributory benefits<sup>1415</sup> may be provided exclusively to claimants who reside in the Member State in which the claim is made in accordance with its legislation.<sup>1416</sup>

However, both integration and old-age mobility allowances are not included among the list of special non-contributory benefits.<sup>1417</sup> According to the mutual information system on social protection,<sup>1418</sup> these two categories of disability allowances can be considered as long-term care benefits for the purpose of the EU rules on the coordination of social security. These benefits are therefore exportable,<sup>1419</sup> and any residence condition for these benefits as contained in Belgian legislation should consequently be waived for persons who are receiving these benefits in Belgium and subsequently moving to another EEA Member State while remaining covered by the Belgian social security system.<sup>1420</sup>

Following legislative changes in 2018,<sup>1421</sup> a further requirement was introduced in respect of replacement allowance for disabled persons which required all claimants to demonstrate they held their main residence in Belgium for at least ten years, including for an uninterrupted period of five years. This provision was subsequently annulled by the Belgian Constitutional

Court<sup>1422</sup> which considered such a requirement to be contrary to the principle of aggregation which is contained in the EU rules on the coordination of social security<sup>1423</sup> insofar as it did not take into account periods of residence completed in another Member State.

### 4.2.1.3 Impact of registration formalities on old-age income guarantee

The old-age income guarantee scheme<sup>1424</sup> aims to grant, under certain conditions, financial assistance to elderly people who do not have sufficient means of subsistence. With regard to the applicable eligibility conditions, EU citizens and their family members who wish to claim such non-contributory assistance are required either to fall within the personal scope of the EU rules on the coordination of social security<sup>1425</sup> or to have the right to claim a Belgian pension.<sup>1426</sup>

Following legislative amendments introduced in 2017,<sup>1427</sup> a further provision was added requiring claimants to demonstrate their main residence has been in Belgium for at least ten years, including an uninterrupted period of five years of residence. The Constitutional Court annulled this provision in a ruling of 2019,<sup>1428</sup> on the basis that such conditions breach the principle of aggregation which is contained in the EU rules on the coordination of social security,<sup>1429</sup> as they fail to take into account any periods of residence completed in another Member State. Following the Constitutional Court's ruling, the Belgian pension service has ceased to apply these residence conditions.

## 4.2.2 Posted workers

In accordance with the EU rules on the coordination of social security, EU workers who are posted to Belgium can remain subject to their home social security scheme for up to two years and will therefore not be subject to the Belgian social security rules.<sup>1430</sup> As a consequence, posted workers will not be entitled to access Belgian allowances for disabled persons, whether in the form of special non-contributory benefits, such as replacement allowance for

1411 Art. 2 §1, Law of 27 February 1987 relating to allowances for disabled persons (n 1378). This refers to *allocation de remplacement de revenus / inkomensvervangende tegemoetkoming*, which is awarded to persons aged 21-64 years who have a disability which reduces their capacity for earning an income by a third or less compared to an enabled person.

1412 Art. 2 §2, Law of 27 February 1987 relating to allowances for disabled persons. This refers to *allocation d'intégration / integratie tegemoetkoming* awarded to persons aged 21-64 who have reduced mobility.

1413 Art. 2 §2, Law of 27 February 1987 relating to allowances for disabled persons. This refers to *allocation pour l'aide aux personnes âgées / tegemoetkoming voor hulp aan bejaarden* to persons aged 65 or over who have reduced mobility.

1414 Art. 4 §1, Law of 27 February 1987 relating to allowances for disabled persons.

1415 These are listed in Annex X, Regulation 883/2004, which includes "Income replacement allowance (Law of 27 February 1987)" in the entry for Belgium.

1416 Art.70 (4), Regulation 883/2004.

1417 Annex X, Regulation 883/2004.

1418 The MISSOC comparative tables contain detailed information on social protection in all 31 EU and EFTA countries, including Belgium <https://www.missoc.org/missoc-database/comparative-tables/results>.

1419 Arts. 21 and 34, Regulation 883/2004.

1420 Valcke (n 1242), p. 19.

1421 Art. 23, Law of 26 March 2018 on strengthening economic growth and social cohesion, (*Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale / Wet van 26 maart 2018 betreffende de versterking van de economische groei en de sociale cohesie*, MB/BS 30-03-2018, 31620).

1422 Belgian Constitutional Court, judgment No 410/2020 of 12 March 2020.

1423 Art. 6, Regulation 883/2004.

1424 Law of 22 March 2001 instituting an income guarantee for persons in old age (n 1379).

1425 Regulation 883/2004.

1426 Art. 4 §1, 2° and 6°, Law of 22 March 2001 instituting an income guarantee for persons in old age.

1427 Art. 3, 2° of the Law of 27 January 2017 amending the law of 22 March 2001 instituting an income guarantee for persons in old age, BS 6 February 2017 (*Loi de 27 janvier 2017 modifiant la loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées / Wet van 27 januari 2017 tot wijziging van de wet van 22 maart 2001 tot instelling van een inkomensgarantie voor ouderen*).

1428 Belgian Constitutional Court, judgment No 6/2019 of 23 January 2019.

1429 Art. 6, Regulation 883/2004.

1430 Art. 12, Regulation 883/2004.

disabled persons, or in the form of long-term care benefits, such as integration and old-age mobility allowances.

### 4.2.3 Self-employed persons

The rules relating to claims for social integration allowances, allowances for disabled persons as well as old-age income guarantee as explained above in respect of EU workers apply equally to EU self-employed persons.<sup>1431</sup>

### 4.2.4 Jobseekers

As a matter of EU law, EU jobseekers are not entitled to social assistance as long as they are looking for work.<sup>1432</sup>

While there is case law which suggests that this general exclusion does not apply to financial benefits which are intended to facilitate access to the labour market, provided a jobseeker can show a genuine link with the host Member State,<sup>1433</sup> it remains unclear as to what extent if any this ruling would apply to social assistance benefits in Belgium.

It should also be noted that Belgian law provides that an EU citizen can claim social integration allowance where they meet the conditions for having a right of residence exceeding three months and they have been present in Belgium for at least three months.<sup>1434</sup> As a result, in theory, this means an EU jobseeker whose right of residence has been recognised and who has been issued with an EU card would be able to claim social integration allowance when three months have expired following the date of their registration.<sup>1435</sup> The same would hold true for the non-EU family members of a jobseeker holding a residence card (F card).<sup>1436</sup>

### 4.2.5 Family members of EU citizens

The above rules are equally valid as regards the family members of EU workers and self-employed persons who are residing in Belgium, regardless of their nationality.

## 4.3 Registration as a precondition for residual social assistance?



A further category of social assistance is foreseen by the Belgian social welfare system in the form of residual social assistance. Such assistance is granted to persons who are not eligible for social security or other forms of social assistance, whenever they are unable to meet their basic needs in order to be able to lead a life in dignity.<sup>1437</sup> This type of assistance is provided by public social assistance centres<sup>1438</sup> and can take various forms<sup>1439</sup> including housing benefits,<sup>1440</sup> medical assistance<sup>1441</sup> and financial assistance equivalent to social integration allowance<sup>1442</sup> among other forms.

In this respect, it is important to note that the EU coordination rules on social security do not apply to social and medical assistance.<sup>1443</sup>

This section will touch upon the question of whether the completion of registration formalities is considered as a precondition for claiming residual social assistance in general and urgent medical care in particular, as well the impact which a decision withdrawing residence rights may also have on claiming such forms of assistance.

### 4.3.1 Workers

The EU rules on the free movement of workers<sup>1444</sup> guarantee equality of treatment to EU workers and their family members as regards “social advantages”, which comprise all advantages which are granted to national workers of the host Member State primarily because of their status as workers or because of their residence on the national territory and which may facilitate the mobility of EU workers.<sup>1445</sup> This potentially includes all forms of assistance, including those granted on a discretionary

1431 For the sake of clarity it should be mentioned that Regulation 492/2011 does not apply to self-employed persons. The right to equal treatment for self-employed persons is covered by Art. 24, Directive 2004/38.

1432 Art. 24(2), Directive 2004/38, which provides that “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)”, which refers to “Union citizens [who] entered the territory of the host Member State in order to seek employment”.

1433 Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344.

1434 Art. 3, 3<sup>o</sup>, 2<sup>nd</sup> indent Law of 26 May 2002 on social integration allowance (n 1377).

1435 Circular of 5 August 2014 (n 1392).

1436 Ibid.

1437 Art. 1, Law of 8 July 1976 on public social assistance centres (*Loi organique de 8 juillet 1976 des centres publics d'action sociale / Organieke Wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn, MB/BS 05-8-1976, 9876*).

1438 Ibid.

1439 Arts. 57 and 60, Law of 8 July 1976 on public social assistance centres.

1440 This refers to *aide au logement / hulp bij huisvesting*.

1441 This refers to *aide médicale / medische hulp*.

1442 This refers to *équivalent du revenu d'intégration / equivalent leefloon*.

1443 Art. 3(5)(a), Regulation 883/2004.

1444 Art. 7(2), Regulation 492/2011.

1445 Case 32/75 *Cristini* ECLI:EU:C:1975:120; Case 207/78 *Even* EU:C:1979:144.

basis<sup>1446</sup> or where the claimant's state of need is the essential condition relating to their award.<sup>1447</sup>

#### 4.3.1.1 Impact of registration formalities on residual social assistance in general

Following amendments<sup>1448</sup> which were made to the relevant legislation in 2012,<sup>1449</sup> restrictions were placed on all EU citizens and their family members, irrespective of their status, which prevented them from claiming residual social assistance during the first three months of their residence in Belgium.<sup>1450</sup> This restriction was however partially annulled by the Belgian Constitutional Court,<sup>1451</sup> which found the restriction on access to social assistance by EU citizens who are workers or self-employed persons and their family members to be contrary to the equal treatment provision contained in the Citizens Rights Directive.<sup>1452</sup> According to the Court, this latter provision requires that EU workers, self-employed persons and those with retained worker status, together with their family members, must be able to claim residual social assistance within the first three months of residence.<sup>1453</sup>

Following this ruling, a ministerial circular was adopted by the FPS Social Integration<sup>1454</sup> to provide guidance on the interpretation of the law in accordance with the judgment.<sup>1455</sup> This confirms that the exclusion of the right to claim residual social assistance within the first three months of residence in Belgium only applies to persons other than EU workers, self-employed persons and their family members.<sup>1456</sup> The ministerial circular specifically states that EU workers and their family members are entitled to claim residual social assistance on the basis of having a right to reside of more than three months as demonstrated by possession of an EU card or F card as the case may be.<sup>1457</sup> The circular also confirms that EU workers and their family members are entitled to claim residual social assistance while they are awaiting the outcome of their application for the registration of their residence in Belgium while holding an Annex 19 or Annex 19ter as the case may be. It is, however, worth emphasising

that the legislation has yet to be amended to reflect these administrative guidelines.

#### 4.3.1.2 Impact of registration formalities on urgent medical care

The Belgian Constitutional Court has also confirmed that EU citizens and their family member have the right to claim urgent medical care<sup>1458</sup> during their first three months of residence in Belgium.<sup>1459</sup>

This aspect of the ruling on urgent medical care has equally been reflected in the ministerial circular issued by the FPS Social Integration.<sup>1460</sup> The possibility for EU citizens and their family members to have recourse to urgent medical care is not conditional upon holding a residence document or being registered on the national population register. In practice, the competent public social assistance centre will issue a specific certificate to EU citizens and their family members confirming that they are allowed to claim free urgent medical care at public healthcare facilities.<sup>1461</sup>

#### 4.3.1.3 Impact of refusal or withdrawal of residence rights on residual social assistance

According to the relevant provisions of the law on public social assistance centres,<sup>1462</sup> in circumstances where an order to leave the territory is taken against a foreigner who is a beneficiary in receipt of residual social assistance, this assistance will be withdrawn, with the exception of urgent medical care, on the day when the person actually leaves Belgium or upon expiry of the deadline for leaving the territory, whichever is the earliest.<sup>1463</sup>

The Belgian Council of State has previously ruled that no expulsion measure can be taken against foreign nationals for as long as an appeal having suspensive effect<sup>1464</sup> is pending against a decision to refuse or withdraw their right of residence, or until the expiry of the appeal period

1446 Case 65/81 *Reina* EU:C:1982:6.

1447 Case 1/71 *Frilli* EU:C:1972:56; Case 249/83 *Hoeckx* EU:C:1985:139; Case 122/84 *Scrivner* EU:C:1985:145.

1448 Art. 12, Law of 19 January 2012 amending the legislation concerning the reception of asylum seekers (*Loi de 19 janvier 2012 modifiant la législation concernant l'accueil des demandeurs d'asile / Wet van 19 januari 2012 tot wijziging van de wetgeving met betrekking tot de opvang van asielzoekers, MB/BS 17-02-2012, 11422*).

1449 Milieu (n 1144), p. 20.

1450 Art. 57quinquies, Law of 8 July 1976 on public social assistance centres.

1451 Constitutional Court, judgment No 95/2014 of 30 June 2014.

1452 Art. 24, Directive 2004/38.

1453 Belgian Constitutional Court, judgement of 30 June 2014 (CC, Arrêt n° 95/2014 du 30 juin 2014), para. B. 41- B.44.

1454 Circular of 5 August 2014 (n 1392).

1455 Art. 57quinquies, Law of 8 July 1976 on public social assistance centres.

1456 Circular of 5 August 2014, paragraph 3.2.1.

1457 Ibid.

1458 Art. 57 §2, Law of 8 July 1976 on public social assistance centres. This is further regulated by the Royal Decree of 12 December 1996 on urgent medical assistance provided by public social assistance centres to foreigners who are illegally staying in the Kingdom (*Arrêté royal du 12 décembre 1996 relatif à l'aide médicale urgente octroyée par les centres publics d'aide sociale aux étrangers qui séjournent illégalement dans le Royaume / Koninklijk besluit van 12 december 1996 betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt verstrekt aan de vreemdelingen die onwettig in het Rijk verblijven, MB/BS 31-12-1996, 32518*).

1459 Constitutional Court, judgment No 95/2014 of 30 June 2014.

1460 Circular of 5 August 2014, section 4.

1461 Valcke (n 1242), p. 24.

1462 Art. 57 §2, para. 5, Law of 8 July 1976 on public social assistance centres.

1463 Art. 57 §2, para. 5, Law of 8 July 1976 on public social assistance centres.

1464 For further discussion see Chapter 1, Section 7. *Procedural safeguards and appeal rights*, Subsection 7.2 *Appeal rights*.

if no appeal has been brought.<sup>1465</sup> During this time, the Council of State held that the person concerned cannot be considered to be unlawfully present in Belgium.<sup>1466</sup>

As a result, EU citizens and their family members should be entitled to continue receiving social assistance during the time that they have a judicial appeal pending against a decision refusing or withdrawing their right of residence. This is reflected in the ministerial circular on residual social assistance adopted by the FPS Social Integration,<sup>1467</sup> which explicitly recognises that an EU citizen or their family member who is subject to a decision to refuse recognition of a right of residence beyond three months (Annex 20) or a decision to withdraw a right of residence beyond three months (Annex 21) or who holds a temporary residence document during a pending appeal (Annex 35) is entitled to continue to receive residual social assistance.

Following the Council of State's ruling,<sup>1468</sup> the administrative practice of the Immigration Office has been brought into line so that decisions against which a suspensive appeal is possible<sup>1469</sup> – including a decision to refuse recognition of a right of residence beyond three months (Annex 20) or a decision to withdraw a right of residence beyond three months (Annex 21)<sup>1470</sup> – are no longer accompanied by an order to leave the territory. This has now been explicitly confirmed in the GemCom guidelines contained in the Syllabus.<sup>1471</sup> In practice, it has been reported that the Immigration Office no longer systematically issues orders to leave the territory to EU citizens even when a refusal or withdrawal decision has

become final,<sup>1472</sup> except when this is taken on grounds of public policy, public security or fraud.<sup>1473</sup>

Nonetheless, it appears that the interpretation given to the ruling by the Immigration Office is a cause for concern as regards two issues which have an impact on the ability of EU citizens and their family members to claim residual social assistance or to continue receiving it once a decision has been taken to refuse or withdraw their right of residence.

Contrary to the Council of State's judgment,<sup>1474</sup> the Immigration Office has maintained its instructions to municipalities to proceed with deletion of the affected person's entry from the National Register<sup>1475</sup> from the moment that a decision has been taken to refuse or withdraw their right of residence with the issue of an Annex 20<sup>1476</sup> or Annex 21<sup>1477</sup> on the basis that they have lost their right to reside.<sup>1478</sup> In practice, this has led to divergent practices amongst both municipalities and public social assistance centres. Some of these authorities

1465 Council of State, judgment No 238 170 of 11 May 2017 which held that insofar as Art. 39/79 §1, Belgian Immigration Law provides that, during the period of time specified for bringing an appeal against any decision refusing or terminating residence rights of EU citizens and their family members, no expulsion measure may be taken, the individual concerned is not unlawfully present during that period, and as a result the Immigration Office cannot take an expulsion measure on the basis of Art. 7, Belgian Immigration Law.

1466 Ibid.

1467 Circular of 5 August 2014, paragraph 3.2.1.

1468 See n 1465, The Council for Alien Law Litigation annulled several expulsion orders taken in conjunction with decisions refusing or terminating residence rights of EU citizens and their family members in appeals which arose in the immediate aftermath of the judgment; see for example CALL, judgments No 245 814 of 9 December 2020, No 228 970 of 19 November 2019 and No 216 547 of 11 February 2019.

1469 Art. 39/79 §1, 8°, Belgian Immigration Law specifically includes decisions terminating as well as refusing recognition of a right of residence of EU citizens and their family members.

1470 For further discussion of the rules relating to refusal and termination of residence rights see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

1471 Immigration Office, Syllabus, (29 October 2020), pp. 145-146 (NL) / pp. 164-165 (FR). However, the Syllabus also indicates that the Immigration Office considers that the Council of State's judgment (n 391) is not applicable to family members covered by Art. 3(2), Directive 2004/38 as implemented by Art. 47/1, Belgian Immigration Law; *ibid.*, p. 151 (NL) / p. 172 (FR).

1472 In practice this means upon expiry of the deadline to appeal period or a judgment is handed down either by the Council for Alien Litigation in case the decision has been appealed or by the Council of State in the event that a further appeal has been filed. During an interview with a public social assistance centre, the lack of resources at the Immigration Office was mentioned as one of the reasons that the Immigration Office no longer issues orders to leave the territory to EU citizens once the decision has become final since the Council of State's judgment (n 1465).

1473 Anthony Valcke, "Expulsion from the Heart of Europe - The Belgian law and practice relating to the termination of EU residence rights" in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill 2020), pp. 155-189.

1474 The identified administrative practice is contrary to the Council of State's judgment (n 1465) because it fails to consider that the EU citizen or the family member concerned remains lawfully resident for as long as an appeal is pending and therefore as long as the deadline for making an appeal has not expired or, if an appeal has been filed, for as long as it is pending, and therefore the person concerned cannot be considered to have had their residence right "withdrawn" or "lost" for the purposes of Art. 12, 5°, Royal Decree of 16 July 1992 concerning the population registers and the foreigners' register, hereafter the "Royal Decree on population and foreigners' register" (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers / Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister*, MB/BS 15-08-1992, 18028) which is the legal basis upon which the Immigration Office's instruction is based.

1475 This leads to the deactivation of their personal identification number of EU citizens and their family members on the national population register.

1476 Annex 20, Royal Decree on Immigration. This is the standard form used to take a decision to refuse recognition of a right of residence beyond three months.

1477 Annex 21, Royal Decree on Immigration. This is the standard form used to take a decision to withdraw a right of residence beyond three months.

1478 Immigration Office, Syllabus, (29 October 2020), pp. 145-146 (NL) / pp. 164-165 (FR). See also Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status* as regards the deletion from the national register following a refusal to recognise a right of residence on the basis that the EU citizen did not provide sufficient proof of their status within three months of submitting an application (Annex 20). For a further discussion on the suspensive effect of appeals, see Chapter 1, Section 7. *Procedural safeguards and appeal rights*, Subsection 7.2 *Appeal rights*.

follow the legislation<sup>1479</sup> strictly and continue to provide social assistance until expiry of the deadline given in any expulsion order or earlier if the person concerned leaves Belgium.<sup>1480</sup> Other authorities decide to stop the assistance either from the moment of deleting the applicant from the National Register (as instructed by the GemCom guidelines contained in the Syllabus)<sup>1481</sup> or on the date of notification of the negative decision to the applicant. Another approach is also taken by some further authorities which follow the Council of State's judgment and continue to provide social assistance while an appeal is pending.

A change of status<sup>1482</sup> of EU citizens and their family members may also have an impact on their ability to claim residual social assistance. As previously mentioned, this issue was raised during the interviews with the Association of Flemish Cities and Municipalities (VVSG)<sup>1483</sup> and a public social assistance centre.<sup>1484</sup> This occurs when an EU citizen initially registers under one category – for example, as a jobseeker – but then their status changes after they have registered and their right of residence has been recognised – for example, they change to the status of a worker after securing employment. While there is no explicit obligation on EU citizens to inform the Immigration Office about such a change of status,<sup>1485</sup> where an EU citizen does not communicate such a change in their situation,<sup>1486</sup> this may have an impact on their right to claim social assistance. For instance, an EU citizen who initially registered as a jobseeker and who then finds work will change their status to that of a worker. However, if this is not communicated to the municipality or the Immigration Office, this information will also not be available to the public social assistance centres which can only base themselves on the information contained on the National Register or official documentation (for example

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1479 Art. 57 §2, para. 5, Law of 8 July 1976 on public social assistance centres, which provides that where an order to leave the territory is taken against a foreigner who is a beneficiary of residual social assistance, this assistance will be withdrawn, on the day when the person leaves Belgian territory or upon expiry of the deadline for leaving the territory whichever is the earliest.

1480 Interview with public social assistance centre, 26 May 2020.

1481 Immigration Office, Syllabus, (29 October 2020), pp. 145-146 (NL) / pp. 164 165 (FR).

1482 For further discussion, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status*.

1483 Interview with VVSG, 3 April 2020.

1484 Interview with public social assistance centre, 26 May 2020.

1485 While this is not required, there is nothing to prevent a change of status once the right of residence has been recognised. It should be noted here that such a change of status – once a right of residence has been recognised – should not trigger any obligation on the EU citizen to have to re-register and obtain a new certificate of application (Annex 19). As a practical matter, any information communicated to the Immigration Office will be added to the EU citizen's administrative file which is kept in digital form by the Immigration Office.

1486 It should also be pointed out that there is no information contained on the website of the Immigration Office or the municipalities which explicitly informs EU citizens and their family members about the need to communicate any change in their status.

a certificate of application, such as Annex 19 or Annex 19ter as the case may be) to verify the person's residence status. As a result, public social assistance centres will not be aware of any change of status that may have occurred after the deliverance of a residence document. This could potentially lead to a situation where EU workers and their family members are not entitled to claim residual social assistance because their change of status from jobseeker to worker has not been communicated. This may arise in particular in circumstances, although maybe unlikely, where the Immigration Office proceeds to take a decision to terminate residence rights (Annex 21) on the basis that a jobseeker has not demonstrated they have a “genuine chance of being engaged”.<sup>1487</sup>

### 4.3.2 Posted workers

The legal framework relating to residual social assistance as discussed above should also apply to posted workers.

### 4.3.3 Self-employed persons

The rules mentioned above in connection with the right of EU workers to claim residual social security assistance apply equally to EU self-employed persons.<sup>1488</sup>

### 4.3.4 Jobseekers

EU jobseekers are not entitled to residual social assistance as long as they are looking for work.<sup>1489</sup> The ministerial circular issued by FPS Social Integration also specifically states that EU jobseekers and their family members are not entitled to claim residual social assistance for as long as the EU citizen is looking for work.<sup>1490</sup>

Although there is case law which suggests that, as an exception to this general exclusion, jobseekers are entitled to access financial benefits which are intended to facilitate access to the labour market, provided they can show a genuine link with the host Member State,<sup>1491</sup> it is unclear as to whether this can apply to any benefits provided under the residual social assistance system in Belgium.

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1487 For further discussion of the concept of a “genuine chance of being engaged” see Chapter 1, Section 3. *Personal scope*, Subsection 3.5 *Jobseekers*.

1488 For the sake of clarity it should be mentioned that Regulation 492/2011 does not apply to self-employed persons. The right to equal treatment for self-employed persons is covered by Art. 24, Directive 2004/38.

1489 Directive 2004/38, Article 24(2).

1490 Circular of 5 August 2014, paragraph 3.2.2.

1491 Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344.

### 4.3.5 Family members of EU citizens

The above rules also apply to the family members of EU workers and self-employed persons who are living in Belgium, irrespective of their nationality.

## 4.4 Conclusion on social welfare benefits



A review of three categories of social welfare benefits was undertaken in this section to determine whether completion of registration formalities is a prerequisite for claiming assistance contribution-based social security benefits, non-contributory social assistance or residual social assistance from the Belgian authorities.

As regards social security benefits, the possibility of workers and self-employed persons to enrol with a healthcare fund is not conditional upon completion of registration, but conditional upon registration as a worker or self-employed person as the case may be. However, family members are only entitled to healthcare in Belgium until they have completed the registration formalities and have been issued with a residence document (EU card or F card as the case may be). The dependent children and the dependent spouse will on the other hand be able to initiate the enrolment process with a healthcare fund once they have been issued with a certificate of application (Annex 19 or Annex 19ter as the case may be).

It was also found that the eligibility conditions for unemployment benefits require claimants to be lawfully resident in Belgium and therefore this requires that they have completed the registration formalities and have been issued with a registration certificate. The existence of a lawful residence condition as regards unemployment benefits poses a particular problem for workers who become unemployed within a year of starting work in Belgium, given that they can only retain their status as a worker for up to six months.

As regards non-contributory social assistance, it was found that the Belgian Constitutional Court has struck down residence conditions which were enacted in respect of allowances for disabled persons and the old-age income guarantee scheme. The residence requirements applicable to social integration allowance were found to be contrary to EU legislation. Legislative action is therefore required to ensure that the law formally recognises the right of EU workers and their family members to claim social integration allowances within the first three months of

their residence in Belgium. In addition, the practices related to the change of status during the registration procedure should be reviewed, as they create a delay which further extends the time during which EU workers and their family members are not entitled to claim social integration allowance.

Similarly, several issues were identified with regard to residual social assistance. In particular, divergent practices by public social assistance centres and municipalities have emerged due to the Immigration Office's instructions to municipalities to unregister EU citizens as soon as a decision to refuse or withdraw residence rights (Annex 20 or 21 respectively) is issued, without waiting for expiry of the deadline for appeal or for the appeal to be determined by a court, which is contrary to case law of the Belgian Council of State. Furthermore, the practices related to the change of status should be reviewed in order to preserve the right to claim social assistance for EU workers and their family members, so that the public social assistance centres can be made aware of any change in their status which occurs after the deliverance of a residence document (EU card or F card as the case may be).



## 5. Impact of registration formalities on fiscal benefits

As opposed to the situation prevailing in the fields of employment law and the coordination of social security, the taxation of individuals is not regulated at EU-level. The Member States therefore enjoy fiscal autonomy which implies that they are free to establish the system of taxation which they deem most appropriate.<sup>1492</sup> Nonetheless, in exercising their discretion Member States must act in accordance with EU law.<sup>1493</sup>

Given that the exercise of national competences in the field of taxation by Member States may lead to conflicting claims from several jurisdictions over the same tax base, this may lead to double taxation, which arises as a result of the imposition of similar taxes by more than one country in respect of the same taxpayer and over

<sup>1492</sup> See for example, Case C-295/08 *Columbus* EU:C:2007:754.

<sup>1493</sup> See for example, Case C-596/19P *Commission v Hungary* EU:C:2021:202.

the same income.<sup>1494</sup> In the absence of any uniform or harmonisation measure adopted at EU level, in the present states of development of EU law, there is no obligation to avoid double taxation.<sup>1495</sup> Instead, when exercising their sovereignty in the area of taxation, Member States have sought to rely on the Organisation for Economic Co-operation and Development (OECD) principles in order to prevent double taxation and allocate tax jurisdiction between themselves.<sup>1496</sup> Belgium has concluded bilateral tax treaties with more than 90 countries including all EU Member States and EFTA States.<sup>1497</sup>

While personal income tax remains governed by national law and bilateral agreements, there is a significant body of case law from the Court of Justice<sup>1498</sup> which makes it clear that such rules must be established and applied in compliance with EU law. As a result, national tax rules which restrict the free movement of workers, the freedom of establishment, the freedom to provide cross-border services and/or the free movement of persons<sup>1499</sup> will be considered contrary to EU law unless objectively justified.<sup>1500</sup>

The following Section will therefore review the extent to which registration requirements are imposed by the Belgian income tax rules in connection with workers, self-employed persons and their family members.

## 5.1 Registration as a pre-condition?



In Belgium, taxation falls within the competences of federal, regional and municipal authorities. Individuals residing in Belgium are as a rule subject to Belgian personal income

tax<sup>1501</sup> and are taxed on their worldwide income.<sup>1502</sup> For federal income tax purposes, an individual is considered to be resident in Belgium if their domicile or their centre of economic interest is situated in Belgium during the income year.<sup>1503</sup> For regional income tax purposes, the domicile on the first of January of the assessment year is taken into account for determining which regional tax system applies to the person in question.<sup>1504</sup> In general, individuals who are registered in the population register are deemed to have their domicile in Belgium<sup>1505</sup> and are thus considered as residents for tax purposes,<sup>1506</sup> unless the contrary is otherwise demonstrated.<sup>1507</sup>

Non-residents on the other hand may also be subject to Belgian tax but in this case they will only be taxed on their Belgian-source income.

In what follows, the link between residence and tax requirements for workers and self-employed persons will be briefly explored. In addition, the link between residence and fiscal benefits (deductible expenses, tax reductions, tax credits) will be analysed.

### 5.1.1 Workers

In Belgium, workers are in principle subject to personal income tax and they should also be able to take advantage of fiscal benefits which are granted to all residents.

#### 5.1.1.1 Personal income tax requirements

The liability to Belgian personal income tax is determined primarily by reference to whether a person resides in Belgium. EU citizens who move their main place of residence to Belgium will become liable to pay personal income tax in Belgium.<sup>1508</sup> The completion of residence formalities will lead to EU workers being registered in the population register and therefore deemed to have their domicile in Belgium for tax purposes.<sup>1509</sup> As a result, EU workers who work and reside in Belgium are liable

1494 Michael Lang, *Introduction to the Law of Double Taxation Conventions* (3<sup>rd</sup> ed, Linde 2021), pp. 1-4.

1495 Case C-513/04 *Kerckhaert* EU:C:2006:713; Case C-295/08 *Columbus* EU:C:2007:75; Case C-67/08 *Block* EU:C:2009:92; Case C-96/08 *CIBA* EU:C:2010:185.

1496 Lang (n 1494), pp. 5-8.

1497 Further details on the international tax treaties which Belgium has entered into can be found on the website of the FPS Finance <https://finance.belgium.be/en/private-individuals/international/international-agreements>.

1498 For a review, see Suzanne Kingston, "The Boundaries of Sovereignty: The ECJ's controversial role applying the internal market rules to taxation" (2006-7) 9 *Cambridge Yearbook of European Legal Studies*, pp. 287-311; Servaas Van Thiel, "The Direct Income Tax Case Law of the European Court of Justice: Past Trends and Future Developments" (2008) 62 *Tax Law Review*, pp. 143-192.

1499 Case C-522/04 *Commission v Belgium* EU:C:2007:405 concerning tax reductions in respect of pension contributions.

1500 Case C-250/08 *Commission v Belgium* EU:C:2011:793 concerning tax advantages in respect of immovable property.

1501 Art. 3, Income Tax Code of 10 April 1992, hereafter the "Income Tax Code" (*Code des impôts sur les revenus du 10 avril 1992 / Wetboek van de Inkomstenbelasting van 10 april 1992*, MB/BS 30-07-1992, 17120).

1502 Art. 5, Income Tax Code.

1503 Art. 2 §1, 1<sup>o</sup>, Income Tax Code.

1504 Art. 5/1 §2, Special law of 16 January 1989 on the financing of the Communities and Regions (*Loi spéciale du 16 janvier 1989 relative au financement des Communautés et des Régions / Bijzondere wet van 16 januari 1989 betreffende de financiering van Gemeenschappen en Gewesten*, MB/BS 17-01-1989, 850).

1505 Art. 2 §1, second para., Income Tax Code.

1506 Art. 2 §1, 1<sup>o</sup>, Income Tax Code.

1507 Under Art. 4, 4<sup>o</sup>, Income Tax Code, foreigners whose details are entered into the register of pending applications are not subject to personal income tax, unless their centre of economic interest was already established in Belgium prior to their registration on the register.

1508 Art. 3, Income Tax Code.

1509 Art. 2 §1, second para., Income Tax Code.

to personal income tax in Belgium on their worldwide income.<sup>1510</sup>

There is no need for residents to register with the Belgian tax authorities upon taking up residence in Belgium, as the latter will receive this information directly from the municipalities based on registration in the national population register. Each year, a personal tax declaration needs to be submitted.<sup>1511</sup> This obligation applies to all taxpayers who are resident of Belgium.<sup>1512</sup>

### 5.1.1.2 Fiscal benefits

It should be noted from the outset that EU workers benefit from the right to equal treatment as regards “tax advantages”.<sup>1513</sup>

In Belgium fiscal benefits take a variety of different forms covering i) personal allowances,<sup>1514</sup> ii) deductible expenses,<sup>1515</sup> iii) tax deductions<sup>1516</sup> and iv) tax credits.<sup>1517</sup>

A first type of fiscal benefit consists in personal allowances, which refer to the amount of income on which a taxpayer does not have to pay any tax.<sup>1518</sup> This includes a basic allowance which benefits every resident taxpayer and a supplementary allowance for each child and other dependent. An additional personal allowance is also awarded to disabled persons.

It should be noted that the supplementary allowance for each child<sup>1519</sup> is only granted if the child forms part of the worker’s household in Belgium.<sup>1520</sup> This implies that the child has registered their residence in Belgium. As a result, an EU worker living in Belgium whose children reside in another EU country would be ineligible for this allowance.

It is questionable whether such residence condition is lawful as a matter of EU law.<sup>1521</sup>

A second category of fiscal benefit comprises deductible expenses, which refer to the expenses incurred during the tax year and which serve to reduce the amount of taxable income. Deductible expenses include compulsory social security payments for workers, professional expenses (determined either on an actual basis or on a lump sum basis)<sup>1522</sup> and family maintenance payments.<sup>1523</sup> It would appear that there is nothing to prevent such expenses from being deductible as regards professional expenses incurred outside Belgium<sup>1524</sup> and maintenance payments made to family member residing outside Belgium.<sup>1525</sup>

A third category of fiscal benefits relates to tax deductions.<sup>1526</sup> The amount of income tax due by the taxpayer can under certain conditions be reduced when certain expenditures have been incurred, including payments for pension savings,<sup>1527</sup> donations<sup>1528</sup> and childcare costs.<sup>1529</sup> These give the right to a tax deduction up to a certain capped amount and is offset against any income tax owed by the taxpayer.<sup>1530</sup> In general, it would appear that expenses which give rise to a tax deduction do not necessarily have to be incurred in Belgium and expenses relating to pension savings,<sup>1531</sup> donations<sup>1532</sup>

1510 Arts. 3 and 5, Income Tax Code.

1511 Art. 395, Income Tax Code.

1512 Ibid.

1513 Art. 7(2), Regulation 492/2011.

1514 Art. 130 onwards, Income Tax Code. These refer to *quotités exemptées / belastingvrije sommen*.

1515 Art. 49 onwards and Art. 104 onwards, Income Tax Code. These refer to *dépenses déductibles / aftrekbare uitgaven*.

1516 Art. 1451 onwards, Income Tax Code. These refer to *réductions d’impôt / belastingverminderingen*. Following the Sixth State Reform, Belgian regions also have the power to grant tax reductions.

1517 Art. 289bis onwards, Income Tax Code. These refer to *crédits d’impôt / belastingkredieten*. Following the Sixth State Reform, Belgian regions are also entitled to grant tax credits as well.

1518 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/declaration\\_impot/taux-revenus-imposables/taux](https://finances.belgium.be/fr/particuliers/declaration_impot/taux-revenus-imposables/taux) / <https://financien.belgium.be/nl/particulieren/belastingaangifte/tarieven-belastbaar-inkomen/tarieven>.

1519 Art. 132, Income Tax Code.

1520 Art. 136, Income Tax Code.

1521 In Case C-177/12 *Lachheb* EU:C:2013:689, the EU Court of Justice held that a child tax rebate is a family benefit for the purposes of the EU rules on the coordination of social security. The same conclusion was reached in Case C-308/14 *Commission v UK* EU:C:2016:436 as regards child tax credit. As a result, it is likely that this supplementary allowance for each child constitutes a “family benefit” for the purposes of Regulation 883/2004. In such a case it should therefore benefit any worker regardless of where the child lives pursuant to Art. 67, Regulation 883/2004.

1522 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/declaration\\_impot/taux-revenus-imposables/revenus-imposables/revenus-professionnels#q4](https://finances.belgium.be/fr/particuliers/declaration_impot/taux-revenus-imposables/revenus-imposables/revenus-professionnels#q4) / <https://financien.belgium.be/nl/particulieren/belastingaangifte/tarieven-belastbaar-inkomen/belastbaar-inkomen/beroepsinkomen#q4>.

1523 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux/rentes\\_alimentaires/payees#q4](https://finances.belgium.be/fr/particuliers/avantages_fiscaux/rentes_alimentaires/payees#q4) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen/onderhoudsgeld/betaald#q4>.

1524 Art. 52, Income Tax Code.

1525 Art. 104, Income Tax Code.

1526 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux](https://finances.belgium.be/fr/particuliers/avantages_fiscaux) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen>.

1527 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux/epargne-pension](https://finances.belgium.be/fr/particuliers/avantages_fiscaux/epargne-pension) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen/pensioensparen>.

1528 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux/dons](https://finances.belgium.be/fr/particuliers/avantages_fiscaux/dons) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen/giften>.

1529 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux/garde\\_enfants](https://finances.belgium.be/fr/particuliers/avantages_fiscaux/garde_enfants) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen/kinderopvang>.

1530 Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/avantages\\_fiscaux/reduction\\_d\\_impot#q1](https://finances.belgium.be/fr/particuliers/avantages_fiscaux/reduction_d_impot#q1) / <https://financien.belgium.be/nl/particulieren/belastingvoordelen/belastingvermindering#q1>.

1531 Art. 145b, Income Tax Code.

1532 Art. 1453z, Income Tax Code.

and childcare costs<sup>1533</sup> which are incurred within the EEA would also qualify.

The final category of fiscal benefits encompasses tax credits,<sup>1534</sup> which is not limited to any income tax due by the taxpayer. Tax credits are also referred to as “negative taxation” as the fiscal benefit associated with these are paid to the taxpayer.<sup>1535</sup>

EU workers who have completed registration formalities will be deemed to have their tax domicile in Belgium by virtue of their entry in the national population register<sup>1536</sup> and therefore be liable to Belgian personal income tax but also benefit from fiscal benefits.<sup>1537</sup> However, completion of registration formalities is not a pre-condition for being subject to Belgian personal income tax.

## 5.1.2 Posted workers

Posted workers and frontier workers in particular are subject to the tax rules of the country of residence, but may also be subject to pay taxes in the country of work. This is where double taxation agreements come into play, as these agreements aim to prevent double taxation in respect of workers.

### 5.1.2.1 Personal income tax requirements

Under many bilateral tax treaties, the amount of tax paid in the country of work will be offset against the tax owed in the country of residence.<sup>1538</sup> In other cases, the income earned in the country of work might be taxable only in that country and exempt from tax in the country of residence.<sup>1539</sup>

Such taxation does not exclude full or partial taxation in the country where the EU citizen is residing. However, if a double tax treaty applies between Belgium and the country of residence, the Belgian income will only be taxed insofar as the treaty so permits.

As a result, the double taxation treaties that Belgium has concluded with other countries will be of relevance in such a scenario.<sup>1540</sup> With regard to the income from an employment activity, these tax treaties follow as a principle that the professional income is taxable in the country of employment.

However, double tax treaties tend to include an exception to this so-called “country of employment principle” if the following cumulative conditions are met as regards posted workers:<sup>1541</sup> (i) the posting to the host State does not exceed 183 days per year, (ii) the salary is paid by an employer that is not established in the host State, (iii) the remuneration is not borne by a permanent establishment of the employer in host State. In such cases the income from an employed activity nevertheless remains taxable in the country of residence. In practice, this means that the income earned by an EU citizen during his posting in Belgium will be subject to tax in his country of residence in case the above-mentioned conditions are met.

Belgium has sought to establish an attractive special income tax regime for foreign executives and high-skilled workers who are posted to Belgium and fulfil certain conditions.<sup>1542</sup> A foreign national who qualifies for the expatriate tax regime is, although living in Belgium, considered to be non-resident for tax purposes, meaning that only their personal and professional income generated in Belgium is taxable in Belgium. In addition, the taxpayer may exclude actual allowances received as part of their package, such as reimbursements for additional expenses incurred from the employment in Belgium.<sup>1543</sup> These tax-free allowances are exempt from income tax up to a capped amount<sup>1544</sup> and not subject to Belgian social security contributions. In addition, the part of the person’s salary that corresponds to professional duties performed abroad, is proportionately exempted from Belgian income tax as well.<sup>1545</sup> In order to benefit from the expatriate tax regime, an application needs to be submitted within six months following start of the assignment on Belgian territory.<sup>1546</sup>

1533 Art. 14534, Income Tax Code.

1534 Further information can be found on the website of the Belgian government [https://www.belgium.be/fr/impots/impot\\_sur\\_les\\_revenus/particuliers\\_et\\_independants/avantages\\_fiscaux](https://www.belgium.be/fr/impots/impot_sur_les_revenus/particuliers_et_independants/avantages_fiscaux) / [https://www.belgium.be/nl/belastingen/inkomstenbelastingen/particulieren\\_en\\_zelfstandigen/belastingvoordelen](https://www.belgium.be/nl/belastingen/inkomstenbelastingen/particulieren_en_zelfstandigen/belastingvoordelen).

1535 Ibid.

1536 Art. 2 §1, second para., Income Tax Code.

1537 Art. 3, second para., Income Tax Code.

1538 Lang (n 1494), pp. 81-84 and 94-104.

1539 Ibid.

1540 Further details on the international tax treaties which Belgium has entered into can be found on the website of the FPS Finance <https://finance.belgium.be/en/private-individuals/international/international-agreements>.

1541 Jan Lein, “De aangekondigde fiscale controle op gedetacheerde werknemers”, *HR Square* (7 May 2018), <https://www.hrsquare.be/nl/rechtspraak/de-aangekondigde-fiscale-controle-op-gedetacheerde-werknemers>.

1542 Art. 139/8, Belgian Tax Circular of 8 August 1983, hereafter the “Belgian Tax Circular on expats” (*Ci.RH.624/325.294, Bull. n° 620, p. 1974 / Bull. Nr 620, p. 2061*).

1543 Art. 142/2, Belgian Tax Circular on expats.

1544 EUR 11,250 up to EUR 29,750 for certain foreign executives.

1545 Art. 142/2, 2°, Belgian Tax Circular on expats.

1546 Art. 142/5, Belgian Tax Circular on expats.

EU citizens who maintain their main place of residence abroad, but who generate an income in Belgium which is not exempted under the relevant double-taxation treaty, will need to register with the tax authorities for the purposes of the submission of a personal income tax declaration as a non-resident.<sup>1547</sup>

### 5.1.2.2 Fiscal benefits

It is important to note is that, since the tax year 2014, non-resident taxpayers are only entitled to fiscal benefits from personal allowances if more than 75% of their worldwide professional income is derived from Belgian sources.<sup>1548</sup> In addition, tax reductions at a regional level are only granted to those non-residents who also maintain their tax residency in another EEA country. The fiscal benefits are pro-rated in case the taxable period for a non-resident taxpayer does not correspond to an entire calendar year.

### 5.1.3 Self-employed persons

The tax rules identified above as regards personal income tax requirements and fiscal benefits for EU workers will also apply as regards self-employed persons.

As opposed to the situation of workers and posted workers, self-employed persons are required to deal with indirect taxes including VAT. Additional tax obligations may arise in the event the person concerned pursues their self-employed activities under the form of a company or other legal entity.

### 5.1.4 Jobseekers

This section is not applicable to EU jobseekers who do not have an income and therefore are not liable to pay income tax.

In the event that a jobseeker generates income through other means they will be subject to Belgian personal income tax by virtue of their residence in Belgium.

### 5.1.5 Family members of EU citizens

Family members will only be subject to personal income tax in Belgium if they generate income in their own right.

<sup>1547</sup> Art. 395, Income Tax Code.

<sup>1548</sup> Further information can be found on the website of the FPS Finance [https://finances.belgium.be/fr/particuliers/declaration\\_impot/non-residents/avertissement-extrait-role#q5](https://finances.belgium.be/fr/particuliers/declaration_impot/non-residents/avertissement-extrait-role#q5) / <https://financien.belgium.be/nl/particulieren/belastingaangifte/niet-inwoners/aanslagbiljet#q5>.

## 5.2 Conclusion on fiscal benefits



The personal tax situation is highly dependent on where a worker or self-employed person resides and works. All EU citizens who reside in Belgium will be subject to Belgian personal income tax and will need to file a personal tax declaration on a yearly basis. EU citizens who are considered non-resident for tax purposes and who derive taxable income in Belgium may also be liable to comply with the Belgian tax rules unless their income is exempted from taxation under any applicable double taxation treaty. The completion of registration formalities is not a pre-condition for being subject to Belgian personal income tax.

When it comes to fiscal benefits, a difference exists between the fiscal benefits which may be claimed by resident taxpayers and non-resident taxpayers. While resident taxpayers are entitled to claim all fiscal benefits for which they meet the eligibility conditions, the exclusion of personal allowances in respect of children residing outside Belgium does not appear in compliance with EU law. Non-resident taxpayers are only entitled to fiscal benefits in Belgium if more than 75% of their worldwide professional income is derived from Belgian sources.



## 6. Conclusion

This chapter examined whether the completion of the registration procedure in Belgium can be construed as a precondition to the exercise of rights contrary to the Citizens Rights Directive.<sup>1549</sup>

To this end, an analysis was carried out on the relationship between the Belgian registration process and access to employment, conditions of employment, healthcare as well as social welfare and fiscal benefits with regard to EU workers, posted workers, self-employed persons and jobseekers as well as their family members.

The completion of registration formalities is generally not a precondition for EU citizens to access employment in Belgium or benefit from conditions of employment. However, the opening of a local bank account by EU

<sup>1549</sup> Directive 2004/38, Art. 25.

citizens whose residence is not registered in Belgium has been flagged as a difficulty which may impact their professional activities. As regards non-EU family members of EU citizens, they will have to have initiated the registration and at least hold a certificate of application (Annex 19ter) in order to prove their right to work to prospective employers or to be able to register as self-employed. Those belonging to the categories of “other family members” will only be able to work if they hold a residence card. However, this is not sufficient should they want to work in a self-employed capacity, and they will also need to apply a professional card, which is a general requirement for all third-country nationals which should arguably not be imposed on family members of EU citizens.

A review of the three categories of social welfare was also undertaken. As regards contribution-based social security benefits: while workers and self-employed persons may enrol with a healthcare fund without having completed registration formalities, family members are only entitled to healthcare in Belgium until they have completed the registration formalities and have been issued with a residence document (EU card or F card as the case may be). The dependent children and the dependent spouse will however be able to initiate the enrolment process with a healthcare fund once they have been issued with a certificate of application (Annex 19 or Annex 19ter as the case may be). The conditions applicable to unemployment benefits require claimants to have lawful residence in Belgium and therefore this requires that they have completed registration formalities and have been issued with a registration certificate. This requirement is also a source of potential problems for workers who become unemployed after having worked for less than a year in Belgium, given that they can only retain their status as a worker for up to six months.

The residence requirements for non-contributory social assistance were found to be contrary to EU law in respect of social integration allowance. Legislative action is needed to ensure that EU workers and their family members are entitled to access social integration allowance within the first three months of residence in Belgium. In addition, the practices related to the change of status during the registration procedure should be reviewed, as these may further extend the time during which EU workers and their family members are not entitled to claim social integration allowance.

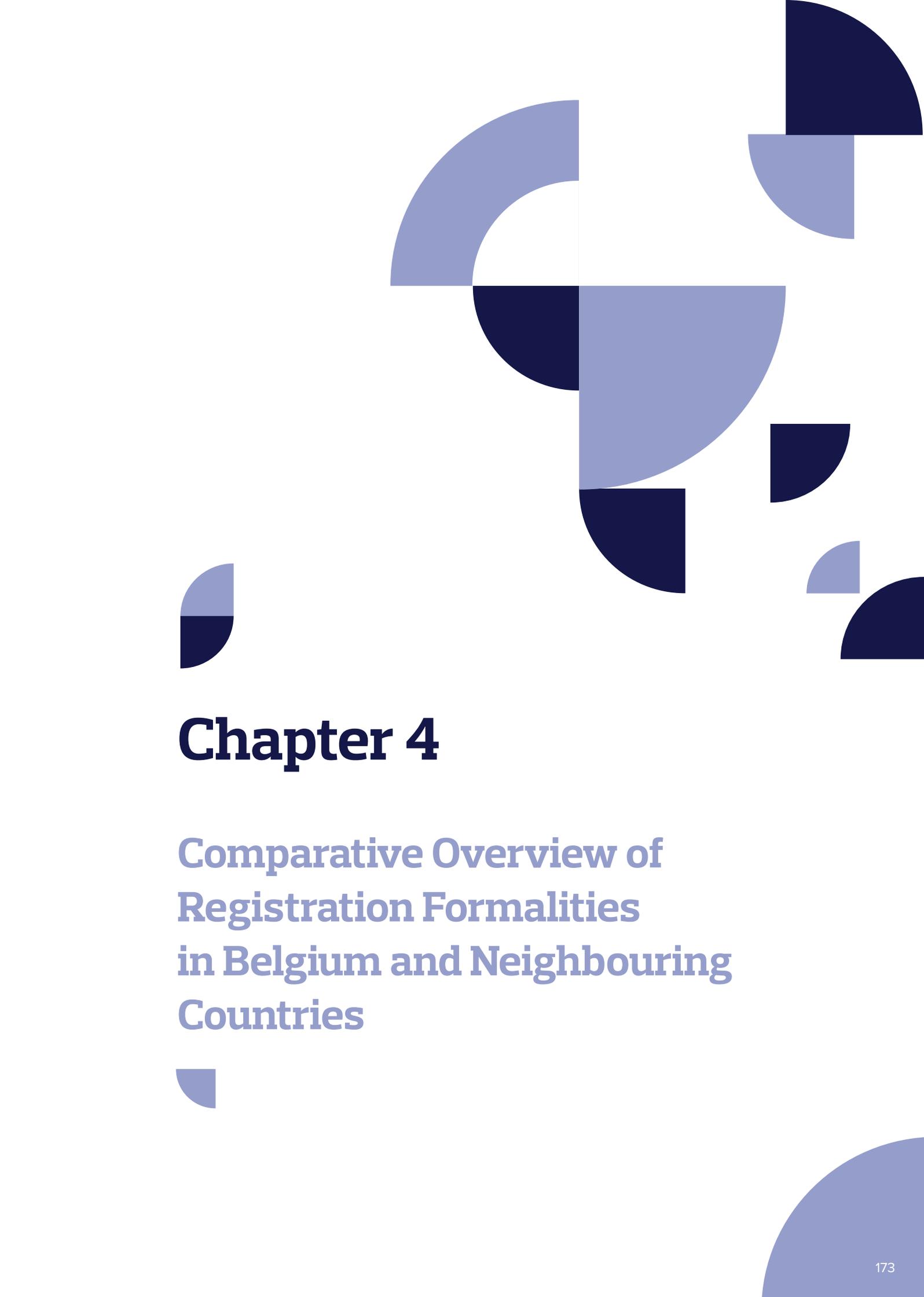
The right to claim residual social assistance is affected by the emergence of divergent administrative practices caused by the Immigration Office’s instructions to municipalities to unregister EU citizens as soon as a decision to refuse or withdraw residence rights has been taken, without waiting for expiry of appeal deadlines as

required by the case law of the Belgian Council of State. Furthermore, the practices related to the change of status by EU citizens and their family members should also be reviewed to ensure that the public social assistance centres can be made aware of any change in status which occurs after the deliverance of a residence document and might open a right to claim residual social assistance.

Finally, as regards fiscal benefits, the completion of registration formalities is not a pre-condition for being subject to the Belgian personal income tax system. While resident taxpayers are entitled to claim all fiscal benefits for which they meet the eligibility conditions, the exclusion of personal allowances in respect of children residing outside Belgium does not appear in compliance with EU law. Non-resident taxpayers are only entitled to claim fiscal benefits under the Belgian tax rules if they derive at least three quarters of their total professional income from Belgian sources.

In conclusion, while Belgian residence formalities do not have an overall negative impact on access to employment and conditions of employment for EU workers and the self-employed, their non-EU family members will be required to have initiated the registration process. In addition, several problems were noted as regards access to social welfare benefits and tax advantages.





# Chapter 4

## Comparative Overview of Registration Formalities in Belgium and Neighbouring Countries



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## Comparative Overview of Registration Formalities in Belgium and Neighbouring Countries



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**Appendices** *These can be consulted on the website of Myria.*

Country fiche for France

Country fiche for Germany

Country fiche for Italy

Country fiche for Luxembourg

Country fiche for Netherlands

# 1. Introduction

The purpose of this Chapter is to provide a comparative overview of the implementation of residence formalities and practices in the Member States neighbouring Belgium, namely the Netherlands, Luxembourg, France and Germany, together with Italy. The latter Member State was included owing to the similarities it presented with Belgium and its neighbours in view of its decentralised application of EU residence formalities.<sup>1550</sup> This selection also has the relative advantage of representing a comparative overview of the six founding Member States of the European Economic Community.

This comparison examines how the Citizens Rights Directive<sup>1551</sup> has been implemented both in law and practice in each of the Member States with the aim of identifying commonalities and differences between the Belgian residence formalities and those operating in the five other Member States as well as identifying best practices.

The comparative analysis has been undertaken on the basis of primary sources, including legislation and soft-law instruments, as well as secondary sources, including relevant national websites, the European Commission's report on transposition of the Citizens Rights Directive,<sup>1552</sup> various studies commissioned by the EU institutions<sup>1553</sup>

as well as reports published by non-governmental organisations.<sup>1554</sup> The analysis has also included country-specific sources where available.<sup>1555</sup>

Based on this information, a country fiche has been prepared for each Member State providing detailed information on the implementation of residence formalities. The country fiches also identify any documented problems that may have been observed and mention any best practice that may have been noted in each Member State.

The results of this research have been synthesised in this chapter in order to provide a comparative overview of residence formalities in Belgium and its European neighbours.

This Chapter should hopefully serve as useful background material for the purposes of the government's stated intention to examine the feasibility of further harmonising the rules on registration formalities applicable to EU citizens and their family members in view of the law and practice of Belgium's neighbours.<sup>1556</sup>

## 2. Overview of transposition

As a matter of EU law, Member States are under an obligation to adopt legally-binding measures to give effect to EU directives.<sup>1557</sup> This obligation is also given further expression by Article 40(1) of the Citizens Rights Directive which requires Member States to adopt the necessary legal, regulatory and administrative measures which are needed to comply with the provisions of the Directive.

1550 This fifth Member State was included at Myria's request from among a choice of the following Member States which was selected in view of the research team's linguistic abilities and availability of source material: Italy for its similarities with Belgium, Ireland for its similar proportion of EU migrants as Belgium and the UK, which has a large EU resident population similar to France and Germany. The UK withdrew from the European Union with effect from 1 February 2020.

1551 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77 (hereafter referred to as the "Citizens Rights Directive" or the "Directive").

1552 Report from the European Commission to the European Parliament and Council on the application of Directive 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, COM(2008) 840 final.

1553 Milieu Ltd and Edinburgh University, "Conformity study of Member States' national implementation measures of Directive 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" (Report for the European Commission, 2008); "Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States" (Study for the European Parliament, 2009, PE 410.650); ICF/GHK and Milieu, "Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation" (Report for the European Commission, 2013); Milieu, "Obstacles to the Right of Free Movement and Residence for EU Citizens and their Families: Comparative Analysis", (Study for the European Parliament, 2016, PE 571.375); CSES, "Study to Support the Preparation of an Impact Assessment on EU Policy Initiatives on Residence and Identity Documents to Facilitate the Exercise of the Right of Free Movement" (Report for European Commission, 2017).

1554 ECAS, "User-friendly Gateways for Mobile EU Citizens" (2018); ECAS, "Obstacles to freedom of movement and political participation of mobile EU citizens" (FAIR EU project synthesis report, 2019).

1555 See for example, Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen "Union Citizenship: Development, Impact and Challenges" (XXVI FIDE Congress in Copenhagen, congress publication Volume 2, 2014) which contains country reports for France, Germany, Italy and the Netherlands.

1556 House of Representatives, General Policy Note, Migration and Asylum and the National Lottery (4 November 2020), (*Chambre des Représentants de Belgique, "Note de Politique Générale, Asile et Migration et Loterie Nationale /Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie en Nationale Loterij, Doc 55 1580/014, 04-11-2020*), p. 29.

1557 Article 288(3) of the Treaty on the Functioning of the EU.

## 2.1 Legal framework



The Citizens Rights Directive has been the subject of specific transposing measures in each of the Member States.<sup>1558</sup>

Like Belgium, France<sup>1559</sup> and the Netherlands<sup>1560</sup> have transposed the rules by making amendment to the legal instruments which govern migration. A different approach to transposition was followed by Germany,<sup>1561</sup> Italy<sup>1562</sup> and Luxembourg,<sup>1563</sup> which have adopted dedicated self-standing legal instruments which specifically apply to EU citizens and their family members.

It is worth noting that Luxembourg and Italy also extend the benefit of the Citizens Rights Directive to the non-EU family members of their own nationals. This is no longer the case in Belgium, which has adopted stricter rules for non-EU family members of Belgian citizens<sup>1564</sup> who have not previously exercised their right of free movement in another Member State.<sup>1565</sup>

Belgium	France	Germany	Italy	Netherlands	Luxembourg
incorporation	incorporation	stand-alone	stand-alone	incorporation	stand-alone

Table 2.1 - Nature of transposition of Directive 2004/38

Note: light shading indicates Member States which have transposed Directive 2004/38 by amending their immigration laws and dark shading Member States which have adopted stand-alone legislation.

1558 This is covered by Section A of the country fiches covering the legal framework in each Member State.

1559 Directive 2004/38 was transposed into French law by making amendments to the Code on the entry and residence of foreigners and the right of asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*). It should be noted that following the completion of the comparative research relating to France, a new immigration code came into force on 1 May 2021. This study is based on the provisions contained in the former code as no information is available on the practical application of the new rules.

1560 Directive 2004/38 has been transposed into Dutch law through amendments made to the Law of 23 November 2000 on the complete revision of the Immigration Law (*Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet*), the Immigration Decree of 23 November (*Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000*) and the Immigration Regulations of 18 December 2000 (*Voorschrift Vreemdelingen 2000*) as well as Volume B of the Immigration Guidelines (*Vreemdelingencirculaire 2000 B*).

1561 Directive 2004/38 has been transposed into German law by the Act on the General Freedom of Movement for EU Citizens (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern, "Freizügigkeitsgesetz"*).

1562 Directive 2004/38 has been transposed into Italian law by Legislative Decree No 30/2007 of 6 February 2007 (*Decreto Legislativo del 6 febbraio 2007, n. 30 "Attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri"*) as well as several administrative circulars.

1563 Directive 2004/38 has been transposed into the law of Luxembourg by the Law of 21 August 2008 on the Free Movement of Persons and Immigration (*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*) together with the Grand-ducal regulations of 5 September 2008 implementing certain provisions relating to administrative formalities contained in the law of 29 August 2008 on the free movement of persons and immigration (*Règlement grand-ducal du 5 septembre 2008 portant exécution de certaines dispositions relatives aux formalités administratives prévues par la loi du 29 août 2008 sur la libre circulation des personnes et l'immigration*).

1564 Art. 40ter §2, Belgian Immigration Law. It should be noted that, in the original transposition of Directive 2004/38 by Law of 25 April 2007 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 25 april 2007 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, MB/BS 10-05-2007, 14584*), Art. 40ter, Belgian Immigration Law initially provided that the rules relating to EU citizens and their family members also extended to family members of Belgian citizens. However, this provision was subsequently amended with the aim of align the conditions applicable to the residence rights of family members of Belgian citizens with those applicable to family reunification by third-country nationals by Law of 8 July 2011 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners in respect of the conditions governing family reunification (*Loi du 8 juillet 2011 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers / Wet van 8 juli 2011 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging, MB/BS 12-09-2011, 58915*). This law was subsequently challenged on several grounds by a number of individuals and organisations before the Belgian Constitutional Court. In its ruling the Court held that the law was unlawful insofar as it discriminated against family members of Belgian citizens who had exercised their free movement rights by imposing harsher conditions than those that applied to family members of EU citizens (Constitutional Court, judgment No 121/2013 of 26 September 2013).

1565 Art. 40ter §1, Belgian Immigration Law. It should be noted that, following its amendment by Law of 4 May 2016 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 4 mai 2016 portant des dispositions diverses en matière d'asile et de migration et modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers / Wet van 4 mei 2016 houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, MB/BS 27-06-2016, 38643*), this provision now explicitly extends the benefit of the provisions relating to family members of EU citizens to the non-EU family members of Belgian citizens who have exercised free movement rights in another EU country and have returned to Belgium, in line with Case C-370/90 *Surinder Singh* EU:C:1992:296. This change followed the ruling of the Belgian Constitutional Court handed down on 26 September 2013 (n 1564).

## 2.2 Nature of residence formalities



Article 8(1) of the Citizens Rights Directive gives Member States the option of requiring EU citizens to register their residence in their territory for periods of residence longer than three months.

As is the case in Belgium, it is compulsory for EU citizens to register their residence in Italy and Luxembourg.<sup>1566</sup> This process leads to the issuance of a registration certificate foreseen by Article 8(2) of the Directive.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
compulsory	optional	none	compulsory	optional	compulsory

Table 2.2 - Nature of residence formalities for EU citizens

Note: light shading indicates the operation of an optional registration system and dark shading indicates a compulsory registration system is in place, whereas grey shading indicates that no registration is possible for EU citizens. This does not apply to non-EU family members who are obliged to register in all Member States reviewed.

Registration is not obligatory in France, Germany (abolished 2013)<sup>1567</sup> or the Netherlands (abolished 2014).<sup>1568</sup> However, this has been criticised as the potential source of legal uncertainty for EU citizens in those countries<sup>1569</sup> given that this may generate difficulties in proving their right of residence when seeking to access other public services.<sup>1570</sup>

However, in France, EU citizens have the option of registering their residence for the purposes of obtaining a residence document there. In the Netherlands, EU citizens also have the option of applying for a registration certificate. Nonetheless, registration is compulsory for those EU citizens who are being accompanied or joined by non-EU family members. In Germany, while formalities relating to the right of residence have been abolished for EU citizens, the latter are nonetheless still required to

register their domicile as is the case for German nationals whenever they change their domicile. Unlike France or the Netherlands, Germany has not provided any possibility for EU citizens to obtain a registration certificate on a voluntary basis.

It should also be noted that, as is the case in Belgium, EU citizens have to declare their domicile (residential address) in line with the rules on the registration of the resident population which applies to all residents in Germany, Italy, Luxembourg and the Netherlands including their own nationals. In France, nationals do not have to declare their domicile as there is no population register.

In Belgium and the other five Member States, it is obligatory for non-EU family members of EU citizens to register their residence, as foreseen by Article 9 of the Citizens Rights Directive.

## 2.3 Problems identified in transposition



In its 2008 report on the transposition of the Citizens Rights Directive,<sup>1571</sup> the European Commission deplored the fact that not a single Member State had been able to transpose the Directive correctly and completely.<sup>1572</sup>

Based on the data obtained from the European Commission,<sup>1573</sup> which was used in its 2008 report on transposition,<sup>1574</sup> each Member State can be given a

<sup>1566</sup> This is covered by Section B of the country fiche on the nature of residence formalities.

<sup>1567</sup> Amending Act of 21 January 2013 (*Gesetz zur Änderung des Freizügigkeitsgesetzes/EU und weiterer Aufenthaltsrechtlicher Vorschriften vom 21. Januar 2013*, BGBl. I, p. 86).

<sup>1568</sup> Decree of 8 July 2014 to amend the Immigration Decree 2000 (abolition of the obligation to report EU citizens) (*Besluit van 8 juli 2014 tot wijziging van het Vreemdelingenbesluit 2000 (afschaffing meldplicht EU-burgers, Staatsblad 2014 nr. 268, 16-07-2014)*).

<sup>1569</sup> Daniel Thym, "Unionsbürgerfreiheit und Aufenthaltsrecht" (2104) *Zeitschrift für Ausländerrecht*, pp. 220-227, p. 222; Kees Groenendijk et al, *European Report on the Free Movement of Workers in Europe in 2012-2013*, p. 16.

<sup>1570</sup> Anna Nicolau, "Freedom of Movement in the EU: A look behind the curtain" (ECAS, 2018), p. 13 <https://ecas.org/wp-content/uploads/2018/03/ECAS-Long-report-final.pdf>.

<sup>1571</sup> Commission (2008) (n 1552).

<sup>1572</sup> Ibid, p. 1.

<sup>1573</sup> Information from the Commission obtained following a request for access to documents made under reference GestDem 2015/1508.

<sup>1574</sup> Commission (2008) (n 1552).

score<sup>1575</sup> which reflects the correctness of its initial transposition of the Citizens Rights Directive.

Belgium	France	Germany	Italy	Luxembourg	Netherlands	EU average
67%	60%	77%	70%	86%	76%	71%

Table 2.3 - Correctness of transposition (source: Commission data used in COM(2008) 840)

Note: light shading indicates below EU average whereas dark shading indicates above EU average which is shaded grey.

As can be seen from the above table, transposition was assessed to be below the EU27 average (71%) in Belgium, France and Italy. Luxembourg was among one of the Member States which was considered by the Commission to have transposed the Citizens Rights Directive in the most accurate fashion.<sup>1576</sup>

While progress has been made to address the deficiencies in transposition of the Citizens Rights Directive which were identified in 2008,<sup>1577</sup> problems nonetheless persist in all Member States aside from Luxembourg.<sup>1578</sup>

## 2.4 Transposition issues concerning family members

Aside from Germany, all Member States were considered by the European Commission to have accurately transposed the provisions of the Citizens Rights Directive relating to the categories of close family members<sup>1579</sup> including spouses, registered partners, descendants and dependent ascendants.

As regards the German transposition of the provision on registered partners,<sup>1580</sup> this was considered ambiguous by the Commission. However, this was subsequently addressed to ensure that registered partners are treated in the same way as married couples as regards their residence rights.<sup>1581</sup>

It should also be noted in this respect that Belgium is the only Member State to make a distinction between registered partnerships which are considered equivalent to marriage and those which are not.<sup>1582</sup> The other Member States tend to provide for the automatic recognition of registered partnerships which has been validly concluded abroad,<sup>1583</sup> provided they are not contrary to public

<sup>1575</sup> The data obtained from the Commission (n 1573) was used in the graphs to grade each of the 144 sub-provisions of Directive 2004/38. 1 point was allocated to each sub-provision which was identified as correctly transposed by the Member State concerned or which was transposed by a provision which was considered more favourable (as allowed under Article 37, Directive 2004/38). 0 point was allocated in respect of each sub-provision which was identified as not having been transposed or having been incorrectly or ambiguously transposed by that Member State. This generated the following scores: Belgium = 97/144; France = 86/144; Germany = 111/144; Italy = 101/144; Luxembourg = 124/144; Netherlands = 109/144. The EU average (102/144 = 71%) was calculated on the basis of data for all 27 countries which were Member States of the EU in 2008.

<sup>1576</sup> The Commission considered that transposition by Portugal was the most accurate (94%), followed by Cyprus (92%), Greece (90%), Finland and Malta (both 88%) and then Luxembourg (86%). However, accurate transposition does not necessarily translate into correct application of the rules as there are considerable problems being reported with the practical application of the rules in several of these Member State. Transposition by Austria was deemed the most inaccurate with provisions on retained rights of residence and permanent residence almost completely lacking and safeguards from expulsion mostly incorrect (40%).

<sup>1577</sup> See for example, closure of infringement cases relating to Directive 2004/38 mentioned in the European Commission's Reports to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU: "On progress towards effective EU Citizenship 2011-2013" (COM(2013) 270), p. 4 and "On progress towards effective EU citizenship 2013-2016" (COM(2017) 32), p. 9.

<sup>1578</sup> See for example, Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their family members: Comparative Analysis*, Study for European Parliament's Civil Liberties Committee (2016); Alina Tryfonidou and Robert Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU*, Study for European Parliament's Committee on Petitions (2021).

<sup>1579</sup> This refers to family members falling within the scope of Art. 2(2), Directive 2004/38 namely the spouse, the partner in a registered partnership equivalent to marriage, their direct descendants who are under the age of 21 or those above that age who are dependent upon the EU citizen or their spouse or partner, and their dependent direct relatives in the ascending line.

<sup>1580</sup> Art. 2(2)(b), Directive 2004/38.

<sup>1581</sup> Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for Germany*, Study for European Parliament's Civil Liberties Committee (2016), p. 11.

<sup>1582</sup> Art. 40bis § 2, 2°, Belgian Immigration Law. For a further discussion, see Chapter 1, Section 3. *Personal scope of the study*, Sub-section 3.6 *Family members*.

<sup>1583</sup> See for example, in France, Art. 515-7-1, French Civil Code; in Germany, Arts. 11 and 13, Introductory Act to the Civil Code (*Einführungsgesetzes zum Bürgerlichen Gesetzbuche*); in the Netherlands, Art. 2 of the Dutch Law on Conflict of Laws in respect of Registered Partnerships (*Wet van 6 juli 2004, houdende regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap*).

order.<sup>1584</sup> Alternatively, some Member States provide for the possibility (not the obligation) for registered partners to make a request for the recording of their foreign registered partnership on the civil status register.<sup>1585</sup>

	Belgium	France	Germany	Italy	Luxembourg	Netherlands
Close family members	correct	correct	incorrect (now corrected)	correct	correct	correct
Other family members	incorrect (now corrected)	incorrect	incorrect	incorrect (now corrected)	incorrect (now corrected)	correct

Table 2.4 - Correctness of initial transposition of provisions relating to family members (source: Commission data used in COM(2008) 840)

Note: light shading indicates that initial problems in transposition have now been addressed, whereas dark shading indicates that transposition problems continue to persist, while Member States where no problems in transposition were reported are shaded grey.

As was also initially the case in Belgium,<sup>1586</sup> the provision of the Citizens Rights Directive relating to the residence of other family members<sup>1587</sup> was not correctly transposed in France,<sup>1588</sup> Germany,<sup>1589</sup> Italy<sup>1590</sup> or Luxembourg.<sup>1591</sup>

Transposition problems continue to persist in France, whose transposition<sup>1592</sup> can still be considered incomplete,<sup>1593</sup> as well as in Germany,<sup>1594</sup> whose transposing measures currently only provide for the German authorities to grant discretionary authorisation in order to avoid particular hardship to other family members.<sup>1595</sup>

### 3. Preparatory phase

Under Article 34 of the Citizens Rights Directive, Member States are required to provide information concerning the rights and obligations of EU citizens and their family members under the Citizens Rights Directive.<sup>1596</sup>

The central government websites for France<sup>1597</sup> and Luxembourg,<sup>1598</sup> as well as the website of the Dutch immigration and nationality service (IND)<sup>1599</sup> provide concise and comprehensive information in a relatively user-friendly format.

These can be considered best practices as they provide detailed step-by-step instructions of the process – including what steps may need to be taken prior to arrival in the country such as legalisation formalities – and a detailed listing of documents to be provided for each category of applicant. In addition, the French and Luxembourg websites link back to the specific article(s) of the underlying legislation contained in the official national legislation database. Other notable best practices include

1584 For example, this would be the case if a partnership had been concluded abroad between blood relatives or between persons below the minimum permitted age.

1585 This is the case in Luxembourg as confirmed on the website of its Ministry of Justice <https://justice.public.lu/fr/famille/partenariat/partenariat-declare-etranger.html>.

1586 For further discussion, see Chapter 1, Section 3. *Personal scope of the study*, Sub-section 3.7 *Other family members*.

1587 This refers to “other family members” falling within the scope of Art. 2(2), Directive 2004/38, namely those who are dependents on an EU citizen, or members of their household, or where serious health grounds require the personal care of the family member by the EU citizen, or the partner with whom the EU citizen has a “durable relationship duly attested”.

1588 Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for France*, Study for European Parliament’s Civil Liberties Committee (2016), p. 10.

1589 Milieu (n 1581), pp. 15-16.

1590 Milieu Ltd, *Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for Italy*, Study for European Parliament’s Civil Liberties Committee (2016), pp. 10-11.

1591 Commission (2008) (n 1552), p. 4.

1592 Art. L 313-11, French Code on the entry and residence of foreigners and the right of asylum (n 1559). For the sake of completeness it should be noted that, following the entry into force of a new French immigration code on 1 May 2021, Art. L 200-5 appears to correctly transpose Art. 3(2), Directive 2004/38.

1593 Milieu (n 1590), pp. 15-16.

1594 Milieu (n 1581), pp. 15-16.

1595 Section 36, Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet).

1596 This is covered by Section C of the country fiche on the preparatory phase.

1597 Information on registration formalities for EU citizens and their family members is available on the French government’s public information portal [www.service-public.fr](http://www.service-public.fr) on the page entitled “*Titres, carte de séjour et documents de circulation pour étranger en France*” <https://www.service-public.fr/particuliers/vosdroits/N110>.

1598 Information on registration formalities is available on the Luxembourg government’s portal for public services [guichet.public.lu](http://guichet.public.lu) on the page *Immigration* <https://guichet.public.lu/fr/citoyens/immigration.html>.

1599 The IND’s main website can be found at the following url [ind.nl](http://ind.nl) which includes a dedicated home page for EU citizens can be found <https://ind.nl/en/eu-eea>. There is also a specific link dedicated to registration as an EU citizen <https://ind.nl/en/eu-eea/Pages/Registering-for-Union-citizens.aspx>.

the provision of on-line applications forms together with a search function allowing the contact details of the local municipality to be easily identified. Another notable best practice is the signposting to sources of legal assistance on the website of the Dutch immigration and nationality service (IND).

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Dutch, French	French	German, English	Italian, English, French, Spanish	French, German, English	Dutch, English

Table 3.1 - Availability of information on residence formalities in different languages

Note: light shading indicates Member States which only provide information in the official languages whereas dark shading indicates those where information is provided in languages other than the official languages. Languages other than the official languages appear in *italics*.

Information is available on-line in English as well as the official national language(s) in Germany,<sup>1600</sup> Luxembourg and the Netherlands. While the information contained on residence formalities for EU citizens and their family members is relatively brief, the Italian national police website<sup>1601</sup> is notable for containing information in Italian, English, French and Spanish, although the German language version of the website does not contain this information. The range of languages covered can be commended as a best practice.

Under the Regulation on the Single Digital Gateway,<sup>1602</sup> Member States are obliged to ensure that their webpages enable users to obtain easy online access to information about the rights, obligations and rules that relate to residence formalities and which are derived from national law.<sup>1603</sup> This includes information relating to taking up residence in another Member State,<sup>1604</sup> including moving temporarily or permanently to another Member State<sup>1605</sup> and the requirements for residence cards for Union citizens and their family members, including family members who are not Union citizens.<sup>1606</sup> These webpages

should also feature a link to the Single Digital Gateway which is known and promoted as the “Your Europe” portal<sup>1607</sup> using the logo which has been decided.<sup>1608</sup> The deadline for national-level websites to upload information on residence formalities expired on 12 December 2020, whereas municipal authorities have until 12 December 2022 to do so.<sup>1609</sup>

Only the national websites of Germany, Luxembourg and the Netherlands currently contain link to “Your Europe” on some but not all national webpages dealing with registration formalities for EU citizens and their family members.

<sup>1600</sup> The main source of information can be found on the website of the Federal Ministry of the Interior [www.bmi.bund.de](http://www.bmi.bund.de) on the page to the EU rules on the free movement of EU citizens and their family members <https://www.bmi.bund.de/DE/themen/migration/aufenthaltsrecht/freizuegigkeit-eu-buerger/freizuegigkeit-eu-buerger-node.html>.

<sup>1601</sup> The main official source of centralised information for Italy appears to be the website of the police [www.poliziadistato.it](http://www.poliziadistato.it) which contains some brief information on residence formalities for EU citizens and their family members <https://www.poliziadistato.it/articolo/17985b2d0db2288ab7858088552>.

<sup>1602</sup> Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 [2018] OJ L 295/1 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services; see further [https://ec.europa.eu/growth/single-market/single-digital-gateway\\_en](https://ec.europa.eu/growth/single-market/single-digital-gateway_en). For a further discussion, see Chapter 1, Section 4. *EU law relating to registration formalities*, Subsection 4.3 *Availability of information*.

<sup>1603</sup> Art. 4(1)(a), Regulation 2018/1724.

<sup>1604</sup> Annex I, entry D., Regulation 2018/1724.

<sup>1605</sup> Annex I, entry D. point 1, Regulation 2018/1724.

<sup>1606</sup> Annex I, entry D. point 4, Regulation 2018/1724.

<sup>1607</sup> Art. 22(1), Regulation 2018/1724. Your Europe portal on the Europa server <https://europa.eu/youreurope/index.htm>.

<sup>1608</sup> Art. 22(2), Regulation 2018/1724.

<sup>1609</sup> Art. 39, Regulation 2018/1724.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
no link <sup>1610</sup>	no link <sup>1611</sup>	linked <sup>1612</sup> <i>Your Europe logo not displayed</i>	no link <sup>1613</sup>	only main linked <sup>1614</sup>	only subject- specific web- pages linked <sup>1615</sup>

Table 3.2 - National websites on EU residence formalities which link to the Single Digital Gateway hosted on the “Your Europe” portal

Note: light shading indicates Member States which do not presently provide a link to “Your Europe”, whereas dark shading indicates Member States which provide a link to “Your Europe”, on some but not all national-level websites relating to EU residence formalities.

## 4. Application phase

The Citizens Rights Directive does not comprehensively regulate the procedure that applies to the submission of applications for residence by EU citizens and their family members.<sup>1616</sup> The process by which an application may be submitted is therefore largely left to the discretion of the Member States.<sup>1617</sup>

the process of registration for the purposes of transposing the Citizens Rights Directive.

### 4.1 Overview of procedure

A comparison of the procedures relating to registration formalities for both EU citizens and their family members shows that there remains a large amount of divergence in the way in which the Member States have decided to set up

#### 4.1.1 Procedure applicable to EU citizens

As is the case in Belgium, EU citizens have to apply for registration of their residence at the local municipality in Luxembourg and Italy. They must do so within three months of their arrival as allowed by the Citizens Rights Directive.

As previously mentioned, EU citizens are not required to register in France or Germany. However, in France, they have the option of applying for a residence document at the local state government office (*préfecture*). In Germany, it is not possible for EU citizens to register on a voluntary basis.

In the Netherlands, EU citizens are only obliged to apply for a registration certificate when they are being joined or accompanied by non-EU family members. In such a case, the application must be submitted to the Dutch immigration and nationality service (IND) through one of their service desks. They may do so at the same time as their non-EU family member submit their application.

The table below gives an indication of the authority tasked with receiving applications for a registration certificate submitted by EU citizens.

<sup>1610</sup> The website of the Belgian Immigration Office was reviewed <https://dofi.ibz.be/fr>.

<sup>1611</sup> The official website of the French government dealing with residence documents was reviewed <https://www.service-public.fr/particuliers/vosdroits/N110> alongside relevant subpages which concern EU citizens and their family members.

<sup>1612</sup> The website of the Federal Ministry of the Interior relating to EU citizens and their family members was consulted <https://www.bmi.bund.de/DE/themen/migration/aufenthaltsrecht/freizuegigkeit-eu-buerger/freizuegigkeit-eu-buerger-node.html>.

<sup>1613</sup> The webpage of the Italian state police dealing with residence formalities for EU citizens and their family members was reviewed <https://www.poliziadistato.it/articolo/17985b2d0db2288ab785808552>.

<sup>1614</sup> The Luxembourg government’s portal for public services dealing with immigration was consulted <https://guichet.public.lu/fr/citoyens/immigration.html> together with relevant subpages which concern EU citizens and their family members.

<sup>1615</sup> The IND’s dedicated home page for EU citizens was consulted <https://ind.nl/en/eu-eea> as well as relevant subject-specific subpages.

<sup>1616</sup> For an overview of the rules contained in Directive 2004/38, see Chapter 1, Section 4. *EU law relating to registration formalities*.

<sup>1617</sup> This is covered by Section D of the country fiche on the application phase.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
municipality	préfecture <sup>1618</sup> (optional)	none	municipality	IND	municipality

Table 4.1.1 - Authority tasked with receiving residence applications submitted by EU citizens

Note: light shading indicates a centralised registration system is in place and dark shading indicates a decentralised registration system whereas grey shading indicates that no registration is possible for EU citizens.

#### 4.1.2 Procedure applicable to non-EU family members

In all Member States, non-EU family members are obliged to apply for a residence card in line with Article 9 of the Citizens Rights Directive. They must do so within three months of their arrival, except in the Netherlands where the deadline is four months.

As is the case in Belgium, an application must be submitted by non-EU family members at the local municipality in Germany and Luxembourg. In France, an application must be submitted at the local state government office (*préfecture*). In the Netherlands, an application must

be submitted to the Dutch immigration and nationality service (IND) through one of their service desks or by post.

However, in Italy, non-EU family members must submit their application for a residence card at the local police headquarters (*questura*) rather than the local municipality as is the case for EU citizens.

The following table provides an overview of the competent authority tasked with receiving applications for a residence card submitted by non-EU family members of EU citizens.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
municipality	préfecture <sup>1619</sup>	municipality	questura <sup>1620</sup>	IND	municipality

Table 4.1.2 - Authority tasked with receiving residence applications submitted by non-EU family members

Note: light shading indicates a centralised registration system is in place and dark shading indicates a decentralised registration system.

## 4.2 Submission in person

All Member States require applications which are submitted by EU citizens and their family members for registration of residence to be made in person.

In the Netherlands, non-EU family members may also initiate an application for a residence card by post. However, they will subsequently have to attend an appointment in person to provide their photograph, signature and biometric details. This can be considered a best practice.

Nonetheless, it should be noted that the COVID-19 pandemic has led to some authorities allowing EU citizens and their family members to initiate the process on-line<sup>1621</sup> or by post<sup>1622</sup> including in Belgium.<sup>1623</sup> Consideration should be given to instituting these measures on a permanent basis.

<sup>1618</sup> This refers to the local state government office.

<sup>1619</sup> Ibid.

<sup>1620</sup> This refers to the local police headquarters.

<sup>1621</sup> For example, the *préfecture de Paris* in France allows applications to be initiated on-line <https://www.demarches-simplifiees.fr/commencer/pp-1ere-demande-membre-famille>.

<sup>1622</sup> For example, the IND in the Netherlands currently allows EU citizens to register by post when they are being joined or accompanied by non-EU family members [https://ind.nl/en/Pages/Coronavirus.aspx#residence\\_permit](https://ind.nl/en/Pages/Coronavirus.aspx#residence_permit).

<sup>1623</sup> For a further discussion, see Chapter 2, Section 3. *Application phase*, Subsection 3.1 *Appointment system and issuance of Annex 19*.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
in person appointment only <sup>1624</sup>	by post followed by personal appointment	in person appointment only			

Table 4.2 - Method of submission of residence applications by EU citizens and their family members

Note: light shading indicates Member States where residence applications may only be submitted in person whereas dark shading indicates Member States where residence applications may only be submitted by other methods. Information for Germany only relates to applications submitted by non-EU family members.

A final observation worth making is that the Single Digital Gateway Regulation does not presently require Member States to ensure that residence formalities can be accessed and completed fully online.<sup>1625</sup>

### 4.3 Prior appointments



As in Belgium, there is great variance between municipalities in France, Germany, Italy and Luxembourg as regards the need for EU citizens and their family members to book an appointment in order to be able to submit an application for registration of their residence.

As in Belgium, there is great variance between municipalities in France, Germany, Italy and Luxembourg as regards the need for EU citizens and their family members to book an appointment in order to be able to submit an application for registration of their residence.

However, excessive waiting times<sup>1626</sup> to obtain an appointment have been reported in Belgium, France and Italy. In situations where it takes considerable time

obtaining an appointment to register, this undermines the obligation which is incumbent on Member States to issue a certificate of registration “immediately” to EU citizens.<sup>1627</sup> Delays also may also create difficulties for non-EU family members who are unable to prove their lawful residence status to prospective employers, private service providers such as banks and public bodies such as healthcare providers.

Although no information could be collated in respect of waiting times to secure an appointment for Luxembourg, there have been no reported problems in practice. In Luxembourg, it is often possible to obtain an appointment on the same day that it has been requested.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
delays reported	delays reported	no information	delays reported	same day possible	2 weeks

Table 4.3 - Average waiting time for securing an appointment for submission of residence applications by EU citizens and their family members

Note: light shading indicates Member States where no excessive delays in obtaining an appointment have been reported in practice, dark shading indicates Member States where delays exceeding 2 weeks have been frequently reported, whereas grey shading indicates that no information could be obtained.

<sup>1624</sup> Some municipalities also accept applications by email, but this has to be sent from a certified email address (*posta elettronica certificata*).

<sup>1625</sup> Art. 6 and Annex II, Regulation 2018/1724 only require the process of requesting proof of residence by way of confirmation of registration at the applicant’s current address to be made fully on-line.

<sup>1626</sup> While Directive 2004/38 does not lay down a firm deadline for EU citizens and their family members to obtain an appointment to register their residence in the host Member State, an excessive delay is considered to be a delay exceeding two weeks.

<sup>1627</sup> Art. 8(2), Directive 2004/38.

## 4.4 Documentation needed to start registration process

In the Netherlands, applications are centralised and handled by the Dutch immigration and nationality service (IND) which requires a prior appointment to be arranged at one of their service desks.<sup>1628</sup> The average waiting time to secure an appointment is around two weeks.

The relatively short waiting time within which appointments can be secured in Luxembourg and the Netherlands can be identified as good practices.

No information could be obtained as regards the existence of delays faced non-EU family members when trying to secure an appointment in Germany for the purposes of applying for a residence card. Since 2015, it is no longer obligatory for EU citizens to apply for a registration certificate and no provision is made under German law for them to obtain such a document on a voluntary basis. Prior to 2015, there were significant delays being reported by EU citizens seeking to register.<sup>1629</sup>

In contrast to the procedure in Belgium, when an application is made by EU citizens and their family members in other Member States, all supporting documents must be submitted at the time an application is made. In contrast, in Belgium EU citizens and their family members have three months from the date of submission of the application to complete their application by provide the necessary supporting documents which demonstrate that they meet the conditions for having a right of residence.<sup>1630</sup>

As a result, contrary what is foreseen by the Belgian registration procedure,<sup>1631</sup> the national rules of the other five Member States do not provide for an additional time limit within which EU citizens and their family members must submit their documentation. However, this does not mean that national rules would prevent new documentation from being submitted prior to a decision being taken on an application.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
3 months	at time of application				

Table 4.4 - Time limit for submitting supporting documentation in respect of EU residence applications

Note: light shading indicates additional time is allowed for submission of supporting documents and dark shading indicates registration system foresees all supporting documents must be submitted at the time an application is made. Information for Germany only relates to non-EU family members.

<sup>1628</sup> The IND's service desks are currently not accepting applications by EU citizens and their family members to be submitted in person due to the COVID-19 pandemic. However, the process can still be completed by post [https://ind.nl/en/Pages/Coronavirus.aspx#residence\\_permit](https://ind.nl/en/Pages/Coronavirus.aspx#residence_permit).

<sup>1629</sup> Milieu (n 1581), p. 19.

<sup>1630</sup> Arts. 50 §2, and 52 §2, Royal Decree on Immigration.

<sup>1631</sup> For a discussion of the procedure, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.1 *Overview of the procedure*; see also Chapter 2, Section 5. *Registration phase*.

## 4.5 Imposing a requirement on non-EU family members to hold a visa



According to the established case law of the Court of Justice,<sup>1632</sup> the Member States cannot impose possession of a valid entry visa as a pre-condition on the registration of non-EU family members of EU citizens. Moreover, the Court has also ruled that the right of residence of non-

EU family members under the Citizens Rights Directive cannot depend on their prior lawful residence in another Member State.<sup>1633</sup>

There are reports that the authorities in France, Germany and Luxembourg<sup>1634</sup> sometimes impose a requirement on non-EU family members to hold a valid entry visa when applying for a residence card despite this not being a condition written into national law.

Furthermore, it should be noted that this requirement was initially contained in the Italian rules<sup>1635</sup> that give effect to the Citizens Rights Directive. Following the intervention of the European Commission in 2010,<sup>1636</sup> the Italian rules were subsequently amended to remove the requirement for non-EU family members to hold an entry visa.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
visa required	visa required	visa required	none required <sup>1637</sup>	visa required	none required

Table 4.6 - Member States whose national authorities sometimes impose a visa requirement on non-EU family members

Note: light shading indicates Member States whose authorities impose a visa requirement on non-EU family members, whereas dark shading indicates Member States which do not.

The above enforcement action casts doubt on whether Belgian law<sup>1638</sup> is compliant in this respect.<sup>1639</sup> Despite the rulings of the Belgian Council for Alien Law Litigation that suggest that such a visa can be required from “other family members” covered by Article 3(2) of the Citizens Rights Directive,<sup>1640</sup> there are no reasons to consider that the Court of Justice’s case law would not also apply to such “other family members” in light of the rulings that have confirmed that procedural guarantees under the Directive also apply to “other family members”.<sup>1641</sup>

1632 CJEU, Case C-459/99 *MRAX* EU:C:2002:461; Case C-508/03 *Commission v. Spain* EU:C:2006:287.

1633 Case C-127/08 *Metock* EU:C:2008:449.

1634 This is covered by Section D of the country fiche on the application phase.

1635 Art. 10, para. 3, point a), Legislative Decree No 37/2007 originally made the issuance of a residence card for non-EU family members conditional upon presentation of an entry visa, whenever required, in addition to a passport.

1636 Commission, Letter of formal notice sent to the Italian Republic, SG(2011) D/18350, C(2011)7523, 28 October 2011.

1637 See n 87.

1638 Belgian Immigration Law, art. 40bis §4 and art. 41 §2, as amended by the law of 19 March 2014.

1639 For a further discussion see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.2. *Application phase*, Paragraph 5.2.4 *Initial documents which should not be required: entry visa required for non-EU family members*; Chapter 2, Section 3. *Application phase*, Subsection 3.4 *Documents required from non-EU family members*, Paragraph 3.4.1 *Visa requirements*.

1640 RVV/CCE, judgment No 223 830 of 9 July 2019; RVV/CCE, judgment No 235 170 of 15 April 2020; RVV/CCE, judgment No 241 897 of 20 April 2020.

1641 CJEU, Case C-89/17 *Banger* EU:C:2018:570 and Case C-129/18 *SM* EU:C:2019:248.

## 5. Verification of domicile

The Citizens Rights Directive is silent on the issue of verification of domicile.<sup>1642</sup>

Belgium and Italy are the only Member States included in this comparison which require the municipal authorities to perform a physical verification of the domicile which has been declared as their place of residence by EU citizens and their family members at the time when they apply for registration.

The other Member States which operate a population register – namely Germany, Luxembourg and the Netherlands – only require a declaration to be made as to a person’s domicile. It is only when there are doubts as to the veracity of the declared domicile that a physical verification of the applicant’s domicile will be undertaken.

In France, where there is no population register, proof of domicile may be adduced by any available means.<sup>1643</sup>

Belgium	France	Germany	Italy	Luxembourg	Netherlands
verification of domicile	no verification	no verification	verification of domicile	no verification	no verification

Table 5.1 - Member States where the registration process involves a physical verification of the domicile of EU citizens and their family members

Note: light shading indicates Member States which do not require physical verification of domicile, dark shading indicates Member States where a declaration domicile suffices, whereas grey shading indicates Member States where there is no population register.

## 6. Registration phase

Given that the procedures relating to the registration of EU citizens and their family members under the Citizens Rights Directive are not comprehensively laid out, the Member States retain the discretion to determine the authorities which are competent to decide on applications.<sup>1644</sup> However, the EU rules do impose specific timelines and impose limitations as to what documentary requirements are permitted.

### 6.1 Decision-making

Italy is the only Member State which provides for split decision-making according to the type of application submitted. All applications submitted by EU citizens will be decided by the local municipality, whereas applications for a residence card submitted by non-EU family members will be decided by the local police headquarters (*questura*). This is similar to the situation prevailing in Belgium, although the categories of applications which may be decided directly by the municipalities is more restricted.<sup>1645</sup>

In Luxembourg, the Ministry of Foreign and European Affairs has the power to decide applications a residence card submitted by non-EU family members, while municipalities issue registration certificates to EU citizens. The Ministry also has the sole competence to take a decision to refuse an application for a registration certificate submitted by EU citizens.

<sup>1642</sup> This is covered by Section E of the country fiche on verification of domicile. For a discussion of the Belgian rules on verification of domicile and their application, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.3 *Verification of domicile*; Chapter 2, Section 4. *Verification of domicile*.

<sup>1643</sup> This includes showing documentation showing a person’s name and address, such as utility bills, receipt for payment of rent or proof of property ownership, income tax bill, local property tax bill, household insurance bill among others. Documents in electronic format are accepted.

<sup>1644</sup> This is covered by Section F of the country fiche on the registration phase.

<sup>1645</sup> Pursuant to the Belgian Royal Decree, art. 51 §3, municipalities may take a decision on straightforward cases, including applications received from workers and self-employed persons, as well as some EU family members. For further discussion see Chapter 1, Section 5 *Residence registration process in Belgium*, Sub-section 5.4.2 *Decision-making*.

In Germany, decisions on applications by non-EU family members are taken by the local immigration authority. In France, decisions-making on application submitted by EU citizens and their family members lies with the local state government office (*préfecture*). The Dutch immigration and nationality service (IND) has the sole competence to decide on such applications in the Netherlands.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Immigration Office + municipalities	<i>préfectures</i>	local immigration authorities	municipalities + <i>questura</i>	Ministry of Foreign & European Affairs + municipalities	Immigration and Nationality Service (IND)

Table 6.1 - Decision-making authorities involved EU residence formalities

Note: light shading indicates Member States where a single decentralised authority decides all applications, dark shading indicates Member States where decision-making is shared, whereas grey shading indicates Member States where a sole centralised authority is endowed with decision-making powers.

## 6.2 Deadlines for issuing a residence document



The Citizens Rights Directive provides for different timeframes within which residence documents should be issued, on the one hand, to EU citizens and, on the other hand, non-EU family members.<sup>1646</sup>

### 6.2.1 Deadlines applicable to EU citizens

Article 8(2) of the Citizens Rights Directive imposes an obligation on Member States to issue a registration certificate to EU citizens immediately.

In Italy, the Luxembourg and the Netherlands, national law provides that a registration certificate is to be issued immediately to EU citizens who apply for one. However, the application of these rules in practice is somewhat different. In Italy, EU citizens will first receive a certificate of application when they apply but will have to await the issuance of a final registration certificate once their domicile has been verified. Although EU citizens will often be issued with a registration certificate on the same day that they apply, delays are nonetheless also being reported in the Netherlands. In Luxembourg, EU citizens will be issued with a registration certificate on the same day that they apply in accordance with the system foreseen by the Citizens Rights Directive. This can be considered a best practice.

No deadline is laid down in law as regards the issuance of residence documents to EU citizens in France. Nonetheless, EU citizens will receive a certificate of application when they choose to apply for a residence document, but they may face considerable delays before being issued with such a document.

In Germany, EU citizens are not able to apply for a registration certificate on a voluntary basis.

<sup>1646</sup> For a discussion, see Chapter 1, Section 4 *EU law relating to registration formalities*, Subsection 4.5 *Deadlines applicable to residence formalities*.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
within 6 months	no deadline (optional system)	n/a	immediately <sup>1647</sup>	immediately	immediately

Table 6.2.1.1 - Deadlines for issuing a residence document

Note: light shading indicates Member States where EU citizens will be issued with a registration certificate immediately upon an application being submitted, dark shading indicates Member States where there is a time-lag between an application being submitted and the issuance of a registration certificate, whereas grey shading indicates Member States where a sole centralised authority is endowed with decision-making powers.

Despite these deadlines, delays<sup>1648</sup> in the issuance of registration certificates have been reported in the majority of Member States as the following table illustrates.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
delays reported	delays reported	no delays reported <sup>1649</sup>	no delays reported <sup>1650</sup>	no delays reported	delays reported

Table 6.2.1.2 - Delays reported in issuing a registration certificate to EU citizens

Note: light shading indicates Member States where no delays are being reported, dark shading indicates Member States where significant delays are being reported.

The procedures in place in the other Member States contrast with the situation prevailing in Belgium. Belgian law<sup>1651</sup> provides for a six-month time-limit within which a registration certificate must be issued to EU citizens. Where there is a failure to comply with this deadline, Belgian law also provides for the automatic issuance of a registration certificate.<sup>1652</sup> Following a recent ruling of the Court of Justice,<sup>1653</sup> which considered as being incompatible with the Citizens Rights Directive a similar rule<sup>1654</sup> which provides for the automatic issue of a residence card to non-EU family members when there has been a failure to comply with the six-month deadline, it can be expected that this provision will be repealed in line with the federal government's stated announcement as regards to repeal the similar provision that applies to non-EU family members.<sup>1655</sup>

## 6.2.2 Deadlines applicable to non-EU family members

Article 10(1) of the Citizens Rights Directive provides that Member States are to issue a residence card to non-EU family members within six months of an application being submitted.

As is the case in Belgium, the six-month deadline which applies to the issuance of a residence card to non-EU family members has been transposed in all Member States included in this comparison. The only exception is Italy where there is some ambiguity as to what deadline applies under general administrative law.

As is the case with the issuance of residence documents to EU citizens, compliance with this legal deadline in practice varies across member States. Delays<sup>1656</sup> have been reported in Belgium, France, Germany and Italy. It should also be noted that in the Netherlands residence cards are on average issued to non-EU family members within three months of an application being submitted. This can be considered a best practice.

<sup>1647</sup> Italy has been marked despite.

<sup>1648</sup> This means a failure to issue a registration certificate "immediately" in accordance with Art. 8, Directive 2004/38.

<sup>1649</sup> Prior to the abolition registration for EU citizens, there had been frequent reports of extensive delays; see Milieu (n 1581), p. 19.

<sup>1650</sup> While no delays have been reported, significant delays of up to 6 months are being reported in Italy in respect of obtaining an appointment to enable EU citizens to apply for a registration certificate.

<sup>1651</sup> Art 42 §1, Belgian Immigration Law.

<sup>1652</sup> Art. 51 §2, Royal Decree.

<sup>1653</sup> Case C-246/17 *Diallo* EU:C:2018:499.

<sup>1654</sup> Art. 52 §4, Royal Decree.

<sup>1655</sup> See discussion below in Paragraph 6.2.2 *Deadlines applicable to non-EU family members*.

<sup>1656</sup> This means a delay exceeding the 6-month legal deadline contained in Art. 10, Directive 2004/38.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
delays reported	delays reported	delays reported	delays reported	no delays reported	no delays reported

Table 6.2 - Delays for issuing a residence card to non-EU family members

Note: light shading indicates Member States where no delays are being reported, dark shading indicates Member States where significant delays are being reported, whereas grey shading indicates Member States where a sole centralised authority is endowed with decision-making powers.

It should be pointed out that Belgium is the only Member State which attaches legal consequences to a failure to issue a residence card to non-EU family members within this six-month deadline. While the Belgian rule<sup>1657</sup> which provides for the automatic issuance of a residence card when the six-month deadline has not been respected could have been considered as a best practice to protect applicants from undue administrative delay, the Court of Justice has held that the Belgian rule is not compatible with the Citizens Rights Directive which requires that a residence card may only be issued to family members following an individual assessment of their residence right.<sup>1658</sup> The federal government has indicated that it intends to repeal the rule<sup>1659</sup> which provides for the automatic issuance of a residence card to the family members of EU citizens when the Immigration Office has failed to take a decision on an application for family reunification within the six-month deadline.<sup>1660</sup>

## 6.3 Documentary requirements



In order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence under EU law, the Citizens Rights Directive is intended to comprehensively specify the documents which may be requested by the competent authorities when issuing of residence documentation to EU citizens and their family members.<sup>1661</sup> Member States

should not therefore require documentation that is not specified by the Directive.<sup>1662</sup>

### 6.3.1 Documents required from EU citizens

The documents which may be requested by Member States are specified in paragraphs (3) and (5) of Article 8 of the Citizens Rights Directive as regards, respectively, EU citizens holding the primary right of residence and those deriving a right of residence as family members who themselves are nationals of a Member State.

The national websites of France, Luxembourg and the Netherlands contain very detailed information on what documentation needs to be provided by EU citizens applying for registration certificates. These take the form of checklists and can be considered a best practice.

While the national implementing rules tend to transpose the provisions of the Directive, problems with the practical application of these rules have been reported in several Member States included in this comparison.

As has been reported in Belgium,<sup>1663</sup> the imposition of documentary requirements by national authorities which are not foreseen by the Citizens Rights Directive has been reported in all the Member States which are included in this comparison. For example, civil status documents are being requested from EU citizens in France, Italy and Luxembourg, despite the fact that they are not claiming residence rights as family members. Another example is provided by the Netherlands, where authorities are reported to require EU citizens and their family members to provide evidence that they deregistered from their former country of residence. Notwithstanding that it may be impossible to obtain such a document in practice, no such requirement is contained in the Directive.

<sup>1657</sup> Art. 52 §4, Royal Decree.

<sup>1658</sup> Case C-246/17 *Diallo* (n 1653). This has also been confirmed by the CJEU in the context of Directive 2003/86 on the right to family reunification [2003] OJ L 251/12 in Case C-706/18 X EU:C:2019:993.

<sup>1659</sup> Art. 52 §4, Royal Decree on Immigration.

<sup>1660</sup> House of Representatives, General Policy Note, Immigration and Asylum and the National Lottery (4 November 2020), (*Chambre des Représentants de Belgique*, “*Note de Politique Générale, Asile et Migration et Loterie Nationale /Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie en Nationale Loterij, 2019-2021, Doc 55 1580/014, 04-11-2020*), p. 28. For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Sub-section 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

<sup>1661</sup> Recital 14 of Directive 2004/38.

<sup>1662</sup> Case C-127/08 *Metock* EU:C:2008:449.

<sup>1663</sup> For further details, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.5 *Documentary requirements*; Chapter 2, Section 3. *Application phase*, Subsection 3.4 *Documents required from non-EU family members* and Section 5. *Registration phase*, Subsection 5.3 *Documents required for registration of residence*.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
excessive requirements	excessive requirements	n/a <sup>1664</sup>	excessive requirements	excessive requirements	excessive requirements

Table 6.3.1 - Reports of excessive documentary requirements imposed on EU citizens

Note: light shading indicates Member States where there is no report of excessive documentary requirements being imposed, dark shading indicates Member States where excessive documentary requirements are being imposed, whereas grey shading indicates Member States where there is no registration system in place for EU citizens.

In addition, workers are sometimes required to demonstrate a minimum income (France and Italy), workers with atypical employment arrangements may be refused registration (France, Luxembourg and Italy), self-employed workers may also be required to demonstrate they generate a minimum level of income (France) and jobseekers may be refused registration unless they can produce proof of imminent work or sufficient resources (France and Italy).

### 6.3.2 Documents required from non-EU family members

Article 10(2) of the Citizens Rights Directive lays down the

documentary requirements which Member States may impose on non-EU family members.

The national websites of France, Germany, Luxembourg and the Netherlands contain very detailed information on what documentation needs to be provided by EU citizens applying for registration certificates. These take the form of checklists and can be considered a best practice.

Although the Member States included in this comparison have correctly transposed the provisions of the Directive in this respect, their application in practice is also the source of problems for non-EU family members, who are reported to face significant difficulties in having their family relationship recognised in (France, Germany and Italy).<sup>1665</sup>

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Excessive requirements	Excessive requirements	Excessive requirements	Excessive requirements	none reported	none reported

Table 6.3.2 - Reports of excessive documentary requirements imposed on non-EU family members

Note: light shading indicates Member States where there is no report of excessive documentary requirements being imposed, whereas dark shading indicates Member States where excessive documentary requirements are being imposed.

Problems include the imposition of minimum financial resources as a precondition for family members to apply for a residence document (Italy)<sup>1666</sup> and the refusal to recognise foreign marriage and birth certificates (France and Italy).<sup>1667</sup> Another recurrent problem in France and Italy<sup>1668</sup> relates to unmarried partners facing difficulties in proving the existence of a “durable relationship”.<sup>1669</sup> The problem has also been reported in Germany, as the relevant provision of the Citizens Rights Directive has not been transposed into German law.<sup>1670</sup>

<sup>1665</sup> This is covered by Section G of the country fiches covering documentary requirements.

<sup>1666</sup> Nicolau (n 1570), p. 48.

<sup>1667</sup> Nicolau (n 1570), pp. 48-49.

<sup>1668</sup> This is covered by Section G of the country fiches for France and Italy covering documentary requirements.

<sup>1669</sup> Art. 3(2)(b), Directive 2004/38 provides unmarried partners in a “durable relationship, duly attested” with a right to facilitation of their entry and residence, but does not specify how the existence of such a relationship can be proved.

<sup>1670</sup> Milieu (n 1581), pp. 15-16.

<sup>1664</sup> Prior to the abolition registration for EU citizens, there has been frequent reports of excessive administrative formalities.

### 6.3.3 Legalisation and translation obligations

The Citizens Rights Directive does not provide for any derogation from the national rules that apply to legalisation or translation.

As is the case in Belgium, the Member States included in this comparison all require documents emanating from public authorities abroad to bear an apostille (also referred to “notarisation”) when issued by countries which have ratified the Hague Convention.<sup>1671</sup> Otherwise foreign public document will need to have undergone legalisation, unless explicitly exempted under a bilateral agreement.

Nonetheless, it should be noted that administrative authorities are reported to exercise their discretion and sometimes accept documents which are not apostilled or legalised.

It should be recalled that public documents issued by other Member States in the uniform format provided by Regulation 2016/1191<sup>1672</sup> do not have to be apostilled or legalised. The use of multilingual standard forms under the Regulation<sup>1673</sup> should also go some way to reducing the need for official translations to be provided.

The administrative practice of the Belgian authorities requires all documents which are not drawn up in Dutch, French, German or English to be accompanied by an official translation.<sup>1674</sup> As regards translations, both Luxembourg and the Netherlands accept documents drawn up in other languages besides the official language(s) without the need for an official translation to be furnished. These can be considered best practices.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Dutch, French, German, <i>English</i>	French	German	Italian	French, German, <i>English</i>	Dutch, <i>English</i> , French, German

Table 6.3.3 - Language of documents accepted without the need for translation

Note: light shading indicates Member States which require all documents which are not drawn up in the official language(s) to be accompanied by an official translation, whereas dark shading indicates those where documents is accepted in a language other than the official languages (namely English). Languages other than the official languages appear in *italics*.

1671 Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, which Italy has ratified <https://www.hcch.net/en/instruments/conventions/full-text/?cid=41>.

1672 Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union [2017] OJ L 200/1.

1673 Arts. 6-12, Regulation 2016/1191.

1674 For a discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.2. *Application phase*, Paragraph 5.2.5 *Initial documents required: legalisation and translation formalities*.

## 6.4 Format of residence documents issued

Although the Citizens Rights Directive requires Member States to issue residence documents to EU citizens and their family members, the Directive does not harmonise their format.

### 6.4.1 Documents issued to EU citizens

Article 8(2) of the Citizens Rights Directive provides that Member States are to issue a registration certificate to EU citizens which bears their name and address and the date of their registration. The Directive does not specify their period of validity nor does it lay down any requirements as to its format.

Italy and Luxembourg both issue registration certificates in paper format. The Netherlands issues a sticker which is intended to be affixed in a passport.

France issues residence documents to EU citizens who submit a request for it in the form of a residence card using the uniform residence permit format laid down by Regulation 1030/2002.<sup>1675</sup> This is comparable to the registration certificate (“E card”)<sup>1676</sup> which is issued in the form of a plastic card to EU citizens by the Belgian authorities<sup>1677</sup> and which uses a similar format as the national identity card.<sup>1678</sup>

1675 Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

1676 Note that the title of the “E card” will change to “EU card” when the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration comes into force. These changes are intended to give effect to Regulation 2019/1157 (n 1675). See further Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 Registration phase, Paragraph 5.4.2 *Decision-making*.

1677 See samples BEL-HO-11001 (Dutch-language format) <https://www.consilium.europa.eu/prado/en/BEL-HO-11001/index.html>, BEL-HO-11002 (French-language format) <https://www.consilium.europa.eu/prado/en/BEL-HO-11002/index.html> and BEL-HO-11003 (German-language format) <https://www.consilium.europa.eu/prado/en/BEL-HO-11003/index.html> available on the Council’s Public Register of Authentic travel and identity Documents Online (PRADO)

1678 See samples BEL-BO-09001 (Dutch-language format) <https://www.consilium.europa.eu/prado/en/BEL-BO-09001/index.html>, BEL-BO-09002 (French-language format) <https://www.consilium.europa.eu/prado/en/BEL-BO-09002/index.html> and BEL-BO-09003 (German-language format) <https://www.consilium.europa.eu/prado/en/BEL-BO-09003/index.html> available on PRADO (n 1677).

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Plastic card	plastic card	none	paper	paper	sticker

Table 6.4.1 - Format of registration certificates

Note: light shading indicates Member States which only issue paper-based registration certificates, medium shading indicates Member States which only issue as sticker to be placed in a passport, dark shading indicates Member States which issue a plastic residence card, whereas grey shading indicates Member States where there is no registration system in place for EU citizens.

Germany no longer issues registration certificates to EU citizens following abolition of the obligation to register.

In order to address disparities in the form of registration certificates, Member States will be required to issue residence documentation to EU citizens in accordance with Regulation 2019/1157 from August 2021.<sup>1679</sup> Although this Regulation does not lay down a standardised format, it will require registration certificates to be labelled in at least one of the Member State’s official languages together with another official EU language.<sup>1680</sup> In addition, registration certificates must contain certain minimum information, namely the personal details of the EU citizen<sup>1681</sup> concerned together with certain mandatory references which relate to the Citizens Rights Directive.<sup>1682</sup> However, Member States will be able to continue to issue registration certificates in the format of their choice.<sup>1683</sup>

## 6.4.2 Documents issued to non-EU family members

Under Article 10(1) of the Citizens Rights Directive, Member States are required to issue a residence card labelled “residence card of a family member of a Union citizen”. Article 11 specifies that the residence card should have a period of validity of five years, or the envisaged period of residence of the EU citizen, if this period is shorter than five years.

France, Germany and the Netherlands all issue plastic residence cards to non-EU family members in the uniform format laid down by Regulation 1030/2002.<sup>1684</sup> Again, this is comparable to the Belgian approach of issuing a residence card to non-EU family members (“F card”)<sup>1685</sup> in the form of a plastic card<sup>1686</sup> and which also uses a similar format as the national identity card.<sup>1687</sup>

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Plastic card	plastic card	plastic card	paper	paper	plastic card

Table 6.4.2 - Format of residence cards issued to non-EU family members

Note: light shading indicates Member States which only issue paper-based registration certificates, whereas dark shading indicates Member States which issue a plastic residence card.

Italy and Luxembourg both issue residence cards to non-EU family members in paper format.

<sup>1679</sup> Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement [2019] OJ L 188/67.

<sup>1680</sup> Art. 6(a), Regulation 2019/1157.

<sup>1681</sup> Art. 6(d), (e) and (f), Regulation 2019/1157 require at least the name and date of birth of the person concerned to be shown as well as their address in accordance with Art. 8(2), Directive 2004/38.

<sup>1682</sup> Art. 6(a) and (e), Regulation 2019/1157 require that the document contains an indication of the title of the document and a clear reference that the document is issued to the EU citizen concerned in accordance with Directive 2004/38.

<sup>1683</sup> Recital 36, Regulation 2019/1157.

<sup>1684</sup> Annex 23, Practical Handbook for Border Guards (C(2019) 7131 final) contains specimens of all residence permits issued to non-EU family members by the EU Member States [https://ec.europa.eu/home-affairs/sites/default/files/e-library/documents/policies/borders-and-visas/schengen/docs/2020\\_handbook-annex\\_23\\_part\\_1\\_and\\_2.pdf](https://ec.europa.eu/home-affairs/sites/default/files/e-library/documents/policies/borders-and-visas/schengen/docs/2020_handbook-annex_23_part_1_and_2.pdf).

<sup>1685</sup> Note that the format of the “F card” will change to follow that of the uniform format for residence permits laid down by Regulation 1030/2002 when the Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration comes into force. See further Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 Registration phase, Paragraph 5.4.2 *Decision-making*.

<sup>1686</sup> See samples BEL-HO-09001 (Dutch-language format), BEL-HO-09002 (French-language format) and BEL-HO-09003 (German-language format) available on PRADO <https://www.consilium.europa.eu/prado/en/BEL-HO-09001/index.html>, <https://www.consilium.europa.eu/prado/en/BEL-HO-09002/index.html> <https://www.consilium.europa.eu/prado/en/BEL-HO-09003/index.html>

<sup>1687</sup> See samples BEL-BO-09001, BEL-BO-09002 and BEL-BO-09003 (n 1677) available on PRADO.

From August 2021, Member States will be required to issue residence cards to non-EU family members in accordance with Regulation 2019/1157.<sup>1688</sup> This essentially means residence cards will now have to be issued in the uniform format,<sup>1689</sup> which is used for residence permits issued to third-country nationals,<sup>1690</sup> and such cards will have to indicate an explicit reference to the Citizens Rights Directive.<sup>1691</sup> Member States will no longer be permitted to issue residence cards in paper format and documents which do not comply with the standards laid down by Regulation 2019/2017 must be phased out by August 2026.<sup>1692</sup>

## 7. Permanent residence

Article 16 of the Citizens Rights Directive establishes the right of permanent residence which EU citizens and their family members may acquire after a continuous period of five years of lawful residence in the host Member State. This provision has been transposed in all of the Member States comprised in this comparative analysis.

## 7.1 Overview of procedure

As is the case in Belgium, in all Member States reviewed here, EU citizens and their family members who want to obtain a document which certifies that they have acquired permanent residence must apply for it.

In each of the Member States included in this comparison, an application may be lodged at any time by EU citizens once they have resided for the requisite period. As permitted by Article 20(2) of the Citizens Rights Directive, non-EU family members must apply before expiry of their residence card.

In France, Germany and Italy – as in Belgium – an application for a permanent residence document must be applied for in person by EU citizens and their family members.

In Luxembourg, applications for permanent residence may be submitted by EU citizens and their family members by post. In the Netherlands, permanent residence applications may be submitted by post or online by both EU citizens and their family members, who will then be invited to attend an appointment to provide their photograph and signature. These may be considered best practices.

Belgium	France	Germany	Italy	Netherlands	Luxembourg
in person appointment only	by post or online followed by personal appointment	by post			

Table 7.1 - Method of submission of residence applications by EU citizens and their family members

Note: light shading indicates Member States where residence applications may only be submitted in person whereas dark shading indicates Member States where residence applications may only be submitted by other methods. Information for Germany only relates to applications submitted by non-EU family members.

As noted above,<sup>1693</sup> the COVID-19 pandemic has led some authorities to allow applications for permanent residence documents to be submitted by EU citizens and their family members by other means.

The practical application of permanent residence formalities is also the source of problems in France, Italy and Germany, where the national authorities are reported to impose excessive formalities in connection with applications for permanent residence submitted by EU citizens and their family members.

<sup>1688</sup> Art. 7, Regulation 2019/1157 (n 1675).

<sup>1689</sup> Such a residence permit comes in the form of a credit-sized plastic card using blue and red or pink graphics on a white background. The card incorporates numerous security features and contains for biometric identifiers.

<sup>1690</sup> Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1.

<sup>1691</sup> Art. 7(2), Regulation 2019/1157

<sup>1692</sup> Art. 8, Regulation 2019/1157.

<sup>1693</sup> See above Section 4. *Application phase*, Sub-section 4.2 *Submission in person*.

Examples include the French and Italian authorities not allowing applications to be made on the basis of a requirement that the five-year period of residence must have been completed immediately preceding the date of application.<sup>1694</sup> This has been reported as a problem also affecting Belgium.<sup>1695</sup> Excessive requirements also include the French authorities obliging applicants to demonstrate

they have sufficient resources or comprehensive sickness insurance for the period following the acquisition of permanent residence,<sup>1696</sup> and the Italian authorities requiring applicants to demonstrate a continuous period of five years of employment or payment of social security contributions despite an applicant having held sufficient resources during the time they did not work.<sup>1697</sup>

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Excessive requirements	Excessive requirements	Excessive requirements	Excessive requirements	none reported	none reported

Table 7.1 - Reports of excessive requirements imposed on EU citizens and their family members when applying for permanent residence

Note: light shading indicates Member States where there is no report of excessive requirements being imposed, dark shading indicates Member States where excessive requirements are being imposed.

## 7.2 Deadlines for issuance of permanent residence documents



Article 19(2) of the Citizens Rights Directive. requires EU citizens to be issued with a document certifying permanent residence as soon as possible.

In France, Germany and the Netherlands, this requirement has been reproduced *verbatim* in national law. However, in practice processing times may be significant particularly in France where delays of six weeks to six months have been reported. Delays have also been reported in Germany.

In Luxembourg, the authorities are under an obligation to issue EU citizens with a document certifying permanent residence within a month of an application being submitted. In Italy, the deadline is 30 days for the permanent residence document to be issued to EU citizens.

As regards non-EU family members, all Member States included in this comparison have transposed the six-month deadline to issue a residence card which is laid down by Article 20(2) of the Citizens Rights Directive.

By comparison, Belgian legislation provides that a permanent residence document must be issued to EU citizens and their family members within five months of an application being submitted.<sup>1698</sup>

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Delays reported	delays reported	delays reported	no delays reported	no delays reported	no delays reported

Table 6.2.1.2 - Delays reported in issuing permanent residence documents to EU citizens and their family members

Note: light shading indicates Member States where no delays are being reported, dark shading indicates Member States where significant delays are being reported.

<sup>1694</sup> Nicolau (n 21), p. 85; REFIT Platform Opinion on the submission of the REFIT Platform Stakeholder Group (Ms Kavrakova) on the Citizenship Directive (2017) [https://ec.europa.eu/info/sites/info/files/xiii-10-a-social-security-coordination\\_en.pdf](https://ec.europa.eu/info/sites/info/files/xiii-10-a-social-security-coordination_en.pdf).

<sup>1695</sup> Nicolau (n 21), p. 85.

<sup>1696</sup> Nicolau (n 21), p. 55.

<sup>1697</sup> Ibid.

<sup>1698</sup> Royal Decree, art. 55, second paragraph, as regards EU citizens and art. 56, second paragraph, as regards non-EU family members.

## 7.3 Format of permanent residence documents issued



### 7.3.1 Documents issued to EU citizens

Article 19(1) of the Citizens Rights Directive provides that Member States are to issue a document certifying permanent residence to EU citizens. The Directive does not specify their period of validity nor does it lay down any requirements as to its format.

Germany, Italy and Luxembourg both issue a document certifying permanent residence in paper format.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Plastic card	plastic card	paper	paper	paper	plastic card

Table 7.3.1: Format of document certifying permanent residence issued to EU citizens

Note: light shading indicates Member States which only issue paper-based registration certificates, whereas dark shading indicates Member States which issue a plastic residence card.

France and the Netherlands both issue permanent residence documents to EU citizens who submit a request for it in the form of a residence card using the uniform residence permit format laid down by Regulation 1030/2002.<sup>1699</sup> This is comparable to the permanent residence document (“E+ card”) which is issued in the form of a plastic card to EU citizens by the Belgian authorities<sup>1700</sup> and which uses a similar format as the national identity card.<sup>1701</sup>

While Member States will be required to issue permanent residence documentation to EU citizens containing certain minimum information<sup>1702</sup> in accordance with Regulation 2019/1157 from August 2021,<sup>1703</sup> Member States retain the ability to choose the format in which such documents are issued.<sup>1704</sup>

<sup>1699</sup> Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

<sup>1700</sup> See samples BEL-HO-12001 (Dutch-language format), BEL-HO-12002 (French-language format) and BEL-HO-12003 (German-language format) available on the Council’s Public Register of Authentic travel and identity Documents Online (PRADO) <https://www.consilium.europa.eu/prado/en/BEL-HO-12001/index.html> <https://www.consilium.europa.eu/prado/en/BEL-HO-12002/index.html> <https://www.consilium.europa.eu/prado/en/BEL-HO-12003/index.html>.

<sup>1701</sup> See samples BEL-BO-09001, BEL-BO-09002 and BEL-BO-09003 (n 125) available on PRADO.

<sup>1702</sup> See n 128 and n 129.

<sup>1703</sup> Art. 6, Regulation 2019/1157.

<sup>1704</sup> Recital 36, Regulation 2019/1157.

### 7.3.2 Documents issued to non-EU family members

Under Article 20(1) of the Citizens Rights Directive, Member States are required to issue a permanent residence card. Article 20(2) specifies that the permanent residence card should be automatically renewable every ten years.

France, Germany, Italy and the Netherlands all issue plastic permanent residence cards to non-EU family members in the uniform format laid down by Regulation 1030/2002. Again, this is comparable to the Belgian approach of issuing a permanent residence card to non-EU family members (“F card”) in the form of a plastic card<sup>1705</sup> and which also uses a similar format as the national identity card.<sup>1706</sup>

<sup>1705</sup> See samples BEL-HO-10001 (Dutch-language format), BEL-HO-10002 (French-language format) and BEL-HO-10003 (German-language format) available on PRADO <https://www.consilium.europa.eu/prado/en/BEL-HO-10001/index.html> <https://www.consilium.europa.eu/prado/en/BEL-HO-10002/index.html> <https://www.consilium.europa.eu/prado/en/BEL-HO-10003/index.html>.

<sup>1706</sup> See samples BEL-BO-09001, BEL-BO-09002 and BEL-BO-09003 (n 125) available on PRADO.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
Plastic card	plastic card	plastic card	plastic card	paper	plastic card

Table 7.3.2: Format of permanent residence cards issued to non-EU family members

Note: light shading indicates Member States which only issue paper-based registration certificates, whereas dark shading indicates Member States which issue a plastic residence card.

Luxembourg issues a permanent residence card to non-EU family members in paper format.

The obligation to issue residence cards to non-EU family members in accordance with Regulation 2019/1157<sup>1707</sup> also applies to permanent residence documents which will need to be issued in the uniform format foreseen by Regulation 1030/2002.<sup>1708</sup> Member States will no longer be permitted to issue paper-based permanent residence cards and such documents will need to be phased out by August 2026.<sup>1709</sup>

## 8. Problems identified in practical application

The obligation under EU law to implement directives also requires the Member States to ensure the rules are also correctly applied in practice.<sup>1710</sup> This is where the majority of problems have been reported in all of the Member States.

These concern all aspects of the registration process relating to the residence rights of EU citizens and their family members, albeit to varying degrees as illustrated by the table below.

	Belgium	France	Germany	Italy	Lux.	Neth.
Excessive delay <sup>1711</sup> in obtaining appointment?	Yes	Yes	Yes	Yes	-	-
Problems with registration of workers?	Yes	Yes	Yes	Yes	-	Yes
Problems with registration of frontier workers?	Yes	-	-	Yes	-	-
Problems with registration of jobseekers?	Yes	Yes	Yes	Yes	-	-
Excessive documentary requirements?	Yes	Yes	-	Yes	Yes	Yes
Imposing non-EU family members to hold a visa?	Yes	Yes	Yes	-	Yes	-
Excessive delay <sup>1712</sup> in issuance of residence cards?	Yes	Yes	Yes	Yes	-	-
Possession of residence document as pre-condition?	Yes	Yes	-	-	-	-

Table 6.5 - Reported problems in practical implementation

Note: "Yes" means problems have been reported in the Member State concerned as identified from the sources which were consulted, whereas the entry "-" means no such problem has been reported.

<sup>1710</sup> See for example, CJEU, Case C-62/00 *Marks & Spencer* EU:C:2002:435.

<sup>1711</sup> While Directive 2004/38 does not lay down a firm deadline for EU citizens and their family members to obtain an appointment to register their residence in the host Member State, an excessive delay is considered to be a delay exceeding two weeks.

<sup>1712</sup> This means a delay exceeding the 6-month legal deadline contained in Arts. 10 and 20, Directive 2004/38 as regards the issuance of residence cards or permanent residence cards to family members or a failure to issue a registration certificate immediately or a document attesting permanent residence to EU citizens under Arts. 8 and 19, Directive 2004/38.

<sup>1707</sup> Art. 7, Regulation 2019/1157 (n 126).

<sup>1708</sup> See n 136.

<sup>1709</sup> Art. 8, Regulation 2019/1157.

As noted above,<sup>1713</sup> one recurrent problem concerns the existence of excessive delays in securing appointments, which has been reported in all the Member States<sup>1714</sup> except for Luxembourg and the Netherlands, as well as in Belgium.<sup>1715</sup> The same Member States are also afflicted by delays in issuing residence cards to non-EU family members.<sup>1716</sup>

As is the case in Belgium, several Member States have adopted a relatively restrictive interpretation of the status of “worker” using working hours and remuneration as determining factors, which appears at odds with the EU Court of Justice’s rulings.<sup>1717</sup> For instance, in the Netherlands, when EU workers claim social benefits, the Dutch IND will only recognise their worker status in circumstances where they work at least 40% of the normal working week (approximately 15 hours) or earn income which is equivalent to at least 50% of the amount of benefit claimed.<sup>1718</sup>

In addition, workers may also be required to produce documentation when registering which is not foreseen by the Citizens Rights Directive,<sup>1719</sup> such as monthly payslips, evidence of sufficient resources and private healthcare insurance.<sup>1720</sup> This problem has been reported in France, Germany and Italy<sup>1721</sup> as well as in Belgium<sup>1722</sup> particularly as regards workers in atypical forms of employment<sup>1723</sup> and those who are accompanied by non-EU family members when the latter apply to be issued with a residence card.<sup>1724</sup>

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1713 For further discussion, see above, Section 4. *Application phase*, Sub-section 4.3 *Prior appointments*.

1714 See Section D of the country fiches covering the application phase.

1715 For further discussion, see Chapter 2, Section 3. *Application phase*, Sub-section 3.1 *Appointment system and issuance of Annex 19*.

1716 For further discussion, see above, Section 6. *Registration phase*, Sub-section 6.2 *Deadlines for issuing a residence document*, Paragraph 6.2.2 *Deadlines applicable to non-EU family members*. As regards Belgium, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

1717 For further discussion of this case law, see Chapter 1, Section 3. *Personal scope of the study*, Sub-section 3.1 *Workers*. For an overview of the practices of the Member States, see Charlotte O’Brien, Eleanor Spaventa and Joyce De Coninck, FRESSCO Comparative Report 2015, *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, Report for the European Commission (2015).

1718 See Section J of the country fiche for the Netherlands covering the impact of residence formalities on equal treatment.

1719 Art. 8(3), first indent, Directive 2004/38 which provides that proof of “worker” status only needs to be demonstrated by producing a specific document in the form of “a confirmation of engagement from the employer or a certificate of employment”.

1720 For further examples, see above, Section 6. *Registration phase*, Sub-section 6.3 *Documentary requirements*, Paragraph 6.3.1 *Documents required from EU citizens*.

1721 See Section G of the country fiches covering documentary requirements.

1722 For further discussion, see Chapter 2, Section 5. *Registration phase*, Sub-section 5.3 *Documents required for registration of residence*, Paragraph 5.3.2 *Documents required from workers*.

1723 For further discussion, see Charlotte O’Brien, Eleanor Spaventa and Joyce De Coninck, FRESSCO Comparative Report 2015, *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, Report for the European Commission (2015).

1724 For further discussion, see Nicolau (n 21), p. 51.

Problems with the registration of frontier workers residing in Italy while working in neighbouring Member States have also been reported,<sup>1725</sup> which also appears to be an issue in Belgium.<sup>1726</sup>

The registration of jobseekers also remains problematic in several Member States. In France, the situation of jobseekers is not addressed by the national measures which transpose the Citizens Rights Directive.<sup>1727</sup> As a result, jobseekers may be refused registration of their residence until they can provide evidence of work or they may be required to demonstrate that they hold sufficient resources so as not to be a burden on social assistance.<sup>1728</sup> A similar situation prevails in Italy, where it is also reported that EU jobseekers are only granted six months in order to find work.<sup>1729</sup> In Germany, it should also be noted that the legal text on the right to residence was amended in 2014 so that EU jobseekers now enjoy an unconditional right to residence for six months, after which they continue to be entitled to residence if they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed, which arguably appears to be in line with the CJEU’s rulings,<sup>1730</sup> although there have been complaints that this has led to systematic verification of the residence rights of jobseekers.<sup>1731</sup>

Aside from excessive documentary requests which EU citizens may face when they seek to register as workers, self-employed persons or jobseekers,<sup>1732</sup> the imposition of excessive or particularly burdensome documentary requirements is also reported in respect of non-EU family members in France, Germany and Italy.<sup>1733</sup>

As previously noted,<sup>1734</sup> one such widespread problem includes the imposition of a visa requirement on non-EU family members by the national authorities in Belgium, France, Germany and Luxembourg.

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1725 See Section G of the country fiche for Italy covering documentary requirements.

1726 Nicolau (n 21), pp. 51-52. For further discussion, see Chapter 2, Section 3. *Application phase*, Sub-section 3.2 *Processing of the application for registration*, Paragraph 3.2.1 *Workers*, Sub-paragraph 3.2.1.3 *Posted workers and frontier workers*.

1727 See Section G of the country fiche for France covering documentary requirements.

1728 Ibid.

1729 See Section G of the country fiche for Italy covering documentary requirements.

1730 Case C-292/89 *Antonissen* EU:C:1991:80 ; Case C-710/19 *G.M.A.* EU:C:2020:1037.

1731 Milieu (n 32), p. 12.

1732 See above, Section 6. *Registration phase*, Sub-section 6.3 *Documentary requirements*, Paragraph 6.3.1 *Documents required from EU citizens*.

1733 See above, Section 6. *Registration phase*, Sub-section 6.3 *Documentary requirements*, Paragraph 6.3.2 *Documents required from non-EU family members*.

1734 For further discussion, see above Section 4. *Application phase*, Sub-section 4.5 *Imposing a requirement on non-EU family members to hold a visa*.

## 9. Appeals

On a final point, it should also be noted that the operation of an optional registration system<sup>1735</sup> generates problems for EU citizens who need to demonstrate their right of residence when accessing social security or social welfare benefits.

This is a significant problem in France,<sup>1736</sup> where it is reported that the social security bodies will often insist upon EU citizens and family members producing a residence document as a condition for claiming benefits.<sup>1737</sup> While in theory French law provides the option to apply for a residence card, in situations where EU citizens decide to make use of this option, the local authorities are reported as refusing to process applications on the basis that such a residence card is not compulsory.<sup>1738</sup> This problem is further exacerbated by the incorrect transposition of Article 25 of the Citizens Rights Directive which provides that the exercise of a right or completion of an administrative formality cannot be made conditional upon holding a residence document. It should also be noted that this provision has not been the subject of any transposition in Belgium.

In the Netherlands, which also operates an optional registration system, EU citizens who claim social security or social welfare benefits will have their details automatically passed on by the relevant institution to the Dutch IND, whenever there is doubt about the lawfulness of an EU citizen's right of residence.<sup>1739</sup> This will then be the subject of verification by the IND.<sup>1740</sup>

In Germany, the courts have been very active in referring cases to the EU Court of Justice as regards the right to equal treatment under EU law and its application to EU citizens claiming non-contributory social assistance.<sup>1741</sup> This case law shows that the authorities tasked with granting social assistance are accustomed to assessing the existence of a right of residence when EU citizens claim benefits. As a result, the abolition of the registration requirement does not appear to have led to any additional difficulties in administrative practice relating to the grant of social assistance to EU citizens and their family members.

Articles 15 and 31 of the Citizens Rights Directive require Member States to provide EU citizens and their family members with judicial redress procedures in order to appeal against any decision which refuses recognition of their residence right. The Directive also requires Member States to provide EU citizens and their family members with an administrative review process where appropriate, which leaves considerable discretion to the Member States.

### 9.1 Availability of administrative review processes

In the event an application submitted by EU citizens and their family members for the registration of their residence results in a refusal, France, Italy, Luxembourg and the Netherlands all provide for administrative review processes. With the sole exception of Italy, these suspend deadlines for lodging judicial appeal proceedings.

The existence of an administrative review process with suspensive effect can be considered a best practice.

<sup>1735</sup> For further discussion, see above Section 2. *Overview of transposition*, Sub-section 2.2 *Nature of residence formalities*.

<sup>1736</sup> See Section J of the country fiche for France covering the impact of residence formalities on equal treatment.

<sup>1737</sup> *Ibid.*

<sup>1738</sup> *Ibid.*

<sup>1739</sup> See Section J of the country fiche for the Netherlands covering the impact of residence formalities on equal treatment.

<sup>1740</sup> *Ibid.*

<sup>1741</sup> Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597; Case C-299/14 *García-Nieto* EU:C:2016:114; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
no review	review (suspensive)	no review	review (non-suspensive)	review (suspensive)	review (suspensive)

Table 9.1 - Existence of administrative review of decisions taken in EU residence cases

Note: light shading indicates Member States where appeals do not have suspensive effect, whereas dark shading indicates Member States where the filing of an appeal carries suspension of the contested decision effect.

## 9.2 Nature of judicial appeal process



In France, Germany, Luxembourg and the Netherlands it is the general administrative courts which have jurisdiction to hear cases involving appeals against decisions taken by the administrative authorities against EU citizens and their family members. In Italy, it is the specialised immigration chambers of the ordinary civil courts which have jurisdiction.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
specialised administrative court	ordinary administrative court	ordinary administrative court	specialised chamber in civil court	ordinary administrative court	ordinary administrative court

Table 9.2.1 - Limitation period to file a judicial appeal in EU residence cases

Note: light shading indicates Member States in which the ordinary administrative courts have jurisdiction to hear appeals, whereas dark shading indicates Member States where specialised courts have jurisdiction.

The deadlines for filing judicial appeals vary greatly across the Member States included in this comparison, with Belgian law providing a relatively short time-limit with which an appeal may be filed.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
30 days	2 months	1 month	10 years <sup>1742</sup>	3 months	4 weeks

Table 9.2.2 - Limitation period to file a judicial appeal in EU residence cases

Note: light shading indicates Member States in which there is a relatively short deadline within which to file an appeal, whereas dark shading indicates Member States where the deadline is longer than a month.

As in the case in Belgium, the lodging of judicial appeals automatically suspends the effects of the administrative decision which is being challenged in the Netherlands. In the other Member States, a specific application to suspend the contested decision would need to be made to the court hearing an appeal.

<sup>1742</sup> There is no specific deadline laid down within which a judicial appeal against a decision refusing the issue of a residence document must be brought. As a result, the ordinary limitation period of 10 years would apply.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
suspensive	non-suspensive	non-suspensive	non-suspensive	non-suspensive	suspensive

Table 9.2.3 - Suspensive effects of judicial appeals in EU residence cases

Note: light shading indicates Member States where appeals do not have suspensive effect, whereas dark shading indicates Member States where the filing of an appeal carries suspension of the contested decision effect.

The level of fees payable for filing judicial appeals also varies greatly. The filing of an appeal before the administrative courts in France and Luxembourg does not attract the payment of any court fees. However, the fees payable for bringing an appeal before the Council for Alien Law Litigation in Belgium are higher relative to all other Member States included in the comparison.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
186 €	none	114 €	125 €	None	178 €

Table 9.2.4 - Fees payable to lodge a judicial appeal in EU residence cases

Note: light shading indicates Member States where the filing of an appeal does not attract payment of a court filing fee, whereas dark shading indicates Member States where the filing of an appeal incurs a court filing fee

In accordance with the Citizens Rights Directive, judicial appeal procedures must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and ensure that the contested decision is not disproportionate. However, the rules of procedure governing judicial appeals in EU residence cases remains governed by national law, in accordance with the principle of procedural autonomy.<sup>1743</sup>

As a result, some variance can also be noted across Member States in respect of the powers of review with which the national courts have been endowed. While the administrative courts in Germany and Luxembourg do not have the power to remake administrative decisions, as is the case in Belgium, the administrative courts in France do have the power to order the respondent authority to issue residence documentation and fix a deadline by which to do so. The Italian courts may remake administrative decisions which they strike down.

The ability of national courts to order specific remedial action – besides simply annulling the contested decision – can be considered best practices because such powers provide safeguards against further significant delay in decision-making following successful appeals and reinforce the right to an effective remedy.

Belgium	France	Germany	Italy	Luxembourg	Netherlands
none	none but court can order specific remedial action	none	court can remake decision	none	court can remake decision

Table 8.2.3 - Power to remake administrative decision in EU residence cases

Note: light shading indicates Member States where courts can only annul an administrative decision on appeal, whereas dark shading indicates Member States where court can remake an administrative decision on appeal or is entitled to order specific remedial action to be taken by the administrative authorities.

<sup>1743</sup> For a discussion, see Chapter 1, Section 7. *Procedural safeguards and appeal rights*, Subsection 7.2 *Appeal rights*.

# 10 Conclusion

A comparison of the procedures relating to registration formalities for both EU citizens and their family members reveals that there are significant variations in the way in which the process of registration has been set up in Member States when transposing the Citizens Rights Directive.

The Member State which has instituted registration formalities in a most similar fashion to Belgium is Italy, given that both Member States share a decentralised system where the registration of EU citizens and their family members is made at municipal level with decision-making split between different authorities. While both countries have endowed specialised courts with competence to hear judicial appeals in residence cases, the choice of giving competence to the civil courts rather than the administrative courts in Italy means that these courts have the power to remake administrative decisions, unlike the situation with the Belgian Council for Alien Law Litigation.

As is the case in Belgium, Italy and Luxembourg have instituted a compulsory registration process, whereas registration is only optional in France and the Netherlands. Germany has abolished the obligation to register and does not offer the possibility of voluntary registration. The absence of a compulsory registration system is not without problems, given that EU citizens may find it difficult to prove their lawful residence when seeking to access private and public services or when claiming social security benefits or social assistance.

The single most notable difference in the way the registration process operates relates to the submission of supporting documents. In all other Member States, documents must be provided at the time of submission of the application by EU citizens and their family members, unlike in Belgium where applicants have three months to provide their supporting documentation.

The comparison also shows that there are several best practices from which Belgium could draw inspiration as a means to improve the ways in which the Citizens Rights Directive is applied in practice.

As regards access to information, the central government websites for France and Luxembourg, as well as the website of the Dutch immigration and nationality service (IND), were noted for providing concise and comprehensive information in a relatively user-friendly format. Other notable best practices are the signposting to sources of legal assistance on the website of the Dutch immigration and nationality service (IND) and the inclusion of direct links to the specific underlying provisions of national legislation on the websites for France and Luxembourg

also. The information on residence formalities applicable to EU citizens and their family members is made available on-line in English as well as the official national language(s) in Germany, Italy Luxembourg and the Netherlands.

As regards the submission of residence applications by EU citizens and their family members, all Member States require applications to be made in person. However, in the Netherlands, non-EU family members may also initiate an application for a residence card by post. Consideration should also be given to ensuring that measures taken during the COVID-19 pandemic which enable the registration process to be initiated on-line or by post are instituted on a permanent basis. When it comes to permanent residence applications submitted by EU citizens and their family members, Luxembourg allows applications to be made by post, while the Netherlands allows applications to be submitted by post or online. In Luxembourg and the Netherlands, there is a relatively short waiting time of less than two weeks within which appointments can be secured for the purposes of submitting an application.

As regards information on the supporting documentation which is required, the national websites of France, Luxembourg and the Netherlands contain very detailed information on what documentation needs to be provided in the form of checklists. As is the case in Belgium, Luxembourg and the Netherlands accept supporting documents drawn up in English to be furnished without the need for an official translation.

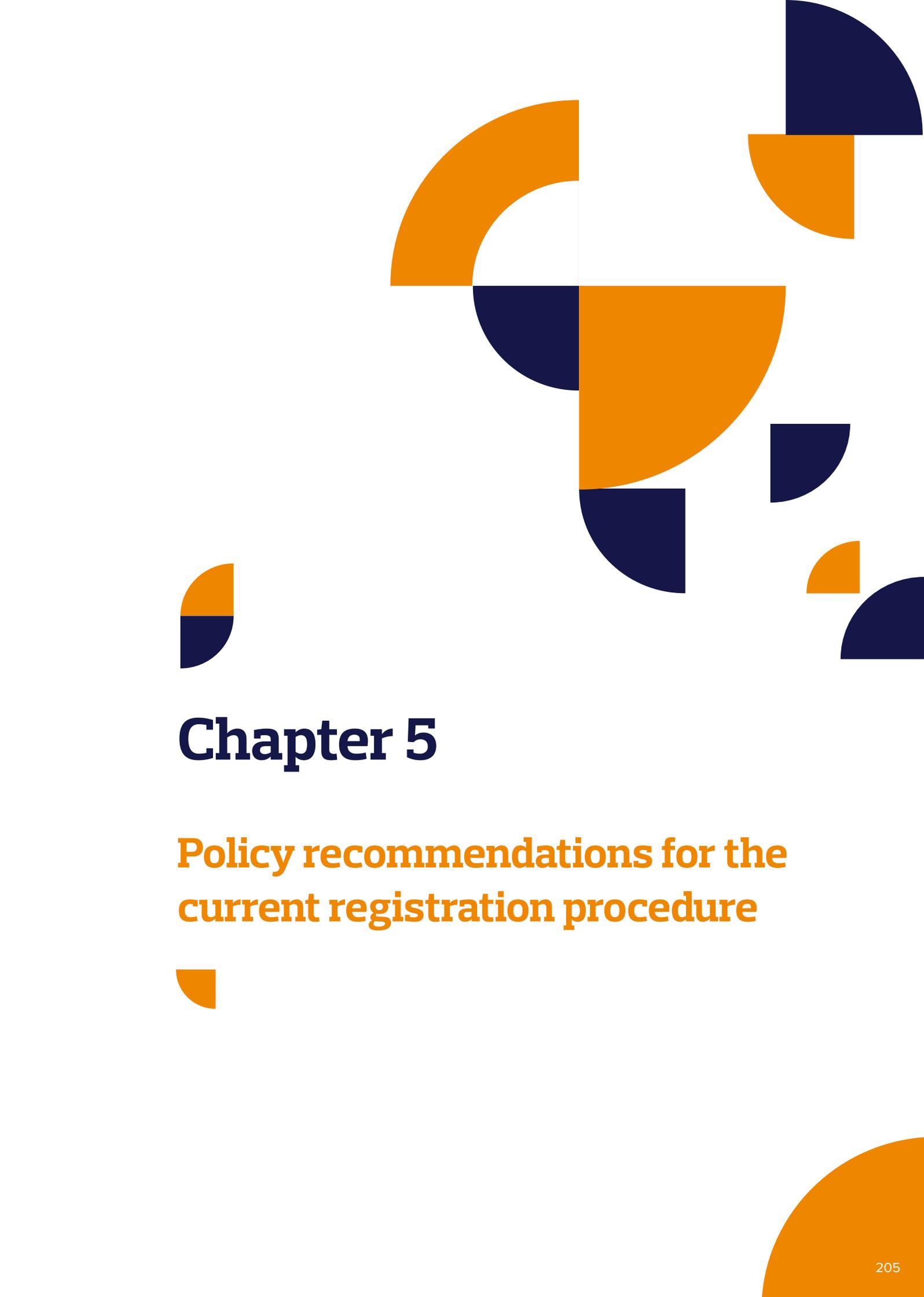
As regards the issuance of residence documents, in the Netherlands and Luxembourg, EU citizens will be issued with a registration certificate on the same day that they apply in accordance with the system foreseen by the Citizens Rights Directive. Moreover, residence cards are on average issued to non-EU family members within three months of an application being submitted in the Netherlands.

As regards appeals, France, Italy, Luxembourg and the Netherlands all provide for administrative review processes in the event an application submitted by EU citizens and their family members for the registration of their residence results in a refusal, which also suspend deadlines for lodging judicial appeal proceedings (except in Italy). Where a judicial appeal is lodged, the ability of the national courts in France, Italy and the Netherlands to order specific remedial action should provide safeguards against further significant delay in decision-making following successful appeals thereby reinforcing the right to an effective remedy.

These are further discussed as part of the recommendations which follow in Chapters 5 and 6.

*The country fiches referred to in this chapter can be found on the website of Myria.*





# Chapter 5

## Policy recommendations for the current registration procedure



# Chapter 5

## Policy recommendations for the current registration procedure



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The policy recommendations in this Chapter **start from the current system** for handling registration requests of EU workers, self-employed, jobseekers and their family members. A more fundamental change towards an immediate registration system is proposed in Chapter 6.

Even though this research focused on the residence registration process for EU workers, self-employed, jobseekers and their family members, most of the recommendations identified below seem **relevant for all EU citizens and their family members** – except when explicitly stated otherwise.

identity card or passport may be fined 200 EUR.<sup>1745</sup> The Immigration Office indicated that fines are not applied in practice and that expired documents are accepted as proof of identity.

Include in the **new website on migration**, envisaged in the 2020 General Policy Note on Asylum and Migration,<sup>1746</sup> up-to-date and accurate **information on the registration formalities** of EU citizens and their family members. Explore synergies with the website of the Immigration Office (e.g. through referral for more in depth information) and of the General Directorate of Institutions and Population (ADIB/DGIP) providing “integrated” information about residence applications and registration procedures (e.g. situations of temporary absence).

## 1. Preparatory phase

### 1.1 Recommendations to the Secretary of State for Asylum and Migration

Align the Circular of 16 June 2016 with actual practice, by **deleting the fines applicable to EU citizens when they submit expired documents to prove their identity.**

EU citizens usually prove their EU citizenship by providing a valid passport or national identity card issued by an EU Member State. Belgian legislation does allow for other means of proof of EU citizenship as well, such as the use of an expired identity document or “any other form of proof”.<sup>1744</sup> Nonetheless, according to a Circular of 16 June 2016, an EU citizen seeking to register without a valid

### 1.2 Recommendations to the Immigration Office

As part of the on-going restructuring of the Immigration Office’s website, **re-organize the website information** on residence formalities for EU citizens and their family members in a logically structured and comprehensive manner, including an exhaustive list of required documents. Provide this information at a minimum also in English and German (and possibly other European languages).

<sup>1745</sup> Circular of 16 June 2016 relating to the imposition of administrative fines of €200 under the Belgian Immigration Law (*Circulaire du relative à l'application des amendes administratives de 200 euros dans le cadre de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers/ Omzendbrief van 16 juni 2016 inzake de toepassing van de administratieve geldboetes van 200 euro op basis van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*).

<sup>1746</sup> House of Representatives, General Policy Note, Asylum and Migration and the National Lottery (4 November 2020), (*Chambre des Représentants de Belgique*, “Note de Politique Générale, Asile et Migration et Loterie Nationale /Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie en Nationale Loterij, 2019-2021, Doc 55 1580/014, 04-11-2020), p. 11.

<sup>1744</sup> Art. 46, Royal Decree on Immigration.

Particular attention should be paid to specifying documentary requirements for atypical categories of economically active EU citizens (such as frontier workers, posted workers and posted self-employed persons) and outlining requirements as to legalisation and translation. Additionally, the steps of the registration procedure for each category of EU citizen as well as their family members could be further elaborated upon. In this way, the Immigration Office would comply with its obligation under Article 34 of Directive 2004/38 to inform the public about the rights and obligations concerning free movement.<sup>1747</sup>

Provide **signposts** on the website of the Immigration Office **to other relevant organisations and services**, to ensure that the applicant has full access to all services available.

These should include at a minimum a prominent link to the Your Europe portal as required by the Regulation on the Single Digital Gateway. Other signposted services could include SOLVIT, Your Europe Advice, the Expulsion Helpdesk, AgII and ADDE.

A link to the legal aid pages of the bar associations should also be provided (see recommendations under 7.2).

## 1.3 Recommendations to the municipalities

Refer to the **updated website of the Immigration Office** for general information and documentary requirements about the registration procedure for EU citizens and their family members, to ensure that complete and up-to-date information is available to the applicant.

This recommendation logically depends on the prior reorganization of the website of the Immigration Office (see recommendation under 1.2).

**Specify on municipal websites the local particularities** regarding the registration procedure of EU citizens and their family members, for instance on the appointment system or an online procedure.

The information on local registration procedures should include whether an appointment is necessary and how it can be arranged and whether there is a possibility to submit the application for registration online. Telephone and email contact details should also be provided.

Provide **signposts** on the municipal websites **to other relevant organisations and services**, to ensure that the applicant has full access to all services available.

These should include at a minimum a prominent link to the Your Europe portal as required by the Regulation on the Single Digital Gateway. Additional signposted services could include SOLVIT, Your Europe Advice, the Expulsion Helpdesk, AgII and ADDE.

The municipal websites should also include links to the legal aid service operated by the local bar association (see recommendation under 7.3).

## 2. Application phase

### 2.1 Recommendations to the Secretary of State for Asylum and Migration

<sup>1747</sup> See Chapter 2, section 2.1.

Amend the Royal Decree on Immigration to allow **the submission of an application for registration to be made online** and the **issuance of certificates of application** (Annex 19/19ter) **in electronic format**.

This legislative change would enable the municipalities to digitalise the first step of the registration procedure (see recommendation under 2.3).

## 2.2 Recommendations to the Immigration Office

Amend the guidance from the Immigration Office (Syllabus, GemCom fiches) to **provide guidance to municipalities on issuing certificates of application** (Annex 19/19ter) **in electronic format**.

The implementation of this recommendation is dependent on a legislative change which would make it possible to submit applications for registration online and issue certificates of application (Annex 19/19ter) electronically (see recommendation under 2.1)

Amend the guidance from the Immigration Office (Syllabus, GemCom fiches) to **ensure that the instructions given to municipalities** on the registration process for the EU citizens and their family members **are fully compliant with the current legislation and case law** with respect to the category under which applicants are registered and other documentary requirements.

In particular, these instructions should remove restrictive interpretations of the concept of worker so that workers with a fixed-term employment contract of less than 6 months, part-time workers working less than 12 hours per week, and paid interns are all correctly processed as workers; remove a visa requirement being a pre-condition for family members to apply and provide more

detailed guidance on other documentary requirements.

## 2.3 Recommendations to the municipalities

Invest in the digitalisation of the first step of the registration procedure, enabling the applicant to **submit their application for registration online and obtain a certificate of application** (Annex 19/19ter) **in electronic format**. Particular attention should be given to the **accessibility and user-friendliness** of such a system.

After the applicant has submitted their proof of identity as well as other required documents, the EU citizen or family member concerned should receive a certificate of application (Annex 19/19ter) by email. The implementation of this recommendation is dependent on a legislative change which would make it possible to issue a certificate of application (Annex 19/19ter) electronically (see recommendation under 2.1). Following this first step, the verification of domicile can be conducted. EU citizens and their non-EU family members would only need to appear in person once in order to obtain an EU/F card for which a visit at the city hall will be required.<sup>1748</sup> The experiences with online applications for registration during the COVID-19 pandemic have shown that such an online system should give particular attention to accessibility and user-friendliness, to ensure effective use of the system.

Retain the possibility for applicants to make a **submission in person** for those who do not have access to the online system or are not digitally literate. In this case, the applicant should be able to obtain an **appointment within 2 weeks** to submit their application for registration, in order to ensure immediate access to an Annex 19/19ter.<sup>1749</sup>

<sup>1748</sup> Municipality C confirmed that they already implement such a registration practice, yet for EU (and non-EU) workers only.

<sup>1749</sup> Art. 8(2), Directive 2004/38. See Chapter 1, section 2.c and Chapter 3, section 3.

**Align the registration process** for EU citizens and their family members to the current legislation and case law with respect to the correct category under which applicants are registered and other documentary requirements.

Divergent practices include restrictive interpretations of the concept of worker (e.g. workers with a fixed-term employment contract of less than 6 months, part-time workers and interns), a lack of awareness of the various categories of family members who should be allowed to apply for registration in Belgium.

## 3. Verification of domicile

### 3.1 Recommendations to the Secretary of State for Asylum and Migration

No specific recommendations.

### 3.2 Recommendations to the General Directorate of Institutions and Population (ADIB/DGIP)

Provide a **practical checklist** on how the verification of domicile has to take place, to make sure that this verification is undertaken in a uniform manner.

## 3.3 Recommendations to the municipalities

Ensure that the verification of domicile takes place **within 15 working days**<sup>1750</sup> in order to avoid excessive delays in the registration procedure.<sup>1751</sup>

Invest (further) in the **digitalisation** of communications between the police and the municipality on the verification of domicile in order to avoid excessive delays in the registration procedure and **consider extending digitalisation to cover the verification of identity documents.**

This recommendation is in line with a recommendation of the Comité P.<sup>1752</sup> Recently, the Ministry of Internal Affairs has taken the initiative to implement a tool at national level (the so-called WOCODO project) for the digitalisation of the communication between the police and the municipality regarding the verification of domicile.

In order to speed up the verification of the authenticity of documents held by EU citizens,<sup>1753</sup> consideration should be given to enable the WOCODO application (or alternatively another application connected to the Belgian police's FOCUS IT platform<sup>1754</sup>) to facilitate communications between municipal officials and the local police.

1750 Art. 7 § 5, Royal Decree of 16 July 1992 concerning the population registers and the foreigners' register.

1751 See Chapter 2, section 4.2.

1752 *Aanbeveling dat "in overleg met de gemeentelijke diensten de uitvoeringstermijnen worden verkort door middel van een digitale overdracht van de opdrachten en de resultaten van de woonstcontroles tussen de gemeentelijke diensten en de politie", Comité P, Toezichtsonderzoek "Domiciliëringen", Dossiernummer 62605, Beeldvorming van de wijze waarop de lokale politiekorpsen de woonstcontrole uitvoeren, p. 39 <https://comitep.be/document/onderzoeksrapporten/2014-12-11-Beeldvorming-van-de-wijze-waarop-lokale-politiekorpsen-de-woonstcontrole-uitvoeren.pdf> / *Recommandation pour "que les délais de traitement soient réduits en concertation avec les services communaux par le biais du transfert numérisé des missions et des résultats des contrôles du domicile entre les services communaux et la police" Comité P, Enquête de contrôle "Domiciliations", Numéro de dossier 62605, Image globale de la manière dont les corps de police locale exécutent le contrôle domicile, p. 39 <https://comitep.be/document/onderzoeksrapporten/2014-12-11-Image-globale-de-la-maniere-dont-les-corps-de-police-locale-executent-le-contrôle-domicile.pdf> )**

1753 For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.2. *Application phase*, Paragraph 5.2.2 *Initial documents required: proof of identity*.

1754 Further details can be found on the Belgian federal police's website *L'ICT au coeur de l'action et de la gestion / ICT, de drijvende kracht achter onze acties en ons beheer* <https://rapportannuel.policefederale.be/gestion-information/ict-action-gestion/> / <https://jaarverslag.federalepolitie.be/informatiebeheer/ict-acties-beheer/>

**Guarantee the right to be heard** of applicants before a negative decision on the verification of domicile is taken.

At present there is no such right to be heard. In certain cases, a negative decision on the verification of domicile may be due to an error in the address that has been visited by the municipal police.

Provide **clear information on the possibilities to appeal** a negative decision on the verification of domicile.

The negative decision should be duly motivated, and the applicant should receive a copy of the decision outlining the arguments and mentioning the possibility of appeal. There is a right to an administrative review of any negative decision on the verification of domicile by the Minister of the Interior<sup>1755</sup> and a subsequent right of judicial review before the Council of State.<sup>1756</sup>

## 4. Registration phase

### 4.1 Recommendations to the Secretary of State for Asylum and Migration

Amend the Royal Decree on Immigration to allow the **issuance of a temporary registration certificate** (Annex 8ter) **in electronic format**.

<sup>1755</sup> Art. 8, Law of 19 July 1991 concerning the population registers, identity cards, foreigner's cards and residence documents.

<sup>1756</sup> Art. 14, Law relating to the Council of State.

This legislative change would enable the municipalities to digitalise this third step of the registration procedure (see recommendation under 4.3).

**Transpose Article 25(1)** of the Citizens Rights Directive, which prohibits the possession of a residence document being a precondition for the exercise of a right or completion of an administrative formality.

At present this provision<sup>1757</sup> is not the subject of any transposition into Belgian law.

Amend Article 42 §1 of the Immigration Law, which currently provides that a registration certificate must be issued to EU citizens within six months, to bring into line with EU law requiring that **registration certificates** for EU citizens must be issued **immediately**.<sup>1758</sup>

At present, Belgian law provides that registration certificates should be issued as soon as possible and at the latest within six months, which means that in practice registration certificates are not issued immediately contrary to the Citizens Rights Directive.<sup>1759</sup>

Separately, Chapter 6 outlines a concrete proposal to move towards an immediate registration system.

**Revise the list of registered partnerships** (legal cohabitation) **which are considered to be equivalent to marriage** in Belgium to ensure that the list is **up-to-date and based on transparent and objectively justified criteria**.

<sup>1757</sup> Art. 25(1), Directive 2004/38 provides as follows: "1. *Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.*"

<sup>1758</sup> Art. 8(2), Directive 2004/38.

<sup>1759</sup> Ibid.

Article 40bis §2, 2° of the Immigration Law places additional requirements on partners who have entered into a registered partnership which is not considered to be equivalent to marriage. The Royal Decree of 7 May 2008 contains a list of registered partnerships, which has not been updated since its adoption and which does not reflect all the Member States which have instituted registered partnerships since then. In this respect it should be observed that the criteria used in Belgian practice to determine whether a partnership is equivalent to marriage are unclear.<sup>1760</sup>

**Amend the Belgian rules to bring them into line with the CJEU case law** by removing the provision<sup>1761</sup> on the **automatic issuance of a residence card upon expiry of the six-month deadline** for issuing residence documentation to non-EU family members.<sup>1762</sup>

This amendment is envisaged in the 2020 General Policy Note on Asylum and Migration.<sup>1763</sup> The federal government intends to repeal the rule which provides for the automatic issuance of a residence card to the family members of EU citizens when the Immigration Office has failed to take a decision on an application within six months.<sup>1764</sup>

A further possible solution could be to align the processes for non-EU family members with those for EU citizens as part of the recommendations on immediate registration formulated in Chapter 6.

**Amend the Belgian rules to bring them into line with the CJEU case law on the residence right of primary carers of EU minors** who remain in education and who are the children of former EU workers.

The CJEU has recognised that primary carers of EU minors who remain in education and who are the children of former EU workers – so-called “*Ibrahim/Teixeira*”

<sup>1760</sup> For further discussion, see Chapter 1, Section 3. *Personal scope of the study*, Section 3.6 *Family members*.

<sup>1761</sup> Art. 52 §4, Royal Decree on Immigration.

<sup>1762</sup> Case C-246/17 *Diallo* EU:C:2018:499.

<sup>1763</sup> General Policy Note (n 3), p. 28.

<sup>1764</sup> For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

carers<sup>1765</sup> – benefit from a right of residence under Article 10 of Regulation 492/2011 on the free movement of workers<sup>1766</sup> without the need to demonstrate they meet the conditions of the Citizens Rights Directive as regards possession of sufficient resources and comprehensive sickness insurance.<sup>1767</sup> This not explicitly addressed in Belgian law.<sup>1768</sup>

## 4.2 Recommendations to the Immigration Office



Amend the guidance from the Immigration Office,<sup>1769</sup> so that EU citizens and their family members are **not removed from the population register, during the additional month** which they are allowed to submit the necessary documents and **during the entire time that an appeal may be pending**.

A refusal to register carries a right of appeal which has suspensive effect under Belgian law. During the 30-day period allowed for bringing an appeal against any decision refusing or terminating residence rights of EU citizens

<sup>1765</sup> C-413/99 *Baumbast and R*, EU:C:2002:493; Case C-310/08 *Ibrahim* EU:C:2010:80; C-480/08 *Teixeira* EU:C:2010:83; Joined Cases C-147/11 and C-148/11 *Czop and Punakova* EU:C:2012:538; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

<sup>1766</sup> Art. 10, Regulation 492/2011 provides as follows: “The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.” This provision as formerly contained in Article 12, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/ 2.

<sup>1767</sup> Case C-310/08 *Ibrahim* EU:C:2010:80; C-480/08 *Teixeira* EU:C:2010:83; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

<sup>1768</sup> Art. 40bis, Belgian Immigration Law.

<sup>1769</sup> This includes the Syllabus and the GemCom fiches as well as the Circular of 30 August 2013 repealing the circular of 20 July 2001 relating to the legal effect of Annex 35 to the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter “Circular of 30 August 2013 on Annexe 35” (*Circulaire du 30 août 2013 abrogeant la circulaire du 20 juillet 2001 relative à la portée juridique de l’annexe 35 de l’arrêté royal du 8 octobre 1981 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers. — Radiations des registres. — Inscription. / Omzendbrief van 30 augustus 2013 tot opheffing van de omzendbrief van 20 juli 2001 betreffende de juridische draagwijdte van bijlage 35 van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. — Afvoering van de registers. — Inschrijving, MB/BS 06-09-2013, 63240*).

and their family members and for as long as any appeal may be pending, no expulsion measure may be forcibly enforced.<sup>1770</sup> The Council of State explicitly held that during this time the person concerned cannot be considered to be unlawfully present in Belgium.<sup>1771</sup> As a result, the individual must remain on the population register during this time.

Amend the guidance from the Immigration Office, to request municipalities to **inform EU citizens about the impact of a change of status** (e.g. from jobseeker to worker) on their rights, and about the need for EU citizens to inform the municipality of such change. In particular, municipalities should inform EU citizens about the available options in case of a change of status after having received their application for a registration certificate (Annex 19), so that the applicant can make an informed decision.

Amend the guidance from the Immigration Office, to **allow a change of status beyond the first three months, without requiring a full new application** for registration.

The filing of a new application, starting a new deadline of six months, can have significant consequences for legal deadlines, social rights, as well as the possible registration of family members.<sup>1772</sup> If an applicant decides to change their status after having received their application for a registration certificate (Annex 19), the applicant should be clearly informed about the time which remains to collect and submit the required documentation and the consequences of submitting an incomplete file. The applicant should also be informed about the consequences of the alternative option of restarting the registration procedure. In that case, the applicant will have more time to collect and submit the required documents but a new (later) date of application will be recorded, which effectively postpones the starting date of the period of residence in Belgium.

<sup>1770</sup> Art. 39/79 §1, Belgian Immigration Law.

<sup>1771</sup> Ibid.

<sup>1772</sup> For a discussion of the consequences, see Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status* as regards the deletion from the national register following a refusal to recognise a right of residence on the basis that the EU citizen did not provide sufficient proof of their status within three months of submitting an application (Annex 20); Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

Amend the guidance from the Immigration Office as to **include a distinction between civil status documents** (e.g. a marriage certificate) **issued by the authorities of an EU country and those issued by the authorities of a non-EU country** as well as a clear indication that no legalisation or translation is required in respect of public documents issued in accordance with EU Regulation 2016/1191.<sup>1773</sup>

The guidance from the Immigration Office still requires civil status documents to be legalised and apostilled, without making a distinction between the documents issued by an EU country or a non-EU country. It makes no reference to Regulation 2016/1191 on public documents which has abolished the requirement for legalisation and translation of most civil status documents issued by an EU country.<sup>1774</sup> According to the European Commission's guidance, official public documents issued by an EU country should undergo legalisation or authentication only if there is a suspicion about the authenticity of the issuing authority.<sup>1775</sup>

Ensure that the implementation of the Royal Decree of 12 June 2020 **does not increase the administrative burden** placed on EU citizens and their family members by requiring additional in-person visits by the applicant.

Since the implementation of the Royal Decree of 12 June 2020,<sup>1776</sup> residence documentation is only issued to EU citizens and their family members in electronic format as EU cards and F cards respectively.<sup>1777</sup> A provisional Annex 8ter will be issued as a temporary residence document to EU citizens. It is not clear whether this will require two in-person visits to be made by every applicant in order

<sup>1773</sup> Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union [2016] OJ L 200/01.

<sup>1774</sup> Arts. 4 and 6, Regulation 2016/1191.

<sup>1775</sup> See Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.2. *Application phase*, Paragraph 5.2.5 *Initial documents required: legalisation and translation formalities*.

<sup>1776</sup> Royal Decree of 12 June 2020 modifying Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the "Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration" (*Arrêté royal du 12 juin 2020 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit van 12 juni 2020 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 29-06-2020, 47612).

<sup>1777</sup> See Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

to retrieve these documents. As mentioned, the Royal Decree should be amended to allow this document to be issued in electronic format by email (see recommendation under 4.1).

## 4.3 Recommendations to the municipalities



Invest in the digitalisation of the third step of the registration procedure, enabling the municipality to **issue a temporary registration certificate (Annex 8ter) in electronic format.**

Following the positive verification of their domicile, an EU citizen should then be issued with a temporary residence document (Annex 8ter) by email. The implementation of this recommendation is dependent on a legislative change which would make it possible to issue this document electronically (see recommendation under 4.1).

This would mean that the EU citizen would only need to appear in person in order to obtain an EU/F card for which a visit at the city hall will be required.<sup>1778</sup>

Invest in **equipment** which enables the municipality to **check the authenticity of identity documents held by EU citizens.**

All passports issued by the EU Member States have to comply with minimum security standards and biometrics laid down by EU law.<sup>1779</sup> In accordance with recently adopted EU legislation,<sup>1780</sup> all national identity cards issued by EU as well as EEA countries will need to be issued in

compliance with minimum security standards<sup>1781</sup> and should contain a machine-readable zone by 2031 at the latest.

In the longer term, municipal officials should therefore be issued with equipment which is capable of reading biometric information contained in passports and national identity documents to enable them to be physically checked at the time that EU citizens appear in person at the municipality to retrieve their EU card. This should be technically feasible given that municipalities currently have equipment which is capable of reading passports issued by the Belgian authorities.

Inform applicants that a change of status might impact their rights<sup>1782</sup> and refer them to a competent organisation for more information (e.g. Myria or another advisory body). Invest in an **online notification system** to notify such changes.

In line with the recommended revision to the Immigration Office's guidance (see recommendation under 4.2), in the event that an applicant decides to change their status after having received their application for a registration certificate (Annex 19), the applicant should be clearly informed about the consequences. An applicant should be given clear information on their option, namely either continuing with their current application which may imply a risk of their file being incomplete, or alternatively restarting the registration procedure which would re-set the three-month deadline for submitting their supporting documentation. This online notification system can be included within or merged into the proposed digitalisation of the process relating to the submission of an application for registration (see recommendation under 2.3).

<sup>1778</sup> Municipality C confirmed that they already implement such a registration practice, yet for EU (and non-EU) workers only.

<sup>1779</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L 385/1.

<sup>1780</sup> Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement.

<sup>1781</sup> These are the same requirements as regards material, printing techniques, protection against copying and counterfeiting which apply to residence permits issued under Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

<sup>1782</sup> See Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.2 *Specific issues: deletion from National Register and change of status*; Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.1. *Registration as a precondition for contribution-based social security benefits?*, Paragraph 4.1.1 *Workers*, Point 4.1.1.3 *Impact of refusal or withdrawal of residence rights on social security benefits* and Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

## 5. Specific provisions on documentary requirements

### 5.1 Recommendations to the Secretary of State for Asylum and Migration

Amend the Belgian legislation regarding **the documentary requirements application to the registration formalities for jobseekers**, to be in line with the interpretation of the CJEU on the registration of jobseekers<sup>1783</sup> and remove the obligation on jobseekers to have to prove the existence of “genuine chance of being engaged” when they first register.

The CJEU held that proof of “a genuine chance of being engaged” cannot be required from EU jobseekers when they first register, as they need to be given at least a reasonable period of time during which the national authorities can only require them to demonstrate that they are seeking employment.<sup>1784</sup> After such a reasonable period of time – which should be no less than six months – the Belgian authorities would retain the option of verifying whether the jobseeker concerned is able to demonstrate that they have a genuine chance of being engaged under the rules relating to verification of the right of residence.<sup>1785</sup>

1783 Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037.

1784 *Ibid.*, para 48.

1785 Art. 42bis, Belgian Immigration Law.

### 5.2 Recommendations to the Immigration Office

Clarify and specify on the new website obligations for EU citizens and their family members regarding the **legalisation and translation** of their documents, in line with Regulation 2016/1191 on public documents and international agreements such as the Hague Convention of 5 October 1961.

One possibility would be to link directly to the dedicated website of the FPS Foreign Affairs which provides country-specific guidance and is available in Dutch, French, German and English.<sup>1786</sup>

Provide **clear and detailed guidelines on documentary requirements** (on the website and in the guidance to the municipalities) for family members of EU citizens as well as atypical workers to further harmonise municipal registration practices across Belgium.

Both the interviews with municipalities and the survey outcomes have confirmed deviating practices when it comes to documentary requirements, especially with regard to applications for registration from family members of EU citizens as well as atypical workers (e.g. paid interns and part-time workers).<sup>1787</sup>

1786 The webpages dedicated to legalisation of public documents can be found on the website of the FPS Foreign affairs in Dutch. [https://diplomatie.belgium.be/nl/Diensten/legalisatie\\_van\\_documenten/zoekcriteria](https://diplomatie.belgium.be/nl/Diensten/legalisatie_van_documenten/zoekcriteria), in French [https://diplomatie.belgium.be/fr/Services/Legalisation\\_de\\_documents/Criteres\\_de\\_recherche](https://diplomatie.belgium.be/fr/Services/Legalisation_de_documents/Criteres_de_recherche), in German [https://diplomatie.belgium.be/de/dienste/beglaubigung\\_von\\_dokumenten/suchkriterien](https://diplomatie.belgium.be/de/dienste/beglaubigung_von_dokumenten/suchkriterien) and in English [https://diplomatie.belgium.be/en/services/legalisation\\_of\\_documents/search\\_criteria](https://diplomatie.belgium.be/en/services/legalisation_of_documents/search_criteria).

1787 See Chapter 2, section 3.3, 3.1.1.2, 3.1.1.4 and 5.3.5.

## 5.3 Recommendations to the FPS Foreign Affairs

Further improve the webpages on the legalisation of public documents, for instance regarding its reference to Regulation 2016/1191 on public documents

Regulation 2016/1191 removes the obligation for certain civil status documents issued by EU countries – including birth and marriage certificates – to undergo legalisation or to be accompanied by an official translation. The website of the SPF Foreign Affairs could be further improved by including explicit references to this Regulation.

## 5.4 Recommendations to the municipalities

**Align the registration process** of the EU citizens and their family members to the current legislation and case law, **as documentary requirements are concerned.**

Both the interviews with municipalities and survey outcomes have confirmed deviating practices when it comes to documentary requirements, especially with regard to applications for registration from family members of EU citizens as well as atypical workers (e.g. paid interns and part-time workers).<sup>1788</sup>

<sup>1788</sup> See Chapter 2, section 3.3, 3.1.1.2, 3.1.1.4 and 5.3.5.

# 6. Permanent residence

## 6.1 Recommendations to the Secretary of State for Asylum and Migration

Amend the Royal Decree on Immigration, which currently provides that a permanent residence document must be issued to EU citizens within five months,<sup>1789</sup> to bring it in line with EU law requiring that a **permanent residence document must be issued to EU citizens “as soon as possible”**.<sup>1790</sup> A two-month deadline would be more appropriate. To reduce processing times, **this competence should also be transferred to the municipalities.**

The Belgian Immigration Law already provides for the possibility to make this transfer to the municipalities, based on a legislative change from 2016,<sup>1791</sup> but until now the Royal Decree on Immigration<sup>1792</sup> has not been amended to make the necessary changes to the current procedure.

Amend the Royal Decree on Immigration to allow the **submission of an application for a permanent residence document to be made online** and the **issuance of certificates of application (Annex 22) in electronic format.**

<sup>1789</sup> Art. 55, fifth para., Royal Decree on Immigration.

<sup>1790</sup> Art. 19, Directive 2004/38.

<sup>1791</sup> Art. 42quinquies § 5, Belgian immigration Law, as amended by Law of 4 May 2016 (*Loi du 4 mai 2016 portant des dispositions diverses en matière d'asile et de migration et modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers / Wet van 4 mei 2016 houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen*, MB/BS 27-06-2016, 38643).

<sup>1792</sup> Art. 55, Royal Decree on Immigration.

This legislative change would enable the municipalities to digitalise the permanent residence procedure (see recommendation under 6.3).

Amend the Royal Decree on Immigration to allow the **issuance of a temporary permanent residence document** (Annex 8quater) **in electronic format**.

This legislative change would enable the municipalities to digitalise the permanent residence procedure (see recommendation under 6.3).

**Transpose the exemption to the general five-year requirement for acquiring permanent residence** for the benefit of persons who become frontier workers or self-employed persons in another Member State and who retain their place of residence in Belgium, provided they have accumulated three years of continuous employment and residence in Belgium.<sup>1793</sup>

The Belgian rules have not transposed this specific requirement which entitles workers and self-employed persons to acquire a permanent right of residence before five years under certain conditions and which previously featured in Regulation 1251/70 on workers<sup>1794</sup> and Directive 75/34 on self-employed persons.<sup>1795</sup>

Delete the Belgian rules<sup>1796</sup> providing that the **five-year period** is to be **calculated** from the date on which an EU citizen was registered on the register of pending applications,<sup>1797</sup> or from the date on which a certificate of application was issued to their non-EU family member.<sup>1798</sup>

The issuance of residence documents to EU citizens and their family members is not constitutive of rights.<sup>1799</sup> As a result, EU citizens and their family members should remain at liberty to prove that their period of residence began before the date on which they first submitted an application for registration of their residence.

Transpose Article 21 of the Citizens Rights Directive, which provides that **continuity of residence** may be attested by **any means of proof** in use in the host Member State. It also provides that continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

The two specific requirements contained in this provision of the Citizens Rights Directive have not been the subject of any transposition into Belgian law.

Amend the Royal Decree on Immigration, as to **authorise municipalities to take decisions** regarding applications for permanent residency **within a shorter period of time**, as in the vast majority of cases the recognition of this right is based on the verification of continuity of residence only.

The five-month period that is currently foreseen for the application procedure for permanent residency<sup>1800</sup> exceeds

<sup>1793</sup> Art. 17(1)(c), Directive 2004/38.

<sup>1794</sup> Art. 2(1)(c), Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24.

<sup>1795</sup> Art. 2(1)(c), Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.

<sup>1796</sup> Art. 55, second para., Royal Decree on Immigration, as regards EU citizens and art. 56, second para. Royal Decree on Immigration, as regards non-EU family members.

<sup>1797</sup> Art. 55, second para., Royal Decree on Immigration refers to the date on which the EU citizen in question was registered on the *registre d'attente/wachtregister*.

<sup>1798</sup> Art. 56, second para., Royal Decree on Immigration refers to the date on which the Annex 19ter was issued.

<sup>1799</sup> Article 25 of Directive 2004/38; see further Part V, Section 1 on the nature of residence formalities above.

<sup>1800</sup> Art. 55, Royal Decree on Immigration.

the prescribed deadline to process such an application “as soon as possible”.<sup>1801</sup>

## 6.2 Recommendations to the Immigration Office

Ensure that the implementation of the Royal Decree of 12 June 2020 **does not increase the administrative burden** placed on EU citizens and their family members by requiring additional in-person visits upon the applicant.

Since the implementation of the Royal Decree of 12 June 2020,<sup>1802</sup> residence documentation is only issued to EU citizens and their family members in electronic format as EU+ cards and F+ cards respectively.<sup>1803</sup> A provisional Annex 8quater will be issued as a temporary permanent residence document to EU citizens. It is not clear whether this will require two in-person visits to be made by every applicant in order to retrieve this document. Consideration should be given to issuing this document in electronic format by email.

<sup>1801</sup> Art. 19(2), Directive 2004/38.

<sup>1802</sup> Royal Decree of 12 June 2020 modifying Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the “Royal Decree of 12 June 2020 modifying the Royal Decree on Immigration” (*Arrêté royal du 12 juin 2020 modifiant l’arrêté royal du 8 octobre 1981 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers / Koninklijk besluit van 12 juni 2020 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*, MB/BS 29-06-2020, 47612).

<sup>1803</sup> See Chapter 1, Section 6. *Obtaining permanent residence in Belgium*, Subsection 6.4 *Decision-making*.

## 6.3 Recommendations to the municipalities

Invest in an **online application system** for the submission of applications for permanent residence, using a simple online form as no document requirements should be imposed, while also **maintaining the possibility of applying in person**. This would include enabling municipalities to issue **certificates of application** (Annex 22) and **temporary permanent residence documents** (Annex 8quater) in **electronic format**. Particular attention should be given to the accessibility and user-friendliness of such a system.

To reduce administrative burden on citizens, EU citizens and their family members should have the possibility of applying for permanent residence online as is the case in other Member States.<sup>1804</sup> The implementation of this recommendation is dependent on a legislative change which would make it possible for municipalities to issue both a certificate of application (Annex 22) and a temporary permanent residence document (Annex 8quater) electronically (see recommendation under 6.1).

Allow applicants to submit their application for permanent residence **two months before the expiration date** of their EU/F card to ensure that applicants will be able to obtain their EU+/F+ card before their previous EU/F card expires (precisely upon reaching 5 years of continuous residence).

This will also avoid non-EU family members having to obtain a temporary Annex 15, with which they are not allowed to travel outside of Belgium or create problems when seeking to re-enter Belgium.<sup>1805</sup>

<sup>1804</sup> See Chapter 4, Section 7. *Permanent residence*, Subsection 7.1 *Overview of procedure*.

<sup>1805</sup> See Chapter 1, Section 6. *Obtaining permanent residence in Belgium*, Subsection 6.2 *Overview of the procedure*.

# 7. Procedural safeguards and appeal rights

## 7.1 Recommendations to the Secretary of State for Asylum and Migration

Re-institute the administrative review at the level of the Immigration Office.

The former right to request an administrative review of decisions taken against EU citizens and their family members<sup>1806</sup> was repealed and replaced by a judicial review system under the Council for Alien Law Litigation (CALL). However, the re-institution of a process of administrative review would go some way to relieving the pressures placed on the CALL and help to reduce the backlog of cases.

## 7.2 Recommendations to the Immigration Office

Provide an effective **first-line complaints handling system** for applicants.

In contrast with other federal administrations, the Immigration Office does not always provide an effective first-line complaints handling system.

<sup>1806</sup> Arts. 64-66 (repealed), Belgian Immigration Law.

Provide signposts on the website of the Immigration Office **to the websites of the legal aid services of the bar associations** to further inform applicants about their right to obtain legal assistance.

The Immigration Office website should provide a link to the legal aid pages of the bar associations.<sup>1807</sup> This is the practice in the Netherlands for example.<sup>1808</sup>

## 7.3 Recommendations to the municipalities

Develop a **protocol** to ensure that procedural safeguards are aligned across municipalities in Belgium.

Such a protocol can for example prescribe the maximum waiting time for a first appointment (two weeks), the deadline for verification of domicile (15 working days) as well as allowing the submission of applications for permanent residence to be accepted two months before the expiration date of the EU/F card.

Provide signposts on the municipal website **to websites of local bar association's legal aid services** in order to further inform applicants about their right to appeal.

The websites of the municipalities should provide a link to the legal aid pages of the local bar associations.<sup>1809</sup>

<sup>1807</sup> The links are to the legal aid pages of the French-speaking and German-speaking bar associations <https://avocats.be/fr/bureaux-daide-juridique-baj> and the Dutch-speaking bar association <https://advocaat.be/een-advocaat-raadplegen/wat-kost-een-advocaat/pro-deo>.

<sup>1808</sup> See Chapter 4, Section 3. *Preparatory phase*.

<sup>1809</sup> The links of local bar associations can be found on the legal aid pages of the French-speaking and German-speaking bar associations <https://avocats.be/fr/bureaux-daide-juridique-baj> and the Dutch-speaking bar association <https://advocaat.be/een-advocaat-raadplegen/wat-kost-een-advocaat/pro-deo>, as well as the dedicated website for obtaining legal aid in Brussels <http://www.aidejuridiquebruxelles.be>.

## 8. General functioning of key actors in the registration procedure

### 8.1 Recommendations to the Secretary of State for Asylum and Migration

Provide **additional human resources to the Immigration Office**, to increase the capacity of the Office to handle residence registration requests from EU citizens and their family members adequately and promptly.

The Immigration Office has indicated that it does not have sufficient resources to ensure all applications for registration by EU citizens and their family members can be decided within the legal deadlines.

### 8.2 Recommendations to the Immigration Office

Ensure that the different types of **guidance** from the Immigration Office to the municipalities (Syllabus, GemCom fiches) are **simultaneously updated**.

At present, the Syllabus is only updated twice a year, whereas the GemCom fiches may be updated more regularly. This may lead to divergent practices at municipal level.

Make the **guidance from the Immigration Office** to the municipalities (Syllabus, GemCom fiches) **publicly available**, as a matter of transparency and good governance.

In the interests of transparency, the guidance issued by Immigration Office to the municipalities by the should be made publicly available. This would also encourage legal consistency in how the rules are applied across the country. A good practice in this regard is can be found on the website of the General Directorate of Institutions and Population (ADIB/DGIP), which contains all regulations and instructions relating to the operation of the national register among other matters.

**Digitalise the communication** (in a GDPR-compliant manner) between the municipalities and the Immigration Office as much as possible, taking into account the progress that has been made on these aspects due to the COVID-19 crisis.<sup>1810</sup>

To that end, a national online portal could be established that can be used for communication between municipalities and the Immigration Office, as well as among municipalities. This would improve information exchange and avoid the development of comparable but incompatible online platforms at the municipal level.<sup>1811</sup> This recommendation is in line with the federal government's intention to examine how workflow processes can be enhanced by the use of digitalisation.<sup>1812</sup>

In the alternative, providers of software packages should be obliged to adhere to compulsory minimum nationwide technical specifications in order to allow for full communication between platforms and accurate workflow charts.

**Consult municipalities** about the implications of law and policy changes at the municipal level.

<sup>1810</sup> For further discussion, see Chapter 2, Section 3. *Application phase*, Subsection 3.1 *Appointment system and issuance of Annex 19* and Box 8.

<sup>1811</sup> For further discussion, see Chapter 2, Section 8 *General functioning of key actors in the registration procedure*, Subsection 8.3 *Online infrastructure*, Paragraph 8.3.1 *At the municipal level*.

<sup>1812</sup> General Policy Note (n 3), p. 13.

Various respondents indicated that changes in law or policy are often imposed on short notice without considering the implications of such changes on the ground, resulting in implementation problems in practice.<sup>1813</sup>

The Civil Affairs and Foreigners Working Group of the Association of Flemish Cities and Municipalities (VVSG) provides an interesting platform to enhance consultation with the municipalities, yet is limited to Flanders and does not include all municipalities. In Flanders, the Working Group could increase its efforts to include the concerns of more municipalities and report back to them; in Wallonia and Brussels, the establishment of a similar platform could be considered.

Organise more **trainings for municipal caseworkers** to further align practices regarding the registration of family members of EU citizens.<sup>1814</sup>

Several municipalities have indicated that the challenges which they face were partly due to a lack of technical skills or a lack of legal knowledge.<sup>1815</sup>

### 8.3 Recommendations to the municipalities

Ensure the capacity of staff to deal with the complex nature and fast paced development of migration law and policies by requiring a **grade B rank** (administrative secretary) for municipal caseworkers working on the registration of EU citizens and their family members.<sup>1816</sup>

Due to the fast-paced developments in legislation and administrative guidelines on the registration of EU citizens, the educational prerequisites for staff handling the registration of EU citizens and their family members

<sup>1813</sup> See Chapter 2, Section 8 *General functioning of key actors in the registration procedure*, Subsection 8.7 Participation in policy development.

<sup>1814</sup> This would be training focusing on Arts. 40bis and 47/1, Belgian Immigration Law and Arts. 52 and 58, Royal Decree on Immigration.

<sup>1815</sup> For further discussion, see Chapter 2, Section 8 *General functioning of key actors in the registration procedure*, Subsection 8.5 *Training of municipal officials*.

<sup>1816</sup> See Chapter 2, Section 8.2 *Human resources*, Subsection 8.2.1 *At the municipal level*.

should be set to grade B which requires possession of a higher education degree.<sup>1817</sup>

## 9. Impact of residence formalities on access to employment, conditions of employment, social security and fiscal benefits

### 9.1 Recommendations to the Minister for the Middle classes, the self-employed, SME's, Agriculture, Institutional Reforms and Democratic renewal

<sup>1817</sup> This corresponds to the grade of administrative secretary (*secrétaire administratif/ administratief secretaris*).

**Amend the Belgian rules on access to self-employment**<sup>1818</sup> in order to ensure that other family members covered by Article 47/1 of the Belgian immigration law and who are in possession of a residence card (F card) or permanent residence card (F+ card) are included among the categories of foreigners who are exempted from the need to hold a professional card in Belgium.

At present, in order to be able to exercise self-employed activities in Belgium, other non-EU family members must first obtain a professional card even after they have had their residence facilitated and been issued with a residence card.<sup>1819</sup> This does not appear in keeping with the right of work which all family members are granted under the Citizens Rights Directive.<sup>1820</sup>

## 9.2 Recommendations to the Minister for Pensions and Social integration (responsible for Disabled persons, the Fight against poverty and Beliris) and the FPS for Social Integration



1818 Art. 1, 1°, Royal Decree of 3 February 2003 exempting certain categories of foreigners from the obligation to hold a professional card for the exercise of a self-employed professional activity (*Arrêté royal du 3 février 2003 dispensant certaines catégories d'étrangers de l'obligation d'être titulaires d'une carte professionnelle pour l'exercice d'une activité professionnelle indépendante / Koninklijk besluit van 3 februari 2003 tot vrijstelling van bepaalde categorieën van vreemdelingen van de verplichting houder te zijn van een beroepskaart voor de uitoefening van een zelfstandige beroepsactiviteit*, MB/BS 04-03-2003, 10517).

1819 The four categories of "other family members" listed in Art. 47/1, Belgian Immigration Law are not included among the family members who are covered by the exemption from the obligation to hold a professional card under Art. 1, 1°, Royal Decree of 3 February 2003.

1820 Art. 23, Directive 2004/38. See to that effect Case C-423/12 *Reyes* EU:C:2014:16.

**Amend Belgian law on the right to social integration**,<sup>1821</sup> as well as the **Ministerial Circular of 5 August 2014**,<sup>1822</sup> in order to ensure compliance with the Citizens Rights Directive and Regulation 492/2011 on the free movement of workers and ensure full alignment with the judgment of the Belgian Constitutional Court.<sup>1823</sup>

Both the law on the right to social integration as well as the Ministerial Circular continue to place restrictions to the ability of EU workers and family members to claim social integration income within the first three months of residence contrary to EU law<sup>1824</sup> and the ruling of the Belgian Constitutional Court.<sup>1825</sup>

**Amend Belgian law on residual social assistance**<sup>1826</sup> as to ensure full compliance with the Citizens Rights Directive.<sup>1827</sup>

Although the Ministerial Circular of 5 August 2014<sup>1828</sup> confirms that the exclusion of the right to claim residual social assistance within the first three months of residence in Belgium only applies to persons other than EU workers, self-employed persons and their family members,

1821 Art. 3, 3°, Law of 26 May 2002 on the right to social integration (*Loi du 26 mai 2002 concernant le droit à l'intégration sociale / Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie*, MB/BS 31-07-2002, 33610); as regards disability allowance, Article 4, Law of 27 February 1987 relating to allowances for disabled persons (*Loi du 27 février 1987 relative aux allocations aux personnes handicapées / Wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap*, MB/BS 01-04-1987, page 4832).

1822 Circular of 5 August 2014 on the interpretation of Article 3, 3° 2<sup>nd</sup> indent of the Act of 6 May 2002 on the right to social integration and Article 57quinquies of the Law of July 8 1976 on public social action services, hereafter "Circular of 5 August 2014" (*Circulaire du 5 août 2014 relative à l'interprétation de l'article 3, 3°, 2° tiret, de la loi du 26 mai 2002 concernant le droit à l'intégration sociale et de l'article 57quinquies de la loi du 8 juillet 1976 organique des centres publics d'action sociale / Omzendbrief van 5 augustus 2014 betreffende de interpretatie van artikel 3, 3°, 2de streepje van de wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie en artikel 57quinquies van de organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn*, MB/BS 08-08-2014, 58165).

1823 Constitutional Court, judgment No 95/2014 of 30 June 2014.

1824 Art. 24(2), Directive 2004/38 and Art. (2), Regulation 492/2011.

1825 For further discussion, see Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.2 *Registration as a precondition for social assistance?*, Paragraph 4.2.1 *Workers*, 4.2.1.1 *Impact of residence formalities on social integration allowance*.

1826 Art. 57quinquies, Law of 8 July 1978 on public social assistance centres (*Loi organique de 8 juillet 1978 des centres publics d'action sociale / Organieke Wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn*, MB/BS 05-8-1976, 9876).

1827 Art. 24(2), Directive 2004/38.

1828 Circular of 5 August 2014 (n 79).

the legislation has yet to be amended to reflect this administrative instruction.<sup>1829</sup>

Provide **clear guidelines and training** towards the municipalities and public social assistance centres with regard to the **impact of the residence status on the right to social assistance and social integration**.

Municipalities and public social assistance centres are not always fully aware of the impact the residence status has on the right to claim social assistance and social integration.<sup>1830</sup> A clear need for information exchange and clarity on this interaction is therefore required. While representation of the social assistance centres at the working group “*Burgerzaken en Vreemdelingen*” of the Association of Flemish Cities and Municipalities has been considered useful, it is still acknowledged that the municipalities are not sufficiently informed with regard to the impact the residence status may have on the right to social assistance and social integration. It is therefore recommended to the FPS for Social Integration,<sup>1831</sup> under the direction of the Minister and in collaboration with the Immigration Office, to issue clear guidelines and provide training on this topic to the municipalities and public social assistance centre.

## 9.3 Recommendations to the Immigration Office



Include clear **information and related online links** on the Immigration Office’s website concerning the **exact rights and obligations** of EU citizens and their family members **during**

**and after the registration process** with regard to employment, social security and fiscal aspects.

In this regard, reference can be made to the “Your Europe” portal, which is a good example of how such information can be provided to citizens on their social entitlements.<sup>1832</sup>

**Amend** the guidance from the Immigration Office,<sup>1833</sup> so that EU citizens and their family members are **not removed from the population register when a decision to refuse or terminate their right of residence (Annex 20 or 21) during the entire time that an appeal may be pending**, in order to ensure compliance with the judgment of the Council of State,<sup>1834</sup> and ensure that **social security benefits and social assistance only ceases when such a decision becomes final** and has included a proportionality assessment in line with the Citizens Rights Directive.<sup>1835</sup>

Contrary to the Council of State’s judgment<sup>1836</sup> – which confirms that foreign nationals are lawfully resident as long as any decision refusing or terminating their right of residence has not become final, namely until the expiry of the appeal period or a final judgment has been made on an appeal – the Syllabus<sup>1837</sup> and the Circular on Annex 35<sup>1838</sup> indicate that municipalities should remove applicants from the national register as soon as a decision has been taken to refuse or terminate their right of residence.<sup>1839</sup> The Immigration office’s guidance should therefore be modified as to ensure full compliance with the judgment of the Council of State.

1829 For further discussion, see Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, 4.3.1.1 *Impact of residence formalities on residual social assistance in general*.

1830 For further discussion, see Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.2 *Registration as a precondition for social assistance?* and Subsection 4.3 *Registration as a precondition for residual social assistance?*.

1831 This refers to *Service public fédéral de programmation Intégration Sociale / Programmatorische federale overheidsdienst Maatschappelijke Integratie*.

1832 See the pages on unemployment and benefits contained on the “Your Europe” portal [https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/index\\_en.htm](https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/index_en.htm).

1833 This includes the Syllabus and the GemCom fiches as well as the Circular of 30 August 2013 on Annexe 35 (n 26).

1834 Council of State, judgment No 238.170 of 11 May 2017.

1835 Arts. 15 and 27(2), Directive 2004/38.

1836 Council of State, judgment No 238.170 of 11 May 2017.

1837 Immigration Office, Syllabus (29 October 2020), pp. 145-146 (NL) / pp.164-165 (FR).

1838 Circular of 30 August 2013 on Annexe 35 (n 26).

1839 For a discussion, see Chapter 1, Section 7. *Procedural safeguards and appeal right*, Subsection 7.2 *Appeal right*, Paragraph 7.2.3 *Suspensive effect of appeal* and Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.1. *Registration as a precondition for contribution-based social security benefits?*, Paragraph 4.1.1 *Workers*, Point 4.1.1.3 *Impact of refusal or withdrawal of residence rights on social security benefits* and Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

Ensure that the public social assistance centres are made aware of any **change of status** by the Immigration Office.<sup>1840</sup>

When an EU citizen initially registers under one category – for example, as a jobseeker – but then their status changes after they have registered and their right of residence has been recognised – for example, they change to the status of a worker after securing employment. While there is no explicit obligation on EU citizens to inform the Immigration Office about such a change of status, where an EU citizen does not communicate such a change in their situation, this may have an impact on their right to claim social assistance.

## 9.4 Recommendations to the municipalities

No specific recommendations.

# 10. Recommendations to Myria

## 10.1 Monitoring

Provide regular **input and feedback** to the Immigration Office to ensure that legislative and policy changes are correctly reflected on the Immigration Office's website.

<sup>1840</sup> For a discussion, see Chapter 3, Section 4. *Impact of registration formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

These could be made as part as Myria's powers to issue recommendations to Belgian authorities.<sup>1841</sup>

**Monitor the progress** made by the Belgian authorities in implementing the above recommendations.

This monitoring would fall within the scope of Myria's powers to undertake all studies and research which is necessary to perform its tasks<sup>1842</sup> and issue an annual report on its activities.<sup>1843</sup>

## 10.2 Areas for further research

Consider a separate study on the **use of languages** by municipalities in their interactions with EU citizens and their family members in particular, and migrants in general.

Consider a separate study on the **visa requirements** imposed on non-EU family members of EU citizens.<sup>1844</sup>

Since 2016, non-EU family members can no longer apply for a long-term visa D with the relevant diplomatic post in order to initiate the family reunification process in Belgium. They are only eligible for a short-stay category C visa. This practice has important disadvantages due to the six months which the Immigration Office takes for issuing a residence card (which restricts the ability of the family member to travel while their application is pending) and also increases administrative burden for some non-EU

<sup>1841</sup> Art. 3, 3°, Law of 15 February 1993 establishing a federal centre for analysing migration, protecting of fundamental rights of foreigners and combating trafficking in human beings (*Loi du 15 février 1993 créant un Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains / Wet van 15 februari 1993 tot oprichting van een federaal Centrum voor de analyse van de migratiestromen, de bescherming van de grondrechten van de vreemdelingen en de strijd tegen de mensenhandel.*, MB/BS 19-02-1993, 3764).

<sup>1842</sup> Art. 3, 1°, Law of 15 February 1993 (n 98).

<sup>1843</sup> Art. 6, Law of 15 February 1993 (n 98).

<sup>1844</sup> Art. 41 §4 and Art. 47/2, Belgian Immigration Law.

family member members who need to prove their status as family members twice (once when applying for a visa and a second time when applying for a residence card). They are moreover treated less favourable than non-EU family members of third country nationals who are able to obtain a family reunification visa (long stay category D visa) within approximately 15 days if filed simultaneously with the sponsor and who are by consequence entitled to a shorter application process for family reunification and smoother residence permit processing (with all the benefits associated therewith).

Consider a separate study on the registration of posted workers.

The latest version of the Syllabus<sup>1845</sup> considers that posted workers should be registered as self-sufficient persons rather than as workers. As a result of this policy change, this category of EU citizens will now fall within the decision-making competence of the Immigration Office instead of the municipalities. It also affects the documents that posted workers will be asked to provide. It is questionable whether this new policy is compatible with EU law, given that there is no reason posted workers could not be considered as “workers” for the purposes of the Citizens Rights Directive.

Consider a separate study on the process involved in the **verification of domicile**, to assess the potential for a more efficient and standardised procedure as well as to evaluate its compliance with Belgian legislation.

This study merely examined the impact of the verification of domicile on the registration process. However, the process which is followed by the municipal police for verifying domicile as such was not analysed in this study.

Consider a study on the **right to an effective remedy** in case of a decision to refuse or terminate residence rights by analysing the judicial review procedure of the Council for Alien Law Litigation (CALL).

There remain serious doubts as to whether the judicial review proceedings before the CALL provide for an

effective judicial remedy for EU citizens and their family members,<sup>1846</sup> as recently suggested by the Advocate General in the *G.M.A.* case.<sup>1847</sup>

Consider a **study on the experiences and perceptions** of EU citizens and their family members themselves, with regard to the registration formalities in Belgium.

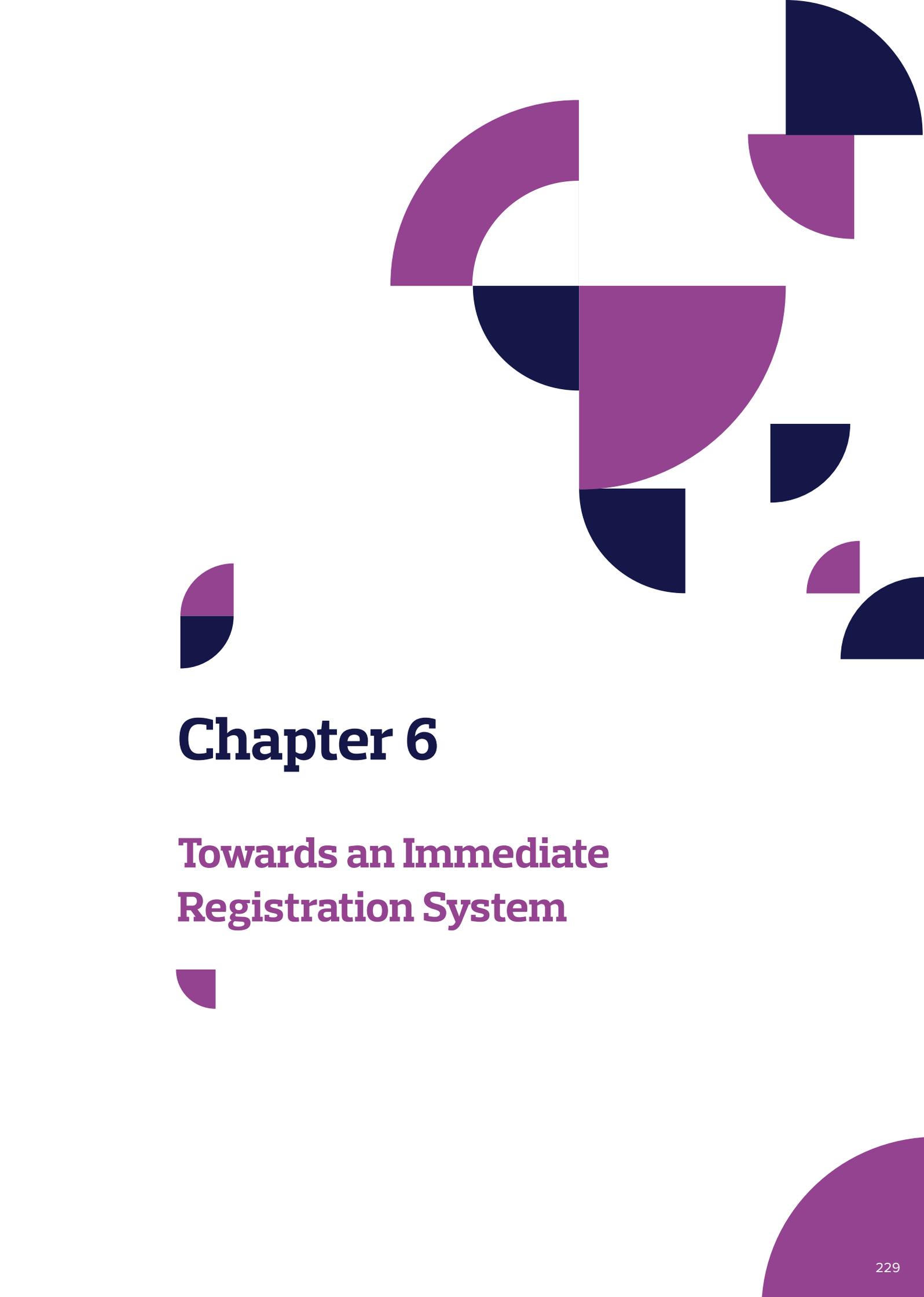
This study was limited to the analysis of municipal practices regarding registration formalities from the perspective of the municipalities themselves and other relevant institutional stakeholders.

<sup>1845</sup> Immigration Office, Syllabus (June 2021), pp. 168, 170 (FR) / pp. 151, 153 (NL).

<sup>1846</sup> For further discussion, see Chapter 1, Section 7.2 *Appeal rights*, Subsection, Paragraph 7.2.1 *Nature of judicial review*.

<sup>1847</sup> Opinion of Advocate General Szpunar in Case C-710/19 *G.M.A.* EU:C:2020:739.





# Chapter 6

## Towards an Immediate Registration System



# Chapter 6

## Towards an Immediate Registration System



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# 1. Introduction

This chapter aims to explore what reforms could be undertaken to the Belgian rules relating to the registration of EU citizens and their family members drawing upon the findings and recommendations contained in the previous chapters. The aim is to explore options for reform which can aid the federal government's commission in its task to overhaul the Belgian legal framework governing migration and the replace it with a code on migration.

The chapter begins by identifying the rationale for reform of the legal framework that underpins the registration system applicable to EU citizens and their family members. After examining some of the possible reform options, a recommendation will be formulated as to how the registration system could be amended. The detailed operation and implications of the proposed reformed registration system will then be discussed in further detail by reference to the various phases of the reformed registration process.

## 1.1 The opportunity for reform

In November 2020, the federal government issued a General Policy Note<sup>1848</sup> in which it proposed to reform the legal framework governing migration in Belgium.<sup>1849</sup> The establishment of a Commission tasked with examining the feasibility of instituting a Code on migration<sup>1850</sup> therefore provides an opportunity to examine what substantive reforms could be made to the rules relating to the registration of EU citizens and their family members.

Even if the proposed Code on migration does not lead to a major overhaul of the Belgian legal framework governing migration, the recent rulings of the Court of Justice in *Diallo*<sup>1851</sup> and *G.M.A.*<sup>1852</sup> provide a further window of opportunity that could allow for reforms to be instituted to the legal framework which underpins the rules relating to the registration of EU citizens and their

family members, given the obligation incumbent on the Belgian government to comply with these judgments.

In its *Diallo* ruling, the Court of Justice held that EU law precludes Belgian law from providing for the automatic granting of a residence card to non-EU family members in circumstances where the competent authorities have failed to respect the six-month deadline contained in Article 10 of Directive 2004/38, without having made an administrative finding that the family member meets the conditions for residing in the host Member State.<sup>1853</sup>

However, the Court of Justice also left open the possibility for Belgian law to provide that failure to take a decision within six months will be deemed to be a refusal of the application by ruling that “*there is nothing to prevent national legislation from providing that silence on the part of the competent administration for a period of six months from the lodging of the application constitutes a refusal*”.<sup>1854</sup> Nonetheless, any deemed refusal would still need to comply with procedural safeguards including the obligation to provide reasons for the refusal.<sup>1855</sup> In any event, the Belgian authorities will remain under a legal obligation to issue a residence card to non-EU family members within six months of an application having been submitted.

The Belgian federal government will need to bring the law into compliance with the *Diallo* ruling. In its judgment, the Court of Justice explicitly ruled that an application cannot be deemed accepted as a legal consequence of the failure to take a decision within six months. It follows that the current rule,<sup>1856</sup> which provides for the automatic issuance of a residence card to non-EU family members whose application has not been decided within six months, will have to be repealed.<sup>1857</sup> The federal government has indicated<sup>1858</sup> that it intends to repeal the rule<sup>1859</sup> in order to reconcile Belgian law with the judgment in *Diallo*.

At the same time, the government has also pledged to examine the possibility of shortening processing times in respect of applications for family reunification.<sup>1860</sup> However, it is not clear at this stage what further amendments will be made to the Belgian legal framework to ensure that there is an effective consequence that attaches to any

1848 House of Representatives, General Policy Note, Migration and Asylum and the National Lottery (4 November 2020), (*Chambre des Représentants de Belgique*, “*Note de Politique Générale, Asile et Migration et Loterie Nationale /Kamer van Volksvertegenwoordigers, Algemene Beleidsnota, Asiel en Migratie en Nationale Loterij, Doc 55 1580/014, 04-11-2020*).

1849 General Policy note (n 1), p. 11.

1850 *Ibid.*

1851 Case C-246/17 *Diallo* EU:C:2018:499.

1852 Case C-710/19 *G.M.A.* EU:C:2020:1037.

1853 *Ibid.*, paragraphs 54 to 56 of the judgment.

1854 *Ibid.*, paragraph 51 of the judgment.

1855 For a discussion of procedural safeguards which apply, see Chapter 1, Section 7. *Procedural safeguards and appeal rights*.

1856 Art. 52 §4, Royal Decree on Immigration.

1857 For further discussion, see Chapter 1, Section 5 *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*.

1858 General Policy Note (n 1), p. 28.

1859 Art. 52 §4, Royal Decree on Immigration.

1860 General Policy Note (n 1), p. 29.

failure to take a decision within the six-month deadline to issue residence documentation.

The same consequence necessarily flows from the *Diallo* judgment in respect of the similar rule that applies to the registration of EU citizens,<sup>1861</sup> which provides for the automatic issuance of a registration certificate to an EU citizen whose application has not been decided within six months. In *Diallo* the Court explicitly relied on its previous case law relating to the declaratory nature of residence documentation issued to EU citizens<sup>1862</sup> as one of the justifications advanced for deciding that EU law precludes the Belgian rules which provide for the automatic grant of a residence card if the six-month deadline is not met. It can also therefore be expected that, despite this not being explicitly mentioned in its Policy Note, the federal government will also repeal this rule as it relates to EU citizens who are not family members.<sup>1863</sup>

Since the judgment was handed down in *Diallo*, the Court of Justice has also considered the Belgian rules relating to the registration of EU jobseekers in the *G.M.A.* ruling.<sup>1864</sup> The Court held that proof of “a genuine chance of being engaged” cannot be required from EU jobseekers when they first register, given that at the time when they lodge their application for registration as a jobseeker, EU citizens have to be given at least a reasonable period of time during which the national authorities can only require them to demonstrate that they are seeking employment.<sup>1865</sup> The Court also explicitly ruled that EU law<sup>1866</sup> precludes national legislation which imposes a condition on jobseekers to demonstrate that they have “a genuine chance of being engaged” when they first apply to register.<sup>1867</sup> The relevant provision of the Royal Decree on Immigration<sup>1868</sup> has yet to be amended to comply with the judgment.<sup>1869</sup>

In view of the federal government’s intention to reform the Belgian legal framework governing migration and given that legislative amendments will need to be made to the Belgian rules that transpose Directive 2004/38 to bring them into compliance with the judgments in *Diallo* and *G.M.A.*, an opportunity has now arisen to engage in

reforming the rules on the registration of EU citizens and their family members.

## 1.2 The need for reform



There is certainly scope for the current registration system to be simplified, with a view to reducing the administrative burden which the system currently places on both the Immigration Office and municipalities.

The survey has revealed that 63% of surveyed municipalities report facing challenges when it comes to processing applications for registration,<sup>1870</sup> although municipalities have different perceptions as to whether they have the sufficient human resources to be able to handle applications for registration submitted by EU citizens and their family members.<sup>1871</sup> The twenty municipalities which did identify the existence of challenges mostly reported a lack of human resources as well as a lack of legal knowledge as being responsible for most of the challenges at the municipal level.<sup>1872</sup>

For its part, the Immigration Office has also indicated that it does not currently have the capacity to process all applications for registration of EU citizens and their family members.<sup>1873</sup> As a result, this means that the majority of applications which fall within the exclusive mandate of the Immigration Office<sup>1874</sup> tend not to be decided within the legal deadline of six months and will be deemed accepted without being assessed on their merits.<sup>1875</sup>

1861 Art. 51 §2, Royal Decree on Immigration.

1862 *Diallo* (n 4), paragraph 49 of the judgment.

1863 General Policy Note (n 1), p. 28 only mentions the abolition of the rule providing for the automatic issuance to a residence card to family members. It is therefore not explicitly stated that the similar rule contained in Art. 51 §2, Royal Decree on Immigration will also be repealed.

1864 Case C-710/19 *G.M.A.* EU:C:2020:1037.

1865 *Ibid.*, para. 48.

1866 Article 45 TFEU and Article 14(4)(b), Directive 2004/38.

1867 *Ibid.*, para. 50.

1868 Art. 50 §2, 3°, Royal Decree on Immigration.

1869 For further discussion, see Chapter 1, Section 3. *Personal scope*, Subsection 3.5 *Jobseekers*; Section 5. *The registration process in Belgium*, Subsection 5.5.5.5 *Documentary requirements*, Paragraph 5.5.2 *Specific provisions on documentary requirements: jobseekers*.

1870 For further discussion see Chapter 2, Section 8. *General functioning of key actors in the registration procedure*, Subsection 8.1 *Overview of challenges encountered at the municipal level*.

1871 For further discussion see Chapter 2, Section 8. *General functioning of key actors in the registration procedure*, Subsection *Human resources*, Sub-section 8.2.1 *At the municipal level*.

1872 For further discussion see Chapter 2, Section 8. *General functioning of key actors in the registration procedure*, Subsection 8.1 *Overview of challenges encountered at the municipal level*.

1873 For further discussion see Chapter 2, Section 8. *General functioning of key actors in the registration procedure*, Subsection 8.2 *Human resources*, Sub-section 8.2.2 *At the Federal level*.

1874 For further discussion see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.2 *Decision-making*.

1875 For further discussion see Chapter 2, Section 5.2 *Decision-making on applications for registration of residence*, Sub-section Section 5.2.1 *Competence division and duration of residence procedure*. Similar findings have been highlighted by the Belgian Court of Audit (*Cour des Comptes / Rekenhof*) which published a report on the processing of registration requests from family members by the Belgian Immigration Office in January 2020 (*Office des étrangers : traitement des demandes de regroupement familial / Dienst Vreemdelingenzaken: Behandeling van aanvragen voor gezinshereniging*).

## 2. Options for reform

Several options for making changes to the rules relating to registration present themselves.

One option which has not been examined further is the institution of a system of automatic registration. During the interviews, some municipalities suggested instituting a system where EU citizens are automatically registered but subject to an *ex post facto* assessment.<sup>1876</sup> However, the establishment of such a system is unlikely to ensure compliance with the ruling of the Court of Justice in *Diallo*<sup>1877</sup> which found that EU law precludes national rules that provide for the automatic grant of a residence card to a non-EU family member when no decision has been made within the legal deadline of six months when this person does not necessarily meet the requirements for its issuance.<sup>1878</sup> This necessarily suggests that, irrespective of the nature of the registration system which is in place, it must provide for an individual assessment of the applicant's circumstances which ensures that a residence document is only issued to EU citizens and their family members where they meet the requirements of the Citizens Rights Directive. As a result, the institution of a system of automatic registration would mean all EU citizens and family members who apply for registration would be issued with residence documentation without necessarily checking the conditions laid down in the Citizens Rights Directive. This would not ensure compliance with the *Diallo* ruling.

Nonetheless, it should be pointed out that the Citizens Rights Directive does allow Member States to adopt more favourable national provisions.<sup>1879</sup> The CJEU has explained that this provision means that Member States

<sup>1876</sup> Ibid.

<sup>1877</sup> CJEU, Case C-246/17 *Diallo* EU:C:2018:499

<sup>1878</sup> For further discussion see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.4 *Registration phase*, Paragraph 5.4.3 *Deadlines for the issuance of residence documents*. However, for the sake of completeness, the opposite view seems to have been expressed by Advocate General Cruz Villalón in his Opinion delivered on 6 October 2015 in Case C-308/14 *Commission v UK* EU:C:2015:666 regarding the application of a “right to reside” test in respect of claims for family benefits, in which he states at para. 94 that “*In fact, European citizenship and, in particular, the affirmation of the principle that a Union citizen is entitled to establish his place of residence in any Member State on the conditions laid down by EU law, precludes national legislation from adopting any approach that might be tantamount to presuming that, after the first three months of residence and before he has acquired a permanent right of residence, such citizen is unlawfully present in that territory, so that it would systematically be for the person in question to prove that this is not the case. As a matter of principle, the opposite presumption should, in fact, be made.*”

<sup>1879</sup> Art. 37, Directive 2004/38 which provides that “*The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.*”

are not precluded from introducing a system that is more favourable than the one established by the Directive.<sup>1880</sup> The CJEU added that it is up to each Member State not only to decide whether it will adopt such a system but also to determine the conditions and effects of that system, in particular as regards the legal consequences of a right of residence granted on the basis of national law alone. This does indeed suggest that a more favourable system than that foreseen by the Citizens Rights Directive could be introduced in national law. However, any right of residence granted under such a purely national system would not constitute transposition of the Citizens Rights Directive,<sup>1881</sup> which would raise problems relating to equality of treatment<sup>1882</sup> as well as procedural safeguards and appeal rights among other issues.

The other options considered below do not involve recourse to more favourable national provisions.

### 2.1 Option 1: Maintain the current legal framework while ensuring compliance with *Diallo* and *G.M.A*

The first option which presents itself is for the legal framework to remain untouched and maintain the *status quo*.

This would involve the Belgian authorities complying with its obligation under EU law<sup>1883</sup> to amend its legislation so that it is brought into conformity with the *Diallo* and *G.M.A.* judgments. This would likely take the form of repealing the relevant rules<sup>1884</sup> so that a failure to take a decision on an application within the six-month deadline would no longer lead to the automatic issuance of a residence card and the requirement for jobseekers to furnish evidence of a “genuine chance of being engaged” when they first register would be removed.

<sup>1880</sup> Joined Cases C 424/10 and C 425/10 *Ziolkowski and Szeja* EU:C:2011:866.

<sup>1881</sup> Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602.

<sup>1882</sup> Ibid.

<sup>1883</sup> Article 91 of the Rules of Procedure of the Court of Justice [2012] OJ L 265/01.

<sup>1884</sup> Arts. 51 §2 and 52 §4, Royal Decree as regards consequences of failing to issue a residence card; Art. 50 §2, 3°, Royal Decree on Immigration as regards the obligation on jobseekers to provide evidence of a “genuine chance of being engaged” at the time of their first registration.

However, there are several reasons as to why maintaining the *status quo* would not be a feasible or desirable option in the long-term.

First, as noted above, the Immigration Office has indicated that it presently lacks sufficient resources to handle all applications, which means that in practice a majority of applications made by family members that fall within its exclusive mandate are presently deemed accepted without being assessed on their merits. This system of deemed acceptance was explicitly ruled out by the Court of Justice as being contrary to EU law.

Second, as previously mentioned, the Immigration Office shifted its enforcement priorities to focus on post-registration verification with a view to taking action to terminate the residence rights of EU citizens and their family members.<sup>1885</sup>

In the event that the Belgian rules are amended so that a failure to decide an application within six months is deemed to constitute a refusal, this will simply create the potential for unnecessary litigation, which will clog up the docket of the Council for Alien Law Litigation (CALL), which still faces a significant backlog of cases.<sup>1886</sup> Given that appeals in such cases are likely to result in the annulment of the implicit refusal decision by the CALL on the basis that the refusal does not contain an adequate statement of reasons as otherwise required by law,<sup>1887</sup> the matter would then be remitted back to the Immigration Office for another decision to be taken. There would again be a risk that no decision is taken within the six-month deadline resulting in another implicit refusal decision, which would once more be open to challenge before the CALL. This would be particularly detrimental to non-EU family members who would be unable to travel outside of Belgium while awaiting the issue of a residence card. In addition, this may lead to situations where the right of non-EU family members to work might be called into question by their employer following the expiry of the six-month deadline indicated in the certificate of application (Annex 19ter).

Given the resource constraints and revision in the casework priorities of the Immigration Office, the option of retaining the current legal framework is not desirable and,

in the worst-case scenario, has the potential of creating a vicious circle of unnecessary litigation.

## 2.2 Option 2: Endow municipalities with enhanced decision-making



The second option for reform is to endow municipalities with the power to decide decisions submitted by EU citizens and their family members. The Immigration Office would therefore lose its decision-making abilities and its role would be limited to post-registration verification.

This is similar to the system which is in place in Italy where decision-making on residence formalities is decentralised at the municipal level for EU citizens, although the local police force has jurisdiction over all third-country nationals including the non-EU family members of EU citizens.<sup>1888</sup> However, the post-registration verification of residence rights is also undertaken by the same authorities.

Nonetheless, there is no guarantee that this would allow for resolution of the issues which have been identified throughout this report. In particular, this option runs the risk of municipalities adopting even more divergent practices in the application of registration formalities, which would jeopardise the uniform application of the residence rules in Belgium, thereby further undermining an objective of the Citizens Rights Directive.<sup>1889</sup> Moreover, about a third of municipalities have reported a lack of legal knowledge as being a source of challenges at the municipal level<sup>1890</sup> and therefore endowing municipalities with unfettered decision-making abilities in respect of EU citizens and their family members risks aggravating this situation.

<sup>1885</sup> For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*; Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.1 *Division of competences and duration of registration procedure*.

<sup>1886</sup> CALL, Annual Report 2020 (*Conseil du Contentieux des Étrangers, Rapport d'activité pour l'année 2020 / Raad voor Vreemdelingenbetwistingen, Activiteitenverslag van het jaar 2020*)

<sup>1887</sup> For further discussion, see Chapter 1, Section 8. *Procedural safeguards and appeal rights*, Subsection 8.1 *Procedural safeguards*.

<sup>1888</sup> For further discussion, see Chapter 4, Section 6 *Registration phase*, Subsection 6.1 *Decision-making* and Appendix C, *Country fiche for Italy*.

<sup>1889</sup> See to that effect, recital 14 of Directive 2004/38 which states that “supporting documents [...] should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence” (emphasis added). The Court of Justice has also held on several occasions that the uniform application of EU law is a fundamental requirement of EU law; see for example, Joined Cases C-143/88 & C-92/89, *Zuckerfabrik* EU:C:1991:65, Case C-308/93 *Cabanis-Issarte* EU:C:1996:169, Case T-713/14 *IPSO v ECB* EU:T:2016:727; see also to that effect in the context of Directive 2004/38, Case C-127/08 *Metock* EU:C:2008:449 and Case C-673/16 *Coman* EU:C:2018:385

<sup>1890</sup> For further discussion, see Chapter 2, Section 8.1 *Overview of challenges encountered at the municipal level*.

In the view of the Immigration Office, the grant of more autonomy to the municipalities could be very challenging as this would require major legislative changes and significant political will to carry the reforms through. Indeed, it is unlikely that a common approach could be found in favour of such a reform that would be satisfactory to a significant proportion of Belgium's 581 municipalities.

In view of the above considerations, the option of endowing municipalities with enhanced decision-making powers is not a realistic option at present.

## 2.3 Option 3: Optional registration system



The third option would be to create an optional registration system for EU citizens and their family members. EU citizens would then have the option of registering if they wanted to obtain a document confirming their status as residents. However, non-EU family members would remain obliged to obtain a residence card.

This would be similar to the registration systems which are in place in several other Member States. This is the case for France, where registration is optional for EU citizens who retain the possibility of obtaining a residence document there.<sup>1891</sup> In the Netherlands, EU citizens also have the option of applying for a registration certificate, although registration is compulsory for those EU citizens who are being accompanied or joined by non-EU family members.<sup>1892</sup>

This option is however problematic given the intricate links between the registration process for EU citizens and their family members and the rules relating to registration on the population registers. The latter requires the registration of all persons (including Belgian nationals) residing on the national territory and results in the issuance of a unique personal identification number which also doubles up as a social security number (among its other uses).<sup>1893</sup> In practice this means that EU citizens would therefore still be required to register their domicile with the local

municipality in any event, as is also the case in several Member States including Germany, Italy, Luxembourg and the Netherlands.

Furthermore, the move to an optional system of registration is likely to create confusion with public and private authorities alike, which have built their administrative systems and business operations on the basis of identity cards and residence permits with electronic functions. In practice, this is likely to lead to a significant number of EU citizens opting to apply for a residence document in any event.

It should also be noted that the institution of an optional registration system would also likely create problems for EU citizens who need to demonstrate their right of residence when accessing social security or social welfare benefits. This is a significant problem in France, where it is reported that the social security bodies – typically the local health insurance funds (CPAM)<sup>1894</sup> and the local bodies responsible for family benefits (CAF)<sup>1895</sup> – will often insist upon EU citizens and family members having to present a residence document in order to claim benefits and invoke their right to equal treatment.<sup>1896</sup> This problem is compounded by the incorrect transposition of Article 25 of the Citizens Rights Directive, which provides that the exercise of a right or completion of an administrative formality cannot be made conditional upon holding a residence document. It should be noted that such this provision has not been the subject of any transposition in Belgium.

Moreover, non-EU family members would still be obliged to register given that this is obligatory under the Citizens Rights Directive.<sup>1897</sup>

Given that moving to an optional system may create additional problems for EU citizens, the option of replacing the current compulsory system with an optional registration system is not suitable for Belgium.

1891 For a further discussion, see Chapter 4, Section 2 *Overview of transposition*, Subsection 2.2 *Nature of residence formalities* and Appendix A, *Country fiche for France*.

1892 For a further discussion, see Chapter 4, Section 2 *Overview of transposition*, Subsection 2.2 *Nature of residence formalities* and Appendix E, *Country fiche for the Netherlands*.

1893 This refers to the *numéro de registre national / Rijksregisternummer*. For a further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.2. *Application phase*, Paragraph 5.2.6 *Issuance of a certificate of application*.

1894 This refers to the *caisses primaires d'assurances maladie*.

1895 This refers to the *caisses d'allocations familiales*.

1896 For further discussion, see Chapter 4, Section 6 *Registration phase*, Subsection 6.2 *Deadlines for issuing a residence document* and Appendix A, *Country fiche for France*.

1897 For a further discussion, see Chapter 1, Section 4. *EU law relating to registration formalities*, Subsection 4.1 *The nature of registration formalities*.

## 2.4 Option 4: Immediate registration system

The final option would involve modifying the existing legal framework to provide for an immediate registration system. Under this system, EU citizens would be issued with a registration certificate immediately upon application in line with the system foreseen by Article 8(2) of the Citizens Rights Directive after verifying that they meet the conditions laid down in Article 7(1) of the Directive.

This is similar to the system in place in Luxembourg,<sup>1898</sup> although it does not extend to non-EU family members whose applications are decided centrally by the Ministry of Foreign and European Affairs.

However, unlike Luxembourg, such a system would also extend to the issuance of residence cards to non-EU family members. It should be emphasised that the proposed immediate registration system would still provide for verification by the national authorities of the personal situation of family members, through the submission of the documents listed in Article 10(2) of the Citizens Rights Directive, that they fall within the scope of the concept of “family member” and therefore meet the conditions laid down in Article 7(2) of the Directive.

This is also the system which some municipalities have indicated should be contemplated.<sup>1899</sup> During the interviews undertaken as part of this research, some municipalities suggested that an immediate registration system may be more efficient in view of the delay of the Immigration Office in processing cases.

This system would retain post-registration verification by the Immigration Office, which could then take action to investigate and, if needed, terminate the right of residence in case EU citizens or their family members fail or cease to meet the requirements on the basis of the current rules.<sup>1900</sup> It would therefore be fully aligned with the Immigration

Office’s current enforcement priorities<sup>1901</sup> and allow it to focus its efforts on the post-registration verification of residence rights.

The institution of an immediate registration system therefore presents itself as the most suitable and appropriate option for reform that would allow to make more judicious use of existing resources both at federal and municipal level.

## 3. Recommended Option: Overview of an immediate registration system

An immediate registration system would involve the issuance of a registration certificate to EU citizens and their family members at the time of their registration.

The application process would foresee a meeting in person at the time of retrieval of the residence card (EU card or F card), but the process would allow for the digital submission of the application and supporting documentation.

Such a system would incorporate the main aspects which are explained below.

EU citizens and their family members would need to register at their local municipality within three months of their arrival. This would involve an applicant having to present all supporting documentation at the time of submission of their application.

In turn this presupposes that EU citizens and their family members have access to information and particularly access to a detailed listing of the documents which are needed to register. This information should be made available by the Immigration Office on its website, which will need to contain detailed step-by-step instructions

1898 For further discussion, see Chapter 4, Section 6 *Registration phase*, Sub-section 6.2 *Deadlines for issuing a residence document* and Appendix D, *Country fiche for Luxembourg*.

1899 Chapter 2, Section 5.2 *Decision-making on applications for registration of residence*, Sub-section Section 5.2.1 *Competence division and duration of residence procedure* and Box 7.

1900 Immigration Law, art. 42bis, which enables the Immigration Office to terminate the residence rights of any EU citizen or family member who ceases to have a right to reside in Belgium.

1901 For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*; Chapter 2, Section 5. *Registration phase*, Subsection 5.2 *Decision-making on applications for registration of residence*, Paragraph 5.2.1 *Division of competences and duration of registration procedure*.

on registration formalities. Ideally, this would take the form of an on-line assessment tool enabling EU citizens to identify under which category they should register and what documents are required for such registration. In addition, the website should provide a function enabling an on-line registration application form to be generated which also allows for the required documentation to be uploaded.

Municipalities will need to ensure that their own websites provide clear practical information on how, when and where EU citizens may register and book appointments. The websites of the municipalities would then redirect to the Immigration Office's website as regards the substantive conditions to be met. EU citizens and their family members should moreover be able to contact municipalities in order to check what documents are required.

Based on detailed checklists developed by the Immigration Office, municipalities will then verify whether an applicant meets the conditions laid down in the Citizens Rights Directive by checking that they have provided the required documentation using the detailed step-by-step instructions provided by the Immigration Office as their reference. Complex cases could be referred back to the Immigration Office for an opinion which should be provided within a week.

Once municipalities have verified the documentation is in order, they would issue an electronic registration certificate,<sup>1902</sup> pending the issuance of electronic EU card or F card as the case may be, which should be issued within a month. An applicant would be issued with the registration certificate at the time of their on-line application for registration. At this stage an applicant would be registered on the register of pending applications<sup>1903</sup> and issued with a personal identification number.<sup>1904</sup> A scanned copy of the documentation would be sent electronically to the Immigration Office together with a summary data sheet.<sup>1905</sup>

Municipalities would be given the power to refuse an application or withdraw any registration certificate which has been issued where an application is manifestly unfounded (for example, no documentation is provided demonstrating that an applicant is an EU citizen or the family member of an EU citizen). An application could also be refused by municipalities in case of fraud or abuse. The Immigration Office would also have the ability to intervene and issue a refusal. However, prior to any refusal decision being taken, the person concerned must be afforded a right to be heard or at the very least be invited

to submit missing documentation. Where an application is refused there should be the possibility of an administrative review by the Immigration Office. A subsequent right to judicial appeal would lie before the Council for Alien Law Litigation as is presently the case.

At the time of the issue of the temporary registration certificate, municipalities will then proceed to verify the domicile of an applicant within 15 days in line with current legislation. This should make full use of digitalisation – making full use of IT solutions such as the WOCODO application<sup>1906</sup> – to ensure the verification of domicile is undertaken by the local police in a timely manner.

In order to speed up the verification of the authenticity of identity documents held by EU citizens,<sup>1907</sup> consideration should be given to enable the WOCODO application (or alternatively another app connected to the Belgian police's FOCUS IT platform<sup>1908</sup>) to facilitate communications between municipal officials and the local police. In the longer term, municipal officials should be issued with equipment which is capable of reading biometric information contained in passports and national identity documents to enable them to be physically checked at the time that EU citizens and their family members appear in person at the municipality to retrieve their residence card (EU card or F card as the case may be).

In case the verification of domicile results in a negative report, a municipality would have a right to refuse an application, subject to an applicant first being heard. There would be a right to an administrative review against any refusal to register by the Immigration Office and a subsequent right of judicial appeal before the Council for Alien Law Litigation. In addition, in line with existing legislation,<sup>1909</sup> there would be a right of administrative review as regards the negative report issued by the municipal police before the Minister of the Interior<sup>1910</sup> and

1902 This could be based on the current Annex 8 or Annex 9.

1903 This refers to the *registre d'attente / wachtregister*.

1904 This refers to the *numéro de registre national / Rijksregisternummer*.

1905 This could be based on the current Annex 19.

1906 This refers to the *Woonstcontrole / Contrôle de domicile* digital communication solution which is being rolled out in Belgium and allows instant communication between municipal officials and the local police.

1907 For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.2. *Application phase*, Paragraph 5.2.2 *Initial documents required: proof of identity*.

1908 Further details can be found on the Belgian federal police's website *L'ICT au coeur de l'action et de la gestion / ICT, de drijvende kracht achter onze acties en ons beheer* <https://rapportannuel.policefederale.be/gestion-information/ict-action-gestion/> / <https://jaarverslag.federalepolitie.be/informatiebeheer/ict-acties-beheer/>

1909 For a discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.3 *Verification of domicile*.

1910 Art. 8, Law of 19 July 1991 concerning the population registers, identity cards, foreigner's cards and residence documents (*Loi du 19 juillet 1991 relative aux registres de la population, aux cartes d'identité, aux cartes des étrangers et aux documents de séjour / Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten*, MB/BS 03-09-1991, 19075).

a subsequent right of judicial review before the Council of State.<sup>1911</sup>

In the event that the verification of domicile is positive, the applicant would then be invited to visit the municipality to obtain their electronic EU card or F card as the case may be. The person's details would then be entered into the register of foreigners.

After five years of continuous legal residence in Belgium, EU citizens and their family members would be able to apply for a permanent residence card by submitting an application online or by post. However, the option would remain to submit an application in person at the municipality. Contrary to the current system where an application for permanent residence needs to be forwarded to the Immigration Office for approval, the municipality would take a decision after having verified continuity of residence. A decision on the permanent residence application would need to be made within one month and can be introduced two months in advance. Where a positive decision is made, the applicant would be invited to visit the municipality to retrieve their electronic EU+ card or F+ card as the case may be.

The municipality would have the possibility of refusing applications which do not meet the legal requirements for permanent residence. However, prior to a refusal decision being taken, the person concerned must be afforded a right to be heard. Where an application is refused there should be the possibility of an administrative review by the Immigration Office. A subsequent right to judicial appeal would lie before the Council for Alien Law Litigation.

## 4. Immediate registration system: Preparatory phase

An immediate registration system relies on authoritative information being available that is of high-quality, providing users with detailed information on the registration process, but which is also user-friendly. The

1911 Art. 14, Law relating to the Council of State (Lois coordonnées du 12 janvier 1973 sur le Conseil d'État / Gecoördineerde wetten op de Raad van State. MB/BS 21-03-1973, 3461).

French and Luxembourg government websites as well as the website of the Dutch Immigration and Nationality Service can serve as useful inspiration in this respect.

This information should be made available by the Immigration Office on its website which will need to contain detailed step-by-step instructions on registration formalities.<sup>1912</sup> Ideally, the website should indicate through an on-line assessment tool under which category the EU citizen should register and what documents are required for such registration.

In addition, the website should provide a function enabling an on-line registration application form to be generated, which also allows for the required documentation to be uploaded. In designing this website, inspiration could be drawn from the central government websites for France<sup>1913</sup> and Luxembourg,<sup>1914</sup> as well as the website of the Dutch immigration and nationality service (IND)<sup>1915</sup> which can be considered best practices in the way in which information on residence formalities is provided.<sup>1916</sup> In addition, the website of Norwegian Immigration Office provides examples of an on-line assessment tool.<sup>1917</sup>

As mentioned below,<sup>1918</sup> it should also provide an on-line registration application form which allows for the uploading of required documentation that is required for registration.

This should also provide details of what documentary requirements may be required in their country of origin such as legalisation or apostille. The website should confirm that civil status documents issued by EU public authorities under Regulation 2016/1191 using the multilingual standard forms do not need translation.

The Immigration Office will need to issue detailed publicly available checklists on what documents are acceptable based on each applicant's profile (for example, salaried worker, self-employed person, jobseeker, spouse, registered partner, children etc.). Again, the website

1912 See further recommendations contained in Chapter 5, Section 1. *Preparatory phase*.

1913 Information on registration formalities for EU citizens and their family members is available on the French government's public information portal [www.service-public.fr](http://www.service-public.fr) on the page entitled "Titres, carte de séjour et documents de circulation pour étranger en France" <https://www.service-public.fr/particuliers/vosdroits/N110>.

1914 Information on registration formalities is available on the Luxembourg government's portal for public services [guichet.public.lu](http://guichet.public.lu) on the page *Immigration* <https://guichet.public.lu/fr/citoyens/immigration.html>.

1915 The IND's main website can be found at the following url [ind.nl](http://ind.nl) which includes a dedicated home page for EU citizens can be found <https://ind.nl/en/eu-eea>.

1916 For further discussion, see Chapter 4, Section 3. *Preparatory phase*.

1917 See UDI website *Home > Want to apply > Residence according to the EU/EEA regulations* <https://www.udi.no/en/want-to-apply/residence-under-the-eueeu-regulations>.

1918 See below Section 4. *Application phase*, Subsection 4.1 *A single procedure applicable to EU citizens and non-EU family members*.

of Norwegian Immigration Office provides examples of detailed documentary checklists by category of applicant.<sup>1919</sup> In addition, the Immigration Office would also issue basic technical guidance to applicants on how to make scanned copies of documentation to ensure scanned documents are of sufficient quality to enable verification. An example of the form which such guidance could take is contained on the website of the Dutch IND.<sup>1920</sup> The checklists would be supplemented by detailed publicly available guidelines intended for use by municipal frontline staff.

In addition to the information being provided in all official national languages - Dutch, French and German - the information should also be made available in English at the very least.

The information made available on the Immigration Office's website should also provide brief information on what applicants can expect in case of refusal. The website should also provide signposting links to the legal aid service of the local bar association,<sup>1921</sup> so that applicants know where to turn to in order to obtain legal assistance.

All the municipalities should link back to the Immigration Office's website as regards registration formalities for EU citizens and their family members.

The websites of the Immigration Office as well as those of the municipalities should also contain a prominent link to the European Commission's "Your Europe" portal using the assigned logo as required by the Regulation on the Single Digital Gateway.<sup>1922</sup>

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1919 See UDI website *Home > Checklists > The registration scheme for EU/EEA nationals* <https://www.udi.no/en/word-definitions/checklists-which-explains-which-documents-you-must-hand-in-with-your-application/#link-5412>.

1920 IND website > *How to upload documents* <https://ind.nl/en/Pages/Uploadingdocuments.aspx>.

1921 In Belgium, only lawyers are entitled to represent individuals wanting to bring an appeal.

1922 Art. 22(2), Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 [2018] OJ L 295/1 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services.

## 5. Immediate registration system: Application phase

An immediate registration system would involve the issuance of a registration certificate to EU citizens and their family members at the time of their registration. This will require the relevant rules<sup>1923</sup> to be amended accordingly.

The application phase would allow for the digital submission of the application and supporting documentation. Alternatively, applicants would have the option to submit their application in person.

### 5.1 A single procedure applicable to EU citizens and non-EU family members

EU citizens and their family members would need to register at their local municipality within three months of their arrival.

There should be an on-line standardised application form which EU citizens and their family members can load fill out and submit to the municipality, together with scanned copies of the supporting documents. The standard application form should be multilingual (Dutch, French, German and English).

### 5.2 Submission on-line or in person

EU citizens and their family members would be able to submit their registration application on-line or attend

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1923 Arts. 50-52, Royal Decree on Immigration.

their local municipality in order to submit an application in person.

The process would allow for the digital submission of the application and supporting documentation. This aim is to build upon the experiences gained both before and during the COVID-19 coronavirus pandemic.<sup>1924</sup>

## 5.3 Prior appointments

The possibility would be retained for applicants to make a submission in person for those who do not have access to the online system or are not digitally literate.

In this case, the applicant should be able to obtain an appointment within two weeks to submit their application for registration, in order to ensure immediate access to a registration certificate.

## 5.4 Documentation needed to start registration process

When an application is made by EU citizens and their family members, all supporting documents must be submitted at the time an application is made.

As mentioned above, in order to ensure scanned documents are of sufficiently good quality to enable verification by municipal officials, the Immigration Office would also issue basic technical guidance to applicants on how to make legible scanned copies of documentation.

There will no longer be an additional period of three months within which EU citizens and their family members must submit their documentation, nor will a further month be provided to EU citizens who fail to provide documents within this three-month period. However, the process would allow for additional submission of documentation after the on-line application has been initiated in case there has been a change in circumstances, for example when a jobseeker finds employment or for a self-employed person to upload their proof of registration.

<sup>1924</sup> For further discussion, see Chapter 1, Section 3. *Application phase*, Subsection 3.1 *Appointment system and issuance of Annex 19*.

## 5.5 Documentary requirements

A new immediate registration system would involve an applicant having to present all supporting documentation at the time of submission of their application.

The Citizens Rights Directive seeks to comprehensively specify the documents which may be requested by the competent authorities when issuing of residence documentation to EU citizens and their family members in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence under EU law.<sup>1925</sup>

Taking into account the above, the Immigration Office will therefore need to develop detailed guidelines to municipalities and include detailed examples of what documentation should be accepted based on the specific profile of each applicant (for example, salaried worker, posted worker, frontier worker, self-employed person, posted self-employed person, jobseeker, spouse, registered partner, children etc.).

### 5.5.1 Documents required from EU citizens

The documents which may be requested by Member States are specified in paragraphs (3) and (5) of Article 8 of the Citizens Rights Directive as regards, respectively, EU citizens holding the primary right of residence and those deriving a right of residence as family members who themselves are nationals of a Member State.<sup>1926</sup>

### 5.5.2 Documents required from non-EU family members

Article 10(2) of the Citizens Rights Directive lays down the documentary requirements which Member States may impose on non-EU family members.<sup>1927</sup>

<sup>1925</sup> Recital 14 of Directive 2004/38.

<sup>1926</sup> See further Chapter 1, Section 4. *EU law relating to registration formalities*, Subsection 4.4 *Documentary requirements* and Section 5. *The registration process in Belgium*, Subsection 5.2. *Application phase* and Subsection 5.5 *Documentary requirements*.

<sup>1927</sup> Ibid.

### 5.5.3 Legalisation and translation obligations

The guidelines issued by the Immigration Office should provide up-to-date information to municipalities on legalisation and translation formalities but also include confirmation of all applicable exemptions.

### 5.5.4 No requirement on non-EU family members to hold a visa

The registration of non-EU family members will not be subject to any requirement to demonstrate possession of a visa.<sup>1928</sup>

Belgian law<sup>1929</sup> would need to be amended to eliminate this requirement.

## 5.6 Immediate issuance of registration certificate

Municipalities will issue the registration certificate<sup>1930</sup> in electronic format to applicants immediately upon receipt of the on-line application or on the spot for those who made an in-person application.

This would serve as proof of registration pending the issuance of electronic EU card or F card as the case may be.

At this stage an applicant would be registered on the register of pending applications<sup>1931</sup> and issued with a personal identification number.<sup>1932</sup>

A copy of the documentation would be sent electronically to the Immigration Office together with a summary data sheet.<sup>1933</sup>

At the same time, a scanned copy of the applicant's identity document would be sent electronically to the local police

via the WOCODO application<sup>1934</sup> to trigger a request for verification of domicile.

In order to speed up the verification of the authenticity of identity documents held by EU citizens,<sup>1935</sup> consideration should be given to enable the WOCODO application (or alternatively another app connected to the Belgian police's FOCUS IT platform<sup>1936</sup>) to facilitate communications between municipal officials and the local police.

## 5.7 Verification of applications and decision-making

Municipalities would have the mandate to verify all applications submitted by EU citizens and their family members on the basis of detailed guidelines published by the Immigration Office. These would provide detailed instructions based on the specific profile of each applicant (for example, salaried worker, posted worker, frontier worker, self-employed person, posted self-employed person, jobseeker, spouse, registered partner, children etc.).

Using these detailed guidelines and checklists provided by the Immigration Office, the municipalities would verify if the applicant has submitted the required documentation. Complex cases could be referred back to the Immigration Office for an opinion which should be provided within a week.

It should be emphasised that the proposed immediate registration system would still provide for verification by the national authorities of the personal situation of EU citizens in order to ensure they meet the requirements of Article 7(1) of the Citizens Rights Directive based on the documents listed in Article 8(3) and (5) of the Directive. Likewise, the situation of family members would also be verified, through the submission of the documents listed in Article 10(2) of the Citizens Rights Directive, in order

1928 See Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.2. *Application phase*, Paragraph 5.2.4 *Initial documents which should not be required: entry visa required for non-EU family members*.

1929 Art. 40bis §4 and Art. 41 §2, Belgian Immigration Law.

1930 This could be based on the current Annex 8ter as regards EU citizens.

1931 This refers to the *registre d'attente / wachtregister*.

1932 This refers to the *numéro de registre national / Rijksregisternummer*.

1933 This could be based on the current Annex 19 as regards EU citizens or Annex 19ter as regards non-EU family members.

1934 This refers to the *Woonstcontrole / Contrôle de domicile* digital communication solution which is being rolled out in Belgium and allows instant communication between municipal officials and the local police.

1935 For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Sub-section 5.2. *Application phase*, Paragraph 5.2.2 *Initial documents required: proof of identity*.

1936 Further details can be found on the Belgian federal police's website *L'ICT au coeur de l'action et de la gestion / ICT, de drijvende kracht achter onze acties en ons beheer* <https://rapportannuel.policefederale.be/gestion-informatie/ict-action-gestion/> / <https://jaarverslag.federalepolitie.be/informatiebeheer/ict-acties-beheer/>

to ensure that they fall within the scope of the concept of “family member” and therefore meet the conditions laid down in Article 7(2) of the Directive.

Municipalities would be empowered to refuse an application or withdraw any registration certificate which has been issued in electronic format where an application is manifestly unfounded (for example, no documentation is provided demonstrating an applicant is an EU citizen or the family member of an EU citizen). Municipalities would also be given competence to refuse an application in case of fraud or abuse.<sup>1937</sup> However, prior to a refusal decision being taken, the person concerned must be afforded a right to be heard.

Where an application is refused there should be the possibility of an administrative review by the Immigration Office which would need to be reinstated.<sup>1938</sup> A subsequent right to judicial appeal would lie before the Council for Alien Law Litigation as is currently the case.<sup>1939</sup>

## 6. Immediate registration system: Verification of domicile

Following the issuance of the temporary registration certificate, municipalities will then proceed to verify the domicile of an applicant within 15 days in line with current legislation.

At the time of the issue of the temporary registration certificate, municipalities will then proceed to verify the domicile of an applicant within 15 days in line with current legislation. This should make full use of digitalisation to ensure the verification of domicile is undertaken in a timely manner.

The verification of domicile by the municipal police should take place according to common process standards, given that the EU citizen will need to be seen in person. Such

<sup>1937</sup> At present, the power to refuse applications on the basis of fraud is only vested in the Minister for Immigration and Asylum or his delegate (in practice the Immigration Office) under Art. 44, Belgian Immigration Law.

<sup>1938</sup> For a discussion, see below Section 11, *Appeals*, Sub-section 11.1 *Administrative review processes* in this Chapter.

<sup>1939</sup> See Chapter 1, Section 7. Procedural safeguards and appeal rights.

verification will need to be digitalised in order to speed up the process.

In case the verification of domicile results in a negative report, a municipality would have a right to refuse an application, subject to an applicant first being heard.

There would be a right to a first-line administrative review against any refusal to register before the municipality. In addition, in line with existing legislation,<sup>1940</sup> there would be a right of administrative review as regards the negative report by the Minister of the Interior<sup>1941</sup> and a subsequent right of judicial review before the Council of State.<sup>1942</sup>

## 7. Immediate registration system: Definitive registration phase

In the event that the verification of domicile is positive and once the verification of required documentation has been completed, the applicant would then be invited to visit the municipality in person to obtain their electronic EU card or F card as the case may be. The person’s details would then be entered into the register of foreigners.

In the longer term, in order to facilitate the prevention of fraud, municipal officials should be issued with equipment which is capable of reading biometric information contained in passports and the machine-readable zone on national identity cards to enable them to be physically checked at the time that EU citizens and their family members appear in person at the municipality to retrieve their residence card (EU card or F card as the case may be).

<sup>1940</sup> For a discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.3 *Verification of domicile*.

<sup>1941</sup> Art. 8, Law of 19 July 1991 concerning the population registers, identity cards, foreigner’s cards and residence documents (*Loi du 19 juillet 1991 relative aux registres de la population, aux cartes d’identité, aux cartes des étrangers et aux documents de séjour / Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten*, MB/BS 03-09-1991, 19075).

<sup>1942</sup> Art. 14, Law relating to the Council of State (Lois coordonnées du 12 janvier 1973 sur le Conseil d’État / Gecoördineerde wetten op de Raad van State. MB/BS 21-03-1973, 3461).

This should be technically feasible given that municipalities currently have equipment which is capable of reading passports issued by the Belgian authorities. All passports issued by the EU Member States currently have to comply with minimum security standards and biometrics laid down by EU law.<sup>1943</sup> In accordance with recently adopted EU legislation,<sup>1944</sup> all national identity cards issued by EU countries as well as EEA will need to be issued in compliance with minimum security standards<sup>1945</sup> and should contain a machine-readable zone by 2031 at the latest.

The municipality would be given the power to withdraw any registration certificate which has been issued in electronic format where, following such a verification of an applicant's identity document, fraud has been detected in this way.<sup>1946</sup>

In such a case, there would also be a right to an administrative review against the withdrawal of any registration certificate before the Immigration Office and a subsequent right of judicial appeal before the Council for Alien Law Litigation.

## 7.1 Deadlines for issuing a residence document

Article 8(2) of the Citizens Rights Directive imposes an obligation on Member States to issue a registration certificate to EU citizens immediately. Article 10(1) of the Citizens Rights Directive provides that Member States are to issue a residence card to non-EU family members within six months of an application being submitted. However, Article 37 of the Citizens Rights Directive allows Member States to provide for more favourable provisions, so this latter deadline serves as an upper limit which can be lowered.

<sup>1943</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L 385/1.

<sup>1944</sup> Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement.

<sup>1945</sup> These are the same requirements as regards material, printing techniques, protection against copying and counterfeiting which apply to residence permits issued under Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

<sup>1946</sup> At present, the power to refuse applications on the basis of fraud is only vested in the Minister for Immigration and Asylum or his delegate (in practice the Immigration Office) under Art. 44, Belgian Immigration Law.

## 7.2 Format of residence documents issued

Following verification of domicile, EU citizens would be issued with a registration certificate ("EU card").

Following verification of domicile, non-EU family members would be issued with a residence card ("F card").

# 8. Immediate registration system: Permanent residence

Article 16 of the Citizens Rights Directive establishes the right of permanent residence which EU citizens and their family members may acquire after a continuous period of five years of lawful residence in the host Member State.

## 8.1 Overview of procedure

After five years of continuous legal residence in Belgium, EU citizens and their family members would be able to apply for a permanent residence card by submitting an application on-line or by post with the municipality. However, the option would remain to submit an application in person at the municipality.

The municipality would then proceed to verify continuity of residence and have the possibility of refusing applications which do not meet the legal requirements.

However, prior to a refusal decision being taken, the person concerned must be afforded a right to be heard. Where an application is refused there should be the possibility of an administrative review before the Immigration Office. A subsequent right to judicial appeal would lie before the Council for Alien Law Litigation.

## 8.2 Deadlines for issuance of permanent residence documents

Article 19(2) of the Citizens Rights<sup>1947</sup> Directive requires EU citizens to be issued with a document certifying permanent residence as soon as possible. As regards non-EU family members, Article 20(2) of the Citizens Rights<sup>1947</sup> Directive requires Member States to issue a residence card within six months. However, Article 37 of the Citizens Rights Directive allows Member States to provide for more favourable provisions so the six-month deadline serves as an upper limit and it is possible for national law to derogate from this and provide shorter deadline.

A decision on the permanent residence application would need to be made within one month. An application can be submitted at least two months in advance.

Where a positive decision has been made, the applicant would then be invited to visit the municipality to retrieve their electronic E+ card or F+ card as the case may be.

## 8.3 Format of permanent residence documents issued

Following verification of continuity of residence, EU citizens would be issued with a registration certificate (“EU+ card”) and non-EU family members would be issued with a residence card (“F+ card”).

# 9. Consequences

## 9.1 Declaratory nature of residence documents

Residence documents may be withdrawn at any time.

## 9.2 Access to employment

No effect is anticipated as regards EU citizens.

However, this would have a positive impact on the ability of “other family members” to work, as they would immediately be issued with a registration certificate (based on the Annex 8ter issued to EU citizens) under this reformed system.

## 9.3 Access to social rights

No effect is anticipated as regards EU citizens.

As is the case now, public social assistance centres<sup>1947</sup> would be able to verify the residence rights of persons claiming social assistance.

Any negative decision would remain appealable to the labour courts.

<sup>1947</sup> This refers to the *Centre Public d'Action Sociale (CPAS) / Openbaar Centrum voor Maatschappelijk Welzijn (OCMW)*.

## 10 Post-registration verification

The Immigration Office would retain its power of verification in respect of the residence rights of EU citizens and their family members.<sup>1948</sup>

### 10.1 Verification of residence rights

There would be no need to change to the current legal framework for verification of residence rights by the Immigration Office under Article 42bis of the Belgian Immigration Law as regards EU citizens, Article 42ter as regards family members and article 42quater as regards non-EU family members.<sup>1949</sup>

### 10.2 Triggers for verification

The on-line registration process foreseen as part of an immediate registration system would generate a summary data sheet based on the information provided by applicants.

The summary data sheet - containing the information which is presently furnished as part of the personal information provided by applicants on the certificate of application (Annex 19 or Annex 19ter as the case may be) - could therefore be used by the Immigration Office to check whether municipalities have correctly registered an EU citizen or their family member as the case may be.

As is the current practice, a claim for benefits and Dimona or Limosa declaration may also be used by the Immigration Office as triggers for verification.<sup>1950</sup>

<sup>1948</sup> Immigration Law, art. 42bis.

<sup>1949</sup> For further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

<sup>1950</sup> Ibid.

### 10.3 Current approach to verification

Further research is needed to be conducted to determine whether the Immigration Office's practice is in line with the requirements of the Directive.<sup>1951</sup>

The Immigration Office should also clarify that a person's details should not be stricken off the population register until any right of appeal has been fully exhausted or until such time as the deadline for appeal has passed where no appeal has been filed.<sup>1952</sup>

## 11 Appeals

Articles 15 and 31 of the Citizens Rights Directive require Member States to provide EU citizens and their family members with judicial redress procedures in order to appeal against any decision which refuses recognition of their residence right. The Directive also requires Member States to provide EU citizens and their family members with an administrative review process where appropriate, which leaves considerable discretion to the Member States.

### 11.1 Administrative review processes

An administrative review process before the Immigration Office should be reinstated.<sup>1953</sup>

This should be a compulsory step before lodging a judicial appeal.

<sup>1951</sup> For a further discussion, see Chapter 1, Section 5. *The registration process in Belgium*, Section 5. The registration process in Belgium, Subsection 5.7 *Refusal, termination and withdrawal of residence rights*.

<sup>1952</sup> For a further discussion, see Chapter 3, Section 4. *Impact of residence formalities on social welfare benefits*, Subsection 4.3 *Registration as a precondition for residual social assistance?*, Paragraph 4.3.1 *Workers*, Point 4.3.1.3 *Impact of refusal or withdrawal of residence rights on residual social assistance*.

<sup>1953</sup> The former right to request an administrative review of decisions taken against EU citizens and their family members under Arts. 64-66 (repealed), Belgian Immigration Law was repealed and replaced by a judicial review system under the Council for Alien Law Litigation (CALL).

Recourse to an administrative review process should suspend deadlines for lodging judicial appeal proceedings.

## 11.2 Nature of judicial appeal process



Further research is needed to be conducted to determine if the appeals procedure before the Council for Alien Law Litigation provides a right to an effective remedy.<sup>1954</sup>

# 12 Conclusion

This Chapter has sought to explore what reforms could be undertaken to the rules relating to the registration of EU citizens and their family members drawing upon the findings and recommendations contained in the previous chapters.

A window of opportunity for reform has opened up following the federal government's stated intention to begin work on instituting a Code on migration to replace the existing legal framework, which is further supported by the need to comply with the rulings of the Court of Justice in the *Diallo and G.M.A.* cases.

It is therefore proposed to institute an immediate registration system in Belgium. An immediate registration system would involve the issuance of residence documentation to EU citizens and their family members at the time of their registration.

Such a system would incorporate the main aspects which are outlined below as part of an explanation of how it is foreseen that such a process would work in practice.

EU citizens and their family members would need to register at their local municipality within three months of their arrival. This would involve an applicant having to present all supporting documentation at the time of submission of their application.

In turn this presupposes that EU citizens and their family members have access to information and particularly

access to a detailed listing of the documents which are needed to register. This information should be made available by the Immigration Office on its website, which will need to contain detailed step-by-step instructions on registration formalities. Ideally, this would take the form of an on-line assessment tool enabling EU citizens to identify under which category they should register and what documents are required for such registration. In addition, the website should provide a function enabling an on-line registration application form to be generated which also allows for the required documentation to be uploaded.

Municipalities will need to ensure that their own websites provide clear practical information on how, when and where EU citizens may register and book appointments. The websites of the municipalities would then redirect to the Immigration Office's website as regards the substantive conditions to be met. EU citizens and their family members should moreover be able to contact municipalities in order to check what documents are required.

Based on detailed checklists developed by the Immigration Office, municipalities will then verify whether a person meets the conditions laid down in Article 7 of the Directive by reference to the detailed instructions provided by the Immigration Office. Complex cases could be referred back for an opinion which should be provided within two to three weeks.

Once municipalities have verified the documentation is in order, they would issue an electronic registration certificate, pending the issuance of electronic EU card or F card as the case may be, which should be issued within a month. An applicant would be issued with the registration certificate at the time of their on-line application for registration. At this stage an applicant would be registered on the register of pending applications<sup>1955</sup> and issued with a personal identification number.<sup>1956</sup> A copy of the documentation would be sent electronically to the Immigration Office together with a summary data sheet.

Municipalities would be given the power to refuse an application where an application is manifestly unfounded (for example, no documentation is provided demonstrating that an applicant is an EU citizen or the family member of an EU citizen) or in case of fraud or abuse. The Immigration Office would also have the ability to intervene and issue a refusal. However, prior to any refusal decision being taken, the person concerned must be afforded a right to be heard. Where an application is refused there should be the possibility of an administrative review by the Immigration Office. A subsequent right to

<sup>1954</sup> For a further discussion, see Chapter 1, Section 7. *Procedural safeguards and appeal rights*, Subsection 7.2 *Appeal rights*.

<sup>1955</sup> This refers to the *registre d'attente / wachtregister*.

<sup>1956</sup> This refers to the *numéro de Registre national / Rijksregisternummer*.

judicial appeal would lie before the Council for Alien Law Litigation as is presently the case.

At the time of the issue of the temporary registration, municipalities will then proceed to verify the domicile of an applicant within 15 days in line with current legislation. This should make full use of digitalisation to ensure the verification of domicile is undertaken in a timely manner.

In case the verification of domicile results in a negative report, a municipality would have a right to refuse an application, subject to an applicant first being heard. There would be a right to a first-line administrative review before the municipality. In addition, in line with existing legislation, there would be a right of administrative review as regards the negative report by the Minister of the Interior and a subsequent right of judicial review before the Council of State.

In the event that the verification of domicile is positive, the applicant would then be invited to visit the municipality to obtain their electronic EU card or F card as the case may be. The person's details would then be entered into the register of foreigners.

After five years of continuous legal residence in Belgium, EU citizens and their family members would be able to apply for a permanent residence card by submitting an application online or by post. Contrary to the current system where an application for permanent residence needs to be forwarded to the Immigration Office for approval, the municipality would take a decision after having verified continuity of residence. A decision on the permanent residence application would need to be made within one month and can be introduced two months in advance. Where a positive decision is made, the applicant would be invited to visit the municipality to retrieve their electronic EU+ card or F+ card as the case may be.

The municipality would have the possibility of refusing applications which do not meet the legal requirements for permanent residence. However, prior to a refusal decision being taken, the person concerned must be afforded a right to be heard. Where an application is refused there should be the possibility of an administrative review by the Immigration Office. A subsequent right to judicial appeal would lie before the Council for Alien Law Litigation.





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Registration formalities for EU workers, self-employed persons, jobseekers and their family members in Belgium, with a comparative outlook

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