The right of residence under Directive 2004/38/EC of the partner with whom the Union citizen has a durable relationship: Assessment and evidence of the starting date of lawful residence

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TABLE OF CONTENTS

1. INTRODUCTION

Union citizens have the right to live in another Member State than their own. The conditions of this right are laid down in the Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC, henceforth: the Directive).[1] Unmarried partners of these citizens can have a residence right in that Member State as well, but they may meet several problems when the relationship is broken.[2] This is especially so where the unmarried partners have the nationality of a non-EU State. Do they have an independent right to continued residence in the Member State where they lived with the Union citizen, and if so, under what conditions? The legal position of unmarried partners is insecure because their right to stay with a Union citizen is not firmly regulated in Directive 2004/38 like that of spouses, children, and registered partners. According to Article 3(2)(b) of Directive 2004/38, Member States shall 'facilitate' entry and residence of the partner with whom the Union citizen has a durable relationship, duly attested. However, it is not fully evident what 'facilitate' means. The Member States therefore have wide discretion to regulate the position of unmarried partners of Union citizens in their national legislation.

In the Netherlands, the legal position of unmarried partners of Union citizens is regulated analogously to the position of spouses and registered partners under the Directive. Though this is in principle a clear and generous approach, the rights and obligations concerning the start and the termination of the lawful residence of these partners are still tainted with indistinctness and ambiguity. It appears that similar problems could arise in other Member States. This expert opinion wants to examine whether applicable Union law contains guidelines or standards that the Member States must abide in order to clarify and secure the legal position of unmarried partners of Union citizens. The Dutch situation is thereby taken as point of reference.

The question this expert opinion seeks to answer is, whether the duty to 'facilitate' laid down in Article 3(2)(b) of the Directive leads to an obligation under Union law for the Member States to assess and evidence the starting date of the lawful residence of the unmarried partner. As a corollary of this enquiry, the question must be answered what the starting date of the residence right is under applicable Dutch law implementing the Directive.

In this expert opinion, section 1 describes the right of residence of family Members of Union citizens under Directive 2004/38/EC. It explains that unmarried partners of Union citizens do not enjoy an automatic right to entry and residence as a corollary of the Directive. However, the Directive does require Member States to facilitate their entry and residence (section 2). Section 3 will investigate the content of the duty to 'facilitate' and argue that the assessment of evidence of the starting date of the residence right of an unmarried partner falls within the scope of this duty as well as the right to an effective remedy guaranteed by Article 47 of the EU Charter on Fundamental Rights. Section 4 will contend that the duty to facilitate obliges Member States to assess and evidence the starting date of lawful residence of unmarried partners of Union citizens if this date is material in both preventing the loss of rights and the attainment of stronger rights. Consecutively, the implementation of the duty to facilitate in the Netherlands is discussed in section 5. The

[1] Council Directive 2004/38/EC 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 [2004] OJ L158/77.

[2] For the sake of clarity we use the term 'unmarried partner' when referring to the partner who has a durable relationship with a Union citizen but whose relationship is not formalised by a marriage or registered partnership.

Netherlands grants unmarried partners of Union citizens a residence right analogous to that of the family members defined in Article 2(2) of the Directive. Finally section 6 shows that in the Netherlands the unmarried (ex) partner of a Union citizen can only have the starting date of the lawful residence assessed in the context of his or her application for retention of his or her residence right or permanent residence. It is argued that this situation is not in conformity with the duty to facilitate and the EU right to an effective remedy. Section 7 contains the conclusions of this expert opinion.

2. THE RIGHT OF RESIDENCE UNDER DIRECTIVE 2004/38/EC

Directive 2004/38/EC lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Union by its citizens and their family members, the right to permanent residence, and the limits placed on these rights.[3] This section describes the different beneficiaries of (section 2.1), the conditions to (section 2.2), and the nature of (section 2.3) the right of residence under this Directive.

2.1 Beneficiaries of Directive 2004/38/EC

Undisputed beneficiaries of the rights laid down in the Directive are expressly identified in Article 3(1) as 'all Union citizens who move or reside in a Member State other than that of which they are a national' as well as 'their family members as defined in point 2 of Article 2 who accompany or join them'. The list in Article 2(2) is exhaustive and is profoundly based on the idea of a relationship by blood (descendants or direct ancestors) or by law (spouses, civil partners if legally recognised in a host Member State). These family members will also be referred to hereunder as the 'nuclear family'.[4]

Article 3 however (see text box below) also identifies other potential beneficiaries under (2). It is correct to call them *potential* beneficiaries forasmuch as the Directive itself does not fully elaborate on their status and rights other than that Member States 'shall facilitate' their entry and residence. As to who is an actual beneficiary of the duty to facilitate, Article 3(2) identifies two groups. The first group is specified under (a) and comprises of any other family members not falling under the clear-cut definitions of family members as laid down in Article 2(2) of the Directive and are either dependents of the Union citizen, members of the household of the Union citizen or in need of personal care by the Union citizen on serious health grounds.

Article 3 Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.
The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

[3] Art 1 of Directive 2004/38/EC.
[4] The choice of this term may in no way be interpreted as implying that other family members such as those mentioned in Article 3(2) of the Directive would not belong to the 'nucleus'. The term is only chosen to serve as a short referral to the family members meant in Art 2(2), by lack of a better one.

The second group is specified under (b) and comprises of the partner with whom the Union citizen has a durable relationship, duly attested.

It follows that the definitions of beneficiaries of the duty to facilitate are not based merely on the idea of relationship by blood or by law as we have seen in Article 3(1) of the Directive. On the contrary, different criteria are used to define beneficiaries of the duty to facilitate – namely loose kinship ties (the dependents or household members), health needs (those in need of personal care), or intimacy (those in a durable relationship).

2.2 Conditions to the right of residence of the 'nuclear family'

Union citizens have a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.[5] This is different for the family members whose right of residence is not individual or personal, but derived from the right of residence of the Union citizen who they are accompanying or joining. It follows from Articles 6(2) and 7(2) of the Directive that the right of residence of the Union citizen shall extend to family members who are nationals of third states, provided that the Union citizen satisfies the conditions of his right of residence. Such a family member thus only has a right of residence if:

- he or she has a family relation with the Union citizen; and
- the Union citizen meets the conditions of his right of residence.

The right of residence of the Union citizen for a period up to three months is not subjected to any conditions or formalities other than the requirement that the Union citizen holds a valid identity card or passport and that the family member holds a valid passport (Article 6). However, by virtue of Article 7(1) of the Directive the right of residence for more than three months is in general[6] subject to the condition that the Union citizen:

- is a worker or self-employed person in the host Member State; or
- has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during their period of residence and a comprehensive sickness insurance cover in the host Member State; or
- is a student in the host Member State and has a comprehensive sickness insurance cover in the host Member State and assures the relevant national authority to have sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during his period of residence.

Retention of the right of residence

Importantly, family members retain their right of residence on a personal basis in case their relationship with the Union citizen has ended, if they meet the conditions laid down in Articles 12, 13 or 16 of the Directive. Under Article 12 family members retain their right of residence in the event of death or departure of the Union citizen if they have resided in the host Member State as family

[5] Recital 1 of the Preamble to Directive 2004/38/EC.

[6] Derogation is possible under Art 7(3) of the Directive for the Union citizen who is no longer a worker or self-employed person.

members for a minimum of one year. Article 13 provides for the retention of the right of residence in the event of divorce, annulment of marriage or termination of registered partnership if the marriage lasted for a minimum of three years, including one year in the host Member State. In addition, both Article 12 and Article 13 require under (1) that the family member satisfies the conditions as defined in Article 7(1)(a),(b), or (c) before acquiring the right of permanent residence.

Under Article 16(2) of the Directive family members who have resided legally for a continuous period of five years in the host Member State shall have an unconditional and personal right of permanent residence there. This continuous period of lawful residence refers to the period of compliance with Article 7(2), not including the period of lawful residence up to three months under Article 6(2).[7]

In order for family members to retain a right of residence on a personal basis the *starting date* of their right of residence under Article 7(2), and in the event of divorce or annulment of marriage or termination of a registered partnership under Article 13 the *beginning of their relation*, is crucial.

2.3 Nature of the right of residence of the 'nuclear family'.

Ex lege nature of the right of residence of Union citizens

The fundamental and personal right of residence in another Member State is conferred on the Union citizen directly by Articles 20(2)(a) and 21(1) of the Treaty on the Functioning of the European Union (TFEU) and exists independent of the fulfilment of administrative procedures.[8] In the case of *Royer*[9] the Court of Justice first recognised the *ex lege* nature of the right of residence, as opposed to a right that can be *granted.* Furthermore it acknowledged the *declaratory* as opposed to *constitutive* nature of a residence card. The Court considered that:

> the right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty - in particular to look for or pursue an occupation or activities as employed or self-employed persons, or to rejoin their spouse or family - is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation.

It must therefore be concluded that this right is acquired independently of the issuance of a residence permit by the competent authority of a Member State. The grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Union law.[10]

Ex lege nature of the right of residence of the nuclear family of Union citizens

Though the right of residence of family members is not conferred on them directly by the Treaty, the family members defined in Article 2(2) of the Directive also enjoy an automatic right to entry and residence in the host Member State.[11] Article 25(1) of the Directive states that the possession of certain residence documents 'may under no circumstances be made a precondition for the exercise

[7] CJEU Joined Cases C-424/10 and C-425/10 *Ziolowski and Szeja* [2011], para 46.
[8] Recital 11 of the Preamble to Directive 2004/38/EC.
[9] CJEU Case 48/75 *Royer* [1976].
[10] CJEU Case 48/75 *Royer* [1976], paras 31-33.
[11] Recital 6 of the Preamble to Directive 2004/38/EC.

of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof'. It follows from this provision that family members' right of residence too exists independent of administrative formalities and that a residence card can only be declaratory of their existing rights. The right of residence in the host Member State of the family member therefore starts from the moment that the following circumstances exist:

- Both the Union citizen and the family member are residing in the Member State;
- The Union citizen satisfies the conditions laid down in Article 7(1) of the Directive for a right of residence; and
- The family member falls within the definition of family members in Article 2(2) of the Directive.

2.4. Nature of the right of residence of unmarried partners

Section 2.1 explained that the unmarried partner is not included in the definition of family members in Article 2(2) of the Directive and therefore does not enjoy an automatic right to entry and residence as a corollary of the Directive.[12] However, Article 3(2) of the Directive does contain the obligation that Member States *shall* facilitate the entry and residence of those defined under Article 3(2)(b). The Member States are thus obliged to take steps in order to facilitate the entry and residence of the unmarried partner defined under 3(2)(b) and *may not* remain inactive.

The implications of the duty to 'facilitate' are further examined in section 3. That section will contend that assessing and providing evidence of the starting date of lawful residence falls within the scope of the duty to facilitate. Subsequently section 4 explains the importance of the period of lawful residence for the legal position of Union citizens and their family members. This section will argue that, in the light of this importance, the duty to facilitate entails a *duty* to assess and evidence the starting date of lawful residence.

[12] This follows from Recital 6 of the Preamble to Directive 2004/38/EC, which states that: 'the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State'.

3. DUTY TO FACILITATE AND ASSESSING AND PROVIDING EVIDENCE OF THE STARTING DATE OF LAWFUL RESIDENCE

As discussed under section 2, there is a distinction between family members defined in Article 2(2) and those family members defined in Article 3(2) of the Directive. It follows from Article 3 that the Directive shall apply to the family members defined in Article 2(2) and that in the case of family members included under Article 3(2), the host Member State shall facilitate entry and residence. This means that whereas family members defined in 2(2) have an automatic right to entry and residence, the host Member State enjoys certain discretion to decide on the right to entry and residence of those persons defined under Article 3(2).[13]

The durable unmarried partner of the Union citizen whose relationship is duly attested belongs to the second category. Though it is this 'family member' who faces most difficulties in practice to retain a right of residence, it is unclear if and to what extent the provisions laid down in the Directive apply. Therefore, this section discusses the obligations stemming from the duty to facilitate and evaluates how assessing and providing the evidence of the starting date of lawful residence may fall within these obligations.

3.1 The obligations stemming from the duty to facilitate

Article 3(2) of the Directive states that 'without prejudice to any right to free movement and residence the persons concerned may have in their own right' the host Member State 'shall, in accordance with its national legislation, facilitate entry and residence'. From this, the following can be assumed. Firstly, the host Member State has a *duty* to facilitate (word *shall* rather than *may* is used) entry and residence which means that it is *obliged* to take some steps and *may not* remain inactive. On the other hand, it is its *national legislation* that should facilitate the entry and residence of the persons concerned, so the content of the measures the Member State is obliged to adopt as well as their nature is left in large to its discretion.

The discretion of the Member States in giving effect to the duty to facilitate is subjected to some limitations. Article 3(2) of the Directive obliges Member States to exercise their discretion 'without prejudice to any rights to free movement and residence the persons concerned may have in their own right'. Furthermore the Member State 'shall undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence to these people falling under the duty to facilitate'. Recital 6 to the Directive adds to this by stating that persons falling under the duty to facilitate have a right to have their situation 'examined by the host Member State in order to decide whether entry and residence could be granted to them'. Such an examination should take into consideration 'their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'. Moreover, the decision must be 'without prejudice to the prohibition of discrimination on grounds of nationality'.

3.2 Literal interpretation of the duty to facilitate

The Oxford online dictionary[14] defines the verb *facilitate* as: 'Make (an action or process) easy or easier.' [15] However, it also provides the following synonyms: 'ease, make possible, make

[13] Recital 6 of Directive 2004/38/EC.
[14] www.oxforddictionaries.com.

smooth/smoother, smooth, smooth the path of, smooth the way for, clear the way for, open the door for; enable, assist, help, help along, aid, oil, oil the wheels of, lubricate, expedite, speed up, accelerate, forward, advance, promote, further, encourage; simplify.'[16]

An examination of the words used for *facilitate* in the various language versions of the Directive gives similar results.[17] It follows from such an examination that though these words predominantly mean *making easier,* the Slovakian version uses the word *Umožní* which literally, and exclusively, translates as *enable*. Since the Court of Justice held that the language versions in which Union legislation is drafted are all equally authentic[18] it could be argued that the duty to facilitate requires Member States to do both *make easier* and *enable* the right to entry and residence of the durable partner.

This interpretation also follows from the decision of the Court of Justice in the case of *Rahman and Others*[19] in which it held that:

> 21 Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision imposes an obligation on the Member States *to confer a certain advantage*, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.
>
> 22 In order to meet that obligation, the Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, *make it possible* for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons [emphasis added].

Accordingly, the extent of obligations stemming from the duty to facilitate entry and residence must be understood as 'imposing an obligation on the Member State to confer a certain advantage' on the persons envisaged in Article 3(2) of the Directive applying for entry and residence 'compared with applications for entry and residence of other nationals of third States'. To that end, the Member State must 'make it possible for these persons to obtain a decision on their application'.

The Court of Justice further held that in order to make it possible for the persons concerned to obtain a decision on their application, it is:

> incumbent upon the Member States to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.[20]

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[15] www.oxforddictionaries.com/definition/english/facilitate.
[16] www.oxforddictionaries.com/definition/english/facilitate.
[17] Words used for *facilitate* in different language versions of the Directive: vergemakkelijkt (Dutch version), favorise (French version), erleichtet (German version), faciliterá (Spanish version), agevolá (Italian version), facilitaza (Romanian version), umožní (Slovakian version), ułatwia (Polish version), διευκολάνει (Greek version), улеснява (Bulgarian version).
[18] CJEU Case C-283/81 *CILFIT v Ministry of Health* [1983], para 18.
[19] CJEU Case C‑83/11 *Rahman and Others* [2012].
[20] Ibid, para 26.

Interestingly so the Court also held that these criteria 'are consistent with the normal meaning of the term "facilitate" and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness'.[21] Though the case at hand dealt with the persons envisaged in 3(2) under (a) concerning family members depending on a Union citizen, there is no reason why the cited considerations of the Court are not of equal relevance to the unmarried partner of the Union citizen as envisaged under (b). So the *criteria* in national legislation which *enable* the decision must also contain criteria relating to the words defining the persons under (b): 'a person with whom the Union citizen has a *durable relationship*, *duly attested* [emphasis added]'. Accordingly, the question whether the criteria relating to 'durable relationship' and 'duly attested' have been met must be extensively examined in order to enable a decision which is based on such an extensive examination.

Furthermore, it was convincingly suggested by Guild et al that the Court's reasoning in the *Romer* case[22] might apply in analogy concerning the certain advantage that must be conferred on the durable partner, compared with other third country nationals applying for entry and residence. [23] It was the Court of Justice's reasoning in this case that the comparison must be carried out not in a global and abstract manner, but in a *specific and concrete manner in light of the benefit concerned*.

Sub conclusion

To sum up, Article 3(2) of the Directive thus requires the host Member State to *make it possible for the persons envisaged in the provision to obtain a decision* on their application for entry and residence, which:

- is based on *criteria* contained in the legislation of the host Member State, that are consistent with the normal meaning of the term 'facilitate' and of the words relating to the definition of the persons concerned;
- is based on an *extensive examination* of the situation of the person concerned, which includes an examination of their personal circumstances, their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen;
- is *without prejudice to any rights to free movement and residence* the persons concerned may have in their own right;
- is *without prejudice to the prohibition of discrimination* on grounds of nationality;
- confers a *certain, specific and concrete, advantage* to the persons concerned compared with applications of other nationals of third States; and
- in the event of refusal is *justified by reasons*.

3.3 Teleological interpretation of the duty to facilitate

As with other EU instruments, the Court of Justice ruled that the provisions of the Directive 2004/38/EC must be also given a teleological interpretation having regard to their objective(s).[24] Furthermore, the Court of Justice has developed rules of interpretation in relation to free movement

[21] Ibid, para 24.
[22] CJEU Case C-147/08 *Romer* [2011], paras 42 and 43.
[23] Guild et al, *The EU Citizenship Directive: A commentary* (Oxford University Press: 2014), p 79-83
[24] CJEU Case C-127/08 *Metock and Others* [2008], para 68.

of persons that are useful to supplement the results of the teleological interpretation.[25] It follows that, to evaluate whether or not the assessment and providing evidence of the starting date of lawful residence of the durable partner falls within the obligations stemming from Article 3(2) of the Directive, we must identify the objectives of the provision and the rules relevant for its interpretation.

Objectives of the duty to facilitate

Advocate General Bot in his Opinion in the case of *Rahman and Others*[26] identified two objectives of Article 3(2) of the Directive. Firstly, the objective 'to promote the free movement of Union citizens', as laid down in Recital 1 to the Directive, was identified. Importantly, he considered the right to family reunification ancillary to this objective, since without the ability to have their family members joining and accompanying them, Union citizens would be discouraged from exercising their primary and individual right to free movement which would impair its effectiveness.[27]

Secondly, he identified the objective 'to promote family unity' as laid down in Recital 6 to the Directive. According to Bot it follows from this objective, which specifically refers to Article 3(2), that the right to entry and residence of family members is not only protected as a right derived from the free movement of Union citizens, but also through the right to the maintenance of family unity in a broader sense.[28] This view is well in line with the recommendations made by the Committee of the Regions in their opinion on the proposal of Directive 2004/38/EC where they suggested that EU citizens should actually have *a right to family unity*.[29]

Rules of interpretation flowing from the Court of Justice's case law

Furthermore, we believe that the following rules of interpretation as developed by the Court of Justice are relevant in this case.[30] First, the provisions of the Directive must be *interpreted broadly* and *must not be deprived of their effectiveness*.[31] This rule presupposes that such an interpretation may not render the exercise of the rights conferred by the EU legal order practically impossible or excessively difficult.[32]

Secondly, in line with Recital 3 of the Preamble to the Directive which states that the adoption of the Directive should *strengthen* the right of free movement and residence of all Union citizens, the Court of Justice laid down the rule that the EU citizens *cannot derive less rights* from Directive 2004/38/EC than from the instruments of secondary legislation which the Directive has either amended or repealed.[33]

Thirdly, if the wording of the provision does not give guidance as to how the terms used in the Directive should be understood, nor contain reference to national laws as regards the meaning of

[25] CJEU Case C-83/11 *Rahman and Others* [2012], Opinion of Advocate General Bot, paras 36 and 37.
[26] These rules of interpretation are referred to in in Case C-83/11 [2012], 'Opinion of Advocate General Bot' paras 33-39.
[27] CJEU Case C-83/11 *Rahman and Others* [2012], Opinion of Advocate General Bot, paras 36 and 37.
[28] CJEU Case C-83/11 *Rahman and Others* [2012], Opinion of Advocate General Bot, para 37.
[29] Opinion of the Committee of the Regions on the 'Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', [2002], OJ C 192/17-19, para 2.1.
[30] Advocate General Bot refers to these rules of interpretation in his Opinion in CJEU Case C-83/11 *Rahman and Others* [2012], paras 33-39.
[31] CJEU Case C-162/09 *Lassal* [2010], para 31.
[32] Advocate General Bot refers to these rules of interpretation in his Opinion in CJEU Case 83/11 *Rahman and Others* [2012], para 106.
[33] CJEU Case C-145/09 *Tsakouridis* [2010], para 23.

terms used therein, the term must be given an *autonomous meaning under EU law* by taking into account *the context in which it occurs as well as the objectives of the rules which it forms part of*.[34]

3.4 Assessing and providing evidence of the starting date under the duty to facilitate

We believe that there are indeed strong arguments to assume that assessing and providing evidence of the starting date of lawful residence falls under the scope of the obligations under the duty to facilitate. This follows from the combination of a literal and teleological interpretation of the duty to facilitate laid down in Article 3(2) of the Directive.

First, assessing and providing evidence of the starting date of lawful residence of the durable partner would only serve and in no way obstruct the objectives of *free movement* and *family unity* since it would strengthen and improve the certainty of the legal status and situation of the durable partner in the Netherlands.

Second, an *effective* and *broad* interpretation of the obligation to *enable the durable partner to receive a decision on an application* for entry and residence based on consistent criteria in national laws and *an extensive examination of the situation of the durable partner* would include not only an assessment of the conditions for a right of residence but also an assessment of the starting date of this right.

Third, the decision must be *without prejudice to the prohibition of discrimination* on grounds of nationality and confer a *certain specific and concrete advantage on* the persons concerned compared with applications of other nationals of third States. This means that where third country nationals who do not fall within the scope of Directive 2004/38/EC have a right under national law to an assessment and evidence of the starting date of their lawful residence, third country nationals who are the (unmarried) partners of Union citizens must also be granted such a right.

The right to an effective remedy

If national rules concerning the assessment and providing evidence of the starting date of lawful residence fall within the scope of the duty to facilitate, this has important consequences. These national rules fall within the scope of EU law and as a result also within the scope of application of the EU Charter of Fundamental Rights (henceforth: the Charter).[35] Arguably the right to an effective remedy laid down in Article 47 of the Charter requires that unmarried partners of Union citizens have an effective remedy before a court or tribunal against decisions concerning the starting date of their lawful residence. This is consistent with Article 15 of Directive 2004/38 and with the cited paragraph 26 of the *Rahman* judgment.

3.5 Conclusions of this section

Considering the arguments mentioned in this section, we believe that assessing and providing evidence of the starting date of lawful residence of the durable partner falls within the scope of the duty to facilitate their entry and residence under Article 3(2) of the Directive. As a result the right to an effective remedy laid down in Article 47 of the Charter applies to decisions concerning the starting date of lawful residence. Accordingly, unmarried partners of Union citizens must have access to an

[34] CJEU Case C-83/11 *Rahman and Others* [2012], Opinion of Advocate General Bot, para 39.
[35] CJEU Case C-617/10 *Åkerberg* [2013], para 21.

effective remedy before a court or tribunal against a decision concerning the starting date of their lawful residence.

The interpretation of the duty to facilitate must take into account *the context in which it occurs.*[36] Therefore the next section explains why the assessment and evidence of this date is important. We will argue that in the light of this importance, Member States have an obligation to assess and evidence the starting date of lawful residence.

[36] CJEU Case C-83/11 *Rahman and Others* [2012], Opinion of Advocate General Bot, para 39.

4. ASSESSMENT AND EVIDENCE OF THE STARTING DATE IN LIGHT OF DIRECTIVE 2004/38/EC

This section discusses the importance to have the starting date of lawful residence assessed and evidenced by the competent authorities in light of the provisions of and the Preamble to Directive 2004/38/EC. Though these provisions only regard lawful residence of Union citizens and their 'nuclear family', the findings of this section may also be of relevance for unmarried partners.

4.1 Importance of the period of lawful residence

The Directive attaches great importance to the period of (legal) residence in the host Member State for both the Union citizen and his family members. Article 16 provides for an unconditional right of residence, namely the right to permanent residence, which is acquired by both Union citizens and their family members after five years of lawful residence in the host Member State. Furthermore, Article 12 provides for retention of residence rights in the event of death or departure of the Union citizen for family members who have been residing in the host Member State as family members for at least one year. Similarly, in the event of divorce, annulment of the marriage or termination of the registered partnership residence rights shall be retained if the marriage or registered partnership had lasted for at least three years, including one year in the host Member State (Article 13(2) see also section 2.2 of this expert opinion). Besides, the time of residence in the host Member State plays an important role in determining whether expulsion or termination of residence is allowed for reasons of public policy or public security (Article 28), public health (Article 29) or for placing an unreasonable burden on the State's social welfare system (Article 14 in combination with recital 16).[37] Though none of these provisions expressly mentions the starting date of lawful residence, the significance of the starting date must be assumed from the fact that they contain rights that can be lost before, and acquired after, a certain *specific* time of lawful residence.

The relevance of the time of residence is further stipulated for in the Preamble to the Directive. Recital 16 states that when considering an expulsion measure of a beneficiary to the Directive on the grounds of recourse to the social assistance system (Article 14) the host Member State's examination should take into account 'the duration of residence'. Furthermore, Recital 17 states that a right of permanent residence should be laid down for all Union citizens and their family members 'who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years[..]'. Also, it is stated in Recital 23 that the scope of expulsion measures on grounds of public policy or public security 'should be limited […] to take account of […] the length of residence in the host Member State'. Moreover, Recital 24 states that 'only in exceptional circumstances […] should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State'.

The objective of this link between the *period* of lawful residence and *strength* of the residence right follows directly from the Preamble. In the case of retention of residence rights by family members it is stated in Recital 15:

> Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity […]measures should therefore be taken to ensure that in such circumstances family

[37] Recital 16 of the Preamble to Directive 2004/38/EC states: 'The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence'.

members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

With regard to the purpose of permanent residence rights for Union citizens and their family members who have chosen to settle long term in the host Member State it is stated in Recital 17 that 'it would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union'. Likewise, it is stated in Recital 18 concerning permanent residence rights that 'in order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions'. It can be inferred from the above that the objectives of permanent residence are to *strengthen the feeling of Union citizenship* as a key to promoting one of the fundamental objectives of the EU: *social cohesion*.

In those cases where expulsion measures are considered it is stated in Recital 23 that 'it can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State'. Moreover Recital 24 provides that 'the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be'. More generally, it must be kept in mind that 'the free movement of persons constitutes one of the fundamental freedoms of the internal market' and that 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence'.[38]

4.2 Obligation to provide evidence of lawful residence

Though the Directive does not contain an obligation for the Member States to provide evidence of the *starting date* of the residence right, it does contain a clear obligation for Member States to assess and provide evidence of the residence right. It follows from Article 8(2), 10(2), 19(1) and 20(1) that the host State is under an obligation (word *shall* rather than *may* is used) to provide evidence of the (permanent) residence rights of Union citizens and his family members, either by the issuance of a registration certificate or a residence card.

Furthermore, it should be noted that Member States are granted absolutely no discretion as to whether or not to issue the document evidencing the right of residence. Besides, the choice of wording – the right *shall be evidenced*[39] - as opposed to *established* or *commenced,*[40] implies that the existence of the right of residence is independent of a registration certificate or residence card and in fact pre-exists the issuance of such a document. Accordingly, both the registration certificate and the residence card serve merely as an administrative formality recognising the legal and factual reality of a Union citizen and or his family member, *id est* his or her right of residence in a given Member State (see also section 2.3 of this expert opinion).

Duty to provide evidence of the lawful residence of unmarried partners

It is important to note that, in listing the documents a family member is required to present when applying for a residence card, Article 10(2) under (e) and (f) expressly mentions which documents

[38] Recitals 2 and 3 of the Preamble to Directive 2004/38/EC.
[39] Oxford Dictionary definition of 'evidenced'.
[40] Oxford Dictionary definition of 'commence' and 'establish'.

must be presented in cases falling under 3(2) of the Directive. It follows that the Directive seemingly extends the scope of this provision and thus creates the obligation to evidence the residence rights of family members to the durable partner of the Union citizen.

Purpose of evidencing lawful residence

The administrative duties and formalities should be understood in light of the purpose of the Directive, which is 'to simplify and strengthen the right of free movement and residence of all Union citizens' and that in order for Union citizens to exercise their right to free movement and residence in line with 'objective conditions of freedom and dignity' their right is extended to their family members.[41] Furthermore, it is stated under Recital 11 that the formalities connected with the free movement of Union citizens within the territory of the Member States 'should be clearly defined'. This required clarity also follows from Recital 14 where it is stated that 'the supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members'.

4.3 A duty to assess and provide evidence of the starting date of lawful residence?

It must be concluded that the starting date of lawful residence is material in both preventing the loss of rights and the attainment of stronger rights under the Directive. Besides, it is evident that the Directive imposes obligations on the Member State to provide evidence of the lawful residence of family members of Union citizens. Further, it follows from the case law of the Court of Justice that the provisions on administrative formalities *must* both be interpreted *broadly* and *not be deprived of their effectiveness.*[42] In light of this context and the purpose of these provisions which is *to simplify and strengthen the right of free movement and residence,* we believe that they require Member States not only to provide evidence of lawful residence of family members of Union citizens but also of the starting date of this lawful residence.

It is evident that a practice which denies the family member an assessment and evidence of the starting date of his lawful residence not only frustrates the relevant provisions of the Directive but also renders them ineffective. If the authorities do not establish and evidence the starting date of lawful residence the family member may encounter difficulties to substantiate this starting date at the moment he or she applies for retention of residence rights or permanent residence. It follows from the Court of Justice's case-law that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise a right granted by EU law would be incompatible with EU law.[43]

The same argumentation should apply to unmarried partners of Union citizens. In section 3, it was concluded that assessing and providing evidence of the starting date of lawful residence of the durable partner falls within the scope of the duty to facilitate their entry and residence under Article 3(2) of the Directive. Our findings in the present section, with regard to the 'nuclear family', are also true for unmarried partners. If a Member State implements its 'facilitating' obligation by granting a

[41] Recitals 3 and 5 to the Directive.
[42] CJEU Case C-162/09 *Lassal* [2010], para 31.
[43] CJEU Case C-199/82 *SpA San Giorgio* [1983], para 14.

residence right to unmarried partners, assessing and providing evidence to the starting date of a residence right is material in preventing the loss of rights and, if applicable, the attainment of stronger rights under the Directive. Thus, assessing and providing evidence of the starting date of the residence right of unmarried partners not only falls within the scope of the Directive but is also an obligation of the Member States if the starting date is material for preventing the loss of residence rights and the attainment of stronger rights under national law.

4.4 Conclusion of this section

In section 3 we argued that the assessment and evidence of the starting date of the lawful residence of the unmarried partners of Union citizens fall within the scope of the duty to facilitate laid down in Article 3(2) of the Directive. This section contended that the duty to facilitate implies a duty to assess and provide evidence of the starting date of lawful residence of unmarried partners of Union citizens if the period of lawful residence is material for preventing the loss of rights and the attainment of stronger residence rights under national law.

Section 5 will explain that under Dutch law residence rights of unmarried partners of Union citizens are the same as the residence rights of the 'nuclear family' of Union citizens. Dutch law applies the provisions of the Directive regarding retention of residence rights and obtaining permanent residence analogously to unmarried partners of Union citizens. As a result the period of residence is as important for the residence rights for unmarried partners of Union citizens as for the 'nuclear family' of such citizens. However as will be explained in section 6 of this expert opinion, the Dutch system does not provide for a possibility to have the starting date of the lawful residence assessed and evidenced other than in the context of an application for retention of a residence right or permanent residence. We will argue that this situation violates the duty to facilitate laid down in Article 3(2) of the Directive and the right to an effective remedy guaranteed by Article 47 of the Charter.

5. IMPLEMENTATION OF THE DUTY TO FACILITATE IN THE NETHERLANDS

The Netherlands implemented the duty to facilitate (laid down in Article 3(2)(b) of the Directive with regard to the unmarried partners) by granting them a residence right analogous to that of the family members defined in Article 2(2) of the Directive. Thus, the Netherlands has granted unmarried partners a similar position as that of the 'nuclear family'. The implementing provisions can be found in Chapter 8.2.2 (Articles 8.7 to 8.25) of the Aliens Decree 2000 (Vreemdelingenbesluit, henceforth: Vb).

This section discusses the consequences of this approach for the nature of the residence right of unmarried partners of Union citizens in the Netherlands and for the possibility of unmarried partners to retain the right of residence after separation of the partners or the death or departure of the Union citizen and to obtain permanent residence. Furthermore we explain how an unmarried partner should 'duly attest' that he has a durable relationship with the Union citizen.

5.1 The nature of the residence right of unmarried partners

Article 8.7(4) Vb provides that the Dutch provisions implementing Directive 2004/38/EC with regard to the 'nuclear family' can equally be invoked by the unmarried partner. This means that the unmarried partner has, under the Vb, the same rights as the members of the 'nuclear family' mentioned in Article 2(2) of the Directive, including the retention of the right of residence after separation or death or departure and the claim to obtain a permanent residence right. Dutch legislation has thus created a residence right for unmarried partners similar to that of the 'nuclear family', in order to comply with the duty to facilitate.

Like the members of the 'nuclear family', unmarried partners will only have a right of residence if the following conditions are satisfied:

- both the Union citizen and the unmarried partner are residing in the Netherlands;
- the unmarried partner has a durable relationship, duly attested with the Union citizen (Article 8.7(4) Vb); and
- the Union citizen satisfies the conditions laid down in Article 7(1) of the Directive (Article 8.12(1)(a)(b) and (c) Vb) and therefore has a right of residence in the Netherlands.

Ex lege nature of the residence right

The legal nature of this residence right for unmarried partners must be determined on basis of the relevant Dutch national legislation. The highest judicial authority to decide on this matter is the Dutch Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State, henceforth: ABRvS). In an extensively reasoned decision of 2011, the ABRvS has analysed the character of the residence right of an unmarried partner of a Union citizen.[44] Indeed, the ABRvS found that the legal basis of the residence right of such an unmarried partner is laid down in Dutch national law. It referred to Article 112 of the Aliens Act 2000, which states that the Aliens Decree may provide for rules deviating from the Aliens Act 2000 to the advantage of the alien in order to implement a treaty or a binding decision of an international organisation. Accordingly, the provisions in Chapter 8.2.2 of the Vb deviate from the normal Dutch immigration rules in the advantage of, amongst others, unmarried partners of Union citizens who use their right to free

[44] ABRvS 14 September 2011, ECLI:NL:RVS:2011:BT1936, JV 2011/462, annotation T.P. Spijkerboer.

movement within the EU.[45] If the conditions of these provisions - analogously applied - are met, lawful residence comes into existence. The ABRvS considered:

> 'Taking into account the wording of Article 112 of the Aliens Act 2000 it follows from this provision that, if the applicable conditions pertaining to lawful residence are met, there is lawful residence accordingly.'[46]

It follows from this consideration that the Dutch Immigration Service (henceforth: IND) has little or no discretion when deciding about the start and continuance of the lawful residence of unmarried partners. According to the ABRvS, under Dutch national law the residence right for unmarried partners commences *ex lege* once the relevant conditions are fulfilled. It fits within this perception, that the residence document bears a declaratory, not a constitutive, character. Indeed, the ABRvS has stated that the issuance of a residence document only serves as a proof of lawful residence, and does not contain a decision as to the starting date of the right of residence.[47]

5.2 Proving a durable relationship

A primary condition of the residence right is that the durable relationship is 'duly attested'. This means unavoidably, that the IND must assess whether the relationship and its durable character are satisfactorily proven. Therefore it is not possible to fulfil the conditions of the residence right of unmarried partners without any interference of the IND. In a decision of September 2011 the ABRvS stated that the Dutch Minister has, within the boundaries of Union law, a certain margin of appreciation in assessing whether there is a duly attested durable relationship.[48]

The European Commission has formulated guidelines on the transposition and the application of Directive 2004/38 which are also relevant for unmarried partners. In these guidelines, the Commission states:

> Persons who derive their rights under the Directive from being *durable partners* may be required to present documentary evidence that they are partners of an EU citizen and that the partnership is durable. Evidence may be adduced by any appropriate means. The requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense. National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case

[45] The ABRvS refers specifically to Arts 8.11(2) and Art 8.13(1) Vb.

[46] Para 2.9.3 of the judgment, author's translation: 'Gelet op de bewoordingen van artikel 112 van de Vw 2000 ligt in deze bepaling besloten dat indien aan de gestelde regels in verband met het rechtmatig verblijf is voldaan daarmee sprake is van rechtmatig verblijf.'

[47] ABRvS 21 February 2011, ECLI:NL:RVS:2011:BP5947, JV 2011/157, annotation B.K. Olivier: 'Met de afgifte van het document aan de vreemdeling, dat strekt tot bewijs van rechtmatig verblijf als bedoeld in artikel 8.13, eerste lid, van het Vb 2000, is niet vastgesteld met ingang van welke datum hij aan het gemeenschapsrecht rechtmatig verblijf in Nederland ontleent.'

[48] ABRvS, 6 September 2011, ECLI:NL:RVS:2011:BS1678, para 2.4: 'Nu in de richtlijn niet nader is gedefinieerd wanneer sprake is van een deugdelijk bewezen duurzame relatie, komt de minister bij de vaststelling wanneer hiervan sprake is, binnen de door het gemeenschapsrecht getrokken grenzen, een zekere beoordelingsmarge toe (vgl. het arrest van het Hof van Justitie van de Europese Gemeenschappen van 15 juni 2000 in C-365/98).'

national rules would need to foresee that other relevant aspects (*such as for example a joint mortgage to buy a home)* are also taken into account [emphasis added]. [49]

In Dutch policy rules, the assessment of the durable character of a relationship is reduced to a more or less formal test. In Chapter (B)10.2.2 of the Dutch Aliens Circular (Vreemdelingencirculaire, henceforth: Vc) it is laid down that the condition of 'a durable relationship, duly attested' must be proven by a minimum period of six months of cohabitation, in the form of a proof of registration in the Municipal civil register, or by the fact that a child was born out of the relationship.

The ABRvS, however, found this approach too narrow. If a family member provides evidence his statement, that he has a durable relationship with a Union citizen who used his right to free movement, the Minister must assess this evidence. Where relevant he must give reasons why the existence of a durable relationship has not been demonstrated. In such a case, it is not sufficient for the Minister to merely refer to the absence of a proof of registration.[50]

Consequently, the right to lawful residence of an unmarried partner commences *ex lege* when he or she meets the conditions. However, the IND assesses whether the condition of a durable relationship is duly attested.

5.3 Retaining a right of residence and obtaining a right of permanent residence

Article 8.15 Vb implements the rules laid down in the Directive 2004/38 on retaining a residence right in case of death or departure of the Union citizen or in case of annulment or termination of the marriage or registered partnership. These rules are applicable to unmarried partners. Although Article 8.15 Vb does not expressly mention the case of termination of a durable relationship, not being a registered partnership, the Court of Amsterdam found that unmarried partners derive a similar right of continued residence from this provision after termination of cohabitation as spouses after dissolution of the marriage.[51] Article 8.17(1)(b) Vb provides that family members, including unmarried partners, have an unconditional right to permanent residence after a continued period of five years of lawful residence.

Like the *initial right of residence* of unmarried partners, both the *right to continued residence* and the *right to permanent residence* of unmarried partners are directly derived from the national provisions of the Vb, implementing the duty to facilitate laid down in Article 3(2) of Directive 2004/38/EC. Thus, the analysis of the ABRvS of the nature of the residence right of unmarried partners in the abovementioned decision of 14 September 2011 is accordingly applicable to the right of continued residence and the right to permanent residence: these rights come into existence *ex lege* once the relevant conditions are met.

An important condition in this respect is that the residence right must have existed during three years (for obtaining a residence right independent of cohabitation with the Union citizen) or five years (for obtaining a right to permanent residence). The IND assesses the duration of the lawful residence. This assessment may include an assessment of date on which the durable relationship started and the date on which it has ended. The starting date of the lawful residence of the

[49] Communication from the Commission on guidance for better transposition and application of Directive 2004/30, COM(2009) 313 def.

[50] ABRvS, 6 September 2011, ECLI:NL:RVS:2011:BS1678, paras 2.4.2 and 2.4.3.

[51] District Court of the Hague, zp Amsterdam, 27 March 2013, AWB 12/24425, AWB 12/30186, ECLI:NL:RBAMS:2013:4271, para 5. See also ABRvS, 1 July 2014, 201403158/1/V4, ECLI:NL:RVS:2014:2569, para 2.2.

unmarried partner of a Union citizen (which may coincide with the starting date of his durable relationship with the Union citizen) is thus material to the retention of his residence rights and for obtaining permanent residence.

5.4 Conclusions of this section

The start and the termination of the residence right of unmarried partners are not dependent on any decision of the IND to grant such a right. However, the IND still has an important role in assessing whether the relationship is duly attested. The date on which the durable relationship of the unmarried partner with the Union citizen started may coincide with the starting date of the unmarried partner's lawful residence. According to Dutch law the unmarried partner has the right to retention of his residence right in case his relationship with the Union citizens ends, after a period of lawful residence of three years. After five years the unmarried partner has a right to permanent residence. Therefore the starting date of his lawful residence is material for preventing the loss of residence rights and the attainment of stronger rights. In sections 3 and 4 it was concluded that the duty to facilitate laid down in Article 3(2) of the Directive requires the national authorities to assess and evidence the starting date of the lawful residence. However, as will be explained in the next section the Dutch system does not provide for a possibility to have the starting date of the lawful residence assessed and evidenced other than in the context of an application for retention of a residence right or permanent residence.

6. ASSESSMENT AND EVIDENCE OF THE STARTING DATE IN THE NETHERLANDS

Under Dutch law the starting date of the lawful residence of unmarried partners of a Union citizen, who used their right to free movement, is the date on which the conditions are complied with. The same – in the reverse sense - applies for the date on which the residence right expires: that is the date on which the conditions are no longer met. This follows from the *ex lege* character of the right (see section 5.1). In principle, the date on which the conditions are fulfilled can be objectively established. However, inasmuch as this date is dependent on an assessment by the IND of whether the conditions are met, and the result of this assessment is challenged by the persons involved, the date is insecure.

Different views are, for example, perceivable with regard to the requirement of Dutch policy rules that the partners must have cohabited for at least half a year (see section 5.2). On the one hand it may be defended that the relationship was durable right from the beginning if it proved to have lasted at least six months. On the other hand it may be contended that the durable character only starts to exist after the termination of the period of six months cohabitation.

This section explains that unmarried partners of Union citizens do not have the possibility to have the starting date of their lawful residence assessed and evidenced before the moment they apply for retention of their residence right or for permanent residence. But, at that moment it is difficult to prove (retrospectively) that the durable relationship with the Union citizen had started at a certain date. This expert opinion argues that this situation in contrary to the duty to facilitate and to the right to an effective remedy laid down in Article 47 of the Charter.

6.1 Registration of lawful residence

In the Netherlands, the Dutch Aliens Administration (Basisvoorziening vreemdelingen, henceforth: BVV) contains information about the legal status of Union citizens and third country nationals. The information of this register is consequently linked to the Dutch civil registration database (Basisregistratie personen, henceforth: BRP) and accessible to most government agencies.[52] The information in the BVV is leading for all other Dutch authorities if the issue of lawful or unlawful residence comes up.

In the BVV the authorities register the date of issuance of the residence card for third country national family members of Union citizens and other third country nationals. With respect to third country nationals who do not fall within the scope of Directive 2004/38/EC that is a correct approach, because under general Dutch immigration law the starting date of lawful residence coincides with the starting date of the validity of the residence card. However, where the residence card has a declaratory character, like in the case of unmarried partners of Union citizens, the issuing date of the card does not reflect the starting date of the lawful residence: this starting date may be earlier than the date of issuance of the residence card[53]

The unmarried partner of the Union citizen may apply for readjustment of the starting date of the residence right as it is laid down in the BVV, in order to obtain official evidence of the correct starting date of his or her lawful residence. However, the question whether this approach is feasible is still pending before the Dutch court.[54]

[52] Art 2.7(1) under 5 and 2.16 Dutch civil registration Act (Wet BRP) and Protocol Identificatie en Labeling (PIL) p 40.
[53] ABRvS 21 February 2011, ECLI:NL:RVS:2011:BP5947 , JV 2011/157, annotation B.K. Olivier, para 2.1.2.
[54] Procedure before the Court of Roermond, nr 14/8026, lodged by Tomas Weterings.

6.2 No authority to assess and evidence the starting date of lawful residence on request

Family members of Union citizens have tried to obtain an assessment and evidence of the starting date of their lawful residence by requesting a written statement of the IND. The ABRvS recognised in a decision of 21 February 2011, that the unmarried partner has a *legal interest* in having the starting date of lawful residence assessed, because this date is material for the existence of the right to permanent residence. According to the ABRvS, the Directive 2004/38 *does not preclude* Member States from establishing and providing evidence of the starting date of the right of residence. However, according to the ABRvS the IND lacks the authority under Dutch law to give a written statement on the correct starting date of the residence right.[55] As a result the Dutch court also lacks the authority to assess the starting date of the lawful residence. So, this avenue leads to a dead-end.

6.3 Difficulties in proving the starting date of the durable relationship retrospectively

In practice the IND only assesses the starting date of lawful residence of family members (including unmarried partners) Union citizens at the moment they apply for retention of their right of residence or for permanent residence. It has proved difficult to present evidence that the conditions for lawful residence (including the existence of a durable relationship in the case of an unmarried partner) were met at a certain date. At the moment the family member applies for retention of their residence right or permanent residence years have passed since the alleged starting date of the lawful residence. This is particularly problematic for the unmarried (ex) partners of EU citizens because the alleged starting date of the durable relationship (one of the conditions for lawful residence) may be contested by the Dutch authorities. If this unmarried partner wishes to prove that his or her cohabitation with the Union citizen started earlier than the date established by the IND, he or she may be dependent on a cooperative attitude of the Union citizen. This may be problematic once the relationship has ended. The fact that the starting date of the lawful residence of unmarried partners cannot be assessed and evidenced before the moment they apply for retention of their residence right or for permanent residence may thus render it very difficult for these partners to obtain the requested residence right.

6.4 Assessment of the Dutch system in the light of the duty to facilitate and the right to an effective remedy

In sections 3 and 4 of this expert opinion we concluded that:

1. the assessment and providing evidence of the starting date of lawful residence of Union citizens falls within the scope of the duty to facilitate and therefore also within the scope of the right to an effective remedy laid down in Article 47 of the Charter;
2. the duty to facilitate includes a duty for the Member States to assess and provide evidence of the starting date of the lawful residence of unmarried partners of Union citizens, if the starting date is material for preventing the loss of residence rights and the attainment of stronger rights;

[55] ABRvS 21 February 2011, ECLI:NL:RVS:2011:BP5947 , JV 2011/157, annotation B.K. Olivier.

3. the right to an effective remedy laid down in Article 47 of the Charter requires that the unmarried partner has an effective remedy before a court or tribunal against the decision concerning the starting date of his or her lawful residence.

In section 5 we explained that under Dutch legislation the starting date if lawful residence is material for unmarried partners of Union citizens: after three years of lawful residence they have a right to retain their residence right independent of the Union citizen, after five years they have the right to permanent residence.

In the Netherlands the unmarried partner of a Union citizen is only able to have the starting date of his lawful residence assessed and evidenced in the context of an application for retention of his or her residence right or for permanent residence. Thus, the discussion about the starting date of the residence right only comes up after it has expired and in the context of a new request for another residence right. This forces him or her to prove the starting date of his or her durable relationship with the Union citizens retrospectively. This may render it impossible or excessively difficult to obtain the residence rights granted to him under Dutch law. As these residence rights implement the duty to facilitate, laid down in Article 3(2) of the Directive, the Dutch system deprives the duty to 'facilitate' of its effectiveness, which is contrary to EU law.

Finally, the Dutch courts are only able to review the establishment of the starting date of the lawful residence in the context of an appeal against the rejection of an application for retention of residence rights or permanent residence. Also during this appeal the unmarried partner will have difficulties to provide evidence of the starting date of the durable relationship with the Union citizen retrospectively. Arguably this may render the remedy before the court or tribunal ineffective.

A duty to create an authority to assess and evidence the starting date?

It may seem remarkable that the IND would not be allowed to give a written statement on a matter - the right of residence of non-nationals - which is fully within the scope of its core business. At any rate, it does not seem difficult for the judiciary to construe such an authority by interpreting national legislation in the spirit of the Directive.

According to standing case law of the Court of Justice there may even be a duty for the national courts to construe such an authority. In the *Unibet* judgment of the Court of Justice[56] it was established that Member States must establish a system of legal remedies and procedures which ensure respect for the right of effective judicial protection. It is for the national courts to interpret the procedural rules governing actions brought before them (…), in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective (…) of ensuring effective judicial protection of an individual's rights under Community law. The Court even held that new remedies must be created 'if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law'.[57] It may therefore be argued on the basis of *Unibet* that under Dutch law an authority must be created for the IND to assess and evidence the starting date of lawful residence.

[56] CJEU Case C-432/05 *Unibet* [2007], paras 43 and 44.
[57] CJEU Case C-432/05 *Unibet* [2007], para 40 and 41.

6.5 Conclusions of this section

The existing system of evidencing the starting date of lawful residence in the Netherlands is not fully tailored to the specific character of the right of residence of unmarried partners. The BVV only registers the date of issuance of a residence card. It is still insecure whether attempts to readjust the starting date of the lawful residence of an unmarried partner as it was registered in the BVV will lead to an adequate result. Attempts to obtain a written statement by the Dutch authorities holding the correct starting date failed because of an alleged lack of authority of the IND to give such a statement. This results in a situation where the unmarried (ex) partner of a Union citizen can only have the starting date of the lawful residence assessed in the context of his or her application for retention of his or her residence right or permanent residence. This implies that the unmarried partner should provide evidence of the starting date of his or her durable relationship with the Union citizen retrospectively. Such a system may render it impossible or excessively difficult for the unmarried partner to obtain the requested residence right. The Dutch system may therefore render the duty to facilitate laid down in Article 3(2) of the Directive ineffective.

Moreover it may be argued that the Dutch system violates the right to an effective remedy laid down in Article 47 of the Charter. It follows from Court of Justice's judgment in *Unibet* that the Dutch courts should interpret the procedural rules in such a way that the duty to facilitate laid down in Article 3(2) of Directive 2004/38/EC is not rendered ineffective. If this is necessary to ensure the rights of unmarried partners under Article 3(2) of the Directive an authority should be created for the IND to assess and evidence the starting date of the lawful residence of those partners. The national courts should be able to effectively review the decision of the IND on the starting date of lawful residence.

7. CONCLUSIONS

The question this expert opinion sought to answer is whether the obligation to 'facilitate' laid down in Article 3(2)(b) of Directive 2004/38/EC leads to an obligation under Union law for the Member States to assess and evidence the starting date of the lawful residence of the unmarried partner. An affirmative answer follows from the findings in this expert opinion. The conclusions of the forgoing sections were:

1. The unmarried partner of Union citizens is not included in the definition of family members in Article 2(2) of the Directive and therefore does not enjoy an automatic right to entry and residence as a corollary of the Directive.[58] However, Article 3(2) of the Directive provides that that Member States *shall* facilitate the entry and residence of those defined under Article 3(2)(b). The Member States are thus obliged to take steps in order to facilitate the entry and residence of the unmarried partner defined under 3(2)(b) and *may not* remain inactive.

2. Assessment and providing evidence of the starting date of lawful residence of the durable partner *falls within the scope of the duty to facilitate* the entry and residence under Article 3(2) of Directive 2004/38. As a result the right to an effective remedy laid down in Article 47 of the Charter applies to decisions concerning unmarried partners of Union citizens. They must have access to an effective remedy before a court or tribunal against a decision concerning their lawful residence.

3. For the nuclear family of Union citizens the starting date of lawful residence is *material in both preventing the loss of rights and the attainment of stronger rights under the Directive.* Besides, it is evident that the Directive imposes obligations on the Member State to provide evidence of lawful residence. Further, it is given that the provisions on administrative formalities *must* both be interpreted *broadly* and *not be deprived of their effectiveness.*[59] In light of their purpose which is *to simplify and strengthen the right of free movement and residence,* this means that they require Member States not only to provide evidence of lawful residence but also of the starting date of this lawful residence. A practice which denies the family member evidence of the starting date of his lawful residence not only frustrates the relevant provisions but also renders them ineffective.

   The same argumentation should apply to unmarried partners of Union citizens. If, under national law, the starting date is material for preventing the loss of residence rights and the attainment of stronger rights under national law, the duty to facilitate therefore obliges Member States to assess and provide evidence of the starting date of the residence right of unmarried partners. Further, it follows from the applicability of Article 47 of the Charter that *unmarried partners of Union citizens must in these Member States have access to an effective*

[58] This follows from Recital 6 of the Preamble to Directive 2004/38/EC, which states that: 'the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State'.
[59] CJEU Case C-162/09 *Lassal* [2010], para 31.

remedy before a court or tribunal against a decision concerning the starting date of their lawful residence.

4. The Netherlands implemented the duty to facilitate with regard to the unmarried partners of Union citizens by granting them a residence right analogous to that of the family members defined in Article 2(2) of the Directive. The residence right for unmarried partners commences *ex lege*, under Dutch national law, once the conditions of these provisions are fulfilled. The start and the termination of the residence right of unmarried partners are not dependent on any decision of the IND to grant such a right. However, the IND still has an important role in assessing whether the relationship is duly attested. The date on which the durable relationship of the unmarried partner with the Union citizen started may coincide with the starting date of the unmarried partner's lawful residence. According to Dutch law the unmarried partner has the right to retention of his residence right in case his relationship with the Union citizens ends, after a period of lawful residence of three years. After five years the unmarried partner has a right to permanent residence. *Thus, under Dutch implementing legislation, the starting date of his lawful residence is material for preventing the loss of residence rights and the attainment of stronger rights.*

5. The existing system of evidencing the starting date of lawful residence in the Netherlands is not fully tailored to the specific character of the right of residence of unmarried partners. The BVV only registers the date of issuance of a residence card. It is still insecure whether attempts to readjust the starting date of the lawful residence of an unmarried partner as it was registered in the BVV will lead to an adequate result. Attempts to obtain a written statement by the Dutch authorities holding the correct starting date failed because of an alleged lack of authority of the IND to give such a statement. This results in a situation where the unmarried (ex) partner of a Union citizen can only have the starting date of the lawful residence assessed in the context of his or her application for retention of his or her residence right or permanent residence. This implies that the unmarried partner should provide evidence of the starting date of his or her durable relationship with the Union citizen retrospectively. Such a system may render it impossible or excessively difficult for the unmarried partner to obtain the requested residence right. *The Dutch system therefore renders the duty to facilitate laid down in Article 3(2) of the Directive ineffective.* The obligation to 'facilitate' means that *the Dutch authorities must assess and evidence the starting date of the residence right on the first moment on which the unmarried partners fulfilled the conditions* posed by the relevant Dutch legislation and not wait until such assessment becomes relevant in the context of an application for retention of the residence right or permanent residence.

6. By not guaranteeing the effectiveness of the rights flowing from its implementation of the duty to 'facilitate' under Article 3(2) of the Directive, *the Dutch system also violates the right to an effective remedy laid down in Article 47 of the Charter*. It follows from Court of Justice's judgment in *Unibet* that the Dutch courts should interpret the procedural rules in such a way that the duty to facilitate laid down in Article 3(2) of Directive 2004/38/EC is not rendered ineffective. An effective avenue to obtain evidence of the correct starting date of the residence right of unmarried partners must be secured. Therefore, national courts

should be able to effectively review the decision of the IND on the starting date of lawful residence. *If it is necessary to ensure the rights of unmarried partners under Article 3(2) of the Directive an authority should be created for the IND to assess and evidence the starting date of the lawful residence of those partners, either by the legislature, or in absence of a clear provision of law, by the national courts in interpreting national law as much as possible in conformity with Union law.*