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Procedural (in)Justice for EU Citizens Moving to Belgium: an Inquiry into Municipal Registration Practices

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Abstract

Moving as a French or Dutch citizen to Belgium should be easy, given the freedom of movement of EU citizens. Reality paints a different picture, however. This paper analyses the practices of Belgian municipalities and the Immigration Office as to the registration of EU workers, self-employed, jobseekers and their family members. It is based on a desk study, a survey among a sample of municipalities as well as semi-structured interviews with municipal officials, the Immigration Office and other stakeholders. The paper adopts a legal understanding of ‘procedural justice’, focusing on dimensions of equal treatment and transparency. It shows that the achievement of procedural justice for EU citizens is impaired by divergent and at times questionable practices by street-level bureaucrats. These practices indicate, among others, that varying levels of ‘deservingness’ of residence in Belgium can be observed within the category of mobile EU workers. Furthermore, increased digitalization and the use of intermediaries in the registration procedure facilitate and reinforce differential treatments among EU citizens and their family members.

Keywords: EU workers, family members, procedural justice, equal treatment, transparency.

Introduction

Within the field of migration law, EU citizens and their family members are generally and rightfully perceived as among the most privileged migrants, as they enjoy freedom of movement within the EU. However, freedom of movement is not exempt from administrative requirements. In Belgium, EU citizens and their (EU or non-EU) family members have to submit an application for registration at the municipality and submit specific documentary evidence, in order to benefit from their right of residence for more than three months. In this interaction between Belgian state actors – the municipalities and the Immigration Office – and EU mobile citizens, EU citizenship is being renegotiated. To that end, this paper aims to answer the following research question: which procedural justice concerns arise during the registration of EU citizens and their family members in Belgium? We argue that a lack of attention to (localised and privatised) implementation procedures can conceal how within the framework

of EU citizenship distinctions are being made that attest to the enactment of citizenship and non-citizenship alike.

In this paper, we adopt a legal understanding of ‘procedural justice’ with a focus on equal treatment and transparency as central elements, as these emerged as key concerns from the empirical research. This understanding diverges from the meaning attached to procedural justice in social psychology, where it refers to people’s *perceptions* of a procedure as ‘consistent, fair and equitable’ (Moynihan, Herd and Harvey, 2014, 47; Lind and Tyler, 1988). This study thus does not consider the experiences and perceptions of EU citizens and their family members themselves.¹ Rather, it is based on the empirical observation and interrogation of those enacting the Belgian state in this registration process, namely the municipalities and the Immigration Office.

The study highlights (local) government practices of unequal treatment among economically active EU citizens and among their family members, that are, for instance, expressed in inconsistent registration requirements. These differential treatments are reinforced by an absence of transparency resulting from an imbalanced implementation of the state’s duty to provide information to EU citizens who move to Belgium (see also Borelli and Wyss, 2022) as well as by the practices of intermediaries such as relocation agencies and private providers of information technology. The way EU citizenship is shaped through such procedural and practical dimensions seems to point to the enactment of an ‘elitist model of free movement’ (O’Brien 2016, 939). Within the category of mobile EU workers specifically, these instances of procedural injustice appear to contribute to the creation of hierarchies of deservingness. This article thereby illustrates how the concept of deservingness can also be applied to the analysis of governmental policies and practices regarding economically active mobile EU citizens and their family members. These findings regarding procedural injustices are in line with

¹ For examples of reports on the experiences of EU citizens and their family members, see Ballesteros et al. (2016), Nicolau (2018) and Tryfonidou and Wintermute (2021).

scholarship on EU mobility (i.e. Lafleur and Mescoli (2018)) that shows the concerns of mobile EU citizens regarding the transparency and consistency of decisions regarding their residence rights.

Methodology

The residence registration requirements in legislation and case law at the EU and Belgian level were analysed via a desk study. The Immigration Office for the first time shared its administrative guidance to municipalities (the so-called ‘GemCom Instructions’).² This provided the authors with a unique insight into until now invisible guidelines and practices. Next, a threefold approach was adopted to analyse the registration practices of a sample of 33 municipalities: a website analysis, an electronic survey (completed by 32 out of 33 selected municipalities) and semi-structured interviews with municipal officials. A longlist of 40 municipalities was based on four parameters, selected by the Federal Migration Centre – Myria:³ the number of EU citizens holding the nationality of a Member State at birth on 1 January 2017; the number of EU citizens currently holding the nationality of a Member State; the number of EU citizens registered as employees; and the number of EU citizens registered as self-employed. Factoring in considerations of regional and provincial distribution as well as size led to a selection of 33 municipalities: 10 from the Wallonia region, 11 from the Brussels region and 12 from the Flanders region. The municipalities included in the sample all had 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.

² These ‘GemCom Instructions’ consist of a Syllabus and online fiches.

³ This paper builds on a larger study commissioned by the Federal Migration Centre – Myria. The latter study also analyses the registration formalities in the Netherlands, Luxembourg, France, Germany and Italy as well as the impact of registration formalities on the access to certain social rights, such as employment and social security. For more information, see van den Bogaard et al. (2021).

Following the survey, 10 municipalities were selected for follow-up interviews, to obtain further insight into the practicalities of certain registration procedures, on the one hand, and to identify good practices and challenges, on the other. The municipalities were purposively selected, taking into account their survey responses and ensuring a balanced representation as to region (i.e. Brussels, Flanders and Wallonia) and size (large / medium-sized municipalities). The municipalities themselves decided who would participate in the interview. In most cases, two to three officials per municipality acted as respondents, such as a front desk officer and a department head. This facilitated a comprehensive understanding of the municipal registration process, from the practical to the policy level. The interviews lasted between 1 and 2 hours; they were taped and transcribed.

This information was contextualised and complemented with semi-structured interviews with key institutional stakeholders, including the Immigration Office, the Association of Flemish Cities and Municipalities (VVSG), as well as several ombudspersons and ABRA (the Association of Belgian Relocation Agents).⁴ The preliminary findings were discussed with the research participants during a workshop in July 2021.

Legal framework

Directive 2004/38⁵ (hereafter referred to as the Citizens Rights Directive) governs the conditions under which EU citizens may exercise the fundamental right of free movement within the territory of the EU Member States. While the right of residence of up to three months is not conditional upon any requirement other than the need to hold a valid passport or national identity card,⁶ the right to reside in an EU country for more than three months essentially

⁴ For more detailed information on the methodology, see van den Bogaard et al. (2021), 4-5.

⁵ 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.

⁶ Art. 6, Directive 2004/38/EC.

requires EU citizens to work – as employees or on a self-employed basis – or to hold sufficient resources so that they do not become a burden on the country’s social assistance system.⁷ The EU rules also specify which family members derive an automatic right to reside with their EU relative⁸ and those whose entry and residence must be ‘facilitated’.⁹ It gives Member States the option of making it compulsory for EU citizens to register with the local authorities when taking up residence for more than three months on their territory.¹⁰ Belgium has opted for this possibility and requires all EU citizens to register with the local municipality.

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 can 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. A positive decision results in the issuance of residence documentation to EU citizens and their family members, while a negative decision may be appealed before a specialised migration tribunal, the Council for Alien Law Litigation (‘CALL’).

In the remainder of this article, first, hierarchies of deservingness among different types of economically active EU citizens are identified, focusing on the categories of workers and jobseekers. Thereafter, differentiations between various types of family members are discussed, regarding registered partnerships, non-EU family members and ‘other’ family members. Finally, how these differential treatments are reinforced by diverging practices in the

⁷ Art. 7, Directive 2004/38/EC.

⁸ Art. 2(2), Directive 2004/38/EC.

⁹ Art. 3(2), Directive 2004/38/EC.

¹⁰ Art. 8(1), Directive 2004/38/EC.

domains of information provision and the privatisation of back-office functions of municipalities is discussed.

Differential Treatment among Economically Active Mobile EU Citizens

In migration scholarship, various tensions have been identified that permeate deservingness frames related to migrants (Chauvin and Garcés-Mascareñas, 2014). One tension concerns the opposition between legal statuses based on vulnerability (e.g. refugees), on the one hand, and performance, on the other. Performance-based deservingness, on its turn, is characterised itself by a tension between deservingness based on economic performance and deservingness related to cultural integration (Chauvin, Garcés-Mascareñas and Kraler, 2013).

In relation to EU citizens, the concept of deservingness has been applied to demonstrate how ‘economically active mobile EU citizens’ – namely workers, self-employed persons and jobseekers – and their family members have always been considered to hold a privileged position over other categories of EU citizens due to their inclusion in the original legal architecture of the European communities (Shuibhne, 2010; Shuibhne, 2015; Davies, 2018; Verschueren, 2018; Jesse and Carter, 2020). The other two groups of persons having a right of free movement – namely holders of sufficient resources and students – have to demonstrate they dispose of sufficient resources and a sickness insurance, before they can benefit from this right. EU citizens who are not economically active and do not fulfil these requirements, will not have a right to reside for more than three months in another EU Member State.

This section shows how differentiations between ‘more’ and ‘less’ deserving appear to also be at play *within* the category of ‘economically active mobile EU citizens’. These distinctions are not provided for by EU law, but arise from national implementation, guidance from the Belgian Immigration Office as well as divergent practices by street-level bureaucrats (Lipsky, 2010). They reveal implicit biases related to the nature of migrant employment, with a preference for ‘standard employment’ as opposed to atypical forms of work. Persons with a

full-time and/or long-term employment contract are treated as more deserving to enjoy their right to free movement.

A Preference for ‘Standard’ Employment

Within the category of EU workers, differentiated and more restrictive practices mainly emerge in relation to what municipal and federal officials perceive as ‘borderline’ cases of ‘standard employment’ (Barron et al., 2009). They include part-time workers working less than 12 hours per week as well as workers with an employment contract of less than three months. These atypical workers are more likely to be denied registration as workers, and to be (incorrectly) registered as jobseekers. They may even be denied long term registration and be issued with the document one receives when staying in Belgium for a short stay (up to three months), namely a declaration of presence (Annex 3ter). This denial of registration or inaccurate registration impacts inter alia access to employment, conditions of employment, social security and fiscal benefits.¹¹ The reluctant attitude which is displayed towards these ‘borderline’ cases aligns with the preference in restrictive immigration policies for ‘standard employment’ (Barron et al., 2009), consisting in full-time – or substantial part-time – work and long-term employment contracts.

To be considered a worker under EU law, a person must engage in ‘genuine and effective’ economic activities.¹² According to the Court of Justice of the European Union (CJEU), weekly average working times of between 10 to 18 hours per week do not prevent a person in part-time work from being considered a worker under EU law.¹³ As a result, a person who engages in part-time work of less than 12 hours per week should not by definition be excluded from registering as a worker as a matter of EU law.

Belgian administrative practice, however, reveals differentiation as to whether and how

¹¹ See for further discussion, see van den Boogaard et al. (2021), Chapter 3.

¹² Article 45 TFEU; Case 53/81 *Levin* EU:C:1982:105.

¹³ Case C-444/93 *Megner & Scheffcl* EU:C:1995:44.

part-time workers are registered. The Belgian Immigration Office recently opted to explicitly include the 12-hour threshold in its administrative guidance to municipalities ('GemCom Instructions') as a criterion to determine whether part-time work is considered genuine and effective as opposed to marginal and ancillary, instructing municipalities to send applications that fall under this threshold to the Immigration Office for further review.¹⁴ This 12-hour requirement corresponds to the minimum number of hours that must be worked in order to be eligible for unemployment benefit in Belgium.¹⁵ In an interview, the Immigration Office emphasised that the 12-hour limit is merely an indicative threshold and reiterated that municipalities should send applications that fall under this threshold to them for further review.¹⁶ Nevertheless, about two thirds (23 out of 32) of the municipalities indicated registering EU workers with part-time work of less than 12 hours per week as jobseekers instead of workers.¹⁷

In addition to part-time workers, EU citizens with a contract of less than three months in duration also face challenges when wanting to register in Belgium. EU case law suggests that a person working for a short-term contract can still be considered a worker.¹⁸ Yet, the GemCom Instructions of the Immigration Office indicate that EU citizens with an employment contract of less than three months should not be registered as a worker.¹⁹ Such individuals will instead be issued with the document one receives when staying in Belgium for a short stay of up to three months (an Annex 3ter).²⁰ In line with these instructions, five municipalities indicated not registering such applicants as residents for a period beyond three months.

¹⁴ Immigration Office, Syllabus (29 June 2021), 150 (NL) / 167 (FR). See for further discussion, see van den Boogaard et al. (2021), 14-16.

¹⁵ Art. 33, 1° Royal Decree of 25 November 1991 regulating unemployment.

¹⁶ Interview with Immigration Office, 10 December 2020.

¹⁷ Eight municipalities confirm registering such applicants under the status of worker; one municipality indicates that such an applicant would not be registered.

¹⁸ 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.

¹⁹ Immigration Office, Syllabus (29 June 2021), 150 (NL) / 167 (FR).

²⁰ Immigration Office, Syllabus (29 June 2021), 150 (NL) / 167 (FR).

Moreover, more than half (19 out of 32) of the municipalities will incorrectly register such EU workers with a short-term contract as a jobseeker.²¹ Being issued with an Annex 3ter (rather than a certificate of application, Annex 19, followed by an EU residence card) implies limitations with regard to the recognition of the right to residence of more than 3 months in Belgium. Applicants who receive an Annex 3ter will – for example – not be able to open a Belgian bank account (Ballesteros et al., 2016; Myria, 2016).

Paid interns submitting a contract of less than three months are confronted with even more legal insecurity and procedural injustice. In this case, the divergence in practices is striking: three municipalities register such interns as a worker, seven as a jobseeker, four as a person with sufficient resources, twelve do not register the applicant at all and six indicate not to know how to register such an applicant.²² The municipalities did not provide any indication as to the rationale for their practices, although this could be attributable to the absence of any specific instructions on how interns should be registered in the GemCom Instructions.

The restrictive approach towards these (perceived) ‘borderline’ cases of workers is also evident from the documentary requirements that municipalities impose. Normally, EU workers should only need to provide their employment contract or a certificate of employment²³ for their registration (as well as a valid identity card or passport).²⁴ However, part-time workers with a contract of less than 12 hours a week and workers with a contract of less than three months may also be asked to provide pay slips²⁵ or proof of possible prolongation of their contract.²⁶ About a quarter of the surveyed municipalities will require payslips from paid interns as well.

²¹ See for further discussion: van den Boogaard et al. (2021), 90.

²² See for further discussion: van den Boogaard et al. (2021), 92.

²³ Annex 19bis.

²⁴ Article 8(3), first indent, of Directive 2004/38; Art. 50 §2, 1°, Royal Decree on Immigration.

²⁵ 8 out of 32 municipalities require payslips from part-time workers with a contract for less than 12 hours a week; 7 out of 32 municipalities require payslips from workers with a temporary contract of less than 3 months.

²⁶ See for further discussion: van den Boogaard et al. (2021), 111.

In sum, Belgian administrative guidance and street-level bureaucratic practices reveal an unduly restrictive interpretation of the concept of worker. Moreover, the scrutinized practices show divergences in how the prevalent ‘borderline’ categories of workers are registered (i.e. as a worker, jobseeker or not registered at all). The non-registration of ‘borderline’ cases of EU workers then leads to the emergence of so-called ‘undocumented EU migrants’ (Lafleur and Mescoli, 2018). These practices confirm the observation by O’Brien (2016, 975) who argues that ‘[e]qual treatment rights are being reserved for those in the privileged position of work with regular hours and pay’.

A Restrictive Interpretation of the Requirements for 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.²⁷ However, jobseekers appear to be treated more stringently in Belgian legislation and practice than what is permitted under EU law. Currently, jobseekers in Belgium should provide upon their first registration both i) proof of registration with a jobcentre or evidence of job applications, as well as ii) proof of ‘a genuine chance of being engaged’.²⁸ 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.²⁹

Belgian authorities have been considered to follow a ‘very restrictive interpretation’ of the concept of a ‘genuine chance of being engaged’ (O’Brien, Spaventa and De Coninck 2015; Valcke, 2020). 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

²⁷ Case C-292/89 *Antonissen* EU:C:1991:80.

²⁸ Art. 50 §2, 3°, Royal Decree on Immigration, adopting the terminology of Article 14(4)(b) Directive 2004/38 and CJEU case law.

²⁹ Art. 50 §2, 3°, point b), Royal Decree on Immigration.

previously worked in another Member State.³⁰ Similarly, 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 having a ‘genuine chance of being engaged’.³¹ There are serious doubts as to whether such an interpretation of the notion of a ‘genuine chance of being engaged’ complies with EU law.³² Moreover, such a restrictive interpretation leads to unequal treatment among jobseekers and thus procedural injustice.

In any event, the requirement that jobseekers must furnish proof of having ‘a genuine chance of being engaged’ when they *first* register needs to be removed in light of the *G.M.A.* judgment of the CJEU, following a request for a preliminary ruling from the Belgian Council of State.³³ The Court held that proof of ‘a genuine chance of being engaged’ cannot be required from EU jobseekers upon their first registration, given that 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 – and not in addition that they have a ‘genuine chance of being engaged’.³⁴

Expedited Procedures through Relocation Agencies

Two cities in our sample, both with a relatively high number of EU workers, offer an expedited procedure to EU workers who apply through their so-called ‘expat/relocation desk’. Applications for registration via these desks are handled more swiftly than in the ‘normal’ procedure and applicants are required to attend fewer in person appointments. Despite the fact that these expedited procedures are not representative of municipal practices across Belgium,

³⁰ CALL, judgments No 158 838 and 158 871 of 15 December 2015; on appeal, such a reason was considered by the CALL 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. See for further discussion: van den Boogaard et al. (2021), 19-20.

³¹ CALL, judgment No 140 965 of 13 March 2015; again upholding the Immigration Office’s decision on appeal.

³² Case C-710/19 *G.M.A.* EU:C:2020:1037.

³³ Case C-710/19 *G.M.A.* EU:C:2020:1037.

³⁴ Case C-710/19 *G.M.A.* EU:C:2020:1037, para. 48.

they are included here because the respective cities host a considerable number of EU workers, and because they show the role of intermediaries in facilitating accelerated registration.

The intermediaries at play here are relocation agencies, these are companies that specialize in supporting employees to move to another country. While one municipality indicated that this accelerated service is indeed only accessible through a relocation agency, the other municipality adopted a broad understanding of the term ‘expat’, including any EU worker who wishes to make use of this service. In the words of a municipal official of the city concerned, ‘the ambition is to be a welcoming and international city, which is open towards labour migrants’. However, while in principle this ‘expat desk’ is accessible to any EU worker, in practice this service is also mostly used by relocation agencies which register EU workers on their behalf; only 30% of the applications were made by EU workers themselves.³⁵

Even though this accelerated procedure is convenient for EU workers, questions as to equal treatment arise from a procedural justice perspective. First, workers are treated in a preferential way compared to other EU citizens applying for registration. Second, in one municipality, access to the relocation desk is restricted to workers whose application is being handled by a relocation agency. These workers will most often be highly skilled workers (who can afford the services of a relocation agency).

Summing up, the registration practices of (borderline) EU workers raise various procedural justice concerns. A first observation is that more stringent documentary requirements are imposed on certain ‘borderline’ categories of EU workers. The restrictive policies on the registration of atypical workers and jobseekers raise questions in terms of equal treatment as well. Additionally, the existence of expedited procedures in two Belgian cities suggests a preferential treatment for highly skilled workers who register through a relocation agency.

³⁵ Interviews with municipalities A and B, 23 June 2020 and 18 September 2020.

These elements cast doubt on the level of impartiality and fairness of the registration procedure (see Moynihan, Herd and Harvey, 2014), and thereby question the existence of procedural justice when it comes to the registration of EU workers in Belgium. The differentiated administrative requirements would support the observation that varying degrees of deservingness among EU workers are at play. This is illustrated by the stark contrast between the obstacles encountered by ‘borderline’ EU workers, on the one hand, and the expedited treatment of highly skilled workers in two Belgian municipalities, on the other.

Differential Treatment among Family Members

The Citizens Rights Directive clearly identifies which family members of mobile EU citizens are able to derive a right of free movement from their EU relative. The Directive distinguishes between, on the one hand, close family members³⁶ who benefit from the *right* to reside with their EU relative in the same Member State, and, on the other hand, ‘other family members’³⁷ whose entry and residence must only be ‘*facilitated*’ by the host Member State. Belgium has opted to provide a *right of residence*³⁸ (as opposed to only a right to facilitation as required by EU law) for these categories of ‘other family members’, namely the partner with whom the EU citizen has a durable relationship, family members who are dependents or who 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.³⁹ The choice by the Belgian authorities to opt for a right of residence for ‘other family members’ supports an extended understanding of the concept of family. Nonetheless, differential treatments which are not substantiated by EU law can also be identified in relation to the family members of economically active mobile EU citizens, depending on the legal nature of their partner

³⁶ Art. 2(2), Directive 2004/38/EC.

³⁷ Art. 3(2), Directive 2004/38/EC.

³⁸ Art. 47/2, Belgian Immigration Law provides that the provisions on family members covered by Art. 40bis are to apply to ‘other family members’.

³⁹ Belgian Immigration Law, articles 47/1 to 47/4.

relationship, on their nationality (EU or non-EU) and on their family relationship. As result, some family members will probably experience a smoother registration procedure than others.⁴⁰

Registered Partnerships

According to the Citizens Rights Directive, close family members include the spouse and the partner in a registered partnership equivalent to marriage.⁴¹ In Belgium, only partnerships which have been registered in Denmark, Finland, Germany, Iceland, Norway, the United Kingdom and Sweden are recognised as equivalent to marriage.⁴² The law does not prescribe any additional conditions to be met by partners in a registered partnership equivalent to marriage, e.g. with regard to the durable nature of the relationship.⁴³ Yet, some municipalities require additional documents to be provided by partners in a registered partnership equivalent to marriage, namely documents proving prior cohabitation (four out of 32 municipalities) or witness statements by third parties (one out of 32), indicating a preference for the classical marriage.

Belgian legislation provides for an additional category of (close) family member of an EU citizen, namely the partner in a registered partnership which is *not* considered equivalent to marriage in Belgium, for which additional requirements in terms of durability and stability of the relationship need to be met.⁴⁴ It is not clear if such a distinction between different types of registered partnerships is allowed under EU law, since the wording of the Directive is ambiguous and the CJEU has not yet clarified this provision.⁴⁵

⁴⁰ For reports of problems experienced in practice by family members, see n 1.

⁴¹ Art. 2(2), Directive 2004/38/EC.

⁴² 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.

⁴³ Art. 40bis, §2, 1°, Belgian Immigration law.

⁴⁴ Art. 40bis, § 2, 2°, Belgian Immigration Law.

⁴⁵ See for further discussion: van den Boogaard et al. (2021), 20-24.

At the municipal level, this distinction between different forms of registered partnerships appears to have led to confusion about the registration of partners with a registered partnership that is not considered equivalent to marriage in Belgium. Several municipal officials indicated in the survey not to know whether their municipality accepts such applications for registration.⁴⁶ A small proportion indicated they would not accept such applications.⁴⁷

Non-EU Family Members

Moreover, the Belgian legal rules and administrative practices are more stringent towards non-EU family members of EU citizens, compared to family members who themselves have the nationality of an EU member state. These include additional conditions such as entry visas and more onerous documentary requirements. This is illustrative of the general air of suspicion which it has been argued permeates the family reunification process involving non-EU spouses in Belgium and elsewhere (Maskens, 2013).

First, Belgian law currently requires non-EU family members who apply for a residence card to demonstrate that they meet the conditions of entry, which depending on whether the non-EU family member is a Schengen-visa exempt national or not, may include holding an entry visa.⁴⁸ In the survey, various municipalities indeed indicated that as part of the registration process they required non-EU family members to hold a visa.⁴⁹ Such requirements are likely to be contrary to the established case law of the CJEU.⁵⁰

Second, the survey responses reveal that divergent documentary requirements are applied to non-EU family members. These may either lead to a negative decision due to an incomplete file or they may impose an unnecessary administrative burden on applicants.⁵¹ The

⁴⁶ Five out of 32 municipalities when it concerns EU partners; four out of 32 municipalities when it concerns non-EU partners.

⁴⁷ One out of 32 municipalities when it concerns EU partners; two out of 32 municipalities when it concerns non-EU partners.

⁴⁸ Art. 40bis §4, second sentence, Belgian Immigration Law, which refers back to the conditions of entry contained in Art. 41 §2.

⁴⁹ Six municipalities require a C visa (short-stay), whereas five require a D visa (long stay).

⁵⁰ Case C-459/99 *MRAX* EU:C:2002:461 and Case C-157/03 *Commission v Spain* EU:C:2005:225. See for further discussion: van den Boogaard et al. (2021), 38-39.

⁵¹ See for further discussion: van den Boogaard et al. (2021), 95-100.

Association for Belgian Relocation Agencies (ABRA) confirmed that there are significant differences between municipalities in terms of the documentation that is being accepted, especially from non-EU family members. This divergence in administrative practices creates uncertainty and practical challenges,⁵² thereby hampering the uniform application of EU law and thus fall short of ensuring principles of procedural justice such as equal treatment.

Other Family Members

Finally, the category of ‘other family members’ are also subject to diverging practices. Some municipalities are unaware of this category or may reject applications for registration from the following ‘other family members’: EU family members who are dependent on the EU citizen on health grounds,⁵³ non-EU unmarried partners of EU citizens who are in a durable relationship⁵⁴ as well as non-EU family members who are part of the EU citizen’s household.⁵⁵

In conclusion, it seems easier for ‘European’ and ‘traditional’ family members to enjoy their right to freedom of movement, than for non-European and/or ‘other’ family members. When analysing the registration practices regarding these different categories of family members of EU citizens, we identify similar concerns regarding equal treatment and transparency, as highlighted above for ‘borderline’ EU workers. First, inconsistencies can be observed with regard to the (non-)registration by the Immigration Office of certain categories of other family members as well as registered partners whose union is not considered equivalent to marriage. The latter category of registered partnerships is a creation of Belgian law and policy, which possibly deviates from EU law. Second, burdensome documentary requirements which are not supported by law, are identified in the registration procedure of

⁵² Interview with ABRA, 27 May 2020.

⁵³ 4 out of 32 municipalities did not know whether their municipality accepts applications from this category of EU family members, 3 municipalities do not accept their applications for registration.

⁵⁴ 3 out of 32 municipalities did not know whether their municipality accepts applications from this category of EU family members, 1 municipality does not accept their applications for registration.

⁵⁵ 2 out of 32 municipalities did not know whether their municipality accepts applications from this category of non-EU family members, 5 municipalities do not accept their applications for registration.

registered partners (compared to married partners) as well as non-EU family members (compared to EU family members) of EU citizens. This is particularly evident as regards the visa requirements for non-EU family members which arguably deviate from CJEU case law. These examples of inconsistency again raise questions about the Belgian registration process in terms of procedural justice.

Differential treatment through Information Provision and Digitalization

Two issues permeate and exacerbate the differentiations made among economically active mobile EU citizens and their family members: firstly, the information provided to applicants prior to registration and secondly, the recourse by municipalities to privatised resources used to guide workflow processes in connection with their back-office functions.

Skewed Information Provision

First, national authorities have an obligation to provide information about the registration procedure and its requirements to EU citizens.⁵⁶ In Belgium, pursuant to legislation on transparent governance and public service charters,⁵⁷ administrative authorities, both at federal and municipal level, 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.⁵⁸

An analysis of municipal websites and of the then website of the Belgian Immigration Office⁵⁹ shows that the information provided about the registration of EU citizens is at times minimal and often skewed, to the detriment of the disadvantaged categories identified above.

⁵⁶ Art. 34, Directive 2004/38; art. 6 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.

⁵⁷ See, at the federal level, the Law of 11 April 1994 on Administrative Transparency, the Public-service User Charter of 4 December 1992 and the Charter for User-friendly Governance of 23 June 2006; see also, at the municipal level, the Law of 12 November 1997 on Administrative Transparency at Provincial and Municipal Levels.

⁵⁸ The Charter for User-friendly Governance of 23 June 2006.

⁵⁹ After the website analysis was conducted, the website of the Belgian Immigration Office was revised. Hence, the results of the website analysis as presented here concern a previous version of the Office's website.

For example, a municipal website may provide information on the registration formalities for EU workers, but fail to mention those applicable to jobseekers or (non-) EU family members.⁶⁰

The limited availability of information on municipal websites may partly be explained by the complexity of the matter and the avowed preference of various municipal officials to discuss the registration procedure with the applicant in person. As one municipal official indicated: ‘We prefer that people call or that they come to us to get the information, because it often depends how you interpret [the information on the website]’.⁶¹ Another municipal official also specified the challenges that arise due to the fast-paced development of Belgian migration law and policy:

It is not useful to put the full procedure for foreigners [on the website], with all the required steps and documents, because if something changes and we have not updated the information, then applicants will refer to our website [as the correct information]. We do not put a lot of information on our website and that is a conscious decision.⁶²

The absence of sufficient and accurate online information creates an additional burden on the mobile EU citizen and their family members, which in public administration discourse is often referred to as the ‘learning costs’ (Herd et al., 2013; Moynihan, Herd and Harvey, 2014). These ‘learning costs’ refer to the effort that – in this case – the EU citizen and their family members must take in order to learn about the registration process, including eligibility for registration, the documents which are required and the various phases of the registration procedure.

Privatised Resources Guiding Workflow Processes

Due to the absence of a national platform that can be used across municipalities and regions, some municipalities have instituted their own online system. The software for these platforms

⁶⁰ See for further discussion: van den Boogaard et al. (2021), 80-82.

⁶¹ Authors’ translation, interview with municipality K, 27 January 2020.

⁶² Authors’ translation, interview with municipality I, 5 December 2019.

is developed by private providers of information technology services, which have integrated workflow charts relating to the various aspects of the registration process into the software for the purpose of enhancing user-friendliness and facilitating back-office functions. A senior municipal official indicated that these workflow charts appear to focus on the most common and ‘unproblematic’ categories of applicants and may not be comprehensive or reflect new developments in case law and legislation.⁶³ The information included in these workflow charts is thus not always accurate or necessarily up-to-date. This is problematic given that municipalities may rely on such workflow charts as the main source of information.

This paper thus illustrates how mobile EU citizens may fall victim to mismatches between policy and practice (Røhnebæk, 2014). Due to the fast-paced development of migration law and policy, digital systems quickly become outdated, resulting in administrative practices that are not always in line with current policy and legislation. As Bovens and Zouridis (2002, 181) suggest, ‘[t]he system designers, legal policy staff, and IT experts in particular are to be regarded as the new equivalent of the former street-level-bureaucrats’. Non-state actors, in this case the software developers, hereby enact the state. Bovens and Zouridis emphasize the importance of transparency in this respect, which should apply at various levels. For example, information on the used algorithms, the interlinkages between different systems as well as digital elements such as ‘electronic forms, decision trees, and checklists’ should be made publicly available so that the position of the citizen can be strengthened (Bovens and Zouridis, 2002, 183).

Herd et al. (2013) and Moynihan, Herd and Harvey (2014, 66) suggest that the use of ‘information technology and government data systems make it more feasible for states to shift the burden from the citizen to the state’. While the use of information technology and data systems have this potential, the example of Belgian registration practices shows that the

⁶³ Interview with municipality C, 22 October 2020.

administrative procedure can also be compromised. Moynihan, Herd and Harvey (2014) acknowledge the risk that, in the process of reducing the administrative burden on citizens, other values may be compromised. In this case, the increased use of technology and online processing systems has arguably caused mobile EU citizens to be subject to a more burdensome procedure, in situations where personal circumstances and exceptional cases do not fit within the standardised digital process.

Conclusion

In theory, the right of EU workers, self-employed persons, jobseekers and their (EU and non-EU) family members to reside for more than three months in another Member State is only demarcated by the requirements imposed by EU law. In Belgian practice, the relation between the state and these persons appears to be shaped by differential treatment to the detriment of certain persons depending on their status (e.g. jobseekers), nature of working arrangements (e.g. part-time workers), format of the relationship (e.g. registered partnerships considered not to be equivalent to marriage) and nationality (non-EU family members). Such differential treatment raises questions from a procedural justice perspective.

This differential treatment of EU citizens and their family members is firstly visible in the skewed information provision by municipalities and the Immigration Office. From a website analysis, it became clear that the unbalanced information provision in particular affects certain categories of EU citizens and family members (e.g. jobseekers, part-time workers and other family members), which raises concerns in terms of transparency and increased learning costs. Furthermore, elements of unequal treatment arise due to stringent administrative requirements that do not align with EU law (e.g. visa requirements for non-EU family members). Additionally, the digitalization of municipal back office systems facilitates the registration of ‘standard’ applicants and fails to facilitate less ‘common’ cases, such as ‘borderline’ EU workers. This phenomenon introduces a situation where non-state actors, in

this case software developers, enact the state (see also Andreetta, Vetter and Yanasmayan (2022) in this issue).

These observations of lacking transparency and unequal treatment in Belgian registration procedures contextualize earlier research (Lafleur and Mescoli, 2018). Whereas Lafleur and Mescoli focused on the increasing practice of terminating residence rights of EU citizens in Belgium as a result of seeking recourse to the Belgian social welfare system, this article offers a distinctive empirical analysis of the initial registration procedure. By providing an exclusive insight into the Immigration Office's guidelines and its implementation at the municipal level, procedural justice concerns relating to the unequal treatment of EU citizens are identified. Moreover, we show how these concerns extend to the registration of their (EU and non-EU) family members. The observed practices thus reveal situations where the concept of EU citizenship is renegotiated by street-level bureaucrats.

Moreover, the paper has shown how intermediaries further shape the citizen-state relation. They include relocation agencies effectively acting as gatekeepers over access to an expedited registration process and private companies offering possibly inaccurate workflow charts within their information technology services provided to municipalities. These findings on the use of information technology services complement the work by Herd et al. (2013) as well as Moynihan, Herd and Harvey (2014), who discuss the use of information technology and data systems as a way of lightening the administrative burdens which are imposed on citizens. This study provides a contrary example of a case where, due to the use of information technology, the accuracy of the (registration) procedure is compromised and administrative burdens exacerbated.

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⁶⁴ 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.

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