Union Citizenship:

Development, Impact and Challenges

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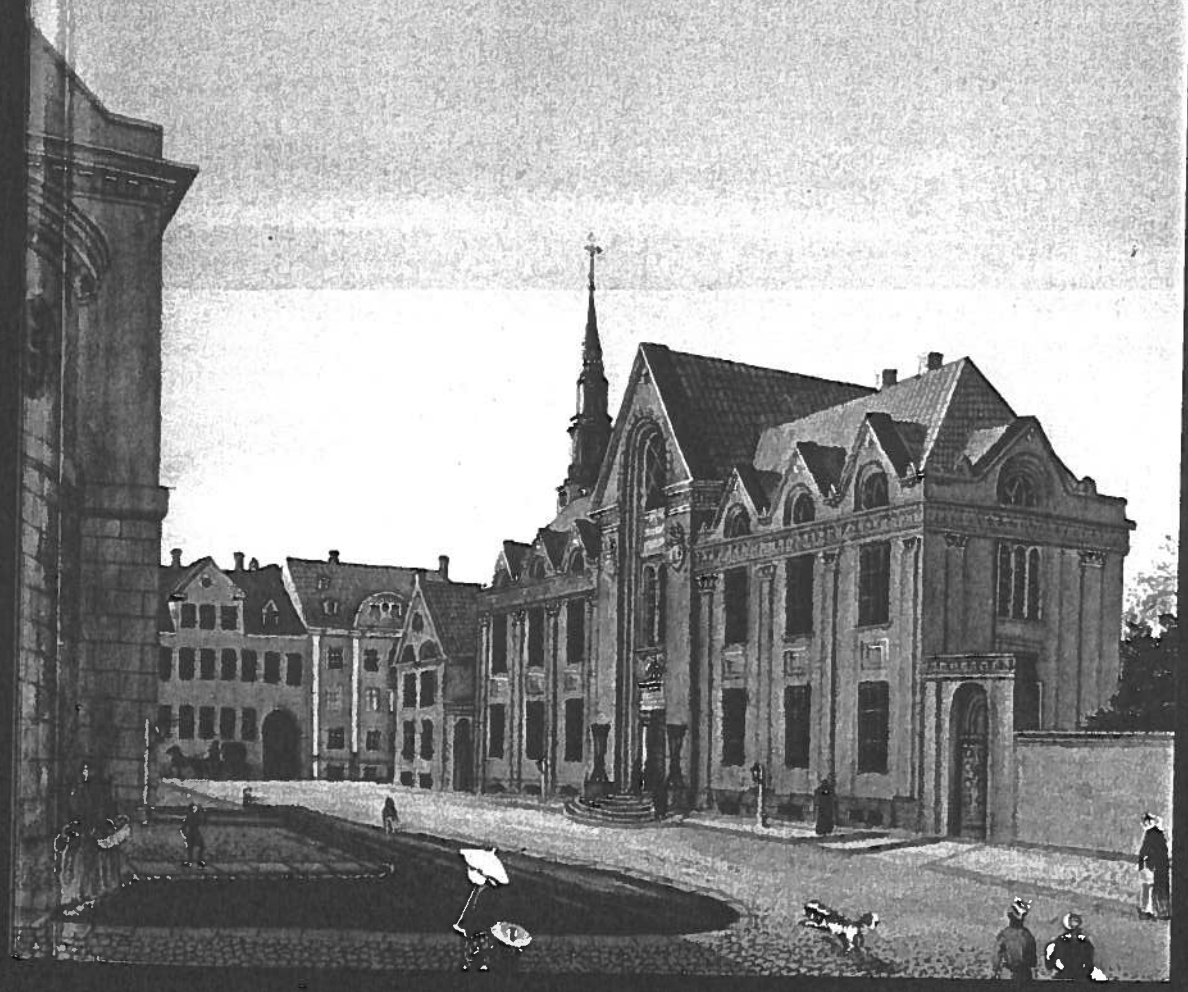

BULGARIA

Alexander Kornezov[1]

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

Question 1

The question of how and to what extent Directive 2004/38/EC has been transposed into Bulgarian law has caused a great deal of confusion in national administrative and judicial authorities. Generally speaking, the Directive was transposed with the adoption of the Entry, Residence and Exit of EU Citizens, and Members of Their Families Act (hereafter the 'EU Citizens Act').[2] However, the scope of application of this Act is restricted only to Union citizens and their family members, who are not Bulgarian citizens.[3] Apparently, the national legislator's understanding of the Directive was that the latter did not apply to nationals with regard to their own Member State. This understanding turned out to be wrong in the light of the Court of Justice's subsequent case-law, according to which the Directive is also applicable to nationals wishing to leave their own Member State.[4] The legal framework governing the right of free movement of Bulgarian citizens is laid down in the Constitution[5] and a number of legislative acts, in particular the Bulgarian Identity Documents Act (hereafter 'ZBLD').[6] In addition, the right of free movement of a Bulgarian citizen's family members who are third country nationals is governed by

1. Dr, Référendaire at the Court of Justice of the EU. The views expressed in this report are personal.
2. Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства (ДВ, бр. 80, 30.10.2006, последно изм. и доп. бр. 21, 13.03.2012).
3. See e.g. order No. 2414 from 11 November 2010 of the Sofia City Administrative Court in case No. 6758/2009.
4. E.g. case C-33/07, Jipa, ECR I-5157.
5. See, in particular, Art 35.
6. Закон за българските лични документи (ДВ, бр. 93, 11.08.1998, последно изм. и доп. бр. 70 от 9.08.2013).

the Foreigners Act.[7] Neither the Constitution, nor these acts have however been drafted with the Directive in mind. Therefore it appears that the Directive, in so far as it is applicable to nationals wishing to exercise their right to free movement, has not been transposed into national law. This matter in particular has generated a substantial body of case-law (see, in particular, the reply to Question 6).

The following analysis will mainly focus on the Union Citizens Act, unless it is otherwise stated. Paragraph 1 of its additional provisions contains the definition of a 'member of the family of a EU citizen'. This definition is broader than the one provided for under Art 2 of the Directive in so far as:

- it generally covers the dependant 'descendants', as well as 'relatives in the ascending order'[8] and not only, as required under Art 2(2)(c) and d), the *direct* descendants and relatives in the ascending line;
- it covers persons in 'factual cohabitation' with a Union citizen.[9] According to Art 2(2)(b) of the Directive, partners in 'registered partnerships' are to be considered as members of the family of a Union citizen, 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage'. In Bulgaria registered partnerships, other than marriage, are not formally recognised[10] and are certainly not considered as 'equivalent' to marriage. Moreover, the term 'factual cohabitation' appears broader than a 'registered partnership'.

Art 3 of the Directive has also been transposed in broader terms. Whereas Art 3(2) of the Directive requires Member States only to 'facilitate' entry and residence for the persons defined therein, Art 5 of the Union Citizens Act provides that these persons 'have the right' to enter and reside in Bulgaria. This, together with the broad definition of a Union citizen's family member mentioned above, practically eliminates the different status of the persons mentioned, respectively, in Arts 2 and 3 of the Directive. Bulgarian law thus seems to provide, as a whole, a much more liberal legal framework for family members of Union citizens than the one required under the Directive. By virtue of Art 37 of the Directive, the latter does not affect more favourable national provisions.

7. Закон за чужденците в Република България (ДВ, бр. 153 от 23.12.1998, последно изм. и доп. бр. 70 от 9.08.2013).
8. §1(1)(b) and (c) of the Union Citizens Act.
9. §1(1)(a) of the Union Citizens Act.
10. Even though national law sporadically attaches certain legal consequences to the so-called 'factual cohabitation', there is no formal definition thereof, nor a possibility to formally register it.

As far as Art 5 of the Directive is concerned, it has been almost literally transposed into the Union Citizens Act.[11]

No relevant case-law of the domestic courts regarding the aforementioned legal provisions could be identified.

Question 2

There is no such evidence in the decisions of national courts and tribunals.

Question 3

The national provisions that are meant to transpose Arts 12-15 of the Directive have been placed in different parts of the Union Citizens Act. This technique makes it difficult to evaluate to what extent Arts 12-15 of the Directive have been correctly transposed into national law. Even if it seems that, overall, most of the rules laid down in Arts 12-15 have been properly reflected into national law, some inconsistencies remain, namely:

- Art 12(3) of the Directive has been transposed incorrectly. Art 15(2) of the Union Citizens Act, read in conjunction with paragraph 4 of the same article, suggests that the Union citizen's children or the parent who has actual custody of the children retain the right of residence in Bulgaria after the Union citizen's departure or death, if they are enrolled in an education establishment, *and* if 'they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements'. This results from an ill-placed *renvoi* which seems to suggest that the above-mentioned requirement is applicable to all family members finding themselves in one of the situations described in Arts 12(2) and (3), and 13(2) of the Directive. This looks like a legislative error given that, first, Art 12(3) of the Directive imposes no such requirement and, second, the rationale behind the right of

11. Art 4.

residence of the Union citizen's children or of the parent having actual custody rights manifestly stands at odds with the aforementioned requirement.

- The requirement, under Art 14(2) of the Directive, that the verifications, by national authorities, of whether the conditions set out in Arts 7, 12, and 13 of the Directive are satisfied, shall not be carried systematically, does not appear as such in the Union Citizens Act. Still, the general scheme of the Act suggests that such systematic verifications should not occur in practice. Indeed, pursuant to Art 9(8) of the Act, national authorities may verify whether the said conditions are satisfied when 'a reasoned conclusion may be made that the rules on the right of residence have been breached'. Nonetheless, a clear prohibition of systematic verifications might have been preferable.
- The Bulgarian legislator has merged the requirements of Arts 14(3) and (4)(b), 15(2) and the last sentence of Art 27(1) of the Directive into one single provision of the Union Citizens Act.[12] Such an approach, while justifiable for reasons of legislative economy, is questionable since it blurs the differences between the abovementioned articles of the Directive and their respective scope. In addition, there is no explicit transposition of Arts 14(4)(a) and 15(3) of the Directive.

No relevant case-law of the domestic courts on the above-mentioned provisions could be identified.

Question 4

Arts 16-18 of the Directive have been almost literally transposed into the Union Citizens Act. With respect to the administrative formalities laid down in Arts 19 and 20 of the Directive, the Union Citizens Act has put into place a more rapid procedure that the one required under the Directive. Indeed, a permanent residence card is issued the same day for Union citizens and within one month for family members who are not Union citizens.[13] The Act does not lay down specific sanctions for failing to apply for a permanent residence card, but stipulates instead, in general terms, that 'minor' violations of the

12. Art 23(4).
13. Arts 16(5) and 19(3) of the Union Citizens Act. Compare with Arts 19(2) and 20(1) of the Directive, which require that the document be issued 'as soon as possible' for Union citizens and 'within six months of the submission of the application' for family members who are not Union citizens.

Act shall be subject to a fine of 20 BGL.[14] Finally, Art 21 of the Directive has not been explicitly transposed into national law.

No relevant case-law of the domestic courts concerning the abovementioned provisions could be identified.

Question 5

The Union Citizens Act contains no provision similar to Art 24(2) of the Directive. In order to evaluate whether and to what extent Bulgaria has made use of that derogation, one has to examine the national legislation governing social assistance and aid for studies, which is scattered between various laws and regulations. The national legislator, as will be demonstrated below, has not followed a common approach to the matter, but has rather dealt with it in a fragmentary fashion.

Thus, Bulgarian and Union citizens are entitled to student scholarships[15] and loans[16] subject to the same conditions. There is no requirement in that regard for Union citizens to have acquired the right of permanent residence or, for that matter, of any residence whatsoever. The Bulgarian legislator has entitled Union citizens to the respective benefit, irrespective of the length of their residence in the country.

As far as entitlement to social assistance is concerned, the Social Assistance Act provides that foreigners are entitled to social assistance, if, in particular, they have acquired the right of 'durable or permanent residence'.[17] That same provision also stipulates that are entitled to social assistance 'the individuals who are so entitled under an international treaty, to which Bulgaria is a party'. This latter category of beneficiaries is not clearly defined; in particular, it is uncertain whether Union citizens come within this category or not, especially in the light of Art 24(2) of the Directive. Alternatively, if the condition of 'durable or permanent residence' is to be considered as applicable to Union citizens, and given that the right of 'durable' residence for Union citizens is acquired after a period of 3 months, it can be deduced that they cannot obtain social assistance during their first 3 months of residence in

14. Approx. 10 EUR, see Art 33 of the Union Citizens Act. This seems in line with Art 20(2) of the Directive.
15. § 6b of Regulation No. 90 of the Council of Ministers (Наредба №90 на МС) of 26th May 2000, as modified ДВ, бр. 70 от 2006.
16. Art 3 of the Student and Doctoral Loans Act (Закон за кредитиране на студенти и докторанти, обн., ДВ, бр. 69 от 5.08.2008 г.).
17. Art 2(6) (Закон за социално подпомагане, обн., ДВ, бр. 56 от 19.05.1998 г.).

Bulgaria. In this respect, it may be argued that Bulgaria has implicitly made use of Art 24(2) of the Directive. It is a different matter that, as a rule, if Member States wish to make use of a derogation, they should do so explicitly.

There are also a number of other more specific national laws governing various particular social benefits, such as, for example, the Family Assistance for Children Act, which lays down the rules on social (non-contributive) benefits during pregnancy, birth, and for raising children. This Act provides that foreigners may claim such benefits, if they have acquired the right of *permanent* residence and 'if the right to such a benefit results from an international treaty to which Bulgaria is a party'.[18] The requirement for permanent residence seems however, in any event, incompatible with Art 24(2) of the Directive.

No relevant case-law of the domestic courts concerning Union citizens could be identified.

Question 6

1.

There is a substantial body of case-law concerning the concept of 'public policy' and the application of the principle of proportionality within the context of Art 27 of the Directive. Most of the case law concerns Bulgarian citizens who were banned from leaving the country on one of the following grounds:

i) the person concerned had committed an offence, while residing in another State;[19] or
ii) the person concerned had a tax or a social security liability of more than 5000 BGN;[20] or
iii) the person concerned had a private debt of the same amount.[21]

The legality of these grounds has been challenged as being contrary to the Constitution, to the ECHR and to EU law (Directive 2004/38). However, it is noteworthy that the right to free movement is not guaranteed in identical terms under these three instruments. In particular:

18. Art 3(5) (Закон за семейни помощи за деца, обн., ДВ, бр. 32 от 29.03.2002 г.).
19. Art 76(5) ZBLD.
20. Approx. 2500 EUR; Art 75(5) ZBLD.
21. Art 76(3) ZBLD, later replaced by Art 75(6) of the same law.

- According to the Constitution, the freedom of movement may be restricted 'for the protection of constitutionally recognised values, such as national security, public health and the rights and freedoms of other citizens' (Art 35);
- Pursuant to Art 2 of Protocol 4 of the ECHR, which Bulgaria has signed and ratified, 'no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

It follows, first, that unlike Art 27 of the Directive, Art 35 of the Constitution makes no mention of 'public policy', but instead allows restrictions for the protection of the 'rights and freedoms of other citizens'. The interesting query here is whether the two concepts overlap or whether they are different. Secondly, Art 27 of the Directive expressly provides that the grounds mentioned in that article cannot be invoked 'to serve economic ends'. Such a condition is absent from the Constitution. Thirdly, the list of grounds on which the freedom of movement may be restricted under Art 35 of the Constitution, seems not to be exhaustive, which is illustrated by the use of 'such as'. The contrast here with Art 27 of the Directive is manifest. Similarly, Art 2 of Protocol 4 of the ECHR provides, like the Constitution, that the freedom of movement may be restricted for the protection of the rights and freedoms of others, and adds as possible grounds the prevention of crime and the protection of morals. There is no equivalent of the prohibition to restrict the freedom of movement on economic grounds either.

Thus Bulgarian courts had the difficult task of distinguishing between, or as the case may be, conciliating these different legal instruments and their subtle differences. The matter was eventually brought before the Supreme Administrative Court (hereafter the 'SAC'), the Constitutional Court (hereafter the 'CC'), the European Court of Human Rights (hereafter the 'ECtHR'), and the Court of Justice.[22]

22. For a comprehensive overview of these developments, see N. Angelova, Freedom of Movement of Bulgarian Citizens as Citizens of the European Union and Measures for Its Restriction, Evropeiksi praven pregled, vol. II (2012), pp. 163-193 and pp.317-319.

2.

The first query that had to be resolved was whether EU law and, in particular, Art 27 of the Directive, was applicable to nationals in respect of their own State of origin. The query gave rise to the preliminary reference in *Gaydarov*,[23] which concerned a ban imposed on a Bulgarian citizen following an offence committed in a third state. The Court of Justice held, first, that the Directive was applicable in such a situation, and second, that national law seemed to allow the imposition of such bans solely on the basis of a previous offence without further evaluating whether the person concerned represented a genuine, present, and sufficiently serious threat affecting a fundamental interest of society.

3.

Secondly, national courts wondered whether the failure to pay a public or a private debt could at all serve as a ground to restrict the right to free movement of Union citizens. After having initially confirmed the legality of such bans, the matter was brought to the ECtHR in *Riener v Bulgaria*. The Strasbourg court held that a ban on leaving the country as a consequence of a failure to pay a *public* debt of 5000 BGN or more (tax or social security liabilities) pursued a legitimate aim, namely, maintaining the *ordre public* and the protection of the rights of others within the meaning of Art 2 of Protocol 4 of the ECHR, without further elaborating on the matter.[24] Later, in *Ignatov v Bulgaria*, the ECtHR held that banning a person who had failed to pay a *private* debt from leaving the country also pursued a legitimate aim, namely, the protection of the rights of others.[25] In both cases, the ban was found to be disproportionate, given that it did not provide for periodic reassessment in the light of factors such as whether or not reasonable efforts to collect the debt had been made and whether the debtor's leaving the country was likely to undermine the chances to collect the money. The ECtHR also pointed out that the ban had an automatic character and could thus remain in force over lengthy periods of time without taking into consideration the debtor's personal conduct.

The matter was also considered by the CC. It found that a ban on leaving the country as a consequence of a failure to pay a *public* debt was, in principle, justified on grounds pertaining to the 'protection of the rights and freedoms of other citizens' within the meaning of Art 35 of the Constitution.[26] It pointed out that such a failure 'undermines the economic foundations of the State, creates a risk for the timely and effective payments and services, necessary for guaranteeing some constitutionally recognised fundamental rights, such as the right to social security and social assistance, medical insurance and free medical care, education, healthy and favourable environment, etc.' A ban on leaving the country on grounds of a failure to pay a *private* debt was, according to the CC, also justified in the name of the 'protection of the rights and freedoms of other citizens', since such a failure breached the creditor's right to private property. Nevertheless, the CC declared both bans unconstitutional, because, in substance, they took no account of the debtor's personal behaviour (e.g. whether he or she cooperated with the authorities or obstructed the reimbursement of the debt),[27] nor did they conform with the principle of proportionality, given that, according to the Bulgarian penal code, only certain serious and intentional failures to pay a public liability, amounting to a criminal offence, may be punished by a ban on leaving the country. It is noteworthy that the CC reasoned exclusively on the basis of Art 35 of the Constitution. It did mention, in a sort of an *obiter dicta*, some of the differences between the text of that provision and Art 27 of the Directive, but drew no conclusion from this, other than stating that the declaration of unconstitutionality would facilitate the transposition of Art 27. In a dissenting opinion, three of the judges added that the bans in question should not be considered as serving economic ends within the meaning of Art 27(1) of the Directive, because they contributed to the 'stability of the public order and legal certainty, given that they are based on a final national judgement or a definitve injunction to pay'.[28]

4.

Therefore it was because of their failure to respect the principle of proportionality that these bans were found to violate the ECHR and the Constitution. The case-law discussed above did not address the question of whether the imposition of such bans is compatible with EU law and, in particular, whether they can be justified on grounds of 'public policy' within the mean-

23. Case C-430/10, nyr.
24. Appl. No. 46343/99.
25. Appl. No. 50/02.

26. Judgment No. 2 in case No. 2/2011.
27. See also the opinion of judges P. Kirov and S. Stoeva, who underline the automatic character of the ban.
28. See the dissenting opinion of judges D. Tokushev, K. Stoichev and V. Angusheva.

ing of Art 27 of the Directive. That question remained relevant since, if the bans could not be justified on that ground, they were illegal *per se*. By contrast, if they were only disproportionate, they could be maintained as such, subject to certain legislative amendments allowing for the particularities of each case to be taken into consideration.

In that regard, national courts considered that a ban following a failure to pay a *public* debt pursued a 'just objective', underlining the public interest involved in the responsibility of the authorities to ensure budgetary revenue.[29] The question was eventually referred to the Court of Justice in *Aladzhov*.[30] The Court pointed out that 'the possibility cannot be ruled out as a matter of principle' that non-recovery of tax liabilities may fall within the scope of 'public policy' within the meaning of Article 27(1) of the Directive, and that the resulting ban cannot be considered, as a matter of principle, to serve exclusively economic ends.[31] The Court hemphasised that the concept of public policy presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a 'genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society', related, for example, to the amount of the sums at stake, or to what is required to combat tax fraud.[32] The Court also addressed the issue of the differences between Art 27(1) of the Directive and Art 35 of the Constitution, pointing out that these differences were 'of no relevance' since 'all that matters' was whether the ban was based on a ground which could be regarded as within the scope of public policy, within the meaning of EU law.[33] As regards the proportionality of the measure, the Court noted that such measures are founded solely on the existence of the tax liability without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy. It also invited the national court to verify whether there existed other less intrusive measures, suggesting strongly that, even if the ban at issue were to be considered as adopted under the conditions laid down in Art 27(1) of the Directive, it looked like it failed to satisfy the conditions of the second paragraph thereof.

29. E.g. judgment No. 15760 in case No. 9700/2012 of the SAC; judgment No. 15087 in case No. 12509/2011 of the SAC.
30. C-434/10.
31. Paras 37 and 38, ibid.
32. Paras 35 and 37, ibid.
33. Para. 33, ibid.

With regard to bans imposed as a consequence of a failure to pay a *private* debt, however, national courts were much more hesitant. Parts of the case-law considered that such bans cannot be justified on grounds of public policy within the meaning of Art 27(1) of the Directive, but served purely economic ends.[34] In one case, such a ban was even held to be of a sufficiently serious nature as to give rise to State liability.[35] Yet, another part of the case-law yet seems to suggest that a failure to pay a private debt can, in principle, constitute a ground of public policy, 'if the financial interest at issue amounts to a fundamental interest of society'.[36] The contradictions in the case-law gave rise to an interpretative judgment of the SAC,[37] where it held that such a ban was contrary to the Directive, because of the automatic and disproportionate character of the measure. The judgment did not address the issue of whether such a ban was to be considered as pursuing one of the grounds spelled out in Art 27 of the Directive. This was noted in two dissenting opinions, one of which argued that the matter should have been referred to the Court of Justice in order for the latter to assess whether a ban for a failure to pay a private debt can be justified on grounds of public policy.

The matter was indeed eventually brought to the attention of the Court of Justice by a lower court in *Byankov*.[38] The Court appeared rather sceptical about whether a failure to pay a private debt was a matter of public policy, noting that 'even if the view could reasonably be taken that some notion of safeguarding the requirements of public policy underlies such an objective, it cannot be ruled out (...), that the prohibition on leaving the territory at issue in the main proceedings pursues an exclusively economic objective, (which) Article 27(1) of Directive 2004/38 expressly excludes (...)'.[39] As regards the requirement of taking into consideration the personal conduct and the proportionality of the measure, the Court's considerations were analogous to those spelled out in *Aladzhov*.

5.

What conclusions can be drawn from the different currents of case-law outlined above? Whereas the assessment of the principle of proportionality car-

34. E.g. judgment No. 7776 in case No. 8814/2012 of the SAC.
35. Ibid.
36. Judgment No. 11100 in case No. 4890/2011 of the SAC.
37. Interpretative judgment No. 2/2011 of the SAC.
38. Case C-249/11.
39. Para. 39.

ried out by the SAC, CC, ECtHR, and the Court of Justice was not dissimilar, this was not necessarily the case with regard to the notion of 'public policy'. While the CC and the ECtHR had no problem concluding that a ban on leaving the country in the event of a failure to pay a public and/or a private debt of a certain amount can be justified on grounds of maintaining the public order (ECtHR) or of protecting the rights and freedoms of others (ECtHR and the CC), the Court of Justice was much less affirmative and manifestly dubious in that regard.

More generally, national courts seemed confused as to the respective scope of application of the Constitution, the ECtHR and EU law, and their underlying principles and rationale. Given the importance of free movement in Union law, it is only logical that the Directive be less permissive of restrictions on the freedom of movement than international treaties, or, as the case may be, national constitutions. This consideration may become even more relevant after EU's accession to the ECHR.

6.

As far as Art 28 of the Directive is concerned, the Bulgarian legislator has not transposed it verbatim. Art 25 of the Union Citizens Act distinguishes only between two categories of Union citizens – those who have resided in Bulgaria for 10 or more years and all other Union citizens, irrespective of whether they have acquired the right of permanent residence or not. With regard to the first category, expulsion may be ordered 'only in exceptional circumstances on grounds of national security'.[40] This seems to reflect, albeit in different terms, the 'imperative grounds of public security' of Art 28(3) of the Directive. With regard to the second category, expulsion is allowed where the Union citizen 'represents a genuine, present, and serious threat to national security or public order'.[41] Thus, the same – *higher* – threshold pertaining to the *serious* character of the threat to public order or national security is applicable to all Union citizens having resided in the country for less than 10 years, irrespective of whether they have acquired the right of permanent residence or not. Therefore it appears that the Union Citizens Acts lays down a more favourable régime, at least with regard to Union citizens who have not yet acquired the right of permanent residence. By virtue of Art 37 of the Directive, the latter does not affect more favourable national provisions.

40. Art 25(2) of the Union Citizens Act.
41. Art 25(1) of the Union Citizens Act.

There is little domestic case-law on expulsion of Union citizens or their family members. In one case, the national court interpreted the notions of serious and imperative grounds of public policy and public security.[42] Confronted with difficulties in establishing the precise length of time of the person's residence in the country, the court decided to examine whether the facts of the case amounted both to serious and imperative grounds of public policy and public security capable of justifying his expulsion. In that regard the court took into consideration the following circumstances: the person was sentenced to more than 5 years in prison for drug trafficking in an organised group, has been presenting himself with a false identity over a long period of time, has resided illegally in the country, and has not culturally and socially integrated into Bulgarian society. It concluded, after quoting the Court's judgment in *Tsakouridis*, that the abovementioned facts suffice to consider that the grounds on which the expulsion decision had been taken amount both to serious *and* imperative grounds of national security.

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

Question 7

The analysis of the existent case-law suggests, first, that national courts do not distinguish clearly between rights acquired under Directive 2004/38 and under Arts 20 and/or 21 TFEU; secondly, that they do not fully apprehend the Court's case-law; thirdly, that there is a general unease when having to address 'purely internal situations': national courts either make no mention of Arts 20 and 21 TFEU at all, or, conversely, refer quasi-automatically to this provision or to Art 21 TEUF without fully taking into account the conditions for their application as spelled out by the Court of Justice in its case-law.

The following examples illustrate this. In *Nalbandian,* an Armenian adult, legally residing in Bulgaria for many years, was ordered to leave the country, because of the expiry of the duration of his residence permit. Mr. Nalbandi-

42. Judgment No. 13042 in case No. 6600/2012 of the SAC. Interestingly, the person whose expulsion was ordered was a Turkish national and it was not alleged that he was a family member of a Union citizen. Yet, probably because there were doubts about his true identity, the court decided to examine, in any event, whether the requirements of the Directive were met.

an's mother, who was suffering from a serious disease which required daily care, had in the meantime acquired Bulgarian citizenship. Mr. Nalbandian challenged the order before the administrative court in Dobrich. The latter rejected the action, pointing out that the applicant's right to family life within the meaning of Art 8 ECHR was not breached since the contested order was imposed by law, was justified by the 'need to protect the rights and freedoms of the others', and was proportionate in that Mr. Nalbandian's father was residing in Bulgaria and could therefore take care of his wife.[43] In its judgment the administrative court made no mention of EU law whatsoever. On appeal, the SAC annulled that judgment on a number of grounds, one of which concerned the failure of the lower court to take account of the applicable Union law.[44] It noted that the applicant has a continuous link with Bulgaria, where his parents live, has property in the country, has had recourse to medical services in the context of his mother's treatment, is culturally and socially integrated and is unlikely to become a burden for the Bulgarian social assistance system. The SAC also mentioned that the applicant's father was suffered from a heart disease. Further, it held that although the applicant's mother, a Union citizen, has never exercised her freedom of movement, that circumstance 'had no bearing on the applicability of Directive 2004/38 and Arts 20 and 21 TFEU', a conclusion it supported by referring to the Court's judgments in *Zhu and Chen45* and *Carpenter*.[46] In its opinion, by virtue of Art 3(2)(a) of the Directive, 'as interpreted in the light of para. 45 of the Court's judgment in *Chen*', the Directive was applicable to Mr. Nalbandian's situation. After mentioning that Mr. Nalbandian's expulsion would affect 'unfavourably' his mother's family relations with her son and would also 'interfere' with her right to a life of dignity and independence within the meaning of Art 25 of the Charter, the SAC concluded that Mr. Nalbandian's removal would deprive his mother of the 'genuine enjoyment of the substance' of her rights as Union citizen. On the basis of these considerations, the SAC found that the contested order breached Art 7 of the Charter, Arts 20 and 21 TFEU, Directive 2004/38 and Art 8 ECHR and, consequently, annulled it.

The SAC's judgment in *Nalbandian* is a good example of the difficulties national courts have experienced in the application of EU rules on citizenship. First, it shows a general misunderstanding of the scope of application of Directive 2004/38. Contrary to what was held in that judgment, the Directive

43. Judgment n° 210 from 08.12.2009 in case n° 447/2009.
44. Judgment n° 15906 from 23.12.2010 in case n° 3284/2010.
45. Case C-200/02.
46. Case C-60/00.

is not applicable to a third country national who is a family member of a Union citizen that has never exercised his or her right to free movement and that has always resided in the Member State of which he or she is a national.[47] Secondly, the judgment in *Nalbandian* demonstrates the practical difficulties in understanding and applying the 'denial of the genuine enjoyment of the substance of a Union citizen's rights' test. In particular, the SAC did not examine the question of whether Mr. Nalbandian's removal would lead to a situation where his mother would have to leave the territory of the Union.[48] In that respect, the SAC did not examine whether Mr. Nalbandian was personally taking care of his sick mother, whether she was economically dependent on him, etc. Thirdly, the judgment in *Nalbandian* also shows the difficulties national courts face when having to apply the Court of Justice's citizenship case-law. SAC's referral to *Zhu and Chen* and *Carpenter* appears ill-placed. Last, but not least, it is unclear what relevance the SAC attached to Mr. Nalbandian's degree of integration into Bulgarian society or to the fact that he was unlikely to become a burden to the social assistance system. These circumstances are generally relevant in the context of Directive 2004/38, but not for the purposes of applying Art 20 TFUE.

Another example of the national courts' misapprehension of the Court of Justice's citizenship case-law can be found in the *Singh* case. Mr. Singh, an Indian national, was ordered to leave the national territory and was banned from re-entering for a period of 5 years on the ground that he was illegally residing in the country. Mr. Singh argued that he had a durable relationship with a Bulgarian citizen for over four years and had a son, who was a Bulgarian citizen himself. Mr. Singh successfully sought the annulment of the order in front of the Administrative court in the region of Sofia, which pointed out, referring to the Court's judgment in *Zambrano*,[49] that the contested order was not sufficiently motivated in that it failed to take account of the applicable Union law.[50] It did not however further discuss the exact application of Union law in the situation at hand. The judgment was however subsequently quashed on appeal by the SAC, which pointed out, first, that the Court's judgment in *Zambrano* was irrelevant, since, unlike Mr. Singh, the third country national in *Zambrano* had legally entered the territory of the Union.[51] Secondly, it held that Mr. Singh cannot be considered a member of a

47. E.g. case C-256/11, Dereci, paras 50-58.
48. Ibid., para. 66.
49. Case C-34/09.
50. Judgment n° 56 from 27.01.2012 in case n° 1152/2011.
51. Judgment n° 5699 from 20.04.2012 in case n° 2713/2012.

Union citizen's family since there was no evidence of his relationship with a Bulgarian citizen, nor did it credit the mother's notary declaration that Mr. Singh was the father of her son since the said declaration did not respect the form required by law. Putting aside the question of whether there was sufficient evidence of Mr. Singh being a Union citizen's family member, the interesting aspect of this judgment is the way the SAC interpreted the Court's judgment in *Zambrano*. The SAC seemed to suggest that what was decisive in that case was the fact that Mr. Zambrano had legally entered the territory of the Union and that the Court's solution would be inapplicable in a situation where the third country national had illegally entered the EU. This understanding does not find support in the Court's subsequent case-law.[52]

There is also evidence of cases where national courts did not at all discuss whether Art 20 TFEU was applicable in a 'purely internal situation'. The *Shishich* case concerned a Bosnian national who had been living in Bulgaria for about 15 years, had a durable relationship with a Bulgarian citizen and was the father of a Bulgarian citizen. Mr. Shishich, whose family members had apparently not exercised their rights of free movement, was ordered to leave the country because he was found to be residing there illegally. The *Hashani* case concerned another 'purely internal situation' where a Kosovo national was ordered to leave the country, despite the fact that he had a durable relationship with a Bulgarian citizen, with whom he had three minor children, also Bulgarian citizens. In neither of these cases did the SAC refer to Art 20 TFEU. Instead, in *Shishich* it relied exclusively on Directive 2008/115[53] and annulled, on that ground, the contested order.[54] In *Hashani*, it annulled the order on the basis of Art 8 ECHR, because it failed to take into account all the relevant circumstances of the case and was, in any event, disproportionate.[55]

Question 8

Where Bulgarian citizenship has been acquired by naturalisation, it may be revoked if, in particular, the naturalised person has withheld any data or facts

52. See for example, the judgment in Dereci, cited at note 47 supra, para. 23 read in conjunction with paras 59-69.
53. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98-107.
54. Judgment n° 11056 from 05.08.2011 in case n° 13868/2010.
55. Judgment n° 13422 from 19.10.2011 in case n° 14875/2010.

which, had they been known, would have served as grounds to refuse acquisition of Bulgarian citizenship.[56] However, the decision to grant Bulgarian citizenship can be revoked no later than ten years after it has been granted and only if the person does not, as a result of the revocation, become stateless. The latter condition was added in February 2012,[57] i.e. after the Court's judgment in *Rottmann*.[58] It is unclear whether this amendment sought to give effect to the Court's judgment. In addition, Art 24 of the said Act stipulates that any person who has acquired Bulgarian citizenship by naturalisation may be deprived thereof, if sentenced by an enforceable conviction for a serious offence against the Republic, subject to the condition that the said person is abroad, and does not become stateless. It thus seems that a situation like the one in *Rottmann* cannot arise under Bulgarian law.

Political rights of EU citizens

Question 9

Directive 93/109/EC was first transposed in national law in March 2007 (3 months after accession) through the adoption of the Election of Members of the European Parliament from the Republic of Bulgaria Act.[59] In 2011, the relevant provisions were merged into the Electoral Code[60] which governs all matters related to the organisation of elections in Bulgaria. The latter has not made use of any of the derogations provided for under Arts 14 and 15 of the Directive.

With regard to the conditions imposed on EU citizens, they are mostly identical with those imposed on national citizens: age requirements (18 years by polling day for the right to vote and 21 years for the right to be elected); absence of indictment and ongoing custodial sentence; residence in Bulgaria or in another EU Member State at least during the last 3 months (for the right to vote) or 6 months (for the right to be elected); lack of citizenship of any State which is not a EU Member State (for the right to be elected). EU citi-

56. Art 22 of the Bulgarian Citizenship Act [Закон за българското гражданство (ДВ, бр. 136, 18.11.1998, последно изм. бр. 68, 02.08.2013)].
57. ДВ, бр. 11, 07.02.2012.
58. Case C-135/08, ECR I-1449.
59. ДВ, бр. 20, 06.03.2007.
60. ДВ, бр. 9, 28.01.2011.

zens' electoral franchise has also been subjected to three additional conditions, two of which result from the Directive (i.e. that he or she is not deprived of his or her electoral franchise in the home Member State and that he or she has stated in advance, in a written declaration, his or her desire to exercise his or her voting rights or to run as candidate in Bulgaria).[61] The third condition, specific to EU citizens, is the requirement that they enjoy a 'durable or permanent residence status' in Bulgaria.[62]

With regard to the latter requirement, the European Commission noted in its 2010 report on the election of MEPs that the 'requirement [for EU citizens] to provide a registration document for proving residence' is contrary to the Directive.[63] In the meantime, the Commission initiated infringement proceedings against Bulgaria concerning the implementation of the Directive.[64] It is interesting to note that the 'durable or permanent residence' requirement applicable to Union citizens only, seems to complement the condition – also applicable to Bulgarian citizens – that, in order to vote, they must have resided in 'Bulgaria or another EU Member State' at least during the last three months prior to polling day. These two conditions, read together, recall the legal framework laid down by Directive 2004/38, whereby Member States may require Union citizens to register with the local authorities for periods of residence longer than three months.[65] Yet, the 'durable or permanent residence' requirement applicable only to Union citizens seems problematic at least from two angles. First, whereas Union citizens residing in Bulgaria for periods longer than three months may indeed be expected to have registered with the local authorities, failure to do so may, according to Directive 2004/38, give rise to 'proportionate and non-discriminatory sanctions'.[66] The query here would be whether depriving the Union citizen of his electoral franchise is a proportionate and non-discriminatory sanction for failing to

61. Arts 8, 9 and 10 of the Directive.
62. Art 3(3) of the Electoral Code.
63. Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), 27.10.2010, COM(2010) 605 final.
64. http://ec.europa.eu/eu_law/eulaw/decisions/dec_20121024.htm. The complaints put forward by the Commission in this letter have however not been publicly disclosed.
65. Art 8(1) of the Citizen Directive.
66. Art 8(2) of the Citizen Directive.

produce a residence card.[67] Second, a Union citizen who has only recently settled in Bulgaria – for example one month before polling day – and who has therefore had no obligation to apply for a residence card, will be unable to vote, even though he had resided for the last three and more months in another EU Member State, thus fulfilling the requirement of Art 5 of Directive 93/109. By contrast, a Bulgarian citizen in a similar situation would be eligible to vote.

In its 2010 report, the European Commission also noted that Bulgaria had failed to correctly transpose the obligation to provide information to Union citizens on the detailed arrangements for exercising their right to vote and stand in elections.[68]

The December 2012 amendments to Directive 93/109/EC may require certain amendments to the Electoral Code. Art 118, para. 2, point 7, of the latter provides that an EU citizen who is not a Bulgarian citizen and who wishes to run for MEP, shall produce an attestation from the competent authorities in the home MS certifying that that person has not been deprived of the right to stand as a candidate in the home MS or that no such disqualification is known to them; however, if he or she is unable to produce such an attestation, it suffices that he or she declares that he or she has not been deprived of the right to be elected in his or her home MS.[69] While this second option seems to be already in compliance with the latest amendments of Directive 93/109/EC, the first proviso (the attestation requirement) should eventually be deleted in order to remove potential administrative hurdles.

No relevant case-law of domestic courts could be identified.

Question 10

Directive 94/80/EC was first transposed in national law in October 2007 (10 months after accession) through the adoption of the Municipal Elections Act.[70] In 2011, the relevant provisions were merged into the Electoral Code. Bulgaria has made use of the derogation provided for under Art 5(3) of the

67. According to the instructions of the Central electoral committee, EU citizens must produce a residence card in order to be able to exercise their electoral franchise: www.europe.bg/htmls/page.php?id=21089&category=354.
68. See note 64 supra.
69. For the 2009 EP elections that second option was inexistent : see Decision No. 11 of 7 April 2009 of the Central Electoral Commission which expressly requires that EU citizens produce such an attestation (Part II, point 1 (d)): http://izboriep.bta.bg/.
70. ДВ, бр. 78, 28.09.2007.

Directive by allowing Union citizens to stand only for municipal councillors, but not for mayors.

The Electoral Code imposes some additional conditions on EU citizens in order to vote or be elected in municipal elections, which are analogous to those mentioned in the reply to the previous question.[71] The European Commission has also initiated infringement proceedings against Bulgaria concerning the implementation of Directive 94/80.[72]

No relevant case-law of domestic courts could be identified.

Question 11

There is no franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law.

Question 12

Persons serving a custodial sentence or interdicted are deprived of electoral franchise. To our knowledge, the question of whether such limitations are compatible with EU law, and in particular with the Charter, has not so far been raised in domestic courts. For other possible tensions with EU law, please refer to the reply to Question 9.

Culture(s) of citizenship

Question 13

Given the relatively limited scope of the issues so far considered by national administrative and judicial authorities, it would be premature to evaluate whether the implementation of EU citizenship in Bulgaria is understood as part of a rights-based EU culture or as an adjunct to national immigration systems. It could nonetheless be noted that parts of the case-law and most recent

71. Arts 3(4)(5) and 4(5)(6) of the Electoral Code. In addition to the conditions mentioned in the reply to Question 9, Bulgarian and Union citizens are also required, in the context of municipal elections, to have resided in the respective municipal electoral territory at least during the last 6 months.

72. http://ec.europa.eu/eu_law/eulaw/decisions/dec_20121024.htm. The complaints put forward by the Commission in this letter have however not been publicly disclosed.

administrative practice have shown a clear preference for a 'rights-based' approach, in particular in cases where Bulgarian citizens have relied on their rights as Union citizens. By contrast, as far as third country nationals, members of the family of a Union citizen are concerned, the 'immigration'-based approach appears dominant. For examples, please refer to the replies to Questions 6 and 7.

Question 14

The Charter has not had a notable effect on how the rights of EU citizens are being interpreted by national courts. The latter have referred to the Charter in more general terms in a couple of judgments concerning EU citizenship, but do not seem to have drawn particular legal consequences from it. The case-law is still marred by confusion with regard to the scope of application of the Charter and that of the ECHR, whose Art 8 has been systematically quoted alongside Art 7 of the Charter, without distinguishing between the two. In that regard, the Court's judgment in *Dereci*[73] does not appear to have been fully understood by domestic courts.

Question 15

Issues connected to EU citizenship have not been a particularly salient issue in the national media. This is probably mainly due to the fact that immigration from other EU Member States has so far been limited. That being said, several themes directly or indirectly linked with Union citizenship have recurrently appeared in local media. A common feature of most of these reports is that they generally pay little attention to the legal aspects of Union citizenship.

One such recurring theme is the ongoing trend of Union citizens, mainly from the UK, settling down in certain regions of the country. Media reports on the matter have mainly focused either on the economic (e.g. how the prices of local real estate and services have been affected) or social (integration, language, customs, etc.) aspects of this trend, without necessarily taking account of Union citizenship as such.

Another frequently reported theme concerns the periodic group expulsions from France and occasionally from other EU Member States of Bulgarian citizens of Roma origin. These group expulsions have been condemned as con-

73. Cited note 47 supra.

trary to EU law by the European Commission[74] and the European Parliament.[75] The former even initiated infringement proceedings against France.[76] However, media reports in Bulgaria have paid little attention to the illegality of such expulsions and the associated aspects of Union citizenship.[77] Some have, instead, either exposed the 'hypocrisy' of the 'old' EU Member States (who call for the integration of the Roma minority, while at the same time subjecting them to group expulsions)[78] or emphasised the fact that such incidents generate negative coverage for Bulgaria as a whole.[79]

There have also been a number of media reports on the ever-increasing number of citizens of third States (mostly Macedonia, Moldova, Serbia, Albania, and the Ukraine), who have acquired Bulgarian citizenship in a fast-track simplified procedure. This procedure is available for citizens of third States of Bulgarian origin and has been designed with a view to reintegrating the Bulgarian minorities living – for historical reasons – abroad.[80] Media reports have suggested that some applicants have sought not so much to

74. http://europa.eu/rapid/press-release_MEMO-10-384_en.htm. In that regard, commissioner Reding declared: 'I personally have been appalled by a situation which gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority. This is a situation I had thought Europe would not have to witness again after the Second World War', see http://www.europeanvoice.com/article/2010/09/reding-slams-france-on-roma-expulsions/68855.aspx.
75. http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100907IPR81450.
76. See Viviane Reding's speech at the XXV Congress of FIDE, 31 May 2012, Tallinn, http://europa.eu/rapid/press-release_SPEECH-12-403_en.htm.
77. E.g. 'Френската сага с ромите', в. 'Монитор', 13.09.2012, 'Франция е депортирала 9800 румънски и български роми', http://dnes.dir.bg/news/frantzia-romi-deportirane-6944046, 20.08.2010, 'Европа се гаври с България заради шушумигите', в. 'Сега', 16.08.2012. For an exception however, see 'Франция наруши антирасистките директиви на ЕС', в. 'Сега', 02.09.2010.
78. E.g. 'Ромите ни заразиха с лицемерие Европа', сп. 'Тема', http://www.tema news.com/index.php?p=tema&iid=620&aid=14643, 'Комунизма ли да върнем заради ромите?', в. 'Сега', 17.08.2010.
79. E.g. '620 000 000 печелят ромските кланове', в. '24 часа', 10.09.2010.
80. For more details on this procedure and some statistical data, see V. Paskalev, Naturalisation Procedures for Immigrants, Bulgaria, and D. Smilov and E. Jileva, Country Report: Bulgaria, both available on the EUDO Citizenship Observatory's website.

reestablish their link with the Bulgarian state, but rather to take advantage of the Union citizenship that comes along with it.[81]

Local media have also reported on some of the infamous campaigns that certain Member States have launched in the context of a presumed influx of Bulgarian and Romanian migrant workers after the end of the transitional period (1 January 2014). These reports have rarely touched upon the legal aspects of free movement within the Union.[82]

It is not clear whether the media has had any influence on national public discourse. However, the absence of condemnation in the media of the group expulsions mentioned above might have had a certain impact on the rather passive stance of the Bulgarian government on this matter. Similarly, the fact that local media have not been particularly critical of certain Member States' campaigns aiming at discouraging or even restricting the rights of Bulgarian migrant workers might also have contributed to the government's very low profile approach to the matter as well as lack of official reaction.

81. E.g., 'Седем хиляди македонци са получили българско гражданство само за месец', в. 'Капитал', 30.12.2011, 'Македонците стават българи по икономически причини', в. 'Преса', 07.12.2012.
82. 'Заплаха ли са българите за Албиона?', в. 'Монитор', 09.03.2013, 'Холандия ни спира от работа в ЕС', в. 'Стандарт', 19.08.2013, 'Холандия иска да удължи забраната за работа на българи на нейна територия', http://pik.bg/.