

FIDE 2014

Questionnaire general topic 2

Union citizenship: development, impact and challenges



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All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.

Introduction

Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union. The purpose of this questionnaire is to stimulate national reports that enable us to understand better, as a primary objective, how the rights attached to Union citizenship are developing and being applied within the legal orders of the Member States. To achieve that objective, we are interested, in the first instance, in examples that demonstrate how national legislatures, administrations and judiciaries are interpreting and applying the aspects of EU citizenship that require implementation at the national level, but we are also keen to gather evidence on how those actors are responding to case law of the Court of Justice relating to citizenship rights that sit outside the parameters of direct national implementation.

Analysis of this rich empirical data will also enable us to present a comparative perspective on the development of EU citizenship rights. Most situations involving the application of EU legal rights happen at national level, and never reach the EU institutions at all. The EUDO Citizenship Observatory and its existing datasets on the acquisition and loss of citizenship and more recently on electoral rights¹ have started to fill a crucial information gap in this context; but cross-tabulation of that data with the national reports prepared for the FIDE Congress will enhance the available material, and thus our understanding of the *reality* of Union citizenship, very significantly.

¹ See <http://eudo-citizenship.eu/databases>.

As a secondary objective, however, we are also keen to get a greater sense of how Union citizenship is developing within and/or impacting upon the *culture* of national citizenship. For example, how are EU citizenship rights being portrayed by the national media and in popular or civil society discourse? Media actors have an extraordinary platform from which to shape the tone of national debate; have they acted responsibly (e.g. by providing accurate information on the applicable rights) in the specific context of Union citizenship? How is civil society discourse (e.g. as emerging through blogs and websites) responding to that steer? More generally, how does EU free movement law, and the citizenship rights associated with it, sit alongside national *immigration* law? In addition, where the interface between national citizenship and EU citizenship is concerned, issues may also be raised about the rights that *static* EU citizens have, or do not have, and how this affects the perception of EU citizenship and those who hold the rights of *mobile* citizens.

The span of Union citizenship and associated rights covers a potentially enormous field and we have, therefore, decided to focus on four key, *citizen-specific* themes in the questionnaire. What we are seeking to understand is how national actors are interpreting and applying the *added-value* rights of Union citizenship i.e. rights beyond those attached to more established free movement categories, such as workers. Our four selected themes are:

1. Citizenship within Directive 2004/38/EC²
2. Citizenship beyond Directive 2004/38/EC
3. The political rights of EU citizens
4. The emerging culture(s) of citizenship

By focusing on these distinct yet interrelated elements of the development and impact of Union citizenship, we aim in our General Report to offer a cross section of insights into how EU citizenship has (or has not) become embedded into the national constitutional, legal and political cultures. We also intend to identify key challenges affecting the realisation of Union citizenship within the Member States.

² 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, [2004] OJ L158/77.

Guide to answering questions

Please endeavour to answer questions in a manner that:

- Provides information in a way that is accessible to a range of national audiences (i.e. explaining national issues in their proper context) and which is comparable across Member States; and
- Is evidence-based and objective: we are interested in receiving examples, rather than a comprehensive account of national legal issues (beyond the scope of a single report), and examples objectively stated will offer much more important comparative data than the views of a particular commentator. Nevertheless, of course, if it is necessary to make a judgment about whether or not EU law is effectively implemented at the national level, this should be included.

Moreover, Rapporteurs are kindly requested, whenever appropriate, to include in their reports information on the position taken on the relevant legal issues by:

- Courts and tribunals in their case law in the relevant jurisdiction;
- Executives and parliaments in the Member State described;
- Academic and professional literature in the relevant Member State; and
- The media in the relevant Member State.

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

The adoption of Directive 2004/38/EC was a significant milestone in the regulation of Union citizenship. In particular, it was anticipated that the application of EU citizenship rights by national administrations, legislatures and judiciaries would be considerably improved by the existence of this detailed framework text. But has this happened in reality? In this section of the questionnaire, we have developed a series of questions that engage with the citizenship-specific elements of the Directive against a thematic concern about *stability* of residence for EU citizens and their family members. The questions address: (1) the evolving definition of family members and relationships of dependency; (2) the potential challenge to residence stability generated by the Directive's economic self-sufficiency conditions; (3) the ground-breaking creation of *direct* EU legal rights for the family members of Union citizens, including third country national family members; (4) the similarly revolutionary concept and status of 'permanent residence'; (5) the express temporal limitations placed on access to certain social security benefits; and (6) against the backdrop of surprisingly moderate recent guidance from the Court of Justice, and also considering the extent to which Member State authorities are considering and applying the Directive's 'softening' criteria when taking decisions about the expulsion of Union citizens or their family members, the legislatively intended distinctions between different groups of Union citizens in the context of expulsion.

Question 1

With respect to a Union citizen's family members, how have Articles 2, 3 and 5 of the Directive been transposed into national law? How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?

Question 2

Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?

Question 3

How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Question 4

How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of applications to date for the status of permanent residence been published for your Member State? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Question 5

How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?³

Question 6

Please describe how the national courts and tribunals have understood, applied and differentiated between the concepts of "public policy, public security or public health" (Article 27), "serious grounds of public policy or public security" and "imperative grounds of public security" (Article

³ Compare e.g. the 'real link' approach applied in Case C-209/03, *Bidar v London Borough of Ealing; Secretary of State for Education and Skills*, Judgment of the Court (Grand Chamber) of 15 March 2005, with the subsequent decision in Case C-158/07, *Förster v IB-Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008; and, in the context of job-seekers, Case C-138/02, *Collins v Secretary of State for Work and Pensions*, Judgment of the Court (Full Court) of 23 March 2004 with Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Judgment of the Court (Third Chamber) of 4 June 2009.

28).⁴ How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin?

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU law

Thinking especially of the decisions in recent case law such as *Rottmann* and *Ruiz Zambrano*,⁵ it is clear that the adoption of Directive 2004/38 has not altogether curtailed the interpretative powers of the Court of Justice with respect to the primary citizenship rights conferred directly by the Treaties. In this section of the questionnaire, our questions are constructed to elicit information about the extent to which national authorities are responding to that jurisprudence and are willing to go beyond the boundaries of the Directive. We highlight two key areas in this respect: (1) ‘purely internal situations’ and the issue of reverse discrimination, especially in cases involving the rights of family members; and (2) the extent to which national rules on the acquisition and loss of citizenship accommodate, or otherwise, the specific implications of those rules for acquisition and/or loss of the status of Union citizenship.

Question 7

To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a ‘purely internal situation’? To what extent has the Court of Justice’s case law grounded directly on the TFEU’s citizenship provisions (e.g. *Chen*,⁶ *Ruiz Zambrano* and subsequent decisions) been effectively implemented and applied at the national level? Does national case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States?⁷ Have legislative or specific administrative changes been put in place? How are these matters being dealt with by the national courts?

⁴ See e.g. Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis*, Judgment of the Court (Grand Chamber) of 23 November 2010 and Case C-348/09, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, Judgment of the Court (Grand Chamber) of 6 March 2012.

⁵ See Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2nd March 2010; and Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*, Judgment of the Court (Grand Chamber) of 8 March 2011.

⁶ Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*, Judgment of the Court (Full Court) of 19 October 2004.

⁷ See Case C-434/09 *McCarthy v Secretary of State for the Home Department*, Judgment of the Court (Third Chamber) of 5 May 2011; Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, Judgment of the Court (Grand Chamber) of 15 November 2011.

Question 8

In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

Political rights of EU citizens

Notwithstanding the emphasis in the Lisbon Treaty on the participatory and representative nature of democracy in the Union legal order, the Member States continue to lag behind the vision spelled out in the EU Treaties and by the EU legislature with respect to the realisation of appropriate electoral rights for Union citizens. This set of questions examines: (1) the implementation of Directive 93/109/EC⁸ on European Parliament elections; (2) the implementation of Directive 94/80/EC⁹ on local elections; (3) the extent to which EU citizens residing in the country are granted electoral rights for regional and other elections under national law i.e. above and beyond the threshold requirements set out in the EU Treaties; and (4) national restrictions imposed on access to the electoral rights applied to Union citizens, including those imposed on their own citizens which may be affected by EU law.

Question 9

Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts? What additional changes will be required by the December 2012 amendments to Directive 93/109/EC.¹⁰

Question 10

Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

⁸ Directive 93/109/EC, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L 329/34.

⁹ Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368/38.

¹⁰ An amending directive was adopted on 20 December 2012 by the Council of Ministers, but has yet to be published in the OJ (Council Document 17198/12, 19 December 2012).

Question 11

Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?

Question 12

Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)? In answering this question, rapporteurs may be interested to know about an emerging line of case law in the UK on the application of EU law, specifically Article 39 CFR, to restrictions on prisoners' voting, which will reach the UK Supreme Court in June 2013.¹¹

Please consider the EUDO Citizenship Observatory (FRACIT) data, especially the relevant national reports, in answering these questions.

Culture(s) of citizenship

We intend to chart the emerging *cultures* of (Union) citizenship in three key respects: (1) the status of Union citizenship is constructed around the paradigm of individual *rights*; but immigration law more generally is traditionally grounded in an ethos of *permission* – do national actors (administrative, legislative and judicial) tend to apply that distinction *appropriately* in their application and interpretation of Union citizenship? (2) To what extent has the culture of rights been strengthened by the changed legal status of the Charter of Fundamental Rights? Are rights-based arguments intensifying, in other words, since the Lisbon Treaty came into effect in 2009? (3) What is the general *tone* of the national debate, in the media and civil society more broadly, on the status of and the rights attached to Union citizenship?

Question 13

On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?

¹¹ The Scottish case of *McGeoch v Lord President of the Council* [2011] CSIH 67 and the English case of *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439 have been conjoined and will be heard together in the Supreme Court in June 2013. In both cases, the applicants will argue that the total ban on prisoners' voting rights in the UK in relation to the prospective European Parliament elections in June 2014 is disproportionate.

Question 14

Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?

Question 15

Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g. expulsion; access to state benefits; derived rights for third country nationals)? How *accurate* is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?