European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems

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Abstract
In recent years much discussion has taken place on the definition of the boundaries for not economically active persons moving within the EU of national solidarity systems guaranteeing a minimum level of subsistence. The main purpose of this article is to demonstrate how different parts of European (internal) migration law have been serving as an instrument in the defining of these boundaries. It will first analyse what has been agreed in the social security co-ordination Regulation 1408/71 on the responsibility that lies on the Member State of residence for the payment of minimum subsistence benefits. Special attention will be paid to the consequences of this financial responsibility for the application of the directives on the right of residence, both for EU citizens (Directive 2004/38) and for long-term resident third country nationals (Directive 2003/109). The article will then comment on the recent case law of the ECJ (and the reactions to it in academic literature) on the entitlement, for not economically active EU citizens, to social minimum benefits in the state of residence. These developments will be placed in the context of what has recently been agreed by the Community legislature on the non-contributory mixed type benefits in Regulation 1408/71.

Keywords
Free movement EU citizens; minimum subsistence benefits; social security co-ordination; Regulation 1408/71; Directive 2004/38; Directive 2003/109; European citizenship; Article 18 EC

1. Introduction
Formulating answers to the question of who belongs to the circle of solidarity of a state and therefore may claim membership of national social insurance or financial support from the public finances, traditionally belongs to the prerogative of the individual states. Since the creation of modern social security and social benefits systems this question has been answered in various ways. Depending on the different social and political history of each state, the boundaries of solidarity systems were defined on the basis of the nationality, residence and/or occupational activity of the persons concerned.
Nowadays the solidarity mechanisms in each of the Member States of the European Union are characterised by a mixture of systems, some based on periods of contribution and/or of work, others on residence and tax-funding. Minimal protection systems such as social assistance or other non-contributory benefits linked to financial or other special needs of a person and financed out of the public purse, are often subject to conditions related to the nationality of the applicant and/or the legality and duration of his residence within the territory of the host state. Solidarity is traditionally a national concept, especially for those forms of financial solidarity not linked to insurance or the payment of contributions.

Within the context of the European Union, Member States in principle still have sovereign power to define their social protection systems. Article 137 (2) EC empowers the Community to adopt minimum requirements in the field of social security and social protection of workers, but these powers were never used and there seems to be no political intention to do so.

It is also settled case law that Community law does not detract from the powers of the Member States to organize their social security systems. In the absence of harmonization at Community level, it is therefore up to each Member State to determine the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits.1

However, the ECJ has always emphasized that the Member States must nevertheless comply with Community law when exercising those powers. In particular European migration law has played and is still playing an important role in this field.2

Already from the very start of Community law in 1958, a system of co-ordination of social security schemes was set up in order to promote the freedom of movement for workers.3

This co-ordination regime determines the Member State of which the social security system is applicable in a cross-border situation to workers and other covered persons (such as the members of the family). Based on the “workplace” principle, it overrules national law based on nationality and/or residence. Moreover, it prohibits all discrimination on grounds of nationality. The main objective is clearly not to define a common social security system, which was at that time as much as it is now politically inconceivable. Its main objective is to abolish all obstacles to the free movement of workers that would be created if migration within the Union were to create adverse affects or even lead to a loss of social security rights. Conditions for entitlement to benefits based on nationality and territoriality are put aside.

2) For the purpose of this article I will concentrate primarily on the European migration law dealing with the rights of persons to move and reside within the Union (internal migration within the 27 Member States). I will not examine the impact of external European migration law on entrance and immigration via the Union’s external borders.
3) Regulation 3/1958, based on art. 51 EEC.