

Supplementary File: The most relevant (yet vague) eligibility criteria concerning means-tested social assistance benefits for persons able for work¹

	EU LEVEL	AUSTRIA <i>Bedarfsorientierte Mindestsicherung (BMS) 2010-2016/ Sozialhilfe</i>	GERMANY <i>Arbeitslosengeld II (auch Hartz IV)</i>
Relevant legal sources	<ul style="list-style-type: none"> - Treaty on the Functioning of the European Union, TFEU - Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States - Regulation 883/2004 on the coordination of social security systems - Diverse case law of the European Court of Justice (ECJ) 	<p>In addition to EU legal sources:</p> <ul style="list-style-type: none"> - Framework Agreement between the Federal Government and the States on Social Assistance from 2010 (Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über eine bundesweite Bedarfsorientierte Mindestsicherung) - State laws² - Domestic case law 	<p>In addition to EU legal sources:</p> <ul style="list-style-type: none"> - Social Code II (Sozialgesetzbuch II) - Domestic case law
General criteria		<p>Persons have to be in a situation of need, of working age, able to work so as to be available to the labor market (Art. 14 Framework Agreement), and registered with the Employment Service (<i>Arbeitsmarktservice</i>).</p> <p>Assets and other benefits such as unemployment benefits must be exhausted before being eligible. BMS is hence a subsidiary benefit.</p> <p>Persons need to be habitual residents in Austria (Art. 4 (1) Framework Agreement).</p>	<p>Persons have to be between 15 years old and retirement age, able to work, in need, and habitually residing in Germany (§ 7 (1) Social Code II).</p> <p>When calculating the respective needs of a person, income, assets and certain other benefits, for instance unemployment benefits, are taken into account, thus making ALG II a subsidiary benefit.</p>

¹ See Heindlmaier, 2018.

² In Austria, poverty relief falls within the competence of the states (Art. 12 (1) Federal Constitutional Law). Until 2010, the Austrian social assistance scheme fell completely within the competence of the nine states. From 2010 to 2016, the new scheme, means-tested minimum protection (*bedarfsorientierte Mindestsicherung*), was still regulated by the states. The respective laws of the states regarding minimum protection entered into force between September 2010 and October 2011. However, the core points were set out in an agreement between the federal government and the states (referred to as the Framework Agreement). Since the expiry of the agreement in 2016, the nine states have again determined the minimum protection completely independently.

<p>EU citizens in atypical employment or those EU citizens who retain worker status after employment of less than one year</p>	<p>Workers enjoy equal treatment and free movement. It is hence crucial whether a person is considered a worker under EU law.</p> <p>Work consists of, according to the ECJ, “effective and genuine activities”, and not only “purely marginal and ancillary” activities (<i>Levin</i>, Case 53/81, para 17).</p> <p>In another case, it holds that a crucial element is “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration” (<i>Lawrie-Blum</i>, Case 66/85).</p> <p>EU citizens who become involuntarily unemployed after having been employed for less than one year retain their status for at least six months (Art. 7 (3b) & (3c) Directive 2004/38). In either case, EU citizens have to register as jobseekers with the competent employment office in order to be granted assistance.</p>	<p>The laws relating to BMS, apart from Vienna, do not distinguish between different groups of EU citizens. They link access to BMS to a right of residence.</p> <p>Vienna states that EU citizens are eligible for social assistance if they are economically active or retain this status. It does not specify when a person is economically active.</p> <p>For instance, the administrative court of the state of Vienna has interpreted the definition of worker expansively, referring to ECJ case law. In one ruling, it considered 7 hours and €100 per week as sufficient.³ There were, however, also limits: a person who was only working occasionally, and where it was clear from the outset that the person would only work on a daily basis a maximum of 4 to 5 times per month, was not deemed a worker and thus had no access to social assistance. This was reinforced because the person was not in a permanent employment relationship, did not have any health insurance, and was not entitled to leave. Such activity was deemed to be negligible, fell short of the benchmark, and was defined as “marginal and ancillary”.⁴</p>	<p>SGB II states that EU citizens who are workers or retain this status are granted social assistance (§ 7 Social Code II). In coherence with EU law, German social legislation does, however, not stipulate <i>when</i> a person qualifies as a worker.</p> <p>German social courts have pushed for an expansive interpretation in rulings on workers. For instance, the Federal Social Court referred to ECJ case law such as <i>Levin</i> and <i>Kempf</i> and highlighted that “worker” had to be interpreted in a broad way. In its ruling, it considered a person who only earned €100 per month (while working 7.5 hours per week) as a worker.⁵ Lower social courts also insisted on a broad interpretation of “worker”: for instance, for the social court of the state of Bavaria working hours of 5 hours per week and a salary of € 187 per month were sufficient⁶; for the social court of the states of Berlin-Brandenburg a person engaged in an activity of 5 hours per week and a salary of €180 was considered a worker.⁷</p>
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³ Administrative court of the state of Vienna, judgment of 5 October 2015, VGW-141/023/9654/2015.

⁴ Administrative court of the state of Vienna, judgment of 16 February 2015, VGW-141/002/532/2015.

⁵ Federal Social Court, judgment of 19 October 2010, B 14 AS 23/10 R.

⁶ Social court of the state of Bavaria, judgment of 6 February 2017, L 11 AS 887/16 B ER.

⁷ Social court of the states of Berlin-Brandenburg, judgment of 27 February 2017, L 18 AS 2884/16.

<p>Jobseekers</p>	<p>Whether a benefit is classified as social assistance or as a measure facilitating access to the labor market is crucial according to EU law: whereas Member States are generally allowed to exclude jobseekers from the former, they may not do so in the case of the latter (cf. <i>Collins</i>, C-138/02; Art. 24 Directive 2004/38).</p> <p>As was found in the <i>Collins</i> case, and as reiterated in <i>Vatsouras and Koupatantze</i> (C-22/08 and 23/08), jobseekers have to be granted a benefit whose aim is to facilitate access to the labor market if they had established a link to the labor market.</p> <p>In <i>Alimanovic</i> (C-67/14), the ECJ confirmed the German law. It clarified that ALG II was to be subsumed within social assistance (according to Art. 24(2) Directive 2004/38) as “the predominant function [...] is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity” (<i>Alimanovic</i>, para 45), as such, the Court considered § 7 Social Code II as compatible with EU law.</p>	<p>Neither state laws on BMS nor the Framework Agreement mention jobseekers.</p> <p>Austrian authorities defined their benefit as social assistance and not as a labor market measure. Some experts and legal scholars, however, doubted whether the Austrian benefit was to be subsumed under social assistance. People who were fit for work had to be available to the labor market (Art. 14 Framework Agreement), and one of the main aims of the minimum protection was, besides combating poverty, to promote (re)integration into the labor market (Art. 1 Framework Agreement).</p> <p>The official definition was apparently not challenged in court as no court cases were identified within the relevant court data base (see Heindlmaier, 2018).</p>	<p>SGB II makes use of the caveat provided for in Article 24 (in combination with Article 14) of Directive 2004/38 to exclude jobseekers (§ 7 Social Code II).</p> <p>Yet, ALG II has two key purposes: on the one hand, it seeks to guarantee a life of human dignity for individuals (§ 1 (1) Social Code II), and on the other hand, it seeks to promote their integration into the labor market (§ 1 (2) Social Code II). A reform in 2006 classified ALG II as social assistance, which could, according to Article 24 of Directive 2004/38, be denied to jobseekers.</p> <p>Since its introduction, the compatibility of the provisions of Social Code II excluding jobseekers from entitlement to ALG II with EU (case) law has been contested in court. In particular, the classification of ALG II as social assistance has been repeatedly challenged – until the ECJ clarified this point.</p>
<p>Economically inactive EU citizens</p>	<p>In the judgment <i>Grczelzyk</i> (C-184/99), the ECJ held that Union citizens (in this case students) who are lawful residents in another member state can receive benefits under certain conditions. Still, member states can conclude that students receiving social assistance no longer meet the criteria for their right of residence and can therefore withdraw it, but this should not be the “automatic consequence” (para 42-43). Indeed, the Court goes on to add that people are not allowed to become an “unreasonable burden on the public finances of the host Member State”, but there should remain “a certain degree of financial solidarity” between nationals and mobile EU citizens, especially if</p>	<p>Persons need to be entitled to “permanent residence” in Austria, which EU citizens fulfil “as long as they would not lose their right of residence by drawing these benefits” (Art. 4 (3) 3 Framework Agreement).</p> <p>Economically inactive EU citizens are excluded from entitlement within the first three months of their stay (Art. 4 (4) Framework Agreement).</p> <p>Most state laws are similar to the Framework Agreement and link entitlement to lawful residence, excluding the economically inactive within the first</p>	<p>In 2006 and again in 2007, § 7 Social Code II was altered to contain two exclusions from entitlement to ALG II: the first for those EU citizens whose right of residence arises solely out of the purpose of searching employment, and the second being for all EU citizens, except the economically active, within the first three months of their stay.</p> <p>Economically inactive EU citizens would fall under the group of those EU citizens whose right of residence arises solely out of the purpose of searching for employment and are hence excluded (see Heindlmaier).</p>

	<p>the financial problems of the mobile EU citizen are only temporary (para 44).</p> <p>Spelling out its key principles of non-discrimination on the grounds of nationality (Art. 18 TFEU) as well as Union citizenship (Art. 21 TFEU), Directive 2004/38 generally accords economically inactive EU citizens the right to equal treatment. Yet, member states do not have to grant social assistance to economically inactive EU citizens during the first three months of their stay (Art. 24 (2) Directive 2004/38). Being allowed to reside longer than three months in a host Member State depends on the condition of having health insurance and “sufficient resources [...] not to become a burden on the social assistance system of the host Member State” (Art. 7 Directive 2004/38).</p> <p>In <i>Bidar</i> (C-209/03), the ECJ held that economically inactive EU migrants may be entitled to social assistance benefits if they have “a certain degree of integration into the society of that State” (para 57), which may be fulfilled if the student actually resided in the Member States for a certain period of time (para 59). In the case of <i>Bidar</i>, the Court considers his three years as sufficient (para 61).</p> <p>In 2014 with <i>Dano</i> (C-333/13), the ECJ finally deemed that Union citizens have the right to equal treatment only if they are legally resident according to Directive</p>	<p>three months of their stay (for details see Windisch-Graetz, 2014).</p> <p>Residence legislation, § 51 Residence and Settlement Act, for its part, lays down the criteria under which EU citizens are allowed to stay more than three months in Austria: they need to be either workers or self-employed; they need to have sufficient resources and comprehensive health insurance for themselves and their family members, and not to require recourse to social assistance benefits <i>or the supplementary pension</i> during their period of residence (<i>since 2011</i>); they had to be in training.</p> <p>The Viennese law is an exception. It specifies that EU citizens are eligible for BMS if they are economically active or retain this status, or if they have acquired the right to permanent residence (after five years) (§ 5 (2) <i>Wiener Mindestsicherungsgesetz</i>). The non-active are hence excluded.</p> <p>For instance, the Viennese Administrative Court accepted the general exclusion of economically inactive EU citizens who had not yet obtained a permanent right of residence under EU law, or who had not kept their status as a worker, from the entitlement to social assistance.⁸ Directive 2004/38 only granted benefits to those EU citizens who were lawfully residing on the basis of the Directive and, when applying for benefits,</p>	<p>Since its introduction, the exclusion of economically inactive EU citizens from entitlement to ALG II has aroused controversy amongst legal scholars and judges. While several courts considered it to be compatible with EU (case) law, others disagreed: for instance the social court of the states of Berlin-Brandenburg, in 2007, referred to e.g. <i>Grzelczyk</i>, highlighting Union citizenship and free movement as enshrined in the EU Treaty, and held that Member States were allowed to predicate the right of residence on the condition of sufficient resources. This did not, however, mean that Union citizens did not enjoy the right to equal treatment according to the principle of non-discrimination on the grounds of nationality (Article 18 TFEU) during their lawful residence. Following ECJ jurisprudence, Union citizens could invoke this article if they resided lawfully in a host Member State for a certain period of time, or if they had a residence document.¹¹</p> <p>According to several social courts, the German provisions were not compatible with EU law, in particular with Article 4 of Regulation 883/2004. This article guaranteed equal treatment with regard to special non-contributory benefits, to which the German social assistance benefits belong, as all such persons residing in Germany were thus entitled to social assistance.¹²</p>
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⁸ For instance: administrative court of the state of Vienna, judgment of 15 January 2014, VGW-141/002/6946/2014; administrative court of the state of Vienna, judgment of 4 March 2014, VGW-141/002/21112/2014.

¹¹ Social court of the states of Berlin-Brandenburg, judgment of 25 April 2007, L 19 B 116/07 AS ER.

¹² For instance: social court of the state of Hesse, judgment of 14 July 2011, L 7 AS 107/11 B ER.

	<p>2004/38 (para 69), which in the case of economically inactive EU citizens includes the provision that they need to have sufficient resources for themselves and their families (if they want to stay longer than three months in the host Member State) (para 73).</p> <p>In <i>Garcia-Nieto</i> (C-299/14), the ECJ confirmed the exclusion laid down in Directive 2004/38, that economically inactive EU migrants can be excluded from social assistance during the first three months of their residence.</p>	<p>economically inactive EU citizens were deemed to have demonstrated that they no longer met the condition of sufficient resources.⁹</p> <p>A ruling of the Administrative Court of Salzburg referred to Directive 2004/38 which stipulated that Union citizens had a right of residence as long as they did not become an unreasonable burden on the social assistance system of the host Member State. It was up to the competent authority to assess this on a case-by-case basis and take into account the criteria as established by the European Commission, namely duration, personal situation, and the amount of social assistance to be paid.¹⁰</p>	<p><i>Dano</i> confirmed the German interpretation and the exclusion of the economically inactive from ALG II. Since 2016, § 7 Social Code II has further excluded those EU citizens who do not reside lawfully in Germany from entitlement to social assistance.</p> <p>The exclusion of the economically inactive for the first three months, as laid down in Directive 2004/38, was confirmed in <i>Garcia-Nieto</i>.</p>
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References:

Heindlmaier, A. (2018). *Deep Europeanization? How EU Member States Administer Free Movement of Persons and Cross-Border Access to Social Benefits at the Street-Level*. [PhD, University of Salzburg].

Windisch-Graetz, M. (2014). Zulässige Differenzierungen bei der Gewährung von Sozialleistungen. *Zeitschrift für Arbeits- und Sozialrecht*, 49(4), 204-210.

⁹ Administrative court of the state of Vienna, judgment of 7 March 2014, VGW-141/015/21226/2014.

¹⁰ Administrative court of the state of Salzburg, judgment of 22 July 2015, LVwG-9/160/19-2015.