European Citizenship under Stress: Social Justice, Brexit and Other Challenges

Edited by Nathan Cambien, Dimitry Kochenov and Elisa Muir

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Contents

PART 4
Supranational Citizenship and the Outside World

Preface

European Citizenship, although derived from the nationalities of the Member States, came to play a significant independent role in reforming European constitutionalism in unanticipated ways by undermining some of the key assumptions underlying the notions of citizenship, equality and democratic accountability. Instead of lingering merely as a super-structure atop Member State nationalities, it instead reshuffles the constitutional basics and not all Europeans emerge as winners as a result.

This collection, based on the contributions – fully updated – which first appeared in two special sections of *European Papers* published in the *Papers* in the last issue of 2018, the first edited by Dimitry Kochenov and the second by Nathan Cambien and Elise Muir, zooms in on the core challenges, which EU citizenship is facing in the times of Brexit, *Tjebbes* and *Dano* and provides a very broad, yet substantively rich take on the current state of EU citizenship scholarship across Europe. Drawing on the expertise of distinguished authors writing alongside new graduates, this book is crossing many lines – from disciplinary, to generational, to deliver a rigorous assessment of the fascinating subject, which still rests, since Maastricht, at the cutting-edge of EU law. Several authors in this book have not been among the participants of the special sections, including Stephen Coutts, Kirill Entin, Ulli Jessurun d'Oliveira, Gillian More and Benedikt Pirker. We are very grateful to them for joining already at the book stage.

This volume would not be possible without wholehearted dedication and often selfless help of numerous colleagues and friends. In particular, we are very grateful to Enzo Cannizzaro and his assistants at the *European Papers*, who published the majority of the advanced drafts of the chapters offered in this volume in the special sections of the *Papers*. We have also benefited from the help of editorial assistants in Leuven, including Martina Guarracino and Nabeelah Sabir, as well as in Groningen, including Nina M. Havig Bredvold, Kyrill Ryabtsev, Flips Schøyen – Flips' significant contribution has been particularly impressive – and Jacquelyn Veraldi at Cambridge. Thanks are also due to all the reviewers for their generous and critical engagement: Ўладзіслаў Белавусаў (TMC Asser Institute), Martijn van den Brink (Oxford), Egle Dagylitė (Anglia Ruskin), Thomas Horsley (Liverpool), Sara Iglesias Sánchez (Luxembourg), Anastasia Karatzia (Essex), John Morijn (NYU Law and Groningen), Jurian Langer (The Hague and Groningen), Charlotte O'Brien (York), Harry Panagopulos (Brussels), Dagmar Schiek (Belfast), Peter Spiro (Temple, Philadelphia), Alina Tryfonidou (Reading), Peter Van Elsuwege (Ghent) and

other colleagues. Last but not least, this volume would not be possible without Anipa Baitakova at Brill, who contracted this work and supported the editors throughout the production process.

While these are not easy times for European citizenship, the constructive engagement the supranational status receives in the contributions to this volume offers plentiful optimistic vistas for the concept, if only for the significant inspiration it provides the European citizens themselves as well as other legal systems with, as demonstrated, *inter alia*, in Entin and Pirker's chapter on the Eurasian Union Court in Minsk. *European Citizenship under Stress* thus comments on the on-going developments, rather than putting a full stop. EU citizenship is young and full of potential, even if constantly tested. As it evolves, this volume demonstrates, its future is bright.

N.C., D.K. and *E.M.*
Luxembourg, Princeton and Leuven, 5 February 2020

Abbreviations

CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CSR	Country Specific Recommendation
EAEU	Eurasian Economic Union
ECHR	European Convention on Human Rights
ECI	European Citizens' Initiative
ECJ	European Court of Justice
ECN	European Convention on Nationality
ECtHR	European Court of Human Rights
ECTS	European Credit Transfer System
ECVET	European Credit System for Vocational Education and Training
EEA	European Economic Area
EEC	European Economic Community
EECOMM	Eurasian Economic Commission
EECT	European Economic Community Treaty
EFTA	European Free Trade Association
EHEA	European Higher Education Area
ELA	European Labour Authority
ERA	European Research Area
ERC	European Research Council
ESE	European School of Economics
ESM	European Stability Mechanism
ESMT	Treaty Establishing the ESM
EU	European Union
EUI	European University Institute
EURES	European network of employment services
JCD	Joint Committee Decision
LTR Directive	Long-Term Residence Directive
MEP	Member of the European Parliament
MoU	Memorandum of understanding
MS	Member State
NAFTA	North American Free Trade Agreement
NTU	Nottingham Trent University
PoW Directive	Posting of Workers Directive
SGB	Sozialgesetzbuch
TCN	Third Country National
TEC	Treaty establishing the European Community

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Table of Cases

Court of Justice of the European Union: European Court of Justice

Court of Justice of the European Union: General Court

EFTA Court

International Court of Justice

Permanent Court of International Justice

European Court of Human Rights

European Commission of Human Rights

Court of the Eurasian Economic Union

National Courts

Austria

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CHAPTER 1

European Citizenship under Stress: Introduction

Nathan Cambien, Dimitry Kochenov and Elise Muir

European citizenship is under stress today as it has probably never been before. The European Union has matured to emerge as a powerful constitutional actor and the expectations grew accordingly, from justice, to the Rule of Law and other fundamental issues, all having EU citizenship and European citizens at the centre.[1] Mass demonstrations in favour of the Union and the values it stands for marked the recent years, from the rallies in Britain to Poland and Hungary. As European flags fly above the hopeful crowds, however, the vector of the Union's evolution is not unambiguous: significant achievements are reported alongside the deterioration of the constitutional climate in some parts of the Union[2] and the perceived weakening of EU citizens' protections.[3] The very significance of fundamental rights protection in the EU is in question in the shade of the 'constitutional bargain' among the Member States.[4] Fundamental rights of EU citizens are said to be 'in decline'.[5] Add Brexit to this picture, which signifies the loss of the EU citizenship status and all the rights attached to it by dozens of millions of Europeans as well as potential difficulties for EU citizens remaining in the UK, and the picture is more complex still.

1 CMLRev. (2015). Editorial comments: The Critical Turn in EU Legal Studies. *Common Market Law Review* 52 (4), pp. 881–888 (and the literature cited therein); de Witte, F. (2015). *Justice in the EU: The Emergence of Transnational Solidarity*. Oxford: Oxford University Press; Kochenov, D., de Búrca, G., and Williams, A., eds. (2015). *Europe's Justice Deficit?* Oxford: Hart Publishing; Williams, A. (2009). *The Ethos of Europe: Values, Law and Justice in the EU*. Cambridge: Cambridge University Press.

2 Pech, L., and Scheppele, K.L. (2017). Illiberalism within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies* 19, pp. 3–47.

3 O'Brien, C. (2018). *Unity in Adversity*. Oxford: Hart Publishing.

4 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism*. Cambridge: Cambridge University Press, p. 176 *et seq.*; but see: Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 204 *et seq.*

5 Yong, A. (2019). *The Rise and Decline of Fundamental Rights of EU Citizenship.* Oxford: Hart Publishing.

This volume brings together a handful of excellent scholars and practitioners[6] to look at a number of crucial challenges EU citizenship is facing at the moment – and Brexit is, naturally, the constant backdrop of any of the challenges discussed. In some sense, EU citizenship emerges as almost in danger. This context, which is quite new in the history of European integration, all the crises past and present notwithstanding, allows us to see the significance and value of EU citizenship with renewed clarity.

⁘

According to settled case law, EU citizenship, which was introduced by the Maastricht Treaty, is intended to be the fundamental status of nationals of the Member States. EU citizenship works on at least two levels. It epitomises the sense of non-discrimination, robust rights for the individuals and also the idea of an ever closer union among the peoples of Europe. As the classical story goes, it builds on the pre-existing free movement of economic actors by adding free movement rights for non-economic actors, as well as, to some extent, the right to equal treatment for all citizens and political rights. While EU citizenship initially had a mostly symbolic value, criticised by Hans Ulrich Jessurun d'Oliveira as a 'pie in the sky' at its inception,[7] it has developed into a driving force of the European integration project two decades later.[8]

In recent times, however, a number of important challenges emerged as potential obstacles to the process of European integration. It comes as no surprise then, that the concept EU citizenship in particular, as a cornerstone of that integration process, has been questioned, tested and even vilified. The 'migration crisis', the increased popularity of Eurosceptic political movements and a number of contentious constitutional processes all contribute to the current legal-political climate where EU citizenship stands challenged, raising a number of fundamental questions that touch upon the core aspects of personhood and rights in EU law and which can be expected to have a profound impact on the EU citizenship concept.

Amongst the different challenges, Brexit occupies a particularly prominent place. Indeed, ever since the United Kingdom voted, on 29 March 2016, to leave the European Union, Brexit has dominated the legal and political debate. Given

6 The usual disclaimer naturally applies: the views expressed in the various contributions of this book only reflect the approach of their respective authors.

7 Jessurun d'Oliveira, H.U. (1995). Union Citizenship: Pie in the Sky? In: Rosas and Antola, eds., *A Citizen's Europe. In Search for a New Order*. London: Sage, p. 58.

8 See, e.g., Jessurun d'Oliveira's contribution to this volume.

its symbolic resonance and its importance for the European integration process, it is only natural that EU citizenship came to play a central role in the negotiations following the UK's decision to leave the European Union. From the outset, the Council and the Commission stated that one of the first priorities for the negotiations would be to agree on guarantees to protect the rights of EU citizens, and their family members, who are affected by Brexit. At the same time, the UK made it clear that it wanted to limit the rights of EU citizens and their family members in the UK, in particular their right to free movement and residence.[9] It is inevitable, therefore, that, in the context of the Brexit negotiations, the concept of EU citizenship emerged as deeply challenged, leading to a handful of ambitious reform proposals[10] but ultimately resulting in a settlement the outcome of which is a significant downgrade in terms of rights of dozens of millions of those who were EU citizens still on January 31, 2020, as Gillian More explains.[11]

This volume takes a representative selection of the said challenges, which raise a multitude of highly complex issues, as an invitation critically to reflect on the current state of the EU legal framework surrounding EU citizenship. The contributions are grouped in four parts, dealing with constitutional developments posing challenges to EU citizenship and its nature; the developments related to free movement of persons and the limits of this paradigm in the context of EU citizenship; challenges to EU citizenship beyond free movement; and, lastly, challenges to EU citizenship in the context of the outside world, focusing, besides the problems posed by Brexit, which inform the narrative throughout, also on EU citizenship's relations with the EEA[12] and its implications for building the Eurasian free movement regime.[13]

First of all, EU citizenship has undergone important constitutional developments, while informing the core of EU's constitutionalism, thus growing hand-in-hand with all the EU's legal-political fundamentals and often challenging these in some crucial respects.[14] Notably, it has developed from what

9 See, e.g. the White Paper entitled "The Future Relationship between the United Kingdom and the European Union" (July 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

10 Cf. Kostakopoulou, D. (2018). *Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens. *Journal of Common Market Studies* 56 (4), pp. 854–869. But see van der Mei in this volume and van den Brink, M., and Kochenov, D. (2019). Against Associate EU Citizenship. *Journal of Common Market Studies* 57 (6), pp. 1366–1382.

11 See More's chapter in this volume. See also Closa, C. ed. (2017). *Secession from a Member State and Withdrawal from the European Union*. Cambridge: Cambridge University Press.

12 See the chapter by Tobler in this volume.

13 See Pirker and Entin in this volume.

14 For the overview, see the chapter by Kochenov in this volume.

was initially perceived as a mostly symbolic concept into a protective layer, offering the holder a number of rights that must under all circumstances be guaranteed. It is, in particular in situations of hardship, for instance in a context where fundamental rights are coming under threat, where its added value is most crucial.[15] While the principle – first mentioned by the Court in its seminal *Ruiz Zambrano* judgment[16] – according to which EU citizens must not be deprived of the genuine enjoyment of the substance of their EU citizenship rights principle, has become well established in the ECJ's case law, the precise scope of this right remains unclear. Quite how the Court develops this principle, and what (fundamental) rights are covered by it, will determine how important the added value of EU citizenship will be in the years to come.[17] With the lack of clarity on this issue, open questions remain regarding the implications of the functioning of EU citizenship status in the context of the values of the Union, and the role played by the citizenship of the Union in the context of the determination of the precise outlines of the material scope of EU law in concrete cases. As this book demonstrates, many vistas are open for the reassessment of EU citizenship's engagement with EU constitutionalism. A particularly thorny – and also brand new – issue in this context is the impact of the cumulation of EU nationalities on the level of the protection of rights, which Europeans enjoy in EU law today: should being a multiple citizen of Europe be a disqualifier in terms of the full enjoyment of rights in EU law? The ECJ has been masterfully navigating all these issues in the recent years, as David de Groot shows in this volume – but numerous fundamental questions remain.[18]

Second, moving to the rights attached to EU citizenship, the right to free movement for EU citizens and their family members is traditionally seen as the most important such right, and with reason. The right to free movement gives an EU citizen the possibility to emancipate himself from the confines of his Member State of origin – which he has not chosen – and to "vote with his feet" by moving to the Member State of his choice. Obviously, as explicitly stated in Article 21 TFEU, this right is subject to certain limitations and conditions, in particular those laid down in the Directive 2004/38[19]. The justification

15 See Jessurun d'Oliveira's chapter in this volume.

16 Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*. See also Kochenov, D. (2011). A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1) pp. 56–109.

17 Cf. the contribution by Kalaitzaki in this volume.

18 See the chapter by de Groot in this volume.

19 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely

for these limitations and conditions, and their precise scope – be this 'social integration',[20] 'abuse of law',[21] or social benefits and 'self-sufficiency', to name just a few – continues to give rise to contention.

On the one hand, a logical consequence of the said emancipating power ensuing from the exercise of the right to free movement is that those who do not or cannot rely on free movement rights are quite literally left behind. The different treatment between "moving" and "static" EU citizens leads to the fundamental question as regards the precise categories of EU citizens that are entitled to benefit from this right and what are the justifications for denying these benefits to other EU citizens. The issue of the (perceived) unequal treatment of different categories of current or former EU citizens is also strongly felt in the context of Brexit. Indeed, one of the most pressing topics in this context are the extent to which UK nationals and their family members will continue to enjoy free movement rights in the EU after Brexit and, conversely, the extent to which citizens from the remaining EU Member States and their family members will have the right to move to the UK.[22]

On the other hand, the relation between the free movement of economic actors and that of non-economically EU citizens remains unclear. While EU citizenship was originally conceived as a "market citizenship", axed on the traditional internal market logic, it has gradually been freed from that logic, as Jesse and Carter, among other contributors, demonstrate with abundant clarity. Unless covered by specific economic free movement regimes, such as the posted-workers framework, for instance,[23] EU citizens have become fully-fledged actors in the European Union in their own right, regardless of their contribution to the internal market. This stands in remarkable contrast with the European Economic Area, which is characterised by the free movement of economically active persons, but which does not share the concept of EU citizenship. Still, the adoption of a special set of EU protective measures for workers and the negotiations in the context of Brexit have acted as a vivid reminder that, at least according to some, the hard core of EU law on citizenship is still to be found in the free movement of economic actors.

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within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158,* 30.4.2004, p. 77–123. See the chapters by Coutts and Muir in this volume.

20 See the chapter by Coutts in this volume.

21 See the chapter by Kroeze in this volume.

22 See the chapters by Cambien and by Jesse and Carter in this volume.

23 See the chapter by Van Nuffel and Afanasjeva in this volume.

Thirdly, EU citizens enjoy significant rights beyond free movement. The right to equal treatment in the different EU Member States, in particular as regard access to social benefits and education, is a classical example of such rights. Specifically in the context of education, the latter right translates into the freedom for students to study in another EU Member State and to enjoy, in that respect, equal access as students coming from that Member State.[24] Evidently, this right to equal treatment implies a degree of financial solidarity between the different EU Member States. For that reason, it invites delicate questions as to the scope of the social benefits covered by the principle of equal treatment and the conditions surrounding the right to rely on it, conditions relating to legal residence and integration in the host Member State in particular. These issues are, again, of particular significance in the context of Brexit,[25] which calls into question the existing solidarity mechanisms. At the moment of the writing of this introduction, the extent of the solidarity from which, for instance, British pensioners living in Spain or French students studying at a UK university will continue to benefit after Brexit remains an open question, but the legal principles underlying the debate do deserve an in-depth examination.

The sophisticated web of rules on the integration of an area without frontiers for EU citizens remains contingent on politics and is therefore extremely fragile. Crucially therefore, EU citizens enjoy a number of political rights, which enable them to engage with the EU political level. Of utmost importance in this regard is the right to vote and to stand as a candidate in elections to the European Parliament, which acts as the representative of EU citizens at the EU level.[26] Also crucial is the EU citizens' initiative, which has the potential to develop into a meaningful form of participatory democracy.[27] Such a mechanism is highly desirable in light of the current political context, which has led to growing calls for further political engagement with the process of European integration. While both rights have been bolstered in recent case law, the precise contours of these rights and, hence, their added value for the European integration project still remain unclear for the moment.

All the challenges outlined above notwithstanding, the European legal order and its citizenship remain a significant example of supranational legal-political possibilities put to the service of the citizens themselves, bolstering a constant (re-)negotiation of access. This is the case with EEA nationals, benefiting from

24 See the chapter by Turmo in this volume.
25 See the chapter by Garben in this volume.
26 See the chapter by Platon in this volume.
27 See the chapter by Athanasiadou in this volume.

the majority of EU citizens' rights in the EU[28] and also gives rise to imitation, as is evidenced by the free movement framework and the case-law of the Court of the Eurasian Economic Union in Minsk, which clearly finds inspiration in the EU's achievements and legal structures.[29] The role of EU citizenship vis-à-vis the outside world equally concerns access to the status for those who do not have it by birth. Indeed, the bolstered status of EU citizenship and its importance for the EU constitutional framework naturally raises fundamental questions regarding the acquisition and loss EU citizenship. New challenges arise here related to the investment naturalizations practiced by a number of the Member States. While the orthodoxy has it – as the ECJ restated in *Tjebbes* to the regret of one of the editors[30] – that the Member States' sovereignty in the field of the acquisition and loss of citizenship is not curtailed beyond the *Rottmann* limitations,[31] the task of ensuring that the new challenges are met effectively could be solved via other fields of EU law, as this book shows, showcasing the importance of observing the freedom of movement of capital, in one example.[32]

The most pressing challenges in the context of EU citizenship's interactions with the 'outside world' arise, however, because of Brexit. Where a Member State decides to leave the European Union, it may be wondered whether the automatic loss of EU citizenship for nationals of the Member State is not or should not be subject to certain mitigating principles of EU law.[33] Regrettably, as the Withdrawal Agreement demonstrates, the parties were probably much less inventive that they could have been in a better world, in trying to ensure that as little rights of EU citizens / former EU citizens are lost as a result of the UK's crushing out of the Union following the surprise referendum result.[34]

It remains to be seen how the concept of EU citizenship and the rights attached to it emerge from the different challenges it faces. The aim of this volume is not to closely monitor current political developments from an academic perspective, but rather to explore the impact that these developments, and the debate they have triggered may have on the said core aspects of the

28 As analysed in the chapter by Tobler in this volume.

29 See the chapter by Pirker and Entin in this volume.

30 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes*. Cf. Kochenov, D. (2019). The *Tjebbes* Fail. *European Papers* 4 (1), pp. 319–336.

31 See the chapter by Jessurun d'Oliveira in this volume.

32 See the chapter by Kudryashova in this volume. For the general context of investment citizenship, see, Kälin, C. (2019). Ius Doni *in European and International Law.* Boston: Brill-Nijhoff.

33 See the chapter by van der Mei in this volume.

34 See the chapter by More in this volume.

concept of EU citizenship. The current challenges are used as an opportunity to assess the current state of EU law on citizenship and to shed light on emerging trends: How does the EU legal order understand the concept of EU citizenship in the current context? Or, in other words: what lessons can be learnt from the current challenges raised against EU integration to date to steer reflections on EU citizenship in the years to come?

PART 1

EU Citizenship: Constitutional Challenges

CHAPTER 2

EU Citizenship: Some Systemic Constitutional Implications

Dimitry Kochenov *

1 Citizenships in Europe: Harmony and Conflict

The EU boasts layered citizenships[1] – the nationalities of the Member States are supplemented by an "additional",[2] "independent"[3] EU-level citizenship granted to Member State nationals and impossible without the nationalities of the Member States.[4] According to the Court of Justice, it is "destined to be the fundamental status of nationals of the Member States".[5] This programme outlined by the shapers of the law is slowly being fulfilled, unsurprisingly, as

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1 Schönberger, C. (2005). *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*. Tübingen: Mohr Siebeck.

2 Art. 20 TFEU.

3 Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Janko Rottmann v. Freistaat Bayern*, para. 23.

4 Schönberger, C. (2007). European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism. *European Review of Public Law* 19(1); Szpunar, M., and Blas López, M.E. (2017). Some Reflections on Member States Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment. In: Kochenov, ed., *EU Citizenship and Federalism*: *The Role of Rights*, Cambridge: Cambridge University Press. See also H.U. Jessurun d'Oliveira's chapter in this volume.

5 E.g. Court of Justice, judgment of 20 September 2001, case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para. 31; Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, para. 82; Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* (*ONEm*), para. 41; Court of Justice, judgment of 2 June 2016, case C-438/14, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, para. 29; Court of Justice, judgment of 5 June 2018, case C-673/16, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, para. 30.

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the status has received a significant boost over recent decades,[6] some disagreements in the literature about its occasional retreat notwithstanding.[7] Ulli Jessurun d'Oliveira's age of the "pies in the sky", if it was ever correctly diagnosed at all,[8] is now definitely over, even if the question is open as to what precisely to count as the starting point of its demise. Candidates for the starting moment of EU citizenship abound. The point of citizenship's proverbial "birth" could overlap with *Ruiz Zambrano*,[9] *Rottmann*,[10] *Grzelczyk*,[11] *Martínez*

6 Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *Modern Law Review* 68 (2), pp. 233–267; Palombella, G. (2005). Whose Europe? After the Constitution: A Goal-Based Citizenship. *International Journal of Constitutional Law* 3 (2/3), pp. 357–382, 377; Kochenov, D. (2011). A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1), pp. 56–109.

7 Garner, O. (2018). The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status. *Cambridge Yearbook of European Legal Studies* 20, pp. 116–146; Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope. In: Kochenov, ed., EU Citizenship and Federalism: The Role of Rights, cit.; Yong, A. (2019). *The Rise and Decline of Fundamental Rights in EU Citizenship*. Oxford: Hart Publishing.

8 Jessurun d'Oliveira, H.U. (1995). Union Citizenship: Pie in the Sky? In: Rosas, Antola, eds., *A Citizens' Europe. In Search of a New Order.* London: Sage Publications, p. 58. See his chapter in this volume for the evolution of his views.

9 *Ruiz Zambrano*, cit.; D. Kochenov, *A Real European Citizenship* cit.; Platon, S. (2012). Le champ d'application des droits du citoyen européen après les arrêts *Zambrano*, *McCarthy* et *Dereci*: de la boîte de Pandore au labyrinth du Minotaure. *Revue trimestrielle de droit européen* 48 (1), pp. 23–52; van den Brink, M. (2012). EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously? *Legal Issues of Economic Integration* 39 (2), pp. 273–289; Hailbronner, M., and Iglesias Sánchez, S. (2011). The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status. *Vienna Journal on International Constitutional Law* 5 (4), pp. 498–537.

10 Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottmann v. Freistaat Bayern*; Davies, G. The Entirely Conventional Supremacy of Union Citizenship and Rights. In: Shaw, ed., *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? EUI Working Papers RSCAS* 2011/62; Kochenov, D. (2010). Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010. *Common Market Law Review* 47 (6), pp. 1831–1846; de Groot, G.-R. (2010). Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie. *Asiel en Migrantenrecht* (5/6), pp. 293–300; Jessurun d'Oliveira, H.U. (2010). Ontkoppeling van nationaliteit en Unieburgerschap? *Nederlands Juristenblad* 16, pp. 1028–1033; Iglesias Sánchez, S. (2010). ¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea? TJUE Sentencia de 2 de marzo de 2010 (gran sala), *Janko Rottmann c. Freistaat Bayern*, Asunto C-135/08. *Revista de derecho comunitario europeo* 37, pp. 933–950.

11 *Grzelczyk*, cit.

Sala,[12] the Treaty of Maastricht,[13] *Micheletti*,[14] or could have even taken place earlier than that.[15] Important rights effective throughout all EU territory accrue to this supranational citizenship, which stems directly from EU law, thus fulfilling the historic prophecy of *Van Gend en Loos* concerning the "constitutional heritage" of every European.[16] However, this picture is nuanced by the fact that EU citizenship is sometimes, quite surprisingly, characterised as "not intended to enlarge the scope *ratione materiae* [of EU law]"[17] – a dictum of the Court which is most likely *ultra vires*,[18] and certainly significantly out of tune with the case law in other areas. Having been dissected and criticised by the author with Sir Richard Plender elsewhere,[19] this formula is most likely bad law by now.

This chapter aims to appraise the core legal significance of the status of Eurpean citizenship and to engage critically with the key mantras appended to it. I claim that EU citizenship directly questions the assumptions underlying the notions of statehood; citizenship; democracy; and equality. Moreover, this "additional" legal status could emerge as an enemy of the nationalities of the Member States, rather than their friend.

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12 Court of Justice, judgment of 12 May 1998, case C-85/96, *María Martínez Sala v. Freistaat Bayern*. See also Opinion of AG La Pergola delivered on 1 July 1997, case C-85/96, *María Martínez Sala v. Freistaat Bayern*, para. 18.

13 Closa, C. (1995). Citizenship of the Union and Nationality of Member States. *Common Market Law Review* 32 (2), pp. 487–518. Cf. O'Leary, S. (1996), *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship.* The Hague-Boston: Kluwer Law International, 1996.

14 Court of Justice, judgment of 7 July 1992, case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, para. 10.

15 Maas, W. (2007). *Creating European Citizens*. Lanham MD: Rowman & Littlefield; Jacobs, F.G., ed.(1976). *European Law and the Individual*. Amsterdam: North-Holland.

16 Court of Justice, judgment of 5 February 1963, case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration.* Due, O. (1994). The Law-Making Role of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings. *Nordic Journal of International Law* 63 (1), pp. 123–137.

17 Court of Justice, judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, para. 23.

18 Although Paul Craig does not use it as an example in his notable account: Craig, P. (2011). The ECJ and *Ultra Vires* Action: A Conceptual Analysis. *Common Market Law Review* 48 (2), pp. 395–437.

19 Kochenov, D., and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text. *European Law Review* 37, pp. 369–396.

a *A Curious Legal Status Perched on Limitations*

Crucially, EU citizenship is one of those rare legal statuses which, although entirely dependent on the determination of the boundary of the material scope of the law which created it[20] – being a derivative supranational legal status produced by a Union founded on the principle of conferral.[21] Even though the Union is obviously capable to affect the substance of national citizenship laws of the Member States to some extent,[22] by prohibiting, for instance, non-recognition of lawfully acquired each-other's nationalities[23] or through subjecting the loss of EU citizenship to EU-level scrutiny based, *inter alia*, on the principle of proportionality,[24] what escapes the EU's non-vigilant eye is remarkable, including racist framing of citizenship[25] and expatriation without any prior notice,[26] leading to the treatment of law-abiding EU citizens worse than suspected terrorists.[27]

Most importantly – and bizarrely, should the EU's 'constitutional' claims be taken seriously – EU citizenship is not yet unquestionably endowed with fundamental rights.[28] While numerous EU citizenship rights are obviously

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20 See, for a very detailed account, Kochenov, D., ed.(2017). *EU Citizenship and Federalism: The Role of Rights*, cit.

21 For a detailed dissection of the application of the principles to the field of EU citizenship law, see: Sarmiento, D. (2019). EU Competence and the Attribution of Nationality in Member States. *IMC Research Paper* (*Geneva*) No. 2019/02; Weingerl, P. and Tratnik, M. (2021). Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality. In: Kochenov and Surak, eds., *The Law of Citizenship and Money.* Cambridge: Cambridge University Press.

22 Cf. Kochenov, D. (2012). *Member State Nationalities and the Internal Market*. In: Nic Shuibhne and Gormley, eds., *From Single Market to Economic Union: Essays in Memory of John A. Usher*. Oxford: Oxford University Press.

23 *Micheletti*, op cit.; Cf. Tratnik, M., and Weingerl, P. (2019). Investment Migration and State Autonomy: A Quest for the Relevant Link. *IMC Research Paper* (*Geneva*) No. 2019/04.

24 *Rottmann*, op cit. Cf. Kochenov, D. (2010). Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, cit.; de Groot, G.-R. (2010). Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie, cit.; Iglesias Sánchez, S. (2010). ¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?, cit..

25 *Kaur*, op cit. Cf. for the context: Lord Lester of Herne Hill, A. (2002). Thirty Years On: The East African Case Revisited. *Public Law* 47, pp. 52–72; Tyler, I. (2010). Designed to Fail: A Biopolitics of British Citizenship. *Citizenship Studies* 14(1), pp. 61–74.

26 *Tjebbes*, op cit. Kochenov, D. (2019). The *Tjebbes* Fail. *European Papers* 4 (1), pp. 319–336; de Groot, G.-R. (2019). Beschouwingen over *Tjebbes. Asiel en Migrantenrecht*, pp. 196–203.

27 Cf. Kochenov, D. (2019), The *Tjebbes* Fail, cit.

28 Yong, A. (2019). *The Rise and Decline of Fundamental Rights of EU Citizenship.* Oxford: Hart Publishing.; Sharpston, E. (2012). Citizenship and Fundamental Rights – Pandora's Box or a Natural Step Towards Maturity? In: Cardonnel, Rosas and Wahl, eds., *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*. Oxford: Hart Publishing. Cf.

there – and this volume scrutinises an array of those in detail too, from free movement and family reunification[29] to social assistance,[30] citizens' initiative[31] and fundamental rights in times of economic crisis,[32] to freedom to move investments around the Union[33] and voting rights[34] – the dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States unquestionably demonstrates the far-reaching limits of EU citizenship.[35] This is because the division of competences between the EU and the Member States generally follows what one can term as a cross-border or internal market logic.[36] Consequently, the actual usefulness of supranational citizenship in taming the negative externalities of the internal market, as well as in establishing a firm ethical and moral grounding and justification for EU citizenship outside the frame of the internal market has been, although theoretically possible,[37] truly feeble if not non-existent in practice.[38] The result has been the weakening of the EU's justice claims,[39] and the punishment and undermining of the life-chances of those citizens who fail to qualify as "good enough" when scrutinised through the internal market lens.[40] One of the core

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Iglesias Sánchez, S. (2014). Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison? *European Law Journal* 20 (4), pp. 464–481; Kochenov, D., and Plender, R. (2014). EU Citizenship: From an Incipient Form to an Incipient Substance? cit.; Caro de Sousa, P. (2014). Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified? *European Law Journal* 20 (4), pp. 499–519.

29 See the chapters by H. Kroeze and N. Cambien in this volume.

30 See the chapters by E. Muir and by M. Jesse and D. Carter in this volume.

31 See the chapter by N. Athanasiadou in this volume.

32 See the chapter by K. Kalaitzaki in this volume.

33 See the chapter by S. Kudryashova in this volume.

34 See the chapter by S. Platon in this volume.

35 van den Brink, M. (2019). EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems. *European Law Journal* 25 (1), pp. 21–36.

36 See, most importantly, Tryfonidou, A. (2009). *Reverse Discrimination in EC* Law. Alphen aan den Rijn: Kluwer Law International.

37 E.g. Kochenov, D. (2013), The Right to Have *What* Rights? EU Citizenship in Need of Clarification. *European Law Journal* 19 (4), pp. 502–516.

38 O'Brien, C. (2016). *Civis Capitalist Sum:* Class as the New Guiding Principle of EU Free Movement Rights. *Common Market Law Review* 53 (4), pp. 937–978; Caro de Sousa, P. (2014). Quest for the Holy Grail, cit.; Peebles, G. (1997). "A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law. *Law and Social Inquiry* 22 (3), pp. 581–618.

39 de Búrca, G. (2015). Conclusion. In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?* Oxford-Portland: Hart Publishing.

40 That a citizenship would punish those who do not qualify as "good citizens" in the eyes of the authority in charge is one of the core functions of the legal status. On this count the EU is not at all atypical, compared with any other public authority in the world, which

features of the EU as it stands consists, accordingly, in ignoring the pain of such unworthy citizens and failing to help those in need, explaining away their plight, as Charlotte O'Brien among others has splendidly demonstrated.[41] As far as EU law is concerned, those who are not "good enough" for its scope do not exist, falling between the cracks in the dogmas of the internal market rationality, brought down by EU law.

It is while burnishing the label on this citizenship which fosters its internal market logic, ignoring the vulnerable instead of defending citizenship bearers from market externalities, that the oxymoronic "market citizenship" was born.[42] With respect to those proclaiming it – and they are no doubt correct in their meticulous engagement with the case law[43] – "market citizenship" is without doubt a misnomer: it simply cannot be taken seriously unless deployed, as the majority of the literature has done, purely descriptively. The reason for this is that to do more requires an inevitable reversal of all the key principles informing the understanding of citizenship and the reasons for the articulation of the term in the first place, which occurs when the full enjoyment of this citizenship's rights and status is made the prize for one's employability and history of travel around the Union, instead emerging from any idea of equality before the law and protecting the vulnerable.[44]

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selects "citizens" among the available bodies, whatever criteria are employed: Kochenov, D. (2019). *Citizenship*. Cambridge MA: MIT Press.

41 O'Brien, C. (2017). *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*. Oxford-Portland: Hart Publishing; Ganty, S. (2021). *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie*. Brussels. Larcier.

42 Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (4), pp. 1597–1628; O'Brien, C. (2016). *Civis Capitalist Sum:* Class as the New Guiding Principle of EU Free Movement Rights, cit.; Kochenov, D. (2019). The Oxymoron of "Market Citizenship" and the Future of the Union. In: Amtenbrink et al., eds., *The Internal Market and the Future of European Integration.* Cambridge: Cambridge University Press, p. 217.

43 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship. *Common Market Law Review* 52 (4), pp. 889–937; Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; van den Brink, M. (2019). EU Citizenship and (Fundamental) Rights, cit.

44 See, for a very detailed treatment, Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit., p. 3 (and the literature cited therein).

All the talk of democracy and rights[45] within the unchangeable market citizenship paradigm[46] could thus be nothing but a renewed entrenchment and glorification of the "wholly internal situation" and "reverse discrimination" thinking. It comes accompanied by the presumption that those who opt to remain outwith the scope of EU law[47] – by staying at home for instance[48] – deserve zero protection and respect within the legal context of the Union. This is an old and deeply troubling story ably characterised by Joseph Weiler as the loss by the Union of a mantle of ideals – and not much has changed in all the years since this characterisation appeared in print.[49] By connecting human worth and dignity, any claim to rights, to employability and the mantras of a citizen's usefulness in the context of the Internal Market, "market citizenship" is the epitome of the ideological space where a human being is openly – not tacitly – commodified, and those evading commodification or perceived as not useful enough are not deemed worthy of the quasi-citizenship at stake.[50] They are not "market citizens" and any other citizenship is apparently not on offer.

The result of this is troubling. When made dependent on the division of competences in the scope of the rights it protects, EU citizenship is turned into a neo-mediæval "citizenship of personal circumstances":[51] a judge first needs to see your full CV with all your jobs, travel history,[52] the nationality of your

45 Lenaerts, K., and Gutiérrez-Fons J.A. (2017). Epilogue on EU Citizenship: Hopes and Fears. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; chapter by S. Platon in this volume.

46 Davies, G. (2015). Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People. In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?*, cit.; Somek, A. (2014). Europe: Political, Not Cosmopolitan. *European Law Journal* 20 (2), pp. 142–163.

47 E.g. H. Kroeze in this volume.

48 Iglesias Sánchez, S. (2017). A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; Davies, G. (2017). A Right to Stay at Home: A Basis for Expanding European Family Rights. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit., p. 468.

49 Weiler, J.H.H. (1998). Bread and Circus: The State of the European Union. *Columbia Journal of European Law* 4 (11), pp. 223–248, p. 231.

50 Peebles, G. (1997). "A Very Eden of the Innate Rights of Man"? cit.; Caro de Sousa, P. (2014). Quest for the Holy Grail, cit.; O'Brien, C. (2016). *Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights, cit.; Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator, cit., pp. 3–82.

51 Kochenov, D. (2018). The Citizenship of Personal Circumstances in Europe. In: Thym, ed., *Questioning EU Citizenship*. Oxford-Portland: Hart Publishing, pp. 37–56.

52 Court of Justice, judgment of 5 May 2011, case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*; Nic Shuibhne, N. (2012). (Some of) the Kids Are All Right: Comment on *McCarthy* and *Dereci*. *Common Market Law Review* 49 (1), pp. 349–380.

current and former spouses,[53] partners and children,[54] and bank accounts,[55] to see whether you – a citizen – "deserve" any EU citizenship rights.[56] This story would not be complete without mentioning that, unlike in the earlier case law, dual nationality could be interpreted against you, as David de Groot's ground-breaking research has shown.[57] Neither disability nor pregnancy will help characterise you as a "good" EU citizen either.[58] A truly minor crime will disqualify you from supranational rights, dignity and respect.[59] Not even being deemed a worker is enough anymore:[60] EU law will eagerly side with the Member States oppressing their ethnic and linguistic, and presumably other minorities, as long as frowning upon these groups is part of their "constitutional identity", thus capable of creating a *de facto* wholly internal situation,

53 Court of Justice, judgment of 12 July 2005, case C-403/03, *Egon Schempp v. Finanzamt München V.*; Spaventa, E. (2008). Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects. *Common Market Law Review* 45 (1), pp.13–45, p. 21, note 34.

54 *Coman*, cit.; Court of Justice, judgment of 14 November 2017, case C-165/16, *Toufik Lounes v. Secretary of the Home Department*. Very much depends on whether one of the spouses is an EU citizen and whether this citizenship counts: also Titshaw, S. (2016). Same-Sex Spouses Lost in Translation? How to Interpret 'Spouse' in the EU Family Migration Directives. *Boston University International Law Journal* 34, pp. 47–115, p. 58.

55 Court of Justice, judgment of 10 October 2013, case C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*; Court of Justice, judgment of 19 October 2004, case C-200/02, *Kunquian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*. Cf. Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; O'Brien, C. (2016). *Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights, cit.

56 S. Ganty. *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne.* cit.

57 See the chapter by D.A.J.G. de Groot in this voume.

58 O'Brien, C. (2017). Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; O'Brien, C. (2016). *Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights, cit.

59 Belavusau, U., and Kochenov, D. (2016). Kirchberg Dispensing the Punishment: Inflicting 'Civil Death' on Prisoners in *Onuekwere* (C-378/12) and *M.G.* (C-400/12). *European Law Review* 40, pp. 557–577; O'Brien, C. (2008). Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity. *European Law Review* 5, pp. 643–665.

60 This development was predicted by Síofra O'Leary long ago: O'Leary, S. (2008). Developing an Ever Closer Union between the Peoples of Europe?: A Reappraisal of the Case-Law of the Court of Justice on the Free Movement of Persons and EU Citizenship. *Edinburgh Mitchell Working Papers* 6, pp.14–24. See, for a majestic treatment, Tryfonidou, A. (2016). *Impact of Union Citizenship on the EU's Market Freedoms.* Oxford-London: Hart Publishing.

depriving "market citizens" otherwise not unworthy *per se* of rights under EU law.[61] The result is a self-proclaimed constitutional system without a free and self-determining constitutional subject endowed with rights.[62] It is a neo-mediæval construct where liberty and entitlements are strictly apportioned based on esoteric considerations rooted in personal histories, wealth, potential and actual employability, and travel and the willingness to do so: a triumph of contingent and morally vacant acts necessary to be performed to enter the Union's field of vision and thereby become endowed with personality in its law, which is the law which purports to have claimed you as its citizen, on top of your own national legal order.[63]

The main outcome of such an approach to the individual is as atypical as it is troubling: before a person's CV and bank accounts have been investigated, the most fundamental, essential legal principles of Western constitutionalism will not apply. This especially concerns *equality before the law*, which does not kick in if you are too poor, like Miss Dano;[64] too pregnant, like Jessy Saint Prix;[65] or too Polish for the Lithuanian state, like Małgorzata Runiewicz. We are thus confronted by the lack of equality before the law as the main starting principle for dealing with EU citizens[66] in a context where the EU produces and constantly re-enacts a neo-mediæval presumption of difference the goodness of which is presumed and does not *per se* require

61 Court of Justice, judgment of 12 May 2011, case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*. The case is analysed in this vein in Kochenov, D. (2018). When Equality Directives are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU. In: Belavusau, and Henrard, eds., *EU Anti-Discrimination Law beyond Gender*. Oxford-London: Hart Publishing. Cf. Dagylitė, E. et al. (2015). The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights. *Croatian Yearbook of European Law and Policy* 11, pp. 1–45.

62 Cf. Azoulai, L., Barbou des Places, S., and Pataut, E., eds. (2016). *Constructing the Person in EU Law: Rights, Roles, Identities*. Oxford-Portland: Hart Publishing.

63 Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator, cit., pp. 3–82.

64 See the chapter by M. Jesse and D. Carter in this volume.

65 Court of Justice, judgment of 19 June 2014, case C-507/12, *Jessy Saint Prix v. Secretary of State for Work and Pensions*; Ganty, S. 'Citoyenneté européenne et genre: approche critique de la directive 2004/38/CE'. In: Bernard and Harmel (eds.). *Code commenté – Droits des femmes*. Brussels: Larcier, 2020, pp. 303–307; Currie, S. (2016). Pregnancy-Related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship: *Jessy Saint Prix*. *Common Market Law Review* 53 (2), pp. 543–562.

66 For a broader analysis of the legality in the context of EU law, see, Somek, A. (2017). Is Legality a Principle of EU Law? In: Vogenauer and Weatherill, eds., *General Principles of Law: European and Comparative Perspectives.* Oxford: Hart Publishing.

justification.[67] Why this is the case has been explained to the citizens a thousand times: Niamh Nic Shuibhne might indeed be right that this is the Court willing "to accept the limitations coded into the current federal bargain".[68] Yet it is not the protection of a perfect Constitution from human rights concerns – which the Court famously did, *inter alia*, in Opinion 2/13[69] – but taking such concerns seriously, which ensures that legal systems are both respected and effective. Honouring the bargain, when viewed in this light, could obviously be a big problem.[70]

b *EU Citizenship: Two Lessons*

Armed with respect for the federal bargain which requires blind faith in and strict adherence to a context-sensitive neo-mediævalism, EU citizenship sends two signals. Firstly, it significantly empowers the willing Member State nationals, "good enough" in the eyes of the supranational authorities, to fall within the scope of EU law. Volumes have been written about the freedom of movement of persons and the right is significant. The very horizon of opportunities of all Member State nationals is broadened by the intercitizenship logic of the supranational status, working as a package of dozens of national legal statuses fused into one.[71] Secondly, being silent on the scope of the law, EU citizenship is constantly presented to us as relatively weak, all the numerous successes reported notwithstanding. Crucially, it is respectful even when the issues to hand unquestionably fall within the scope of EU law: if a Member States wants to ignore EU law to grant fewer rights to women – it can.[72] If a Member State

67 Kochenov, D. (2016). Neo-Mediæval Permutations of Personhood in the European Union. In: Azoulai, Barbou des Places, and Pataut, eds., *Constructing the Person in EU Law: Rights, Roles, Identities*, cit., pp. 133–158.

68 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?, cit., p. 176.

69 Opinion 2/13 (*ECHR Accession II*) (2014) ECLI:EU:C:2014:2454, para. 170. Eeckhout, P. (2015). Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky? *Fordham International Law Journal* 38 (4), pp. 955–992; Kochenov, D. (2015). EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It? *Yearbook of European Law* 34, pp. 74–96, 94.

70 Balkin, J. (1997). Agreements with Hell and Other Objects of Our Faith. *Fordham Law Review* 65 (4), pp. 1703–1738.

71 Kochenov, D. (2019). Interlegality – Citizenship – Intercitizenship. In: Klabbers, and Palombella, eds., *The Challenge of Interlegality*. Cambridge: Cambridge University Press, p. 133; Golynker, O. (2009). European Union as a Single Working-Living Space. In: Halpin, and Roeben, eds., *Theorising the Global Legal Order*. Oxford: Hart Publishing, p. 151.

72 O'Brien, C. (2017). The ECJ Sacrifices EU Citizenship in Vain: *Commission v. United Kingdom. Common Market Law Review* 54 (1), pp. 209–243.

wishes to continue abusing its own ethnic minorities by denying them a right to a name – it can.[73] Both the rights of individuals and the sovereignty of the Member States thus stand protected – to a point.[74] The flexibility of this arrangement seems to be key, however, which emerges as fundamental to the proverbial 'federal bargain'. Moreover, if a Member State you are associated with leaves the EU, your supranational "new" citizenship is thereby extinguished: it is not that personal after all.[75]

11 EU Citizenship: Questioning the Established Narrative

Although the literature on EU citizenship has been booming in recent years, the absolute majority of analyses have been confined to reactions to the ever-growing and byzantine case law and trying to make sense of the Court's hints in various directions.[76] This is no doubt the core of legal research and some of the contributions developing scholarship in this direction have been spectacularly illuminating.[77] The majority of the contributions to this book fit equally well within this established tradition. But what if we tease the "true" lawyers a little and entertain scrutiny of the very context of EU law, using its citizenship as a pretext, in the vein of Pedro Caro de Sousa, Agustín José Menéndez, Charlotte O'Brien and Alexander Somek?[78] Questioning the established story

73 *Runevič-Vardyn and Wardyn*, cit.; Kochenov, D. (2018). When Equality Directives are Not Enough, cit.

74 Lenaerts, K. (2012). '*Civis Europaeus Sum*': From the Cross-Border Link to the Status of Citizen of the Union. In: Cardonnel, Rosas and Wahl, eds., *Constitutionalising the EU Judicial System*, cit.; Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship, cit.; M. Jesse and D. Carter in this volume.

75 van den Brink, M., and Kochenov, D. (2019). Against "Associate EU Citizenship". *Journal of Common Market Studies* 57(6), pp. 1366–1382. But see Kostakopoulou, D. (2018). *Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens. *Journal of Common Market Studies* 56 (4), pp. 854–869.

76 See, e.g. a great example of the opposing interpretations of the same case law by two of the most eminent scholars of EU citizenship: Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?, cit., and Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope, cit.

77 E.g. Wollenschläger, F. (2010). A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration. *European Law Journal* 17 (1), pp. 1–34; Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending, cit.

78 E.g. O'Brien, C. (2017). *Unity in Adversity*, cit.; Menéndez, A.J. (2015). Whose Justice? Which Europe? In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?*, cit.; Caro de Sousa, P. (2014). Quest for the Holy Grail – Is a Unified Approach to the Market

can be a useful way to see the well-known case law, as well as all the twists and turns of the European citizenship story, in quite a different light.

It can be argued that EU citizenship works against the established understandings of (a) statehood, (b) citizenship, (c) democracy and (d) equality, situating these in the context of cosmopolitan constitutionalism.[79] The current dynamics illustrate the well-noted Joppkean global weakening of citizenship[80] and the rise of a new way of organising political communities.[81] European citizenship exemplifies key future global trends in citizenship and the development of constitutionalism, even if as already mentioned, with a necessary, surprising neo-mediæval twist.[82]

a *Empowering the Citizen – Humiliating the State*

EU citizenship rights are of great importance, enlarging citizens' horizons of opportunities by a factor of twenty-seven: work, residence, family reunification and non-discrimination on the basis of nationality where EU law is applicable – all have become claims to be turned against the government of *any* participating state, whether an EU member or not. Moreover, the direct effect of EU law, including its citizenship rights provisions, ensures that national law cannot prevail in the face of EU citizens' supranational entitlements.[83] States stand "humiliated",[84] obviously enjoying no power – legally at least – to close their territories and their nations to *others*, however friendly these are proclaimed to be. This touches the core of statehood, if not nationhood: no Member State can decide (some exceptions notwithstanding)[85] who among

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Freedoms and European Citizenship Justified?, cit.; Somek, A. (2012). On Cosmopolitan Self-Determination. *Global Constitutionalism* 1, pp. 405–428.

79 Somek, A. (2014). *The Cosmopolitan Constitution*, Oxford: Oxford University Press.

80 Joppke, C. (2010). The Inevitable Lightening of Citizenship. *European Journal of Sociology* 51 (1), pp. 9–32.

81 Somek, A. (2014). Europe: Political, Not Cosmopolitan, cit.

82 Kochenov, D. (2016). Neo-Mediæval Permutations of Personhood in the European Union., cit. pp. 133–158.

83 Arena, A. (2018). The Twin Doctrines of Primacy and Pre-Emption. In: Schütze, and Tridimas, eds., *Oxford Principles of European Union Law: Vol. 1: The European Union Legal Order*. Oxford: Oxford University Press.

84 Davies, G. (2010). The Humiliation of the State as a Constitutional Tactic. In: Amtenbrink, and Van den Berg, eds., *The Constitutional Integrity of the European Union.* Hague: T.M.C. Asser Press, p. 147.

85 Kostakopoulou, D. (2014). When EU Citizens Become Foreigners. *European Law Journal* 20 (4), pp. 447–463; Meduna, M. (2017). *"Scelestus Europeus Sum"*: What Protection Against Expulsion Does EU Citizenship Offer to European Offenders? In Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.

the EU's citizens may enter its territory, reside and work there. Going further, a similar regime applies to a huge number of foreigners too, be they EEA nationals, third country national family members of EU citizens or other privileged categories.[86] Furthermore, States have lost the ability to favour "their own" – the first key feature of any citizenship, distinguishing between "us" and "them" – in a growing array of situations: the core outcome of the prohibition of discrimination on the basis of nationality in within the scope of application of EU law.[87] EU citizens are now virtually always "us", striking at the heart of national citizenships. Being unable to empower "their own" affects the nature of European States. Rather than picking citizens through the framing of migration and naturalisation legislation, in the EU the *States* are picked by citizens directly empowered by EU law. The essential legal characteristics of European States and their nationalities are thereby seriously altered. The new reality has not yet been fully internalised by the legal-political systems of the Member States.

b *Promoting Democracy – Undermining Democratic Outcomes*

The implications for the nature of democracy are equally significant. In terms of procedure, EU citizens participate in EU-level and municipal-level elections in their state of residence,[88] as well as being able to register citizens' initiatives, provided what these propose is within the scope of EU law.[89] Even without covering national elections, the EU and its citizenship is a vehicle of democratic inclusion. Simultaneously, however, EU citizenship can shield its bearers from the application of legitimate democratic outcomes to them, once a connection with EU law is found. Having its final say, the Court of Justice then tests the reasonableness and proportionality of any national measure. This

86 Kochenov, D., and van den Brink, M. (2015). Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU. In: Thym, and Zoetewij-Turhan, eds., *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*. Leiden-Boston: Brill/Nijhoff, p. 66.

87 Davies, G. (2003). *Nationality Discrimination in the European Internal Market*. The Hague: Kluwer Law International; Lenaerts, K. (2006). Union Citizenship and the Principle of Non-Discrimination on the Grounds of Nationality. In: Fenger, Vesterdorf, and Hagel-Sørensen, eds., *Festskrift til Claus Gulmann:* Liber Amicorum. Copenhagen: Forlaget Thomson.

88 Cf. Fabbrini, F. (2017). The Political Side of EU Citizenship in the Context of EU Federalism. In Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.; S. Platon's chapter in this volume.

89 Iannì, A. (2019). The European Citizens' Initiative in the Light of the European Debt Crisis: A Gateway Between International Law and the EU Legal System. *European Papers* 3 (3), pp. 1159–1178.

potentially covers any national rule objected to by an EU citizen, including rules on nationality itself.[90] Democracy's function is thus changed significantly, placing absolute emphasis on contestation.[91] This produces new users of democracy: cosmopolitans fighting "unreasonable" regulation.[92] While the trend is not new,[93] the EU context reinforces it. Having used EU law to choose a State, EU citizens both participate in democratic decision-making and enjoy protection from its legitimate outcomes. This is valid at all levels of the law, including legislation, constitutional-level rules and the duties of State-level citizenship. That said, citizens cannot do much supranationally, given that the design of the Union prevents the essential principles of the internal market from being subjected to democratic contestation, or any other form for that matter.[94] In a curious ideological twist, the internal market as it stands is presented to the Europeans as rational, technocratic and apolitical, foreclosing any democratic dialogue about Europe's future development.[95]

c *Promoting Non-Discrimination – Undermining Equality*

Akin to sorting "us" from "them", equality among the holders of the status is said to be a core feature of citizenship. Its practical realisation depends on how clearly the scopes of EU and national law are delineated: *both* promise equality. Since, as we have seen, EU citizenship cannot bring citizens automatically within the material scope of EU law, additional factors are determinant. The law is malleable: the nationality of your former wife,[96] being born across a border[97]

90 *Rottmann*, cit.; Kochenov, D. (2010). Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, cit.

91 Kumm, M. (2010). The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review. *Law & Ethics of Human Rights* 4 (2), pp. 142–175.

92 Somek, A. (2014). Europe: Political, Not Cosmopolitan, cit.; Somek, A. (2013). The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment. *Transnational Legal Theory* 4 (2), pp. 258–282; Somek, A. (2012). On Cosmopolitan Self-Determination, cit.; Davies, G. (2010). Humiliation of the State as a Constitutional Tactic, cit.

93 Badiou, A. (2003). *L'éthique: Essai sur la conscience du mal*. France: Nous.

94 E.g. Davies, G. (2015). Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People. In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?*, cit.

95 Wilkinson, M.A. (2015). Politicising Europe's Justice Deficit: Some Preliminaries. In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?*, cit.; Menéndez, A.J. (2015). Whose Justice? Which Europe? In: Kochenov, de Búrca, and Williams, eds., *Europe's Justice Deficit?*, cit.

96 *Schempp*, cit.

97 *Chen*, cit.

or the vague likelihood of changing States in the future[98] can suffice to bring EU-level equality into play, covering a flexible group of EU citizens; though not all. While EU and national citizenships extend equally to the same people, the application of EU equality – not dependent only on status – is an either/or question which disables national equality claims, as the question is not answered by analysing the objective situation of the person concerned. The Court's attempts to frame EU law's scope through the severity of the actual or potential violation of the essence of EU-level rights[99] met strong resistance, ruining clarity. When France promises equality to all Frenchmen it cannot possibly deliver, since two French neighbours living largely similar lives can be subject to two different legal systems for reasons bearing no relation to their lives or legal status. The promises of national and EU-level equality are fictitious: indeed, it is the differentiation in the face of the law, rather than equality before the law, which emerges as the main supranational – and thus national-level – legal principle, as far as EU citizenship is concerned.

d *Implications for the Rule of Law: the Sole Possibility of One Type of Constitutionalism*

As a result of the blurred and contested essence of EU citizenship, the nature of the state, democracy and national citizenship in the EU are profoundly transformed. By its very existence, the EU and its citizenship promote one particular type of constitutionalism[100] to which the Member States are bound to adhere, which implies an emphasis on proportionality and justification,[101] and a toning down of representative democracy and equality claims. Due to the penetrating nature of EU law, the relationship between the levels of the law in this model is far more complex than in the majority of "straightforward" federations:[102] the EU is much more malleable and haphazard.[103] Two key features of national citizenship do not hold true here: in a Union where EU law enjoys supremacy and direct effect and the scope of this law is necessarily blurred, citizenship firstly does not bring about equal treatment. Secondly, national

98 Court of Justice, judgment of 2 October 2003, case C-148/02, *Carlos Garcia Avello v. Belgian State.*

99 *Ruiz Zambrano*, cit.

100 Perju, V. (2012). Proportionality and Freedom – An Essay on Method in Constitutional Law. *Global Constitutionalism* 1 (2), pp. 334–367.

101 Neyer, J. (2012). *Justification of Europe: A Political Theory of Supranational Integration*. Oxford: Oxford University Press.

102 Beaud, O. (2007). *Théorie de la fédération*. Paris: PUF.

103 Schütze, R. (2009). *From Dual to Cooperative Federalism: The Changing Structure of European Law*. Oxford: Oxford University Press.

citizenship does not provide better treatment than other EU citizens within the scope of application of EU law. EU law thus brings about a very significant alteration to the very legal essence of the Member States' nationalities. Crucially, the humiliation of the state and undermining of the key features of citizenship is not accompanied by a solid doctrinal or practical alternative: we are not shown a new way. Instead, we are constantly treated to the dogmatic mantra of the perceived benefits of the "apolitical" internal market. As a result, morally and ethically vacant reasons rooted in the internal market – such as the programmed-in belief that those who chose to move about in space are entitled to more constitutional protections and are more "valuable" as EU citizens – can set aside fundamental human rights concerns and key principles of the national constitutional law of the Member States. Setting aside the norms of a particular legal order is not a problem *per se*, of course. It becomes a problem, however, when the reasons underpinning this are not sufficiently clear – if not arcane – and are entirely removed from the realm of democratic testing.

III We Have Time: the New Picture Is Here to Stay

The legal context of the EU, amplifying and reinforcing the global trends in citizenship, equality and democracy, also brings with it grave challenges, and as a path-dependent process faces virtually no serious challenge. Critical analyses of it are equally limited and surprisingly new.[104] Hungary and Poland, with their crises of the Rule of Law,[105] or the waving goodbye UK, with its anti-immigration populism,[106] oppose the EU for entirely different reasons. However, the ongoing process of reinvention both of citizenship and the state in the EU has only just begun. Exposing it with clarity and scrutinising its implications

104 See, e.g., Editorial comments (2015). The Critical Turn in EU Legal Studies. *Common Market Law Review* 52 (4), pp. 881–888 (and the literature cited therein). Cf. Williams, A. (2009). *The Ethos of Europe: Values, Law and Justice in the EU*. Cambridge: Cambridge University Press; de Witte, F. (2015). *Justice in the EU: The Emergence of Transnational Solidarity*. Oxford: Oxford University Press.

105 Pech, L., and Scheppele, K.L. (2017). Illiberalism Within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies* 19, pp. 3–47; Sadurski, W. (2018). How Democracy Died (In Poland): A Case Study on Anti-Constitutional Populist Backsliding. *Sydney Law School Research Paper* 1; Szente, Z. (2017). Challenging the Basic Values – Problems with the Rule of Law in Hungary and the Failure to Tackle Them. In Jakab, and Kochenov, eds., *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*. Oxford: Oxford University Press, p. 456.

106 Cf. Closa, C., ed. (2017). *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*. Cambridge: Cambridge University Press.

for the development of the constitutional systems around the world is a starting point for coping with a reality which is here to stay. The sterile and cartoonish official story retold in EU textbooks simply does not hold, and States which fail to take note are in danger of getting a rude awakening in the near future, be it through absurd populist victories or by finding themselves attempting to implement Brexit-like claims. An alternative narrative of EU citizenship, to contribute to a sound dynamic understanding of the evolution of statehood and citizenship in Europe and beyond is sorely needed at the moment. EU citizenship, focused on fundamental rights, equality and a critical rethinking of the core grounds behind the division of competences between the EU and the Member States, could provide such a much-needed narrative and a starting point, offering a sounder and less awkwardly "depoliticised" paradigm of European integration than the *pure* internal market. One can coexist with the other, but the realisation that the essential starting points of the internal market and of EU citizenship are incompatible should necessarily be the starting point of such a journey.[107]

In the light of the above, how far, then, is EU citizenship deserving of its name? The question is open what kind of rights Europeans could legitimately see as unquestionably associated with their supranational citizenship – as opposed to with a proxy of the internal market, that is.

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107 Cf. Kochenov, D. (2013) The Citizenship Paradigm. *Cambridge Yearbook of European Legal Studies* 15, pp. 197–225.

CHAPTER 3

Union Citizenship and Beyond

*Hans Ulrich Jessurun d'Oliveira**

1 Introduction

When you ask your neighbour whether she is a Union citizen you may expect a negative or a question mark. The status has not really sunk in, notwithstanding the freedom of movement that goes with it or the right to elect members of the European Parliament. Recently people became aware of the status because of Brexit, as they were suddenly confronted with what they thought was an inherent right turning out to be a fragile status to be taken away through Brexit.[1] Time to reflect once more on Union citizenship. This contribution addresses a few core issues concerning the status: the concept itself (part 2), nationality of a member state as the connecting factor between a person and Union citizenship (part 3), and the prospects of the 'fundamental status' (part 4). These themes will be looked at with a double-faced head: history and future of the concept are brought into play.

2 The Concept of Union Citizenship

Union citizenship was formally instituted by the Maastricht Treaty in 1992. Spanish Prime Minister Gonzalez took the initiative but it was prepared long before and, as an idea, had many fathers and mothers. Immanuel Kant for instance, in his *Zum ewigen Frieden*, stated that '*... ursprünglich aber niemand an einem Orte der Erde zu sein mehr Recht hat, als der andere.*' And in his utopian view he dreamt of a *ius cosmopoliticum 'so fern Menschen und Staaten, in äussern auf einander einfliessenden Verhältnis stehend, als Bürger einer allgemeinen Menschenstaats anzusehen sind.'* It is interesting to notice that Kant considered the right to hospitality and the freedom of movement of people

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1 See Jessurun d'Oliveira, H.U. (2018). Brexit, Nationality and Union Citizenship: Bottom Up and Top Down. In: Hess, Jayme, and Mansel, eds., *Europa als Rechts- und Lebensraum: Liber Amicorum für Christian Kohler*. Bielefeld: Gieseking Verlag, pp. 201–214. See also the chapters by A.P. van der Mei and G. More in this volume.

as the central implication of the proposition that nobody has a stronger right to be somewhere than anyone else. On a smaller scale, it was the right to freedom of movement that was the core of the rights entailed by being a European citizen. This despite the fact that many definitions of citizenship both by political scientists and lawyers start out with political rights as the nucleus of the concept.

Mention may be made here as well of Altiero Spinelli (1907–1986), who is considered to be nothing less than one of the founding fathers of the two postwar Europe organisations: the Council of Europe and the European Communities. During his imprisonment as a communist opponent of the fascist Mussolini regime, he served long prison sentences and was exiled to a small island off the Italian coast between Rome and Naples: Ventotene.[2] Here he studied the American Federalists and issued in 1941, with some others, the Ventotene Manifesto, in which he drew up a blueprint for a federalist Europe, beyond the nation-states, as the only way he saw to combat fascism and national socialism. He had learned from James Madison that the prospects for freedom were greater in a larger federation than in a small one.[3] He pleaded for a continental citizenship alongside with citizenship of the national states. Much later, as an MEP, he inspired the Spinelli plan for a federal Europe, adopted with a large majority by the European Parliament, which paved the way for the Single European Act and the Maastricht Treaty.[4]

There are many other inspirations. Let us return to the 16th of June 1940. France is invaded by the German army and stands on the brink of collapse. Talks between the French and British governments are conducted with a view to prevent – or at least postpone – the imminent surrender of the French army and to allow first and foremost the French fleet to seek refuge in foreign ports. Protagonists: General de Gaulle and Winston Churchill with his war cabinet. While de Gaulle is eagerly waiting in the next room, the war cabinet is drafting a concept Declaration of Union to be offered as support to prime minister Raynaud of France. It states e.g.:

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2 Ventotene was already used as a place of exile in ancient Rome: Emperor Augustus isolated his daughter Julia there because of what he saw as her excessive adultery. Recently, 22 August 2016, Prime Minister Renzi of Italy chose this *lieu de mémoire* for a mini-summit on the future of Europe after Brexit.

3 For a recent comparative study, see Bierbach, J.B. (2017). *Frontiers of Equality in the Development of EU and US Citizenship*. The Hague/Heidelberg: TMC Asser and Springer.

4 The federalists assembled as The Crocodile Club, named after a Strasbourg restaurant, and since 2010 there has been a 100-MEP Spinelli group, led by Verhofstadt, Cohn-Bendit and others.

> The two Governments declare that France and Great Britain shall be no longer two nations, but one Franco-British Union.
>
> The Constitution of the Union will provide for joint organs of defence, foreign, financial, and economic policies.
>
> Every citizen of France will enjoy immediately citizenship of Great Britain; every British subject will become a citizen of France.[5]

In view of later developments it is remarkable to see General de Gaulle urging a union between France and Great Britain and accepting a common citizenship, and to witness the willingness of the British Government to bridge the Channel in terms of statehood and citizenship: these were the days of 'Brintroitus'. See, by contrast, the historian Boris Johnson, Prime Minister of the Brexit-cabinet, now comparing the European Union with Hitler and Napoleon.

At the outset I took a dim view of European Citizenship. I wrote in 1995: 'The populations of the Member States have not asked for citizenship; it has graciously been bestowed upon them as a cover-up for the still existing democratic deficit. As an alibi it may please Brussels; whether it changes anything in the sceptical attitude and weak position of the populations of the Member States is, in my view, rather improbable.'[6] The term amounted to not much more than a gaudy ribbon around a motley ensemble of already existing rights, first and foremost the freedom of movement for a small number of economically active nationals of member states. What difference can a word make? Well, my initial analysis proved to be wrong. I had to admit gradually that a word can make a difference. The word citizenship raises expectations about developments connected with ideas about citizenship. It is a fertilizer with its own growth potential. These ideas are, as is to be expected, manifold, blurred, and range from a status in civil society to a concept of persons as political agents.

Indeed, one of the disturbing problems with the definition of citizenship is the recurring use of citizenship as synonymous with nationality.[7] In a recent

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5 Churchill, W. (2005) *The Second World War, Volume II,—Their Finest Hour* (2nd Edition). London: Penguin Books, p. 182 ff. Nothing came of the declaration: Prime Minister Raynaud could not collect the assent of his cabinet and had to resign; Pétain then took over and eventually bred the Vichy regime. De Gaulle escaped by the skin of his teeth: he jumped on board a small airplane that brought the British ambassador back from Bordeaux to London, pretending to see the diplomat off.

6 Jessurun d'Oliveira, H.U. (1995), Union Citizenship: Pie in the Sky? In: Rosas and Antola, eds., *A Citizen's Europe. In Search for a New Order.* London: Sage Publications, p. 84.

7 In the Commentary to the European Convention on Nationality at art. 2 one reads: 'with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous'.

study, Olivier Vonk, who works at the EUDO Citizenship Observatory, based at the EUI, states:

> Since the Observatory uses the term citizenship in describing the domestic nationality law rules in forty-seven European Countries, this practice provides further justification for giving citizenship a more prominent place than I did in previous publications.[8]

If this is the prevalent view at the EUDO Citizenship Observatory, then it is difficult to distinguish between Union citizenship and its connecting factor, the possession of the nationality of a Member State. In order to be a Union citizen, one has to be a 'citizen' of a member state. Are there two citizenships involved, two nationalities, or one citizenship and one nationality? This is not only wordplay. Denmark, already extremely aloof about the Maastricht Treaty, which it had rejected by referendum in June 1992, issued a unilateral declaration half a year later, stating emphatically that

> 1. Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state. (…)
> 2. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules.(…)[9]

Although in the English version the terms nationality and citizenship are being used, the Danish word *'borgerskap'* refers to both concepts and may have caused the Danes to declare that the *Unionsborger* is not at all identical to the *statsborger*. There is more.

We should not forget that at the stage of the negotiations towards the European Constitution in 2002, Giscard d'Estaing issued a paper in which he suggested that 'member states nationals would have "double" nationality in the

8 Vonk, O. (2016). Reflections on Comparative Law and Legal Translation in Studying Different Citizenship Regimes. *Nederlandse Vereniging voor Rechtsvergelijking* 73, p.56.

9 Preliminary Draft, Title II, Art.5. European Council Document 92/C 348/01, *OJ C 348*, 31.12.1992, p. 1–4.

future.' And the Preliminary Draft stated: '*This article establishes and defines Union citizenship: every citizen of a Member State is a citizen of the Union; enjoys dual citizenship, national and European citizenship; and is free to use either as he or she chooses, with the rights and duties attached to each* (…).'[10] Small wonder that the concept of Union citizenship is surrounded by complexities and perplexities.

The Treaty, however, differentiates, rightly so, between nationality and citizenship. It indicates that holding the nationality of a member state entails being a citizen of the Union, and that this citizenship 'shall be additional to and not replace national citizenship.' Nationality then is seen as a formal legal bond between a person and a state, whereas citizenship refers to substantive rights and duties attached to nationality, according to a municipal legal system, and to Union citizenship, according to the Treaty and secondary legislation.

It is remarkable that one can be called a citizen of an international organisation. We do not normally see ourselves as citizens of the United Nations, or of the *Bureau international des poids et mesures*, or of the Council of Europe. There are no citizens of NAFTA. The term reveals something about the various aspirations of the EU; how it strives to become an entity akin to a state, a federal thrust. It bestows on all persons holding the nationality of a member State the status of citizen in this special Europe-wide organisation with its institutions. The term promises to these persons political influence, legitimising the European Parliament and in bridging at least partially the so-called democratic deficit. It suggests forms of protection as well.

The attributes of Union citizenship are only partially defined. It is telling that the catalogue of the rights attached to Union citizenship in the TFEU is no more than a rough indication: Art. 20 TFEU light-heartedly appends 'inter alia' to its list, a clear indication that it is open-ended. It may grow and new rights and duties may be added. We have to look, according to Art. 20, 'in the Treaties'. Hence the discussion about the extent of the rights and duties that can be brought under the heading of Union citizenship has animated the debate, not only among scholars, but also in the courts. Are fundamental rights, as mentioned in the Charter and the ECHR, part and parcel of Union citizenship? No, some would say, these rights can be invoked by everyone, they are not specific. Yes, others assert, the exclusivity of the right is not the criterion, as demonstrated by the right to petition the EP (Art. 227 TFEU) which is assigned to 'any

10 Preliminary Draft, Title II, Art.5, cit.

natural or legal person residing in a Member State', and the same goes for the right to apply to the European Ombudsman (Art. 228 TFEU).[11] The central right to move and work freely in the Member States is granted to all nationals of non-EU EFTA member states as well.

In other words, the edges are blurred, and I have come to see this as an asset of the concept. It has grown to be a not-fully-exclusive status of nationals of member states. It changed from a symbolic ribbon around a set of rights as I saw it at the time, into a meaningful dynamic concept of the relationship between the EU and the bulk of the population. The impact of the political rights attached to it, especially the right to vote and stand for elections in the EP, has increased through the increased powers of the EP. Secondary legislation and case-law show a definite shift from market citizenship of the economically active to a rounder, fully-fledged form of citizenship. Up till now, as we all are aware of the waning enthusiasm for the European project. Many Union citizens are not aware of the fact that they are just that, and the meagre turnovers at the election of MEPs not only reproduce the aversion of the voters to politics in general, but also show their distrust of what is perceived as the black box of 'Brussels'. So my current position has, possibly against the tide, changed from scepticism into two hurrahs for Union citizenship. Brexit may kindle a new enthusiasm for the status.

3 The Connecting Factor: Nationality of a Member State

'Every person holding the nationality of a member state' (Art. 20 TFEU). Nationality, then, is the unique pass to Union citizenship. I have had, from the outset, two bones of contention with this connecting factor. First, its exclusiveness, and second, the way the European Court of Justice has dealt with the nationality issue.

11 There are more examples of non-exclusivity: Gibraltarians have the right to vote for the European Parliament, though not as nationals of a member state but 'qualified Commonwealth citizens', cf. Court of Justice, judgment of 12 September 2006, case C-145/04, *Spain v. United Kingdom*. See also Declaration Nr. 55 by Spain and the UK, annexed to the Lisbon Treaties: 'The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. (…)' And the right to move and reside freely within the territory of the member states is granted, derivatively, to third country and stateless relatives of Union citizens; on the other hand this right has been withheld from nationals of new member states for transitional periods. Declatations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon. *OJ C 326*, 26.10.2012, p. 337–361, 358.

a) *Defining the "peoples"*

The framers of the Treaty of Lisbon, both in its preamble and its Art. 1, talk about bringing about 'an ever closer union among the peoples of Europe', and 'desiring to deepen the solidarity between their peoples.' Is the term 'people' identical with 'nationals of a specific member state'? The ECJ held that this is not the case. In *Spain* v. *UK* it stated that '*the term "peoples", which is not defined, may have different meanings in the States and languages of the Union.*'[12] These cases concerned the right to vote for the EP. Of course, this franchise may be narrowed down by European legislation to nationals of member states, but as long as this is not the case, the situation exists that there are, here again, non-nationals entitled to rights which belong to Union citizens as enumerated in Art. 20 TFEU as well. No exclusivity in this central political right. 'Peoples' may have more surprises in store in other areas than that of voting rights.

It is interesting to notice that the Court leaves it to the member states to define their 'peoples'. The member states are free to include non-nationals in their respective 'peoples', such as third country permanent residents, refugees, stateless persons etc. These, too, are then subject to the desire to deepen the solidarity and to create an ever-closer union. Why would it be unacceptable to grant them the status of Union citizens? Many categories among them already have a certain privileged status under EU law. Over the years various authors and institutions have militated for inclusion of third-country permanent residents in the territories of the member states.[13] For them, 'peoples' are

12 *Spain v. United Kingdom*, cit., para. 71. Idem in the decision of the same day: Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger*, para. 44. Eman and Sevinger became later Prime Minister and Minister in the Government of Aruba, a '*land*' in the Kingdom of the Netherlands.

13 Among many others, Van Dijk, P. (1992). Free Movement of Persons: Towards European Citizenship. *Sociaal-Economische Wetgeving* 40, pp. 277–307, Oliveira, A.C. (1996) *Third Country Nationals and European Union Law*, doctoral thesis. Florence: European University Institute; Bernitz, U. and Lokrand Bernitz, H. (1999) Human Rights and European Identity: the Debate about European Citizenship. In: Alston, ed., *The EU and Human Rights*. Oxford: Oxford University Press, p. 522: 'The conclusion is that legal abode in the Union is a more appropriate criterion than nationality in respect of free movement and other Community Rights'; O'Keeffe, D. (1994). Union Citizenship. In: O'Keeffe and Twomey, eds., *Legal Issues of the Maastricht Treaty.* London: Wiley Chancery Law, p.104 *et seq*.; O'Leary, S. (1996). *European Citizenship, The Option for Reform.* London: Institute for Public Policy Research; Kochenov, D. (2013). The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon? *International and Comparative Law Quarterly* 62, pp. 97–136, and the authors mentioned there in footnote 47; Hirsch Ballin, E. (2015). *Citizens Rights and the Right to Be a Citizen*. Leiden/Boston: Brill Nijhoff, p.108; Jessurun d'Oliveira, H.U. (1995) Union Citizenship: Pie in the Sky?, cit., p. 80; Jessurun d'Oliveira, H.U. (2003). Europees burgerschap: dubbele

populations of the member states that should be included in the EU as citizens. Union citizens are not only nationals, but persons who are legally domiciled in the territories of the member states as well. The non-discrimination principle of Art. 18 TFEU 'on grounds of nationality' should be extended to the prohibition on grounds of domicile. In innumerable respects, non-nationals residing in the EU are subject to the legal order of the EU; they should have a voice as Union citizens as well. One is aware of the fact that this is a constitutional issue: the member states would lose part of their grip on non-nationals on their territory if the latter derived rights under EU law for being Union citizens. The self-definition of states as nation-states would be diluted and the balance between EU and the Member States would shift. Indeed, it has shifted already as the ECJ has strengthened the grip of Union law on sedentary citizens by demolishing bit by bit the concept of the 'internal case'. Furthermore, many third country nationals and stateless persons have rights, derived from Union citizens, as family members. Still, it is not acceptable to divide the populations of the member states into Union citizens and others, into first-class citizens and second- class citizens. This brings me to the second issue.

b) ***Defining the "nationals"***

Who defines who is a national of a member state? The answer seems so simple. The European Convention on Nationality states at the outset (Art. 3) as a general principle: *'Each State shall determine under its own law who are its nationals.'* Full stop. This is considered to be the codification of the guiding principle of international law. The determination by a state is not unfettered though: human and fundamental rights delineate the boundaries of the discretion.

If the competence of the state in defining who is its national and who is not is beyond doubt, this does not mean that all other states have to recognize the outcome of this legislative competence. Under international law, as again codified in the European Convention on Nationality (Art. 3(2)) other states shall recognize this law '*in so far as it is consistent with applicable international conventions, customary international law and the principles generally recognized with regard to nationality.*' The question thus arises of whether the Union Treaties allow the member states and the European Union to withhold recognition

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nationaliteit? In: *Europees burgerschap.* The Hague: Asser instituut Colloquium Europees recht, 33rd session, p. 99. See ECOSOC 'Opinion on a More Inclusive Citizenship to Immigrants' Soc/479, 1 October 2013, para.1.11: 'The Committee proposes that, in future, when the EU undertakes a new report of the Treaty (TFEU), it amends art.20 so that third-country nationals who have stable, long term resident status can also become EU citizens.'

to elements of member states' municipal nationality laws. The Convention is silent about acceptance by international organizations. This is remarkable as the Convention dates from 1997 and was framed in the Council of Europe, which was well aware of the existence of the European Union. But even if one accepts that international organisations, with their own specific legal orders, are allowed to act in the same way as states, the question remains whether they have the right not to accept effects of the nationality (laws) of a member state? Are there grounds in the Treaties or elsewhere for refusing to accept the outcome of the laws of the member states, or, for that matter, third states?

The member states have repeatedly stated that this is not the case, and that the competence to define their nationals is their 'reserved domain.' Thus, annexed to the Maastricht Treaty is a Declaration by the Conference, indicating that

> wherever in the Treaty establishing the European Community reference is made to nationals of the Member States the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the presidency and may amend any such declaration when necessary.

At the Edinburgh summit of December 1992, even after *Micheletti*,[14] they repeated, according to the Conclusions of the Presidency, 'The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national laws of the Member State concerned.'[15]

This is no small matter. In the end it concerns the existence of the member states insofar as a state is defined not only by territory and governmental organisation, but also by its nationals, citizens. If a state is not free to define who are its nationals, this loss of competence is at the same time not only a reduction of sovereignty, but even a loss of statehood. This fact, 'the most sacred of cows',[16] has coloured my position on this issue.

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14 Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and others*.

15 European Council in Edinburgh, 11–12 December 1992, Conclusions of the Presidency, Part B. Annex 1, 53.

16 Carrera Nuñez, S. (2015). How much does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union? In: Carrera Nuñez and G.-R. de Groot, eds., *European Citizenship at the Crossroads. The Role of the European Union on Loss and Acquisition of Nationality*. Oisterwijk: Wolf Legal Publishers, p. 293.

We all are aware of the developments. In 1992, the ECJ in its judgment *Micheletti* initiated a series of decisions in which it held that '[*u*]*nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for acquisition and loss of nationality.'* Note that this is a misguided *obiter dictum* in two ways: in the first place because *Micheletti* was about the *effects* of Micheletti's undisputed Italian nationality in Spain under Community law, and in the second place because it intimated that international law entailed or obliged Member States to frame their nationality laws with due regard to Community law. That was in my mind begging the question, and I do not see any corroboration for the Court's assumption. According to international law the matter is still the 'reserved domain' of the state concerned. The phrase was nevertheless repeated in *Kaur*,[17] *Zhu and Chen*,[18] and in *Rottmann*,[19] without any explanation why the Court deviated from Art. 3 of the European Convention on Nationality or the previous Hague Convention of 1930 Concerning Questions relating to the Conflict of Nationality Laws (Art. 1). I submit that international law is silent about the role of Union law in controlling the competence of member states in matters of nationality.

The whole issue is one of *recognition*, of acceptance, by the Union and its member states, not one concerning the determination of acquisition and loss of nationality. In other words: the *sedes materiae* is Art. 3(2), not Art. 3(1) of the ECN. No freedom of movement allowed here. This is a difference with a term as 'worker' under Union law: there no international Conventions stand in the way of defining the term, for good reasons, uniformly under Union law, and to take away definition power from the member states.[20]

Importantly, 'nationality' under Union law may differ from nationality in the laws of the member states. Various member states have indicated in unilateral declarations who are to be considered their nationals for Union law purposes, Germany and Great Britain in particular. Although these declarations included and excluded many millions of persons holding the nationality of these states, no protests from the other member states of the Union were to be heard, and the ECJ[21] accepted them without any restraint. This means that

17 Court of Justice, judgment of 20 February 2001, case C-129/99, *Kaur*.

18 Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen.*

19 Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*. See my case-note Jessurun d'Oliveira, H.U. (2011) Decoupling Nationality and Union Citizenship. *European Constitutional Law Review* 7 (1), pp. 138–160, and generally the literature listed in: de Groot G.-R., and Vonk, O. (2015) *International Standards on Nationality Law.* Oisterwijk: Wolf Legal Publishers, pp. 574–576.

20 Cf. Court of Justice, judgment of 23 March 1982, case 53/81, *Levin*.

21 See *Kaur*, cit.

nationality in the Treaties is a form of *functional* nationality: not for all purposes, but for the specific function of being a connecting factor to the Union legal order, especially its chapters on Union citizenship and the prohibition of discrimination. Therefore it is allowed, on the one hand, for member states to indicate which of their nationals are to be considered 'nationals' for Union purposes, and on the other hand, for the Union and its member states to consider whether these indications hold water. Or, for that matter, if they have to be curtailed or extended.

But Union law is from my point of view not yet allowed to interfere with the competence of the member states to determine who are or who are not their nationals. There is no competence in the Treaties to deal directly with the laws on nationality of the member states. The idea that the obligation for sincere cooperation (Art. 4(3) TEU) can be used as an argument that the member states should allow inroads into their laws on nationality is not convincing. Art. 4(1) and (2) and Art. 5 TEU are more appropriate as arguments for the proposition that, as long as an explicit transfer of powers by the Treaties in the area of the law on nationality has not taken place, then according to international law the competence of each state to determine under its own law who its nationals are is unscathed. Competences not conferred by the treaties shall remain with the member states (Art. 5(2) TEU). Especially, it might be added, when it concerns such a sensitive and central issue as nationality. Laws on nationality belong to the identity of the member states and their fundamental constitutional structures to be respected by the EU, according to Art. 4(2) TEU. Although these have to be interpreted restrictively, they are still in place.[22]

This has been my position since *Micheletti*, and I remain there. But this does not mean that I disagree with the outcome of *Rottmann*. *Rottmann* and its predecessors are wrongly decided in obliging the member states (under international law) to have due regard to Union law in matters pertaining to the loss and acquisition of their nationality. But I do subscribe to the idea that the Union and its member states have a competence to accept or refuse the outcome of these laws for Union purposes. Union law is indeed involved when it comes to the recognition of the acquisition or the loss of nationality of member states, because Union citizenship is necessarily at stake. Therefore general principles of Union law, including the Charter and the ECHR, both procedural

22 See, in the field of defining the concept of spouse in Directive 2004/38 as including same-sex marriages: Court of Justice, judgment of 5 June 2018, Case C-673/16, *Coman, Hamilton and Asociaţia Accept*, with my comments: Jessurun d'Oliveira, H.U. (2018). Het Europese Hof omarmt eindelijk het huwelijk van mensen met hetzelfde geslacht. *Nederlands Juristenblad* 28, pp. 2060–2064.

and substantive, are to be taken as guidelines in looking at the laws of the member states and their application.

Let us give an example of this scrutiny. According to the Dutch law on nationality, a person holding both Dutch nationality and a second nationality automatically loses his or her Dutch nationality after having resided for more than ten years abroad without receiving, on his /her request, a new passport or confirmation of Dutch nationality. 'Abroad', i.e. not having residence in the Netherlands or in the territories of the European Union.[23] In my view, the Union is not allowed to interfere with this provision, but it is free not to accept the outcome for Union purposes, and still consider a person, though in this way divested of his or her Dutch nationality under Dutch law, as a Union citizen under Union law. The Union may hold the provision to be contrary to Art. 4(c) and Art. 7(1) of the European Convention on Nationality, and to Art. 47 of the Charter and Art. 6 of the ECHR.[24] The provision is arbitrary, exceeds the limits drawn by the ECN which do not target the first generation of Dutchmen abroad, but subsequent ones, and is under-inclusive in its bureaucratic criteria for maintaining a genuine link. It is furthermore not geared to the specificities of the individual case. The ECJ is asked to decide on this provision, which will probably not bear the test developed in *Rottmann*.[25]

It is the Dutch Council of State that requested a preliminary ruling in its decision of 19 April 2017. AG Mengozzi, however, in his conclusions considered that the provision was not contrary to Art. 20 TFEU and Art. 7 of the Charter. In one case a minor was involved, and here the AG was clear and adamant:

> L'article 20 TFUE et l'article 7 de la Charte des droits fondamentaux de l'Union européenne doivent être interprétés en ce sens qu'ils s'opposent à une disposition législative telle que l'article 16, paragraphe 1, sous d) et 2 de la loi sur la nationalité néerlandaise en vertu de laquelle une personne mineure, ayant également la nationalité d'un pays tiers, perd de plein droit, sauf cas exceptionnel, la nationalité de son Etat membre, et,

23 Art. 15 s. 1 sub c of the Dutch Code on Nationality.

24 See Jessurun d'Oliveira, H.U. (2016). Automatisch verlies nationaliteit voor Nederlander buitenaf onhoudbaar. *Nederlands Juristenblad*, pp. 248–255; and see, in the same vein, the Report by the Dutch National Ombudsman, Rapport verlies nationaliteit. 'En toen was ik mijn Nederlanderschap kwijt …' Report of 10 May 2016, Nr. 2016/145.

25 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes and others*. The Dutch government announced in its coalition agreement (10 October 2017) a comprehensive modernization of its nationality law in March 2017, but nothing has come out of this promise yet.

> partant, le statut de citoyen de l'Union, en conséquence de la perte de la nationalité par son parent.

According to the AG, a minor is not a second class Union citizen, and should have the same right to block the loss of his nationality as his parents. The interests of the child do not coincide with the unity of nationality in the family as the Dutch Government proposed to explain the automatic loss of nationality by the children of a parent who loses his nationality. If the Court follows, that would be the first time that a legislative provision would be struck: in *Rottmann* only an individual decision by the administration was targeted.

An opposite example is the Maltese case. European institutions took courage from the *Rottmann* judgment in attacking the Maltese Individual Investors Programme allowing rich persons to 'buy' Maltese nationality and by that token Union citizenship. Both the Commission and the European Parliament exerted pressure, successfully, on Malta to include as a 'genuine link' a condition of a residence status for the foreign investors.[26] In the scheme just proposed these interventions are not acceptable, but the Union, and the member states, are possibly in a position to refuse these new Maltese citizens their entailing status of citizens of the Union. This depends, of course, on arguments derived from principles of Union law. I agree with Sergio Carrera that these institutions started on a dangerous path in insisting on the need for a genuine link, invoking bad old *Nottebohm*. In the first place one should bear in mind that in *Micheletti,* the simple fact that Italy acknowledged Micheletti as its citizen, although he had lived all his life in Argentina and had only the scantiest of links, iure sanguinis, with Italy, allowed him to claim his European citizenship. The Court explicitly denied Spain the right to add any further conditions.

In the second place: *Nottebohm* is precisely an example where it was not the (Liechtenstein) nationality of a person that was denied (by Guatemala), but only one of the consequences, the exercise of diplomatic protection against another state.

In the third place, to introduce one or another type of 'genuine link' condition as a requirement for all European nationality legislation would open up a Pandora's box of brands of ethnic nationalism. It is playing with fire to inflate the flat criterion of nationality, which until now has sufficed, rightly

26 See the excellent paper by Carrera, S. (2015), cit. Cf. Jessurun d'Oliveira, H.U. (2016). Nudging in Europees nationaliteitsrecht. In: Vonk *et al*., eds., *Grootboek. Opstellen aangeboden aan Prof. mr. Gerard-René de Groot*. Deventer: Wolters Kluwer, p. 215–228.

so, as a ticket to Union citizenship.[27] The acceptance by the Union and its member states of persons as Union citizens, although they lost their nationality of a member state under municipal legislation, and, contrariwise, the refusal to accept persons as Union citizens in spite of their holding the nationality of a member state, may presumably have repercussions on the nationality legislation of the states involved. Member states may want to adapt their rules to the reactions of the Union and the other member states in terms of Union citizenship. That is their discretion, their reserved domain, according to international law, just as it is for other states and the Union to take a position as to the effects in their legal orders. This position must rest on considerations concerning the exigencies of international conventions, customary international law, and the principles generally recognised with regard to nationality, some of these conventions being part and parcel of the Union legal order including its Charter and the ECHR. Nudging is allowed, dictating not.

4 The Fundamental Status

'*Union citizenship is destined to be the fundamental status of nationals of the Member States* (…)'. Fifteen years ago, the ECJ issued this futuristic clarion blast for the first time, in *Grzelczyk.*[28] It repeated the formula one year later in *Baumbast and R*,[29] and picked it up again in *Rottmann*,[30] in slightly different wording: 'destined' was changed into 'intended'. Whether this change was intentional is not clear, although it seems that the Court saw no difference. ('As the Court has several times stated').It may have indicated a shift from its own vision ('destined') to deference to the vision of the lawmakers ('intended'). Be that as it may, one is allowed, and even invited to try and figure out what this 'fundamental status' is about.

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27 Is the fact that, five centuries ago, your (my) Sephardic ancestors have been banished from the Iberian peninsula a link genuine enough to warrant the acquisition of the Portuguese or Spanish nationality by descent? See H.U. Jessurun d'Oliveira. (2016). Iberian nationality Legislation and Sephardic Jews. 'With Due regard to Union Law'? In: Carrera and G.-R. de Groot, eds., *European Citizenship at the Crossroads*, cit., p. 251–265.

28 Court of Justice, judgment of 20 september 2001, case C-184/99, *Grzelczyk*, para. 31. In Dutch: 'De hoedanigheid van burgers van de Unie dient immers de primaire hoedanigheid van de onderdanen van de Lidstaten te zijn (…)'.

29 Court of Justice, judgment of 17 September 2002, case C- 413/99, *Baumbast and R*, para. 82.

30 *Rottmann*, cit., para. 43. In Dutch: 'moet de primaire hoedanigheid van de onderdanen van de Lidstaten zijn.'

In the first place, there is its relationship to the nationality, citizenship, of the member states. As I see it, the status is emancipating itself from *ius tractus*, as Kochenov calls it, from being fully dependent of the laws on nationality of the member states, to an autonomous status which in turn defines the boundaries of these nationality laws.[31] The tables are being turned and the laws on nationality have to conform with the exigencies of Union law and principles. Inroads are being trodden into the reserved domain. Union citizenship has indeed in this respect become fundamental, the laws of the member states are becoming derivative and dependent.

In the second place: although the bulk of the case-law of the ECJ concerns the extent of freedom of movement, it is clear that there is a shift in attention from mobile citizens to those who stay at home. Many rights attached to Union citizenship can be exercised at home: franchise for the EP, right of petition, right to approach the European Ombudsman. This fact undermines any doctrine on 'the internal case' and 'reverse discrimination'.[32] The Union citizen cannot be defined in terms of his whereabouts; wherever he is, he can claim a number of rights under the Treaties as a Union citizen. Most Union citizens stay at home, do hang their hat there, and enjoy their status as Union citizens, although they encounter negative aspects of the freedom of movement of mobile citizens there as well. The proof of solidarity is in accepting displacement and possibly what is framed as social dumping. By cutting the citizen loose from his economic activities, the Treaties have expanded Union citizenship (in a practical sense) from a mere 2% of the populations to 100 percent and more, given the fact that there are quite a number of nationals of member states residing in third countries as well, counting as Union citizens, though not living in the territories of the member states. In the third place, there is the swing from market citizen to citizens as political actors. The Union citizen is politicised in that he exerts political power not only in electing his representatives in the European Parliament, but in the respective national parliaments as well. Both bodies are institutions of the Union as controllers and law-makers; they have grown in power. Union citizens have franchise in local government as well. They have a collective right to initiative. They vote in national referenda on Union issues. The so-called democratic deficit is not so much being caused

31 Kochenov, D. (2009). *Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights. *Columbia Journal of European Law* 15(2), pp. 169–237.

32 See already Jessurun d'Oliveira, H.U. (1990). The Community Case. Is reverse discrimination still permissible under the Single European Act?, In: De Beur, ed., *Forty Years On: The Evolution of Post-war Private International Law*. Deventer: Kluwer, p. 71–86.

by the institutional arrangements, but by the lack of enthusiasm of the people as political actors. The non-voters have little ground to decry the lack of democracy in the Union; the low turnouts at national elections in many member states are mirrored by the elections for the European Parliament. Democratic deficit may also be defined as the waning trust of the European populations in the workings of their existing democracies and politicians and the problem of which of the manifold regulating and policy making institutions and agencies to address.[33] We need more active citizens!

There remain a lot of desiderata. New pies in the sky. To name a few: Union citizenship should be extended to long-term residents on the territories of the Union Member states. The content of Union citizenship should be expanded in several ways in various areas, not only to make the concept more coherent, but also to offer the beneficiaries more rights in the Union and all of its member states. This means doing away with the doctrine of the internal case, a long overdue exercise. One cannot uphold the idea of Union citizenship with concomitant rights that can be exercised in part in the home member state, one cannot create an area without internal frontiers, and at the same time maintain internal borders. *Petit à petit l'oiseau fait son nid!*

33 Cf. Van Middelaar, L. (2017). *De nieuwe politiek van Europa*. Groningen: Historische Uitgeverij, part 4, p. 277ff.

CHAPTER 4

EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits

*Katerina Kalaitzaki**

1 Introduction

The EU is no longer an organisation which merely pursues economic objectives but is also evolving towards a more political and constitutionalised Union. The article supports the idea that the political integration in the domain of EU fundamental rights is primarily evolving through a 'triangular', inter-connected system of protection, including the constructivist transformation of EU citizenship, the institutionalised developments of EU law,[1] and the protection of fundamental rights as general principles of EU law. Yet major components of a comprehensive and all-embracing fundamental rights policy are still absent, which is even more perceptible during periods of crisis, such as the recent financial crisis, where the gaps in citizens' rights protection became evident due to the difficulties encountered in challenging the consequences of the conditionality imposed.[2] This deficient protection largely derived from the restricted scope of application of fundamental rights under the Charter, its unstable judicial interpretation, and in turn from the unwillingness of the Court to rule on complex financial cases. The financial crisis and its mechanisms constitute a useful case study from which to assess the modern 'triangular' protection of rights and encourage interest in assessing new legal paths to reinforce it.

Although EU citizenship has not played a substantial role in the financial crisis, this article suggests that it is not constrained to its current, 'confined'

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1 Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *The Modern Law Review* 68 (2), pp. 233–267, 250 *et seq*.

2 Menéndez, A.J. (2013). The Existential Crisis of the European Union. *German Law Journal* 14 (5), pp. 453–526, 455.

form, since it is designed to encounter constant evolution and progress.[3] Its constructive character culminated in the judicially developed 'substance of the rights' doctrine, which has substantially altered the architecture of EU fundamental rights protection towards including purely internal violations within the Union's scope, if they amount to emptying Union citizenship rights of their substantive meaning. When placed within a new jurisdictional test, the doctrine can arguably fill the gaps of the current protection system in an effort to link EU fundamental and citizenship rights and propose an alternative, more effective use of rights.

II Setting the Scene: Legal Characteristics of the 'Triangular' Fundamental Rights Protection System

The first corner of the 'triangle' is the legal concept of Union citizenship,[4] which constituted a decisive step towards a constitutionalised Union;[5] although a relevant personal status had clearly matured long before its formal incorporation in the Maastricht Treaty.[6] The list of rights provided under Article 20 TFEU, although non-exhaustive, fell short of establishing the full range of modern citizenship rights,[7] since no legal connection was declared with fundamental rights. The Commission however, defined EU citizenship as a dynamic concept which should always reflect 'the aims of the Union, [...] stemming from the gradual and coherent development of the Union's political, economic and

3 *Union citizenship*, Contributions by the Commission to the Intergovernmental Conference SEC (91) 500 Bull EC Supp. 2/91, p. 87; Closa, C. (1992). The Concept of Citizenship in the Treaty on European Union. *Common Market Law Review* 29 (6), pp. 1137–1169, 1167.

4 Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship, cit., p. 250.

5 Wiener, A. (1999). The Constructive Potential of Citizenship: building European Union. *Policy & Politics* 27 (3), pp. 271–293.

6 Kochenov, D., and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text. *European Law Review* 37, pp. 369–396; Welge, R. (2015). Union Citizenship as Demoi-cratic Institution: Increasing the EU's Subjective Legitimacy Through Supranational Citizenship. *Journal of European Public Policy* 22 (1), pp. 56–74; Kostakopoulou, T. (2010). *Citizenship, Identity and Immigration in the European Union: between Past and Future*. Manchester: Manchester University Press; O'Leary, S. The relationship between Community citizenship and the protection of fundamental rights in Community law. *Common Market Law Review* 32 (2), pp. 519–554, 519.

7 European Parliament (1991). Bindi Report on Union Citizenship. Doc. A 3-0139/91, 23 May 1991; Closa, C. (1995). Citizenship of the Union and Nationality of Member States. *Common Market Law Review* 32 (2), pp. 487–518, 490.

social dimension'.[8] It has indeed proved to be of 'constructivist' nature, especially through the Court of Justice's case law, by deepening European integration, based on a federal logic, while broadening the potential impact on EU fundamental rights. Namely, after *Martínez Sala*,[9] EU citizenship demonstrated a shift away from 'economic and market citizens', to a social and political dimension,[10] while establishing protection against discrimination based on nationality and a free-standing right to move and reside freely.[11] The constructivist nature of EU citizenship culminated with the inclusion of new, unwritten rights into the concept, through the 'substance of the rights doctrine'.

Regardless of the influence exerted by EU citizenship in forming current policies, a significant role was also played by the 'effects of institutional interaction',[12] such as the Charter, whose list of rights is far more extensive, as it reunites a wide range of rights and freedoms – including socioeconomic rights – which have been violated the most during the financial crisis.[13] On the contrary, considering the nature of the two concepts, the list under EU citizenship might currently be limited, but its constructivist nature arguably allows for expansion of the '*inter alia* list' under Article 20 TFEU. Therefore,

8 *Union citizenship*, Contributions by the Commission to the Intergovernmental Conference, cit., p. 87.

9 Court of Justice, judgment of 12 May 1998, case C-85/96, *María Martínez Sala v. Freistaat Bayern.*

10 O'Leary, S. (1999). Putting Flesh on the Bones of European Union Citizenship. *European Law Review* 24 (1), pp. 68–79; Kochenov, D. (2009). *Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between status and Rights. *Columbia Journal of European Law* 15 (1), pp.169–237, 173 *et seq.*

11 Court of Justice, judgment of 7 September 2004, case C-456/02*, Trojani*; Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*; Barnard, C. (2013). *The Substantive Law of the EU: The Four Freedoms,* Oxford: Oxford University Press; Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 83; Court of Justice, judgment of 26 October 2006, case C-192/05, *Tas-Hagen and Tas*; Opinion of AG Kokott delivered on 30 March 2006, case C-192/05, *Tas-Hagen Tas*, para. 33.

12 Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship, cit., p. 264; Liisberg, J.B. (2001). Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law of just an inkblot. *Jean Monnet Working Paper,* no. 4/01, p. 7; Lenaerts, K. (2012). Exploring the Limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review* 8 (3), pp. 375–403; Arestis, G. (2013). Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective. *College of Europe Cooperative Research Papers* No. 2/2013, p. 2; Schneider, C.B. (2014). The evolution of the first Bill of Rights of the European Union and its position within the constellation of national and regional fundamental rights protection systems. *Bridging Europe Working Paper*, p. 2 *et seq.*

13 Peers, S., Hervey, T., Kenner, J., and Ward, A., eds. (2014). *The EU Charter of Fundamental Rights A Commentary*. London: Bloomsbury Publishing.

while the list of rights under the Charter adequately incorporates the rights violated during the financial crisis, the precise extent of Union citizenship rights cannot be clearly defined from a strictly textual perspective. However, it is generally believed that the essence of EU citizenship is much broader than the list provided by Article 20(2) TFEU, in the broader sense of what supranational citizenships entail.[14]

The third piece of the EU triangular system is the protection of fundamental rights as general principles of EU law, many of which are unwritten and judge-made, but the majority of which have been codified in the Treaties over time.[15] They *inter alia* assist with judicial interpretations and legal reviews,[16] but more importantly, they are largely used to fill legal gaps where relevant EU laws are lacking or do not provide a concrete answer.[17] It can thus be argued that general principles are both institutional and constructive in nature, since they are enshrined in the Treaty, but the Court regularly recognises new rights as falling within the 'general principles umbrella', under Article 2 TEU.

Nevertheless, the effectiveness and potential use of the instruments in a crisis, largely depends on their material and/or personal scope of application and the existence of any legal restrictions. The scope of EU citizenship was largely based on the logic of economic growth,[18] which has arguably diminished its essence and the attempts made in the Maastricht Treaty to connect it with the citizen.[19] However, the CJEU has identified an increasing number

14 Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, p. 26 *et seq.*

15 Cuyvers, A. (2017). General Principles of EU law. In: Ugirashebuja, Ruhangisa, Ottervanger, and Cuyvers, eds., *East African Community Law: Institutional, Substantive and Comparative EU Aspects.* Leiden: Brill Nijhoff, p. 220.

16 Court of Justice, judgment of 19 November 1991, joined cases C-6/90 and C-9/90 *Francovich*, para. 30; Court of Justice, judgment of 5 March 1996, joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, paras. 27–36; Court of Justice, judgment of 8 April 2004, joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others,* para. 10.

17 Court of Justice, judgment of 19 January 2010, case C-555/07, *Kücükdeveci*, para. 21; Court of Justice, judgment of 23 April 1986, case 294/83, *Les Verts v. Parliament*, para. 12.

18 Kochenov, D. (2011). A Real European Citizenship: A new Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1), pp. 56–109, 61; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (6), pp. 1597–1628, 1621 *et seq.*; Eeckhout, P. (2002). The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review* 39 (5), pp. 945–994, 971; Douglas-Scott, S. (1998). In Search of Union Citizenship. *Yearbook of European Law* 18 (1), pp. 29–65, 30 *et seq.*

19 Shaw, J. (2010). Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism. *Edinburgh School of Law Working Paper Series* No. 14/ 2010, p. 11;

of 'citizenship cases in which the element of true movement is either barely discernible or non-existent',[20] while the *ratione materiae* of EU law has been further stretched to cover virtually hypothetical cross-border situations.[21] EU citizenship has further managed to overcome the strict requirement for a cross-border element completely, by creating an independent, EU citizenship-based right,[22] and redefining the material and personal scope of EU citizenship[23] to allow more cases to fall within the CJEU's jurisdiction. Most importantly, in *Ruiz Zambrano* the Court ruled that Article 20 TFEU prevents Member States from taking measures which have the effect of 'depriving EU citizens of the genuine enjoyment of the substance of rights conferred on them by the citizenship of the Union'.[24] It therefore created the possibility of EU law 'intervening', once the enjoyment of the essence of EU citizenship rights is brought into question.[25]

The restriction on the field of application of the Charter under Article 51(1)[26] also severely limits the scope of fundamental rights policies, including the relevant jurisdiction for challenges to austerity measures. The Court has not accepted the restriction easily, although it continues to be difficult to predict whether a domestic measure will be found to be bound by the Charter.[27] The

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Spaventa, E. (2008). Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects. *Common Market Law Review* 45 (1), pp. 13–45, 40.

20 Opinion of AG Sharpston delivered on 30 September 2010, case C34/09 *Ruiz Zambrano*; van Eijken, H., and de Vries, S.A. (2011). A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*. *European Law Review* 36 (5), pp. 704–721, 710; Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe. *Legal Issues of Economic Integration* 35 (1), pp. 43–67, 50 *et seq.;* See further: Court of Justice, judgment of 14 October 2008, case C-353/06, *Grunkin and Paul*.

21 Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen,* para. 45; Court of Justice, judgment of 12 July 2005, case C-403/03, *Schempp*, para. 47; Court of Justice, judgment of 2 October 2003, case C-148/02, *Garcia Avello*, para. 45; Spaventa, E. (2008). Seeing the Wood despite the Trees, cit., p. 21.

22 O'Brien, C. (2016)."Hand-to-mouth" citizenship: decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment. *Journal of Social Welfare and Family Law* 38 (2), pp.228–245, 229 *et seq.*

23 *Rottmann*, cit.

24 Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano,* para. 42.

25 Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations, cit., p. 50 *et seq.*

26 Fontanelli, F. (2014). The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights. *Columbia Journal of European Law* 20 (2), pp. 194–247, 193 *et seq.*

27 *Ibid.*, p. 193.

Court has interestingly interpreted 'implementation' under Article 51(1) broadly as meaning to 'fall within the scope of EU law'.[28] In *Fransson*[29] a remote connection with EU law was enough to trigger the Charter, stressing how much grey area remains in the interpretation of this provision. The scope of EU fundamental rights is therefore interpreted variously, with the Charter being more likely to apply to national rules in cases with a stronger EU interest, while applying only in extreme cases regarding the co-ordination of rules.[30] Therefore, although the Court has interpreted Article 51(1) broadly, the level of discretion available allows it to promote a differentiated understanding of the Charter's scope of application in selected cases. The vagueness and uncertainty deriving therefrom,[31] was also criticised by the European Parliament, stating that the citizens' expectations "go beyond the Charter's strictly legal provisions" and called on the Commission to do more to meet citizens' expectations.[32] Within the framework of strengthening the protection of EU fundamental rights, the Parliament had even proposed the deletion of Article 51 of the Charter,[33] recognising the structural difficulties it creates. A reinforced system, towards a truly constitutionalised Union, could be achieved by adopting a broader and more stable use of the Charter, to make rights more visible to citizens, especially in situations which are firmly within the scope of EU law or have a clear connection with it, such as those of the European Stability Mechanism (ESM).

General principles of EU law are also invoked when 'implementing Union law', in view of the fact that almost all Charter rights have been previously recognised as general principles.[34] Unlike the Charter, however, due to their hybrid nature, the scope of application of general principles is not as restricted.[35]

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28 Court of Justice, judgment of 18 June 1991, case C-260/89, *ERT v. DEP,* para. 42; Court of Justice, judgment of 13 June 1996, case C-144/95, *Maurin.*

29 Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*; Spaventa, E. (2016). The interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures. *European Parliament's PETI Committee PE* 556.930.

30 Spaventa, E. (2016). The interpretation of Article 51 of the EU Charter of Fundamental Rights, cit., p. 10.

31 Fontanelli, F. (2014). The Implementation of European Union Law by Member States, cit., p. 200.

32 European Parliament resolution of 21 January 2016 on the activities of the Committee of Petitions, 2014, (2014/2218(INI)), para. 24.

33 European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para. 15.

34 van den Brink, M.J. (2012). EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously. *Legal Issues of Economic Integration* 39 (2), pp. 273–289, 287.

35 Tridimas, T. (2013). Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions. In: Bernitz, Groussot, and Schulyok, eds., *General Principles of EU Law and*

According to AG Bot in his Opinion in *Scattolon*, the restrictive scope of application defined for the Charter was not intended to restrict the scope of application of the fundamental rights recognised as general principles of EU law,[36] which can still be invoked where the Charter cannot. Therefore, in terms of the scope of application of the respective instruments, it is argued that a constructivist understanding of EU citizenship can more effectively overcome its restrictions compared to the Charter, demonstrating its greater potential for safeguarding citizens' rights.[37]

III The Modern Protection of Fundamental Rights

To cope with the financial crisis and safeguard financial stability in the euro area,[38] new mechanisms were adopted,[39] including the permanent ESM, which was established as an international, intergovernmental Treaty (ESMT)[40] concluded and ratified by the Member States outside the EU legal order. Accordingly, Article 136(3) TFEU states that the mechanism is activated if indispensable to safeguarding the stability of the euro area as a whole, subject to strict conditionality,[41] which is agreed under the relevant memoranda of understanding (MoUs). As a way to alleviate budgetary concerns, conditionality is based on austerity and includes reductions in public spending, cuts in wages

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European Private Law. Alphen aan den Rijn: Wolters Kluwer; Lenaerts K., and Gutiérrez-Fons, J.A. (2010). The constitutional allocation of powers and general principles of EU law. *Common Market Law Review* 47 (6), pp. 1629–1669, 1640; Court of Justice, judgment of 13 July 1989, case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft.*

36 Opinion of AG Bot delivered on 5 April 2011, case C-108/10, *Scattolon*, para. 120.

37 Kochenov, D. (2011). A Real European Citizenship, cit., p. 61.

38 Tuori, K. (2014). *The Eurozone Crisis: A Constitutional Analysis by Kaarlo Tuori and Klaus Tuori,* Cambridge: Cambridge University Press; European Commission (2015). Quarterly Report on the Euro Area. *Economic and Financial Affairs* 14 (2), p. 28, http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip001_en.pdf; Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European financial stabilisation mechanism; Council Document 9614/10 of 10 May 2010, *OJ L/118*, 12.05.2010, p. 1–4.

39 Rodriguez, P.M. (2016). A missing piece of European emergency law: legal certainty and individuals' expectations in the EU response to the crisis. *European Constitutional Law Review* 12 (2), pp. 265–293, 270.

40 Treaty Establishing the European Stability Mechanism (ESM) (2012) D/12/3, Recitals 1 and 5.

41 Opinion of AG Kokott delivered on 26 October 2012, case C-370/12, *Pringle*, paras. 142–143; Craig, P. (2014). *Pringle* and the Nature of Legal Reasoning. *Maastricht Journal of European and Comparative Law* 21 (1), pp. 205–220, 208 *et seq*.

and increases in tax revenues.[42] Although necessary for the mechanism to work,[43] the conditionality imposed was repeatedly challenged for fundamental rights infringements.[44] Due to the diversified legal establishment and the use of the financial assistance mechanisms, the judicial challenges have proven arduous,[45] while the current protection system has been largely ineffective in protecting EU citizens' rights.

The Court has repeatedly referred to the Charter in its rulings, only to conclude in most cases that it cannot be invoked due to a lack of connection with EU law. Therefore, leaving aside the level of protection which could actually have been offered by the Charter, the Court's persistent preference for interpreting Article 51(1) in the narrowest way possible when in fact a connection with EU law could be identified, has led EU citizens to a state of deadlock in such actions. This is primarily the case in claims against the Member States, which are under a duty to implement the agreed conditionality into national laws, in order to restore stability and return to sustainable growth.[46] The Court in *Pringle*[47] and later in *Sindicatos dos Bancarios*,[48] ruled that the provisions of the Charter do not apply to the implementation of the MoUs for the provision of stability support under the ESM, since the Member States are not implementing Union law within the meaning of Article 51(1) of the Charter.[49] The

42 Theodoropoulou, S., and Watt, A.(2011). Withdrawal symptoms: an assessment of the austerity packages in Europe. *European Trade Union Institute Working papers* No. 2/ 2011, p. 11 *et seq*. 8.

43 Gilliams, H. (2011). Stress Testing the Regulator: Review of State Aid to Financial Institutions after the Collapse of Lehman. *European Law Review* 36 (1), pp. 3–25, 5 *et seq*.; Avalos, H.R.B. (2012). Moral Hazard in the Euro-Zone. *MPRA Papers* No. 61103, p. 2 *et seq.*; *Pringle*, cit., paras. 69 and 111.

44 Lusiani, N., and Saiz, I. (2014). Safeguarding human rights in times of economic crisis. *Council of Europe Commissioner for Human Rights*, available at https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa. https://rm.coe.int/16806daa3f.

45 Kilpatrick, C. (2015). On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts. *Oxford Journal of Legal Studies* 35 (2), pp. 325–353, 331.

46 Financial Assistance Facility Agreement between European Stability Mechanism and The Republic of Cyprus as the Beneficiary Member State and Central Bank of Cyprus as Central Bank, https://www.esm.europa.eu/sites/default/files/esm_ffa_cyprus_publication_version_final.pdf.

47 *Pringle*, cit., para. 178.

48 Court of Justice, judgment of 7 March 2013, case C-128/12, *Sindicato dos Bancários do Norte and Others.*

49 Adam, S., and Mena Parras, F.J. (2013). The European Stability Mechanism through the legal meanderings of the Union's constitutionalism: Comment on Pringle. *European Law Review* 38 (6), pp. 848–865, 850 *et seq.*; *Pringle*, cit., para. 180.

Pringle ruling had raised intense debate, since the ESMT, indicates that the EU framework should be observed by the ESM members, especially 'the economic governance rules' set out in the TFEU,[50] while previous rulings and principles, allowed more room for a connecting link with EU law.[51]

Further reluctance was manifested, in *Sindicato Nacional*,[52] where the Court, narrowly ruled that it had no jurisdiction to determine the request for preliminary ruling, since no link with EU law was found.[53] In contrast, although, the Portuguese Government seemed to 'have gone further than its commitments in the MoU',[54] the national legislation also makes express reference to the Council Decision on granting financial assistance, thus at least a remote link between the national measure with EU law was evident. The Court of Justice was straightforwardly asked about the validity and interpretation of specific provisions implemented in national law in *Florescu*,[55] where it had for the first time indicated that since the MoU is an act of the EU institutions, it must be regarded as implementing that law according to Article 51(1), despite the amount of discretion they have in deciding the implementing measures.[56] As a whole, the Charter failed to protect EU citizens' rights completely during the financial crisis, primarily because the unstable status of the restriction under Article 51(1) allowed the Courts to treat claims against Member States as purely internal,[57] even when a remote connection with EU law existed. This approach largely deprived citizens of the ability to proceed in such litigation to the factual assessment of the disputed measures and possible remedies.

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50 Beck, G. (2014). The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means. *European Law Review* 39 (2), pp. 234–250, 240; Hinarejos, A. (2013). The Court of Justice of the EU and the legality of the European Stability Mechanism. *Cambridge Law Journal* 72 (2), pp. 237–240, 237.

51 Court of Justice, judgment of 12 February 2009, case C-45/07, *Commission v. Greece*; Court of Justice, judgment of 20 April 2010, case C-246/07 *Commission v. Sweden*, para. 91; Barnard, C. (2013). The Charter, the Court – and the Crisis. *University of Cambridge Faculty of Law Research Papers* No. 18/ 2013, p. 9.

52 Court of Justice, judgment of 26 June 2014, case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins.*

53 See also, Court of Justice, judgment of 10 May 2012, case C-134/12, *Corpul Naţional al Poliţiştilor.*

54 Barnard, C. (2013). The Charter in time of crisis: a case study of dismissal. In: Countouris, and Freedland, eds., *Resocialising Europe in a Time of Crisis*. Cambridge: Cambridge University Press, p. 262.

55 Court of Justice, judgment of 13 June 2017, case C-258/14, *Florescu and Others.*

56 *Ibid.*, para. 34.

57 Kilpatrick, C. (2015). Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law. *European Constitutional Review* 10 (3), pp. 393–421, 400.

The Charter has been more successfully invoked against the acts of the EU institutions tasked with negotiating the MoUs and overseeing the austerity plan.[58] In her view in *Pringle,* AG Kokott emphasised that the Commission remains a Union institution and is bound by the full extent of EU law, even when acting within the framework of the ESM.[59] Accordingly, the Court in *Ledra Advertising Ltd* stated that the Commission retains within the framework of the ESMT, its role as guardian of the Treaties and should refrain from signing an MoU whose consistency with EU law and the Charter is doubtful.[60]

In contrast, fundamental rights as general principles of EU law have rarely been used, and only recently with any positive effect. Specifically, *Associação Sindical dos Juízes Portugueses*[61] questioned the compatibility of austerity measures imposed on the judiciary with the principle of judicial independence. The Court clearly sought to overcome the legal barrier of the Charter by invoking the principle of effective judicial protection under Article 19(1) TEU, since according to the Court, its material scope goes beyond that of Article 47 of the Charter. Although this is a beneficial development for fundamental rights, it is another demonstration of the Charter's weaknesses, forcing the Court to resort to concepts from the pre-constitutionalisation years, where the protection of rights solely depended on general principles. In contrast to the minimal application of the Charter and the general principles, EU citizenship has not played any substantive role in the austerity measures case law. This is primarily due to the limited list of rights attached to it, rendering it irrelevant in such cases, which are grounded in alleged fundamental rights' infringements, thus demoting citizenship from being 'the fundamental status of Union citizens'.[62]

The limited applicability of these legal instruments left many wondering how fundamental rights can be among the foundational values of a constitutionalised Union, if their use can be limited more easily than it can be invoked. It has also resulted in a gap in effective judicial protection, because of the limited routes available to access justice, the reluctance of the Courts to support those seeking to minimise the impact of the austerity measures, and finally because the Court's rulings were largely based on reasons unconnected with

58 Article 13(3) of the ESM Treaty.

59 Opinion of AG Kokott, *Pringle*, cit., para. 176; Committee on Constitutional Affairs, *Opinion*, 11 February 2014, 2013/2277(INI), para. 11.

60 Court of Justice, judgment of 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising v. Commission and ECB*, para. 59.

61 Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*; See further, Court of Justice, judgment of 7 February 2019, case C-49/18, *Escribano Vindel*.

62 *Grzelczyk*, cit., para. 31.

law, but rather with politics.[63] The reluctance of the Court is arguably based on the nature of the claims under dispute, which include complex economic situations and can have substantial impact on national democracy.[64] The Court has therefore demonstrated a preference for 'evading' performing legal assessment, rather than embarking on judicial activism, so as to avoid the hostile reaction which would ensue. A disparity in the pursuit of Union objectives is also demonstrated, namely that the Court seems more willing now to act to address the current rule of law crisis and protect the democratic judicial processes at the national and European level,[65] than it did during the financial crisis. Interest in assessing new routes to equally safeguard citizens' rights and Union's objectives has been prompted, such as the use of EU citizenship in novel areas using the recent 'substance of the rights doctrine'.

IV The Court's 'substance of the rights' Doctrine

To tackle the limitations of EU law described above effectively, a broader scope of application of fundamental rights is needed, using a 'living instrument' with transformative qualities, such as the concept of EU citizenship, and the substance of the rights doctrine. *Rottmann*[66] in particular has been correctly described as the foundation which paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins.[67] The Court indicated the importance of having due regard to EU law when exercising national powers within the sphere of nationality,[68] and specifically ruling

63 Tomkin, J. (2013). Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy. *German Law Journal* 14 (1), pp. 169–189, 180 *et seq.*; Repasi, R. (2017). Judicial protection against austerity measures in the euro area: Ledra and Mallis. *Common Market Law Review* 54 (4), pp. 1123–1155, 1123 *et seq.*; Ghailani, D. (2017). Violations of fundamental rights: collateral damage of the Eurozone crisis. In: Vanhercke, Natali, and Bouget, eds., *Social policy in the European Union: state of play* 2016. Brussels: ETUI, p. 158 *et seq.*

64 Kriesi, H. (2012). The Political Consequences of the Financial and Economic Crisis in Europe: Electoral Punishment and Popular Protest. *Swiss Political Science Review* 18 (4), pp. 518–522, 519 *et seq.*; Funke, M., Schularick, M., and Trebesch, C. (2016). Going to extremes: Politics after financial crises 1870–2014. *European Economic Review* 88, pp. 227–260, 230.

65 Court of Justice, judgment of 24 July 2018, case C-216/18 PPU, *Minister for Justice and Equality.*

66 *Rottmann*, cit.

67 Lenaerts, K. (2015). EU citizenship and the European Court of Justice's 'stone-by-stone' approach. *International Comparative Jurisprudence* 1 (1), pp. 1–10, 2.

68 *Rottmann*, cit., para. 41.

that where an EU citizen is addressed by a decision withdrawing naturalisation, which causes him to lose the status and the rights conferred by Article 20 TFEU, this falls by reason of its nature and its consequences, within the ambit of EU law.[69] The citizenship-specific rights which a person would lose are thus emphasised, rather than the general human rights imperative, which indicates a substantial increase in the effect of EU citizenship on national citizenship.[70]

The *Ruiz Zambrano* case offered further insights into this development and extended the idea that Member States and the EU should leave the substantive core of rights under EU citizenship intact.[71] In answering the question of whether Article 20 TFEU has an autonomous character and serves as a sufficient connection with EU law, the Court of Justice developed a jurisdictional test, whereby national measures are precluded if depriving EU citizens of the genuine enjoyment of the substance of EU citizenship rights.[72] Consequently, third-country nationals obtain a derived right to reside in their children's Member State of nationality under Article 20 TFEU when the factual conditions of *Ruiz Zambrano* are met.[73] This ruling constitutes one of the most inspiring of the last decade, primarily due to it marking a departure from the traditional cross-border concept, as the Court interpreted Article 20 TFEU as a sufficient link in itself,[74] consequently extending the scope of application of EU law. Secondly, because the prohibition against a violation of the substance of rights has been applied as a self-standing EU test,[75] while it had *hitherto* been applied within the context of the proportionality test. Despite the potentially enormous implications of the doctrine, it has been characterised as frustratingly opaque,[76] since little clarity was provided with regards to the circumstances under which it can be invoked.

Subsequent case law provided further clarity, on the conditions for triggering the recently developed doctrine. It is evident that not every limitation of a

69 *Ibid.*, para. 42.

70 Shaw, J. (2011). Setting the scene: the *Rottmann* case introduced. In: Shaw, ed., *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? EUI Working Papers RSCAS* 2011/62, p. 4.

71 *Ruiz Zambrano*, cit.

72 *Ibid.*, para. 44.

73 *Ibid.*, para. 45.

74 van Eijken, H., and de Vries, S.A. (2011). A New Route into the Promised Land, cit., p. 711.

75 van den Brink, M. (2017). The origins and the Potential Federalising Effects of the Substance of Rights Test. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, p. 90 *et seq.*

76 Lansbergen, A., and Miller, N. (2011). European Citizenship Rights in Internal Situations: An Ambiguous Revolution. *European Constitutional Law Review* 7 (2), pp. 287–307, 290 *et seq.*

right will trigger the doctrine, but only its deprivation. In particular, the Court clarified in *McCarthy*[77] that Article 21 TFEU is 'applicable to situations that have the effect of depriving [a Union citizen] of the genuine enjoyment of the substance of the rights' under EU citizenship or of 'impeding the exercise of his right of free movement and residence' within the Member States.[78] The use of the doctrine, does not thus depend on an EU citizens' age, but rather upon the seriousness of the restraint to the substance of the rights normally conferred. Therefore, a distinction is made whereby the 'impeding effect' refers to the traditional line of case law requiring a cross-border link, without requiring the national measures to cause the loss of the status of Union citizens in practice.[79] If no cross-border situation occurs, only a deprivation of the substance of the rights will trigger EU law,[80] requiring the national measure to create more than a 'serious inconvenience'. Moreover, in *Dereci,*[81] the Court indicated that the 'deprivation' of the substance of the rights refers to situations in which the Union citizen not only has to leave the territory of the Member State, but the Union territory as a whole.[82] The strict approach was confirmed in *Yoshikazu Iida*,[83] where the Court recalled that 'purely hypothetical prospects of exercising the right of freedom of movement' and of that right being obstructed[84] do not establish a sufficient link with EU law. This stricter approach[85] emphasised the need to determine whether there is a relationship of dependency with the child's primary carer,[86] while a major part underlying the Court's reasoning was clearly based on the respect for the division and balance of competences as enshrined in Article 5 TEU. The Court of Justice affirmed in *Rendón Marín* that the prohibition under Article 20 TFEU, only applies in 'very specific' situations, while this derived right cannot be refused when the

77 Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy.*

78 *McCarthy*, cit., para. 56.

79 Lenaerts, K. (2011). 'Civis Europeus Sum': from the cross-border link to the status of citizen of the Union. *Online Journal on free movement of workers within the European Union* 3, pp. 6–18, 8 *et seq.*

80 *McCarthy*, cit., para. 56.

81 Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci and Others.*

82 *Ibid.*, para. 66.

83 Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida.*

84 *Ibid.*, para. 77.

85 See further: Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*; Court of Justice, judgment of 10 May 2017, case C-133/15, *Chávez-Vílchez and Others*.

86 Royston, T., and O'Brien, C. (2017). Breathing and not-incarcerated, estranged fathers do not automatically cancel out mothers' *Zambrano* rights. *Journal of Social Security Law* 24 (2), pp. D62-D64, D63.

effectiveness of EU citizenship is to be disregarded.[87] Therefore, in the Court's view, any possible limitations on the substance of citizenship rights undermine its effectiveness.[88] A *de facto* loss of a Union citizenship right is thus required, which rightly reduces the consequences of the test without being too intrusive.[89] Although it is believed that fundamental rights should not be ruled out based on a narrow reading of the Treaties,[90] the doctrine should be applied only when EU citizenship rights are deprived and cannot be remedied at the national level, to keep the test within the limits of an acceptable federal and legal balance within the EU.

The reasoning of *Rottmann* was more recently applied in *Tjebbes*,[91] confirming the applicability of EU law and competence of the Court to answer the Raad van State's (Council of State) question on the compatibility of Dutch nationality law with the Treaty provisions on EU citizenship, even though the loss of nationality occurred by operation of a law rather than an express individual decision.[92] The *Tjebbes* judgment has in fact been even more progressive in intervening into Member State nationality law, both procedurally and substantively, by requiring an individual examination of any decision withdrawing nationality having regard to a set of consequences linked to the status of Union citizenship. While this judicial progression, constitutionalising one of the few areas of executive discretion and dominance,[93] could constitute the means to effectively protect the legal heritage of EU citizens, the Court followed a rather unexpected logic. Despite the jurisdictional examination, the ruling in *Tjebbes* tacitly overturns previous caselaw of the Court by holding that EU law does not preclude the withdrawal of EU citizenship based on an *ex lege* annulment, which comes without warning and based on no wrong-doing.[94] In other words,

87 Court of Justice, judgment of 13 September 2016, case C-165/14, *Rendón Marín*, para. 74.

88 Neuvonen, P.J. (2017). EU citizenship and its "very specific" essence: *Rendón Marín* and *CS*. *Common Market Law Review* 54 (4), pp. 1201–1220, 1205 *et seq.*

89 See further: Ritter, C. (2006). Purely internal situations, reverse discrimination, *Guimont*, *Dzodzi* and Article 234. *European Law Review* 31 (5), pp. 690–710; Wiesbrock, A. (2012). Disentangling the 'Union Citizenship Puzzle'? The *McCarthy* Case. *European Law Review* 36 (6), pp. 861–873; Iglesias Sánchez, S. (2014). Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison? *European Law Journal* 20 (4), pp. 464–481.

90 D. Kochenov, On Tiles and Pillars: EU Citizenship as a Federal Denominator, in D. Kochenov (ed), *EU Citizenship and Federalism*, cit., p. 10.

91 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes and others*.

92 *Ibid.*, para. 20.

93 S. Coutts, Bold and Thoughtful: The Court of Justice Intervenes in Nationality Case Law: Case C-221/17 Tjebbes, in *European Law Blog*, 25 March 2019, europeanlawblog.eu.

94 D. Kochenov (2019). The *Tjebbes* Fail. *European Papers* 4 (1), pp. 319–336.

while confirming and even extending the applicability of EU law when examining the loss/acquisition of EU citizenship, the Court regressively made EU citizenship dependent upon the renewal of a passport before its expiration according to the facts of the case.

The judicial establishment of the doctrine, is of great significance, not only concerning its numerous implications, but also in relation to its prospects for further progress and development, towards a more constitutionalised Union. In particular, the judicial activism of the Court of Justice has marked a process of re-delimiting the scope of EU law, through the development of the constructivist nature of EU citizenship, while more meaning and value has been granted to the concept of EU citizenship and the rights attached thereto. More importantly, the 'substance of the rights' doctrine, has expanded the non-exhaustive list, towards including new rights. The '*inter alia* clause' under Article 20(2) TFEU suggests that citizens can enjoy further rights, beyond those expressly stated therein, not only through the procedure enshrined under Article 25 TFEU but also through the judicial incorporation of unwritten rights.[95] Following the recent judicial developments, the list has indeed been expanded to include new rights, contrary to the allegation of *McCarthy* that the approach put forward in *Ruiz Zambrano* was only applicable to the 'rights listed in Article 20(2) TFEU'.[96] This consideration is arguably rather unexpected and inaccurate since the recent series of case law has protected EU citizens' rights not expressly listed in Article 20(2) TFEU, such as the right against forced removal from the EU's territory or even the ability to benefit from equality in a wholly internal situation outside the scope of EU law.[97] It is therefore argued that the extent of Union citizenship rights is much broader than what is defined in a textual sense.[98]

v The Way Forward: the 'Internal Applicability of EU Law' Test

The recently developed 'substance of the rights' doctrine, seems to have the potential to change the architecture of the fundamental rights protection, towards enhancing the modern protection of EU citizens' rights and overcoming

95 Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit., p. 25 *et seq.*

96 Lenaerts, K. (2011). 'Civis Europeus Sum', cit., p. 9.

97 Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger*, para. 61; Besselink, L.M. (2008). Annotation of *Spain v UK, Eman en Sevinger*, and ECtHR Case *Seviger and Eman v The Netherlands*. *Common Market Law Review* 45 (3), pp. 787–813.

98 Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit., p. 26 *et seq.*

the deficiencies identified. This can be done by establishing a connection of the substance of the rights doctrine with the Charter rights and/or the fundamental rights as general principles of EU law, aiming to grant EU citizens a core of rights other than those already listed in Article 20(2).

The proposed way forward, namely the 'internal applicability of EU law' test will be built on two main starting points. It will be firstly based on the idea that the non-exhaustive list under Article 20(2) TFEU, should always be interpreted in compliance with Article 2 TEU which the Member States are also obliged to comply with. The second starting point is that beyond the scope of Article 51(1) of the Charter, fundamental rights issues are left to national legislation and judiciary, provided that they safeguard the values enshrined under Article 2 TEU. The recent developments have, however, allowed some room for EU intervention, in cases that are normally considered as wholly internal and/or as falling outside the scope of EU law.[99] The proposal brings the classic doctrine a step further, by proposing a three-step jurisdictional test which will allow EU fundamental rights, besides the ones under the list of Article 20 TFEU, to be specifically used in purely internal situations. The test particularly involves a judicial incorporation combing a dynamic reading of Article 2 TEU, Article 20 TFEU and the general principles of EU law.

1 *First Step: Delimiting the Test in Accordance with Article 2 TEU*

The first step of the test consists in the delimitation of the scope of application of the proposal using Article 2 TEU, in a different way from von Bogdandy's 'reverse Solange'.[100] This article supports that the '*inter alia* clause' under the non-exhaustive list of Article 20(2) TFEU should be interpreted as including the Union's foundational values, which also work as general legal standards of protection for EU citizens. However, broadening the scope of application of fundamental rights cannot be achieved merely by extending the list of EU citizenship rights already falling within the sphere of the substance of the rights doctrine. It is necessary to focus on cases which require EU intervention by delimiting the scope of application of the proposal to the essential core of rights, which represents the minimum circle of fundamental rights common to the Member States, which cannot be diminished without the right in question losing its value either for the right holder or for society as a whole.[101] The first step

99 von Bogdandy, A. et al. (2012). Reverse *Solange* – Protecting the essence of fundamental rights against EU Member States. *Common Market Law Review* 49 (2), pp. 489–519, 490.

100 Ibid., p. 489.

101 Brkan, M. (2018). The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core. *European Constitutional Law Review* 14 (2),

will essentially elaborate this idea through Article 2 TEU[102] and embody an assessment of the exact content of its values.

Although Article 2 TEU works as a legal standard of assessment, it cannot be interpreted as meaning that the Member States are fully bound by the entire fundamental rights *acquis*, since this is expressly prevented by the Charter and the Treaty itself.[103] On the contrary, it aims at safeguarding the essentials which are 'common to the Member States',[104] covering long-standing national traditions[105] used by several constitutional courts, and infringements of certain rights which cannot be justified in accordance with the CJEU's case law.[106] For instance, in *Tele2 Sverige,*[107] the CJEU ruled that the right to freedom of expression (Article 11 of the Charter), constitutes one of the EU's foundational values under Article 2 TEU and it is an essential foundation of a pluralist democratic society.[108]

The right to effective judicial protection, largely unprotected and exposed during the financial crisis, also falls under Article 2 TEU, not only because it constitutes a component of the 'rule of law', but also because it is undoubtedly connected to the 'respect for human rights'. Relatively early in the case law, the Court insisted that the Union is based on the rule of law and has built up in its case law a catalogue of elements inherent to the rule of law, within the meaning of Article 2 TEU,[109] including the principle of separation of powers,[110] the principle of effective judicial protection[111] and effective application of EU law.[112] Consequently, a violation of the rule of law principle under Article 2

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pp. 332–368, 340 *et seq*.; Rivers, J. (2006). Proportionality and Variable Intensity of Review. *The Cambridge Law Journal* 65 (1), pp. 174–207, 176 *et seq.*

102 Conclusions of the Presidency of 21–22 June 1993 (SN 180/1/93).

103 Article 51(1) of the Charter and Article 6 TEU.

104 Von Bogdandy, A. et al. (2012). Reverse Solange, cit., p. 500.

105 The need to protect the essence of fundamental rights and not to impose any unjust limitations is expressly enshrined in most of the national Constitutions or EU Charters: Article 19(2) German Basic Law, Article 4(2) Czech Fundamental Rights Charter, Article 8(2) Hungarian Constitution, Article 30(3) Polish Constitution, Article 18(3) Portuguese Constitution, Article 49(2) Rumanian Constitution, Article 13(4) Slovakian Constitution, Article 53(1) Spanish Constitution.

106 von Bogdandy, A. et al. (2012). Reverse Solange, cit., p. 491.

107 Court of Justice, judgment of 21 December 2016, joined cases C-203/15 and C-698/15, *Tele2 Sverige AB*.

108 Nakanishi, Y. (2018). The EU's Rule of Law and the Judicial Protection of Rights. *Hitotsubashi Journal of Law and Politics* 46, pp. 1–12, 5.

109 The term 'rule of law' was enshrined in Article 6 TEU by the Treaty of Amsterdam 1997.

110 Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas.*

111 Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*; *Schrems*, cit.

112 Nakanishi, Y. (2018). The EU's Rule of Law and the Judicial Protection of Rights, cit., p. 11; Brkan, M. (2018). The Concept of Essence of Fundamental Rights in the EU Legal

TEU would likely aggravate a fundamental rights infringement, undermine the basic foundations of the EU legal order and the substantive meaning of Union citizenship.[113] Such infringements, amounting in their extent and seriousness to the total inexistence of the fundamental right's essence, cannot be adequately remedied within a Member State, but rather at the Union level, through the use of a federalising tool.[114] However, the use of Article 2 TEU in the proposed test, does not aim to establish its infringement, but is rather used as a safety valve towards including only the 'essentials' within Article 20(2).

2 *Second and Third Step: Another Use of Rights*

After defining the essence of Article 2 TEU – delimiting the content eligible to be judicially incorporated into the '*inter alia*' list – the next step is to assess the scope of application of the respective Charter right or general principle, to determine its compatibility with the doctrine. The infringement under dispute must finally constitute a deprivation in accordance with the *Zambrano* doctrine and not a mere inconvenience or impediment, so as to satisfy the proposed test and challenge rights-violating measures outside a strict interpretation of the scope of EU law.

As a result of this divergence in interpretations of Article 51(1), the test's wording is not entirely unambiguous.[115] The question is thus to what extent the Court of Justice could interpret the scope of the Charter so as to fall within the substance of the rights doctrine. On the one hand, if the 'implementation' concept is adopted according to *Åkerberg Fransson*,[116] the Charter can be considered applicable in situations 'falling within the scope of EU law' and be invoked in relation to the substance of the rights doctrine.[117] On the contrary, if the Court cleaves to its narrow interpretation, this does not necessarily prevent the application of EU fundamental rights in purely internal situations,[118] depending on the extent to which the narrow scope of the Charter can restrain

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Order, cit., p 340 *et seq*.; Court of Justice, judgment of 20 November 2017, case C-441/17, *Commission v. Poland*; *Associação Sindical dos Juízes Portugueses*, cit., para. 31.

113 Opinion of AG Poiares Maduro delivered on 12 September 2007, case C-380/05, *Centro Europa 7*, para. 22; Guidance can be drawn from the interpretation given to the criterion of a 'serious and persistent breach' under Article 7(2) TEU.

114 von Bogdandy, A. et al. (2012). Reverse *Solange*, cit., p. 501.

115 The explanations relating to the Charter of Fundamental Rights (2007) OJ C 303/02, state that the Charter 'is only binding of the Member States when they act in the scope of Union law'.

116 *Åkerberg Fransson*, cit.

117 van den Brink, M.J. (2012). EU Citizenship and EU Fundamental Rights, cit., p. 282.

118 *Ibid.*, p. 287.

the scope of those general principles as well.[119] The prevailing view in this article is that the scope of application of the Charter is narrower than that of general principles of EU law and the narrow scope of the former cannot affect that of the latter.

After the pragmatic Opinion of AG Bot in *Scattolon*,[120] the Court in *Associação Sindical dos Juízes Portugueses* clarified that Article 19(1) TEU can be applied in full, even if the Charter does not apply, in a far-reaching demonstration of the Court's judicial activism in favour of European integration.[121] It is therefore safe to say that at least in the case of effective judicial protection, general principles of EU law have a broader scope of application than the Charter rights, with the latter not affecting the former's application. Accordingly, the argument put forward by AG Mengozzi that the Charter prevents the inclusion of EU fundamental rights in the substance of the rights doctrine is not entirely correct,[122] or at least is not the only possible explanation. That being the case and due to the complexity of the Charter's scope, fundamental rights as general principles are more likely to be found eligible to be included in the substance of the rights doctrine as part of the new jurisdictional test.

3 *The Paradigm of Effective Judicial Protection*

A link between fundamental rights as general principles of EU law and the substance of the rights doctrine is accordingly attainable, provided that the relevant principle of EU law is an 'essential' under Article 2 TEU and its scope of application is broader than that of Article 20 TFEU. Although this possibility is arguably achievable for several principles, that of effective judicial protection is the most suitable for examination, since it has been a vulnerable and constantly-violated right during the recent financial crisis, and recent judicial developments have substantially added to its significance.[123]

The concept of 'effective judicial protection' is dual-faced, occasionally referred to by the Courts as a self-standing 'principle'[124] of EU law or as a 'fundamental

119 Editorial Comments (2010). The Scope of Application of the General Principles of Union law: An Ever Expanding Union. *Common Market Law Review* 47 (6), pp. 1589–1596, 1590.

120 Opinion of AG Bot, *Scattolon*, cit., para. 120.

121 *Associação Sindical dos Juízes Portugueses*, cit., para. 29.

122 Opinion of AG Mengozzi delivered on 29 September 2001, case C-256/11, *Dereci and Others*, paras. 37–39.

123 Alston P., and Weiler, J.H.H. (1999). An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights. In: Alston, ed., *The EU and Human Rights*. Oxford: Oxford University Press, p. 200.

124 Court of Justice, judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 39; Court of Justice, judgment of 1 April 2004, case C-263/02 P, *Commission*

right' under the Charter.[125] It *inter alia* entrusts the responsibility to ensure judicial review in the EU legal order both to the Court of Justice and to the national courts and tribunals.[126] As discussed above, the Court made clear in *Associação Sindical dos Juízes Portugueses* that the scope of application of Article 19 TEU is broader than that of Article 47 of the Charter.[127] Through a particularly interesting legal reasoning, the Court built on 'operationalising' Article 2 TEU, by stating that Article 19 TEU, 'gives concrete expression to the value of the rule of law'.[128] Without offering any explanation on the applicability of the Charter, the Court overcame the barrier in Article 51(1) and exclusively relied on Article 19(1) TEU, merely by requiring the existence of a virtual link between the relevant national measures and EU law and thus enabled natural and legal persons to challenge a broader set of national measures using this route.[129] This ruling has created a national legal obligation to safeguard judicial independence based on a combined reading of Articles 2, 4(3) and 19(1) TEU, regardless of whether the situation falls within the scope of EU law. The judgment has far-reaching consequences for effective judicial protection, since the Court went beyond the minimum effective necessity of the national remedies needed to ensure the application of EU law and gave the green light to proceed with the proposed jurisdictional test.[130]

The new approach towards Article 19 TEU, is believed to have a great resemblance with the substance of the rights doctrine, since both were developed by the Court of Justice as the main actor, through the exercise of judicial activism. Moreover, they aimed to overcome the barrier created by the restricting provision of the Charter's scope, while at the same time, both resulted in the enhancement of citizens' rights protection. There are however significant dissimilarities between them, namely the substance of the rights doctrine constitutes a tool for claiming EU legal jurisdiction, which is only triggered when

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v. Jégo-Quéré, para. 29; Court of Justice, judgment of 16 July 2009, case C-12/08, *Mono Car Styling*, para. 46.

125 Court of Justice, judgment of 29 January 2009, case C-275/06, *Promusicae*, para. 62; Leczykiewicz, D. (2010). 'Effective Judicial Protection' of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law. *European Law Review* 35 (3), pp. 326–348, 330.

126 Nic Shuibhne, N. (2013). *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*. Oxford: Oxford University Press.

127 *Associação Sindical dos Juízes Portugueses*, cit., para. 32.

128 *Ibid.,* paras. 29–38.

129 *Ibid.,* paras. 27–29; Pech, L., and Platon, S. (2018). Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juízes Portugueses*. *EU Law Analysis*, available at http://eulawanalysis.blogspot.com.cy/2018/03/rule-of-law-backsliding-in-eu-court-of.html.

130 Pech, L., and Platon, S. (2018). Rule of Law backsliding in the EU, cit.

a deprivation of the genuine enjoyment of the substance of the rights under Article 20 TFEU occurs.[131] It can thus be characterised as a moderately invasive approach, which must be used as a last resort to preserve the effectiveness of EU law. In contrast, the development of Article 19(1) TEU[132] constitutes a new general obligation, regardless of whether the matter falls within the scope of EU law. It is therefore more invasive, since it essentially created a federal standard of review for the principle of judicial independence that can now be directly invoked before national courts, demonstrating that the Court of Justice does not hesitate to issue courageous decisions to secure EU law.[133]

This article proposes a practical tool for claiming jurisdiction under EU law, rather than a general obligation, to enable the review of national breaches of the rule of law occurring outside the areas covered by the EU's *acquis*. Beyond the scope of the Charter, applicants challenging austerity measures have not been able successfully to invoke EU fundamental rights, although numerous assistance packages were clearly granted through EU-established mechanisms, unless the substance of the rights doctrine were triggered and the matter were brought within the scope of EU law. According to the current proposal, if an infringed right whose substance had been deprived by a national measure was not expressed within the list of Article 20(2), the '*inter alia*' clause applies, suggesting that citizens can also enjoy the protection of other rights.[134] The delimitation of the 'eligible' rights is best achieved using Article 2 TEU, without aiming to establish its infringement, but it is rather used as a boundaries-indicator. Subsequently, the scope of application of the respective Charter right or general principle, is assessed to determine its compatibility with the doctrine.

VI Concluding Remarks

Recent judicial developments, including the substance of the rights doctrine, have built on the constitutional perspective of EU citizenship,[135] by *inter alia*

131 *Ruiz Zambrano*, cit., para. 44.

132 *Associação Sindical dos Juízes Portugueses*, cit.

133 Taborowski, M. (2018). CJEU Opens the Door for the Commission to Reconsider Charges against Poland. *Verfassungsblog*, available at https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/.

134 See, Eeckhout, P. (2002). The EU Charter of Fundamental Rights, cit., p. 980 *et seq.*; Da Cruz Vilaça, J.L., and Silveira, A. (2017). The European Federalisation Process and the Dynamics of Fundamental Rights. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 133 *et seq.*

135 Hailbronner K., and Thym, D. (2011). Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* (*ONEm*). *Common Market Law Review* 48 (4), pp. 1253–1270.

proving that the list of rights the Treaties express is not exhaustive, but can rather incorporate 'unwritten' rights.[136] More importantly, they have granted further opportunities for reinforcing EU fundamental rights protection, such as the proposed expansion of the substance of the rights doctrine towards including the principle of effective judicial protection, when a deprivation of the substance of the rights under the principle of effective judicial protection occurs. Nevertheless, strong objections against such a proposal can be raised. The proposed expansion of the doctrine can easily be perceived as a threat to the system of allocation of competences. However, no such contradiction occurs, because Article 2 TEU is employed as a safety valve, confining the expansion of the proposal with the requirement for a deprivation of the substance of the rights, which safeguards national identities, provided that the foundations and the effectiveness of EU law are not eroded.

Moreover, conflicts with other Treaty provisions can emerge, including with Article 25(2), which allegedly prevents the desired judicial incorporation of fundamental rights into citizenship status. However, this does not constitute an absolute obstacle to judicial incorporation, since the procedural limitations are read as applying to the legislature only,[137] thus ensuring the constitutional legitimacy of a judicial incorporation. The use of Article 2 TEU could also raise arguments that the 'values on which the Union is built' are illusory in a number of respects.[138] Although an *acquis* on values would give it more weight, the increasing use of the provision in the Court's case law proves the opposite.[139] Moreover, no conflict with Article 7 TEU can arise, since the proposal is not intending to turn Article 2 TEU into black-letter law or establish its violation, but rather to 'operationalise' it, by shaping the essence of the values expressed therein, which also constitute basic rights to be enjoyed by EU citizens.[140]

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136 Kochenov, D. (2013). The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon? *International and Comparative Law Quarterly* 62, pp. 97–136, 100.

137 Düsterhaus, D. (2017). EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 643 *et seq.*

138 Kochenov, D. (2013). On Policing Article 2 TEU Compliance – Reverse *Solange* And Systemic Infringements Analyzed. *Polish Yearbook of International Law* 33, pp. 145–170, 150 *et seq.*

139 *Associação Sindical dos Juízes Portugueses*, cit.; General Court, judgment of 3 February 2017, case T-646/13, *Minority SafePack – one million signatures for diversity in Europe v. Commission*; Court of Justice, order of 17 July 2014, case C-505/13, *Yumer*; Court of Justice, order of 12 June 2014, case C-28/14, *Pańczyk*; General Court, judgment of 10 May 2016, case T-529/13, *Izsák and Dabis v. Commission.*

140 Kochenov, D. (2013). On Policing Article 2 TEU Compliance, cit., p. 160.

All in all, the proposal is fully in line with the doctrinal and jurisprudential approaches towards Union citizenship and will arguably allow citizens facing effective judicial protection violations, including those faced during the financial crisis, to bring their cases within the scope of EU law, provided that the requirements described above are satisfied. Further rights can also be protected through this proposal if the test is satisfied, with equality and non-discrimination rights constituting the most likely candidates, considering that during the crisis, the disputed measures were commonly challenged before the Court as being discriminatory and that the general principle of non-discrimination has long been established within the EU legal order. Although the proposal's reach is limited, it would definitely overcome the barrier imposed by Article 51(1) of the Charter and safeguard the 'substance' of the 'essential' rights which must be included in the list of EU citizenship rights. It is also believed that such an incorporation in practice would prompt the Court to be more willing to claim jurisdiction, while the current imbalance between the EU's purposes would be largely restored, by acknowledging that the enjoyment of rights continued to lie at the heart of the EU, even during the financial crisis.

CHAPTER 5

Free Movement of Dual EU Citizens

*David A.J.G. de Groot**

1 Introduction

Nationality is a curious good. You either have it, or you don't; you can acquire it and you can lose it; you can have one or multiple. The problem for those with multiple nationalities is that only one at a time can be applied to each specific situation. The question then is, which nationality is applied to which specific situation?

In the book that was launched at the conference where this *Chapter* was first introduced,[1] AG Szpunar and Blas López wrote that situations where the nationality of a person does not reflect the Member State of origin where this person was born and always resided, and situations of dual EU citizens "should be taken into account, firstly, by the EU legislator and, secondly, by the Court of Justice in its interpretation of EU law, to prevent Union citizenship becoming in part a victim of its own success".[2] In many cases where nationality is a connecting factor for the establishment of rights, the Court only considers the implications of the judgment on dual EU citizens when they are a party to the case, but fails to do so when they are not a party.[3] However, it is not only the EU

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1 Kochenov, D., ed. (2017). EU Citizenship and Federalism: The Role of Rights. Cambridge: Cambridge University Press. At the conference *EU Citizenship, Federalism and Rights*, Luxembourg, 18–19 November 2017.

2 Szpunar, M., and Blas López, M.E. (2017). Member State Nationality. In: Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 122–123.

3 The Court of Justice did consider it in *Bogendorff von Wolffersdorff* and in *Freitag*, where the applicants were dual EU citizens. However, for example in *Runevič-Vardyn* the fact that there was a dual EU citizen child of the applicants was mentioned and that he was born after the case was submitted and therefore couldn't be an applicant, but for the effects of the judgment it seemed to be not considered. Nor did the Court even consider what would happen if Sayn-Wittgenstein had also had the German nationality next to the Austrian one. Such a situation would have led to a clash of constitutions. Court of Justice: judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*; judgment of 8 June 2017, case C-541/15, *Freitag*;

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legislator and the Court, but also academia that should take more account of the free movement rights of dual EU citizens. There is extensive literature that touches upon the subject of dual nationality in general. This mostly relates to topics of whether it should be allowed or not;[4] private international law;[5] loyalty issues;[6] political participation;[7] whether or not one should renounce the other Member State's nationality upon naturalisation in another Member

judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn*; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*.

4 See, *i.a.*, de Groot, G.-R., and Vink, M. (2008). *Meervoudige nationaliteit in Europees perspectief: een landenvergelijkend overzicht, Voorstudie voor de Adviescommissie voor Vreemdelingenzaken*. Den Haag: ACVZ; Faist, T., ed. (2007). *Dual Citizenship in Europe: From Nationhood to Societal Integration*, Aldershot: Ashgate; de Groot, G.-R. (2006). Een pleidooi voor meervoudige nationaliteit. In: Faure and Peeters, eds, *Grensoverschrijdend recht*. Antwerpen/Oxford: Intersentia; de Groot, G.-R., and Schneider, H.E.G.S. (2006). Die zunehmende Akzeptanz von Fällen mehrfacher Staatsangehörigkeit in West-Europa. In: Menkhaus and Sato, eds., *Japanischer Brückenbauer zum deutschen Rechtskreis.* Berlin: Duncker&Humblot; de Groot, G.-R. (2003). The Background of the Changed Attitude of European States in Respect to Multiple Nationality. In: Kondo and Westin, eds., *New Concepts of Citizenship: Residential/Regional Citizenship and Dual Nationality/Identity.* Stockholm: CEIFO.

5 See, *i.a.*, Pfeiff, S. (2017). *La portabilité du statut personnel dans l'espace européen. De l'émergence d'un droit fondamental à l'élaboration d'une méthode de la reconnaissance.* Bruxelles: Bruylant; Franzina, P. (2013). The Evolving Role of Nationality in Private International Law. In: Annoni and Forlati, eds., *The Changing Role of Nationality in International Law.* London: Routledge; Vonk, O. (2012). *Dual Nationality in the European Union. A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of the Member States*. Leiden/Boston: Martinus Nijhoff Publishers; Vonk O. (2011). De rol van dubbele nationaliteit voor toegang to the Unieburgerschap en voor rechts – en Forumkeuzebevoegdheid in het Europese international privaatrecht. *Nederlands Juristenblad* 27, pp. 1760–1766; de la Pradelle, G. (2002). Dual Nationality and the French Citizenship Tradition. In: Hansen and Weil, eds., *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe.* New York: Berghahn Books; Verwilghen, M. (1999). Conflits de nationalités, plurinationalité et apatridie. *Recueil des cours de l'Académie de droit international de la Haye*, pp. 9–484.; Dethloff, N. (1995). Doppelstaatsangehörigkeit und Internationales Privatrecht. *Juristenzeitung* 50 (2), pp. 64–73; Boele-Woelki, K. (1981). *Die Effektivitätsprüfung der Staatsangehörigkeit im niederländischen internationalen Familienrecht.* Deventer: Kluwer.

6 See, *i.a.*, Spiro, P.J. (2017). Multiple Citizenship. In: Shachar, Bauböck, Bloemraad, and Vink, eds., *The Oxford Handbook of Citizenship.* Oxford: Oxford University Press; Jones-Correa, M. (2001). Under Two Flags: Dual Nationality in Latin American and Its Consequences for Naturalisation in the United States. *International Migration Review* 35 (4), pp. 997–1029.

7 See, *i.a.*, Bauböck, R. (2007). Stakeholder Citizenship and Transnational Political Participation. A Normative Evaluation of External Voting. *Fordham Law Review* 75 (5), pp. 2393–2447; Spiro, P.J. (2003). Political Rights and Dual Nationality. In: Martin, and Hailbronner, eds., *Rights and Duties of Dual Nationals: Evolution and Prospects.* New York: Kluwer Law International.

State;[8] and more general questions of loss[9] and acquisition of nationality,[10] and an independent EU citizenship.[11] There is furthermore quite abundant literature concerning purely internal situations,[12] which focuses either on persons who only possess the nationality of the Member State of residence, or on dual EU citizens who have never moved or have a Third Country background.[13]

However, free movement law as applied to dual EU citizens who have already moved is an almost forgotten issue in recent years.[14] It used to be an issue of interest before 2011,[15] when a dual EU citizen was considered a "Super Citizen" based on the *Garcia Avello* case.[16] At the time, Alina Tryfonidou stated

8 See, *i.a.*, Kochenov, D. (2011). Double Nationality in the EU: An Argument for Tolerance. *European Law Journal* 17 (3), pp. 323–343.

9 Concerning loss of nationality there have in recent years been many publications concerning dual nationals, where it concerns deprivation of nationality on grounds of terrorist activities: *i.a.* de Groot, G.-R., and Vonk, O. (2015). De ontneming van het Nederlanderschap wegens jihadistische activiteiten. *Tijdschrift voor Religie, Recht en Beleid* 6 (1) pp. 34–53; Wautelet, P.R. (2017). Deprivation of Citizenship for "Jihadists". Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment. *Recht van de Islam* 30, p. 49 *et seq.*

10 See, *i.a.*, Witte, N. (2014). Legal and Symbolic Membership. Symbolic Boundaries and Naturalisation Intentions of Turkish Residents in Germany. *EUI Working Paper RSCAS* 2014/100.

11 See, *i.a.*, Margiotta, C., and Vonk, O. (2010). Nationality Law and European Citizenship: The Role of Dual Nationality, *EUI Working Paper RSCAS* 2010/66.

12 See, *i.a.*, Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe. *Legal Issues of Economic Integration* 35 (1), pp. 43–67; Lenaerts, K. (2011). 'Civis Europeaus Sum': From the Cross-border Link to the Status of Citizen of the Union. *Online Journal on Free Movement of Workers within the European Union* 3 (6), pp. .

13 Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin. In: Guild, ed., *The Reconceptualization of European Union Citizenship.* Leiden: Brill, pp. 173–176.

14 It is considered in some Opinions of AGs. See e.g.: Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*; Opinion of AG Kokott delivered on 25 November 2010, case C-434/09, *Shirley McCarthy*; Opinion of AG Sharpston delivered on 12 December 2013, case C-456/12, *O, B, S and G*; Opinion of AG Szpunar delivered on 20 May 2014, case C-202/13, *Sean Ambrose McCarthy*; Opinion of AG Bot delivered on 30 May 2017, case C-165/16, *Lounes*.

15 On 5 May 2011 the Court of Justice rendered the ruling in case C-434/09, *Shirley McCarthy*.

16 Court of Justice, judgment of 2 October 2003, case C-148/02, *Garcia Avello*. After *Garcia Avello*, Thomas Ackermann had argued that a dual EU citizen could never fall within a purely internal situation as long as (s)he had residence in an EU Member State. Dimitry Kochenov wrote that "[a]ll of them [read: dual EU citizens] are now within the scope *ratione materiae* of EU law whatever happens". After *Shirley McCarthy*, Janek Nowak stated that this was obviously not the case. See: Ackermann, T. (2007). Case C-148/02, *Carlos Garcia Avello v. Etat Belge*. *Common Market Law Review* 44 (1), pp. 141–154, 146; Kochenov, D. (2010). Citizenship Without Respect: The EU's Troubled Equality Ideal. *Jean Monnet*

quite clearly what seemed to be on the minds of many scholars dealing with dual citizens and reverse discrimination: "In my view, reverse discrimination is discrimination based on the ground of 'non-contribution to the internal market'. This is due to the fact that, in cases of reverse discrimination, the only person/traders that are disadvantaged and discriminated against are those that rely on EC law against their own Member State and cannot show the existence of the requisite link with the fundamental freedoms".[17] Since dual EU citizens can establish an intracommunity connection from their other Member State's nationality, they are able to rely on Community law; hence free movement law applies to them in all cases. Indeed, at the time this could have been validly argued based on the existing case-law. However, with the *Shirley McCarthy* case, things changed, and have, nearly unnoticed, become worse and worse for dual EU citizens.[18]

One can now find statements like "[w]ith dual citizenship, migrants can freely pursue economic opportunity in states of original and adopted citizenship, a benefit to growing numbers of circular migrants".[19] This is correct, but solely for the dual citizen, not for his Third Country National (TCN) family members, because all applicable laws concerning family reunification would be national legislation, and not derived rights from EU law. That is, until *Lounes* was decided by the Court.[20]

In this *Chapter*, a couple of constellations of movement of dual EU citizens will be discussed, introduced by explaining beforehand the system of ranking, movement, and the mobility quality. Special attention will first be given to the "right to return" case-law, where the Court created a double condition, which has detrimental effects on dual EU citizens moving between the Member States of nationality.[21] Thereafter, the *Lounes* constellation will be explained,

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Working Paper 8/2010, p. 47; Nowak, J.T. (2010). Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'Emploi (Onem) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department. *Columbia Journal of European Law* 17 (3), pp. 673–704, 703.

17 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law.* Alphen aan de Rijn: Kluwer Law International, p. 19.

18 Tryfonidou, A. (2012). Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* Trilogy. *European Public Law* 18 (3), pp. 493–526, 511.

19 Spiro, P.J. (2017), Multiple Citizenship, cit., p. 635.

20 Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*. See also on the case with a different analysis: Gualco, E. (2018). Is *Toufik Lounes* Another Brick in the Wall? The CJEU and the On-going Shaping of the EU Citizenship. *European Papers – European Forum*, *Insight* 3 (2), pp. 911–922, available at europeanpapers.eu.

21 "Right to return" or "returners" refers to its meaning according to the case-law of the Court of Justice of the European Union on persons who resided in a Member State (of which they did not have the nationality) and then returned to the Member State of nationality. EU law grants in these cases a retention of rights which is not necessarily provided for in

where the Court ruled on the situation of a naturalised dual EU citizen and the continued application of Art. 21 TFEU. This case has to be dissected in detail, as it creates more issues than it solves. These questions relate, first of all, to whether *Lounes* applies only in a Member State of naturalisation and only for as long as that naturalised dual EU citizen stays there, or whether it applies anywhere in the EU. Secondly, it has to be considered to whom the case applies. This second part relates to the mode of acquisition of the additional nationality and whether a certain genuine link has to exist in order for the case to apply. The argument continues with the question whether *Lounes* only applies to dual EU citizens, or whether it also applies to any other "single" EU citizens who lost the original Member State nationality upon naturalisation in another Member State. If the case were to only apply to the dual EU citizens, it is then argued that Member States would have to be restricted concerning nationality laws which establish automatic loss of nationality upon acquisition of another nationality and rules on acquisition which require a renouncement of the previously held nationality. When looking at the potential consequences of this case applying to any "single" EU citizen who had the nationality of another Member State before acquiring the one of the Member State of residence, we see a legal and practical distinction between own nationals, which is prohibited. The Court would then have no choice but to change the "right to return" case-law and to revisit cases where the nationality of another Member State was lost, leading to a loss of rights. It is concluded that the Court has to make a choice: either apply *Lounes* only to dual EU citizens and consequently restrict severely the competences of Member State in nationality law; or apply it to any EU citizen who has made use of the free movement rights, which means that extensive case-law has to be changed.

11 Setting the Scene

11.1 *Applicable Nationality – Ranking and Mobility Quality*

Applicable nationality is a matter of recognition of nationality, but principally a matter of giving effect to a nationality. A State has to recognise that a person has the nationality of another state based on International Law; whether it

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the general provision of "right to return" in international law, as established in *i.a.* Art. 12, para. 4, of the International Covenant on Civil and Political Rights (ICCPR). Concerning this general right see Edwards, A. (2014). The Meaning of Nationality in International Law in an Era of Human Rights. In: Edwards and van Waas, eds., *Nationality and Statelessness under International Law.* Cambridge: Cambridge University Press, pp. 35–38.

applies this nationality, which is connected to a certain set of rights, or another, which is connected to a different set of rights, is another issue.[22] While in International Law, based on *Nottebohm*,[23] a genuine-link principle or most-effective-nationality principle is applied, in EU law there is a sort of ranking of nationalities, based especially on *Micheletti*.[24] Depending on the legal situation, be it applicable law to the name, or applicability of Directive 2004/38/EC, the ranking is different.[25]

One can distinguish four different ranks of nationality in EU law. These ranks are the Third Country nationality (TC), the Privileged Third Country nationality (TC+),[26] the nationality of a Member State other than the Member State of residence or destination (MS) and the nationality of the Member State of residence or destination (Home MS).[27]

With these four ranks one can have nine different combinations of dual nationalities (see Table 5.1)[28]:

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22 Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco*, advisory opinion of 7 February 1923.

23 International Court of Justice, *Nottebohm* (Liechtenstein v. Guatemala), judgment of 6 April 1955.

24 Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti*.

25 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.

26 A State with whom the Union has a bilateral (or multilateral) agreement which grants certain rights to its nationals. After Brexit also the UK will be part of this category, if a trade agreement is concluded. See for an overview of different TC+ Countries and rights (until 2010): Wiesbrock, A. (2010). *Legal Migration to the European Union, Ten Years after Tampere.* Nijmegen: Wolf Legal Publishers, p. 97 *et seq.* For specifically the status of citizens of the European Free Trade Association (EFTA) states, which I consider only the most privileged of the TC+, see: García Andrade, P. (2014). Privileged Third-Country Nationals and Their Right of Free Movement and Residence to and in the EU: Questions of Status and Competence. In: Guild, Gortázar Rotaeche, and Kostakopoulou, eds., *The Reconceptualization of European Union Citizenship.* Leiden: Brill Nijhoff, p. 111 *et seq.*

27 The point of view for MS and Home MS rank nationality is always the Member State where certain rights are to be applied. A dual French-German person from the point of view of the Netherlands, thus a Member State of which the person does not have the nationality, has a "MS/MS" combination of nationalities. From the point of view of France or Germany the person would have a "Home MS/MS" combination.

28 Diagonal pattern means that the person is an EU citizen. A "Home MS/Home MS" constellation for the nationality purpose is impossible, as it would mean that a person has two nationalities which are, however, of the same Member State. It is therefore shaded with a grid pattern. As will be seen for the movement factor this is different as one can move between two Member States of nationality.

TABLE 5.1 Dual nationality combinations

Nationality 2 / Nationality 1	Third Country	Third Country + (TC+)	Other MS (MS)	Residence/ Destination MS
Third Country	TC/TC			
Third Country+	TC+/TC	TC+/TC+		
Other MS	MS/TC[a]	MS/TC+	MS/MS	
Residence/ Destination MS	Home MS/TC	Home MS/TC+[b]	Home MS/MS[c]	Same nationality

a *Micheletti*, cit.

b Court of Justice, judgment of 12 March 2012, case C-7/10 and C-9/10, *Kahveci and Inan*.

c If mover: Right to return case-law (*Singh*/*Eind*/*O&B*, cit., see sections 11.3 and 11.4). If non-mover: *Shirley McCarthy,* cit. If naturalised: *Lounes,* cit.

Based on the case-law of the European Court of Justice it can be established that of these types of nationality, in case of application of Directive 2004/38/EC, the Home MS's nationality is ranked highest.[29] This leads to many (possible) conflicts where it concerns dual EU citizens, as the Directive might simply not be applied to the case on the ground that the dual EU citizen has the nationality of that Member State.

In EU free movement law and migration law, what is worth most is the MS rank. The MS rank takes precedence over the TC and TC+, based on the *Micheletti* case-law, which ruled that having the nationality of another Member State is enough to fall within the ambit of EU law. Regardless of whether the *genuine-link* with a TC rank nationality is greater, the MS rank always prevails.

The MS rank gives full access to the rights under the Treaties, especially Arts 20 and 21 TFEU, and access to Directive 2004/38/EC with the privileged family reunification rules concerning TCN family members. It is, however, limited by the condition that the person must have made use of his free movement rights. This I will call having activated the "mobility quality". It is furthermore limited by the requirement of having sufficient means, or by being a worker or self-employed. If these conditions are fulfilled it is granted all rights of a Home MS rank, with only a few exceptions, like the right to vote in national elections and

29 Except when it concerns a TC+ rank national who has naturalised in the "Home MS" while retaining the TC+ nationality. This would not lead to application of the Directive, but of that TC+ related Treaties and secondary legislation.

protection against expulsion (which is already very limited). These exceptions are even more limited when the person gains the long-term resident status. The MS rank is, however, ranked (for the moment) lower than the Home MS. Thus, for a dual EU citizen who has both the Home MS rank and an MS rank nationality (Home MS/MS), the Home MS takes precedence.

The Home MS nationality is on the one hand ranked highest, as it takes (at the moment) precedence over the others where it concerns nationality to which effect is given concerning migration law and free movement (except against TC+ when naturalised), but worth least in EU law, as all rules applicable to it are decided by the Member State in question. These can be as limited or as generous as the Member State desires. As was stated before, the only rights that the Home MS has and the MS does not, are the rights to vote in national elections, and to absolute protection from expulsion from the Home MS. The Home MS nationality can be turned into an MS nationality i.a. by movement to an MS State, thus activating the "mobility quality". This mobility quality also functions to prevent that certain rights are lost which were previously acquired and made use of while it was an MS rank.

This rank has to be combined for certain cases with a "movement" or a change of purpose factor of the Member State ("residence" to be used in cases of naturalisation or renouncement).

There are in total twelve different types of movement, as is shown in Table 5.2.[30]

To give some examples:

– a dual EU citizen moving from a Member State of which he has the nationality, to a Member State of which he does not have the nationality is "MS/MS movement Home MS/MS";[31]
– a dual EU citizen moving between the Member States of nationality is "Home MS/MS movement Home MS/Home MS";[32]

30 Diagonal pattern means EU law applies, or at least to a certain extent. Horizontal pattern means EU law might indirectly apply depending on the relation between the TC+ and the EU. Vertical pattern means EU law probably does not apply. If the mobility quality was activated once in a lifetime though, it would be favourable if it continued to be effective even if an individual between residence in an MS and returning to a Home MS resides in a TC. No pattern concerns any move to a TC where EU free movement law obviously is not applicable.

31 The nationality ranks are both MS rank, as the point of view has to be the Member State of destination.

32 As the point of view of only the Member State of destination has to be taken, only one of the nationalities of the person is a Home MS rank, the other nationality is MS rank, irrespective of the fact that the person came from another Member State of nationality. For

TABLE 5.2 Movement and residence changes

Previous residence/ destination country	Third Country	Third Country+	Other MS	Residence MS (home MS)
Third Country	TC/TC	TC+/TC	MS/TC	Home MS/TC
Third Country+	TC/TC+	TC+/TC+	MS/TC+	Home MS/TC+
Other MS	TC/MS	TC+/MS	MS/MS	Home MS/MS
Destination MS (home MS)	TC/Home MS	TC+/Home MS	MS/Home MS	Home MS/Home MS[a]

[a] It is argued in this *Chapter* that *Lounes*, cit., implies that also in a Home MS/Home MS move Art. 21, para. 1, TFEU applies.

– an EU citizen that is born and continues to reside in a Member State of which (s)he is not a national is "MS residence MS";[33]
– an EU citizen that naturalises in the host Member State while retaining the other Member State's nationality is "Home MS/MS residence MS/ Home MS".[34]

On the contrary, when one considers the case-law of the Court on names' recognition, the Member States' nationalities are equal, and the dual EU citizen may choose between the two. A Member State can only refuse to recognise a name established by the law of the other Member State of nationality if there is an absolute constitutional prohibition.[35]

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the movement it is different. There both the point of view of the Member State of origin and the Member State of destination have to be considered. As the EU citizen moving between Member States of nationality is considered by either as its national, it is "movement Home MS/Home MS".

33 It is "residence MS" as there is no actual movement between Member States. This is the *Catherine Zhu* constellation. Court of Justice, judgment of 19 October 2002, case C-200/ 02, *Zhu and Chen*.

34 It is "residence MS/Home MS" as before naturalisation the Member State of residence was not a Member State of nationality. With the naturalisation the function of this Member State changes, as it becomes a Home MS. "Residence" makes clear that there is no factual movement between states, but that it is a function change of the Member State of residence.

35 One has to distinguish in the case-law of the Court "absolute constitutional prohibitions" from "conditional and inconsistently applied constitutional prohibitions". Whereas the first can justify a refusal to recognise the name, the latter also has to fulfil the condition of proportionality. In my view, in the case of dual EU citizens, a conditional and especially an

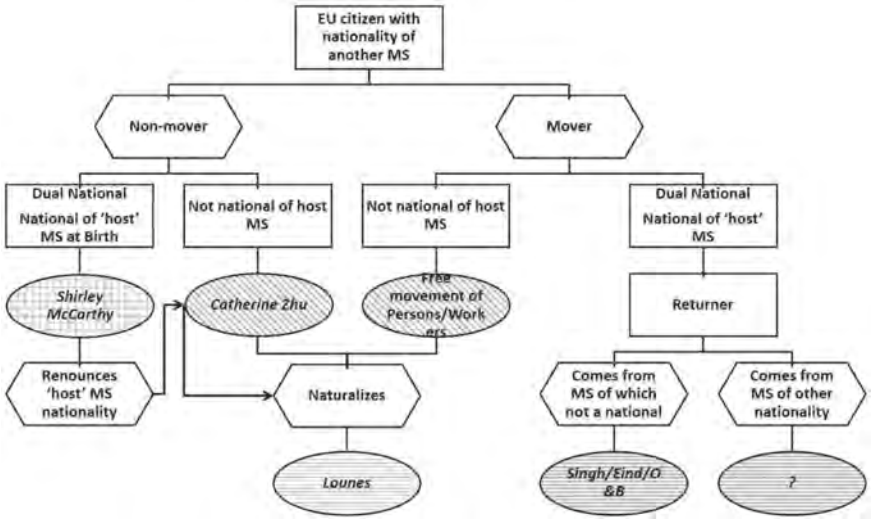

FIGURE 5.1 Applicable law to dual EU citizens

11.2 *Constellations*

There are many different constellations and lines of case-law in free movement law. If one considers the free movement of persons and workers, and EU citizenship cases,[36] the entire setting where it concerns family reunification under Directive 2004/38/EC looks like this Picture.[37]

I will especially address the *Lounes* and the "returner" constellations.

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inconsistently applied constitutional prohibition, can never justify a restriction, since it cannot be proportional. To give some examples of different types: in *Sayn-Wittgenstein* it concerned an absolute constitutional prohibition; in *Bogendorff von Wolffersdorff* it concerned a "conditional constitutional prohibitions" and in *Runevič-Vardyn* it concerned an inconsistently applied constitutional prohibition.

36 I exclude here case-law like *Carpenter* which is in free movement of services and technically could apply to a dual national living in the Member State of nationality, if one compares them to persons having only the nationality of the Member State of residence (Court of Justice, judgment of 11 July 2002, case C-60/00 *Carpenter*). *Carpenter* would add thus an additional category to "Non-Mover" – "Dual National-National of the host MS at Birth" => "Grant Services abroad", if the answer is yes *Carpenter* applies, if the answer is no, *Shirley McCarthy* would apply. However, if services are provided abroad that means that there must be sufficient means or that the person is a worker or self-employed. In the argumentation used in this *Chapter*, this should be already enough to make a *Shirley McCarthy* case a *Catherine Zhu* constellation by ranking the other MS nationality higher than the Home MS nationality.

37 To explain the shapes and colours of the boxes: Shapes: *a*) Square means a characteristic of the person, like nationality; *b*) Oval/Round means applicable law or case-law; *c*)

11.3 *Right to Return – Conditions* (*Home MS*(*/MS*) *Movement MS/ Home MS*)

In *O and B*[38] the Court in essence set out three conditions[39] for the right to return,[40] which have to be fulfilled next to the exhaustive list of documents required based on Art. 8, para. 2, and Art. 10, para. 2, of the Directive, which is applicable by analogy:[41]

a) the Union citizen made use of his free movement rights under the Directive by application of Art. 7, para. 1, or even Art. 16, para. 1, of the Directive;[42]

b) the family life must have been established, or the TCN must have joined the Union citizen while the Union citizen was exercising his rights under Art. 7, para. 1, or Art. 16, para. 1;[43]

c) the family member must have had residence in the host Member State based on Union law, specifically Art. 7, para. 2, or Art. 16, para. 2, of the Directive.[44]

The *O and B* case is considered to facilitate circular migration. This is, however, only true to the extent that it concerns a person who comes from a Member State of which he is not a national. When it concerns a dual EU citizen coming from a Home MS, who is moving to another Home MS, *O and B* is anything but a facilitator; it is indeed an impediment.

Hexagon means (non-)action by the person; Patterns: a) Diagonal (*Catherine Zhu* and Free movement of Persons/Workers) means EU Free movement lawfully applicable (incl. Directive 2004/38/EC); *b*) Vertical (*Shirley McCarthy*) means purely internal situation; *c*) Horizontal means applicability of EU Free movement law is (yet) unclear (?) and EU free movement law is only in so far applicable that it has been used before (thus Directive 2004/38/EC applicable by analogy: *Singh/Eind/O and B*). In the case of *Lounes* the horizontal pattern is looser because the rule that the rights must have been used before does not apply. In the schematics the person always has the nationality of another Member State, thus MS rank nationality. If Catherine Zhu had theoretically at birth somehow been granted several other Member State nationalities, but not the one of residence (thus MS/MS rank), the situation would have been the same.

38 Court of Justice, judgment of 12 March 2004, case C-456/12, *O and B*.

39 *Ibid*., para. 57.

40 Previous case-law on the right to return: Court of justice, judgment of 7 July 1992, case C-370/90, *Singh*; Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*. See also: Berneri, Ch. (2017). *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens.* Oxford/ Portland: Bloomsbury Publishing, especially pp. 43–63; Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers: *O and B,* and *S and G*. *Common Market Law Review* 52 (3), pp. 753–777.

41 *O and B*, cit., para. 50.

42 *Ibid.*, paras. 51 and 56.

43 *Ibid.*, paras. 54–55.

44 *Ibid.*, para. 54.

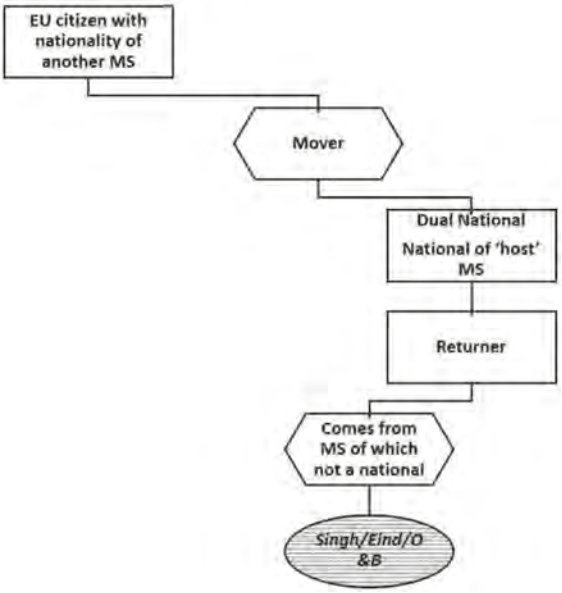

FIGURE 5.2 Constellation right to return from MS

11.4 *"Circular" Right to Return* – (*Home MS/MS Movement Home MS/ Home MS*)

In *O and B*, the Court seems to have forgotten to take into account dual nationals and how its case-law applies to them. The reason is that the Court wanted to emphasise an issue concerning the *Shirley McCarthy* case. This concerned the application of the Directive to nationals of the Member State of residence.

The Court stated that "[i]t follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national".[45] From a teleological interpretation, the Court argues that the aim of the Directive is to "facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States" as is stated in Art. 1, let. a), of the Directive.

Here, the Court emphasises the point that one is actually exercising that right.[46] By "move", the Court seems to mean a movement within the territory

45 *Ibid.*, para. 37.
46 *Ibid.*, para. 41.

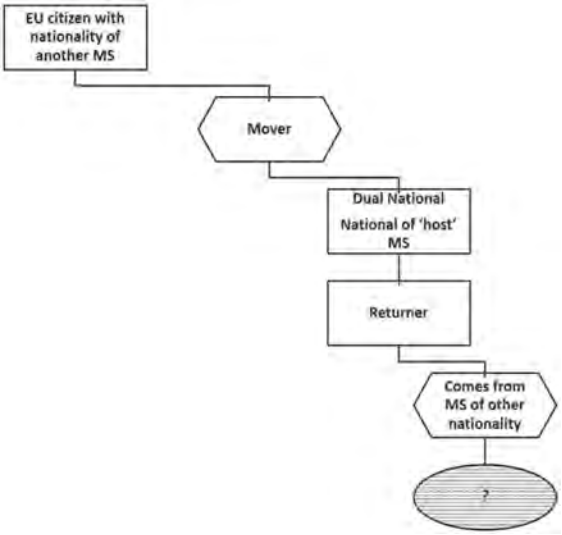

FIGURE 5.3 Constellation right to return from home MS

of the Union, and "reside" refers to the territory of all the Member States minus one, the Home Member State.

The Court also mentioned that, because international law does not allow a State to refuse to its own nationals the right to enter and remain there, the Directive only applies to cases where the Union citizen wants to enter a Member State of which he is not a national.[47] Thus, the Court states that "Directive 2004/38 is therefore also not intended to confer a derived right of residence on third-country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national".[48] Derived rights of residence for a TCN family member of a Union citizen who resides in a Member State of nationality would only be possible in some circumstances based on Art. 21 TFEU.[49] As stated before, the Directive would apply by analogy in these cases, but not directly.

There is a serious problem here when one considers dual nationals. The Court has made the right to return conditional upon the Directive having already been applicable before, while it has made the Directive conditional upon not having the nationality of the "host" Member State. This double condition can only affect dual EU citizens in a negative way.

47 *Ibid.*, para. 42.
48 *Ibid.*, para. 43.
49 *Ibid.*, para. 44.

Let's consider a dual German-Romanian national who was born and grew up in Germany. At a certain moment, this person moves to Romania and works there for a couple of years. In this period, he marries a TCN. Because he has Romanian nationality, the authorities do not allow family reunification based on the Directive, but they are kind enough to give a national residence permit to the spouse. After some time in Romania, the couple decide to go to Germany. The German authorities, however, refuse the right to return on the following grounds, based on the previous three criteria set out:

a) the EU citizen did not have a residence right in Romania based on Art. 7, para. 1, of the Directive, but an autonomous right because he is a Romanian national;

b) because the EU citizen did not have an Art. 7, para. 1, based residence right, the TCN spouse is considered not to have joined him while he was exercising this right;

c) consequently, the TCN spouse did not have an EU residence permit under Art. 7, para. 2, or Art. 16, para. 2, but merely a national residence permit.

As the Directive has never been applicable to the case, it can also not be applied by analogy.

This constellation highlights the challenge for circular migrating dual EU citizens.

First of all, the fact that the dual citizen is not considered to be exercising his rights under Art. 7, para. 1, of the Directive while he is moving to another Member State. If he had not had Romanian nationality, this would clearly have been an Art. 7, para. 1, residence. Only the fact that he is a dual national puts him in a disadvantaged position.

The second point is the specific condition that the Court imposed, that the TCN family member must have had a derived residence right under Art. 7, para. 2, and Art. 16, para. 2, of the Directive. What if the TCN has a residence right on his own, like a blue card or national residence card? In *Eind* the Court stated that:

> Community law does not require the authorities of that State [the home Member State] to grant a right of entry and residence to a third-country national who is a member of that worker's family because of the mere fact that, in the host Member State where that worker was gainfully employed, that third-country national held a valid residence permit issued on the basis of Article 10 of Regulation No 1612/68.[50]

50 *Eind*, cit., para. 26.

The national authorities could, therefore, just ignore this fact.

As the Court of Justice seems to believe that the Directive does not apply in such cases of dual nationals moving between the Member States of which they are nationals, it would also be highly doubtful whether it would consider Art. 7 of the Charter of Fundamental Rights of the European Union (Charter) to be applicable in such a case. This happens despite the fact that there is an obvious cross-border element, and in all other cases the Directive, meaning an implementing act in the sense of Art. 51, para. 1, of the Charter, would be applicable.

It is very unfortunate that this case of the dual German-Romanian national is not just a theoretical scenario meant to describe the disadvantages for dual nationals, but it is an actual case from 2016 where the *Bayerischer Verwaltungsgerichtshof* had to decide on a family reunification case with a dual German-Romanian citizen who had lived his entire life in either Germany or Romania.[51] The Court considered it unclear, though it refrained from referring a preliminary question to the Court of Justice, whether a person who has the nationality of two Member States and moves from one to the other in order to work, has made use of his free movement rights and whether – upon returning to the first Member State after four years – the right to return also applies.[52] The uncertainty about this was based upon the reason that the dual EU citizen had always lived in a Member State of which he has the nationality.[53]

Let's consider now that this German-Romanian dual EU citizen moved first to Greece and benefited from family reunification there based on the Directive, which is applicable because he is not a national of Greece. He then moves to Romania, and the Directive applies by analogy, and therefore family reunification is granted. But if he would move then from Romania to Germany, would the Directive, which was applicable by analogy in Romania, again be applicable by analogy?

The entire situation looks even more curious if one considers another German-Romanian, Mircea Florian Freitag, who moved between both Home Member States in order to have his name changed to the original Romanian version, which he wanted to be recognised in Germany, his other state of nationality. His case was decided only recently, in June 2017.

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51 Administrative Court of Munich, judgment of 20 January 2016, 10 C 15.723.

52 *Ibid.*, para. 46.

53 Germany has altered its administrative guidelines in the meantime concerning this aspect to allow the applicability of the free movement rights. Administrative Guidelines on the Implementation of the Freedom of Movement Act of 3 February 2016 (Germany), *Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU*, section 1.4.2.

In *Freitag,* the Court stated that "[a]ccording to settled case-law, a link with EU law exists in regard to nationals of one Member State lawfully resident in the territory of another Member State [...].That is the case as regards the applicant in the main proceedings, who is a Romanian national and is resident in the territory of the Federal Republic of Germany, of which he is also a national".[54] Furthermore, the Court considered that making recognition of the name established by another Member State conditional upon having the habitual residence there – which means in essence that Art. 7, para. 1, of the Directive is applicable to the person – is a restriction of the free movement rights.[55]

The Court therefore states the opposite in *Freitag,* where it concerned names, from what it ruled in *O and B*, where it concerned family reunification. This issue has now been addressed in *Lounes*.

11.5 *Naturalisation* – Lounes (*Home MS/MS Residence MS/Home MS*)

On 14 November 2017, the Court of Justice gave its judgment in the *Lounes* case, which concerns a person who has the nationality of one Member State, moved to another Member State, and naturalised there while retaining the first Member State's nationality. The question addressed to the Court was whether Directive 2004/38/EC would still apply to that person after naturalisation. The Court of Justice had to make a choice between two lines of case-law:

a) the "right to return" case-law, which would mean that the Directive ceased to be applicable to the person upon naturalisation, and only rights previously made use of (e.g. family reunification was applied for before naturalisation) would be retained by analogy. This is a logical option, since the only difference between the right to return and naturalisation is that the "movement" change is replaced by a "residence factor" change; or

b) the TC+ naturalisation cases, where it was decided that preferential rights on migration acquired under the legal framework applicable to nationals of a TC+ continue to be applicable after naturalisation.[56]

This second option concerns the *Kahveci and Inan* case-law.[57]

As was explained concerning the ranking, privileged Third Countries are called here TC+. This does not mean that each of these countries has the same rights. Some have more than others. Swiss citizens have, due to the Bilateral Treaties, nearly equal rights with EU citizens, and the same applies to nationals

54 *Freitag*, cit., para 34.

55 *Ibid.*, para. 39.

56 Meaning, cases concerning persons who had at naturalisation the nationality of a TC+ and who were able to retain this other nationality.

57 *Kahveci and Inan*, cit.

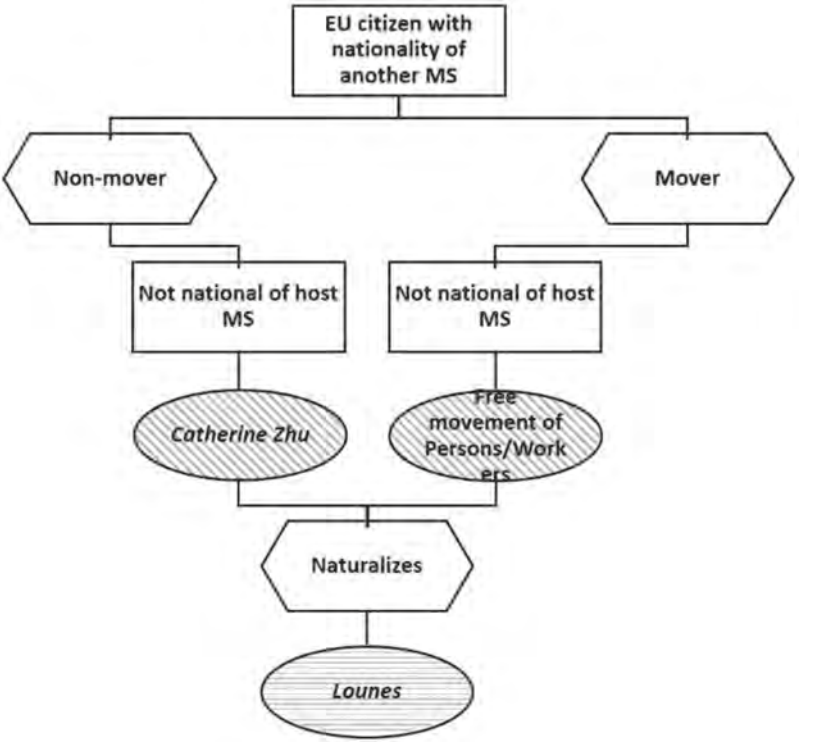

FIGURE 5.4 Constellations lounes

of the EEA States.[58] Others have fewer rights but are still quite privileged, such as Turkish nationals who benefit from the EEC-Turkey Association Agreement[59] and Decision 1/80.[60]

58 *I.a.* Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Final Act – Joint Declarations – Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products.

59 Agreement establishing an Association between the European Economic Community (EEC) and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963.

60 Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association.

In *Kahveci and Inan,* the question was whether a Turkish national could still invoke Decision 1/80 after he had acquired the nationality of the host State, *in casu* the Netherlands, while retaining Turkish nationality.[61] The Court stated that "[a] rule [...] providing that the rights conferred by the first paragraph of Article 7 of Decision No 1/80 can no longer be relied upon where the Turkish worker who is already legally integrated in the host Member State has obtained Netherlands nationality, would have precisely the effect of undermining the legal status expressly conferred on Turkish nationals by the law resulting the EEC-Turkey Association Agreement".[62] Here, the Court made a similar argumentation as in *Micheletti*, though in this case, ironically, the third-country nationality gained preference, as more rights were attached to it than to having the nationality of the host State. The Court concluded that "Article 7 of Decision No 1/80 must be interpreted as meaning that the members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State can still invoke that provision once that worker has acquired the nationality of the host Member State while retaining his Turkish nationality".[63] This, however, only applies to cases where the TC+ rights concern family reunification, and not to other rights, such as social security.[64]

The reasoning behind this decision of the Court was that, if integration results in the loss of rights, this would lead to discouraging TC+s from pursuing the ultimate form of integration, "naturalisation".[65]

In his Opinion on *Lounes*, AG Bot comes, to a certain extent, to the same conclusion as the Court in *Kahveci and Inan*.[66] However, he makes things rather confusing, by not referring to this case-law.[67] Instead, he first applies option

61 It thus involved a "Home MS/TC+ residence MS/Home MS" constellation. It is not entirely clear whether the applicants had actually retained Turkish nationality or reacquired it while retaining the Dutch nationality. There is in the Netherlands a renouncement requirement of the previous nationality upon naturalisation, which can be waived in case it is (nearly) impossible to lose the other nationality. This is what might have happened. What is also possible is that they reacquired Turkish nationality while retaining the Dutch nationality which is also possible, through a derogation of the rule on automatic loss of nationality upon acquisition of another nationality if one is born there or it is the nationality of the spouse.

62 *Kahveci and Inan*, cit., para. 38.

63 *Ibid.*, para. 41.

64 This was at issue in Court of Justice, judgment of 11 November 1999, case C-179/98, *Mesbah*. See for this distinction: *Kahveci and Inan*, cit., para. 34.

65 *Kahveci and Inan*, cit., paras. 33 and 35.

66 Opinion of AG Bot, *Lounes*, cit.

67 In its judgment, the Court of Justice also did not refer to this case-law although it quite obviously was inspired by it.

1, coming to the conclusion that only rights attained before naturalisation can still be applied, but then changes his mind.[68]

If the Court had decided for option 1, this would have led to a consistent application of case-law unfavourable to dual EU citizens – unfavourable, but at least consistent. Still, this would mean that a naturalised TC+ would have more rights than a naturalised person who already was an EU citizen before.

Option 1 would have been especially problematic in the light of Brexit, because it would also mean that a person who naturalised in one Member State, who retained the nationality of another Member State – that has withdrawn from the Union under Art. 50 TEU and has negotiated a preferential trade agreement with the EU, including certain free movement rights – would suddenly be in a better position in the Home MS, than when (s)he was a dual EU citizen, since the person would be a TC+. This certainly cannot have been the intended outcome.

The Court decided for option 2, and thus made the other Member State's nationality effective concerning the application of Directive 2004/38/EC in a Home Member State; this leads to a situation where it is utterly unclear when the Directive is applicable to a dual EU citizen. This gives rise to questions such as "would it only apply to naturalised dual EU citizens, to the detriment of dual EU citizens who have both nationalities since birth?" or "can this second group get into the same situation by moving to another Member State, returning, and having a life-long application of the Directive; or only for a certain period? And what if they renounce one nationality, and then reacquire it?".

III *Lounes* Judgment

III.1 *Dual Nationality and the Directive – Home MS Rank Always Applicable*

Concerning the Directive, the Court considered that the purpose of it is to "facilitate the exercise of the primary and individual right to move freely within

68 Though, he also comes to a similar conclusion, while stating that Art. 21 TFEU should be applied because it would be conflicting with integration. The AG stated that "[t]o continue the family life which she has started, she would then be forced to leave that State [state of naturalisation] to move to another Member State in order to be able to claim once again the rights conferred by Directive 2004/38 and, in particular, the possibility of residing with her spouse". For Mrs Garcia Ormazabal and Mr Lounes this does not change the situation at all. Mrs Garcia Ormazabal and Mr Lounes did not have a family life before her naturalisation, but only four years afterwards. According to the facts she naturalised on 12 August 2009 and Mr Lounes only arrived in the UK in January 2010. Only in 2013 did they begin a relationship and married in 2014. Opinion of AG Bot, *Lounes*, cit., paras. 21–22.

the territory of the Member States", a right that is granted to EU citizens. Family members of these citizens have a derived right. However, the Court confirmed here that TCN family members cannot derive any autonomous rights from the Directive.[69] The Court furthermore reiterated what it had stated in *O and B*, that through a "literal, contextual and teleological interpretation", the Directive does not confer a derived right of residence to TCN family members of an EU citizen in his Home MS. The Court once again considered that the wording used in the Directive – "Member State other than that of which they are a national", "another Member State" and "host Member State" – clearly indicates that it is not supposed to be applicable in a Member State of which the person is a national.[70] The Court also stated that the Directive only governed the exercise of the free movement rights (and consequently not the retention of these rights).[71]

Moreover, the Court considered that the Directive is not intended to grant the right of entry and residence in the Home MS since, based on a principle of international law, a Member State cannot refuse such a right to its own nationals. Since the EU citizen already has an unconditional right of residence in the Member State of nationality, the Directive is consequently not intended to grant a derived right of residence to the TCN family members of such a person.[72]

Applying these considerations to the case, the Court concluded that there is no doubt that Mrs García Ormazábal had indeed exercised her right of free movement when she moved to the UK, as a Spanish national. She therefore had held the status of beneficiary under Art. 3, para. 1, of the Directive and had resided there based on Art. 7, para. 1, and even Art. 16, para. 1, of the Directive. However, this had changed when she naturalised. According to the Court the "acquisition of British citizenship gave rise to a change in the legal rules applicable to her, under both national law and the directive".[73] From the moment of naturalisation she ceased to be a beneficiary for the purpose of the Directive,

69 This is actually not entirely correct. Art. 13, para. 2, of the Directive concerns the retention of the right of residence by a TCN family member in case of divorce, annulment of marriage or termination of the registered partnership. Under the conditions set in that article, the residence is retained. The article furthermore states that "[s]uch family members shall retain their right of residence exclusively on personal basis". One cannot but understand this "exclusively on personal basis" as meaning that it concerns an autonomous right.

70 *Lounes*, cit., paras. 34–35.

71 *Ibid.*, para. 36.

72 *Ibid.*, para. 37.

73 *Ibid.*, paras. 38–39.

as her residence was no longer a conferred right, but an inherently unconditional right under national law.[74]

The fact that she still had Spanish nationality, or that she had exercised her free movement rights did not change this. The Court considered that, despite these conditions, Mrs García Ormazábal had, since her naturalisation, no longer "been residing in a 'Member State other than that of which [she is] a national' ".[75] Consequently, the Directive is not applicable to the Home MS/MS combination as the Home MS rank gains preference.

Thus far, the judgment is not very surprising; the statements made by the Court concerning Art. 21, para. 1, TFEU are, however, far-reaching.

III.2 *Dual Nationality and Art. 21, Para. 1, TFEU*

Concerning Art. 21, para. 1, TFEU the Court considered, first, that just like the Directive, Art. 21, para. 1, TFEU does not grant an autonomous right of residence to the TCN family member of an EU citizen, but only a derived right of residence. The "purpose and justification" for this derived right are based on the fact that the refusal would interfere with the free movement rights, its exercise, and its effectiveness accorded to the EU citizen.[76]

The government of the UK argued that it concerned a purely internal situation. The Court disagreed with this, considering that a situation where an EU citizen has made use of the free movement rights by residing legally in another Member State cannot be treated as a purely internal situation solely on the ground that the person has acquired the nationality of the Member State of residence. The Court emphasised, referring to *Freitag,* that it "has already held that there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals".[77]

The Court went on, stating that a dual EU citizen who has exercised the free movement rights by moving to a Member State other than "the Member State of origin", may rely on the rights pertaining to EU citizenship "also against one of those two Member States", meaning the Member States of nationality. This specifically includes, according to the Court with reference to *Metock*, the right "to lead a normal family life, together with their family members, in the host

74 Read the purpose of the Member State of residence has changed concerning the movement and residence indications as explained in section II.1.

75 This means that the Home MS rank nationality gains priority over the MS rank nationality for the purpose of the Directive, irrespective whether the mobility quality was activated.

76 *Lounes*, cit., paras. 45–48.

77 *Ibid.*, paras. 49–50.

Member State". Denying this right to a dual EU citizen who has naturalised in the Member State of residence would undermine the effectiveness of Art. 21, para. 1, TFEU.[78]

The Court then provides several grounds for this.

First of all, denying this right would place Mrs García Ormazábal in the same situation as Shirley McCarthy, who had not made use of the free movement rights.

Secondly, the rights conferred by Art. 21, para. 1, TFEU are intended for integration into the host Member State. Naturalisation is the show of intent "to become permanently integrated in that State". It would be illogical, according to the Court, that an EU citizen who has acquired rights by making use of the free movement rights, would have to "forego those rights" because (s)he wants to naturalise in order to be more deeply integrated into the society of that State.[79]

The Court further stated that an EU citizen who had acquired the nationality of the Member State of residence next to the original Member State nationality would be treated less favourably for the purpose of family life than the EU citizen who holds only the nationality of origin. The Court considered that these rights "would thus be reduced in line with their increasing degree of integration in the society of that Member State and *according to the number of nationalities that they hold*".[80] The last part of the sentence is rather cryptically formulated – one should consider for this the situation described above concerning the consequences of Option 1 (applying *O and B* strictly to the case), which would result in a situation where a person having the nationalities of every Member State would never be able to derive rights from the Directive and consequently from EU law.

The Court concluded that a person who naturalised in the Member State of residence, while retaining the original nationality of another Member State, should be able to continue to enjoy the rights derived from Art. 21, para. 1, TFEU, especially the right to "build a family life" with the TCN spouse, by means of a derived right of residence for the spouse. The conditions for granting this derived right of residence should not be stricter than those provided for in the Directive, as was already stated in *O and B*.[81]

78 *Ibid.*, paras. 51–53.

79 *Ibid.*, paras. 56–58. It is very remarkable, that the Court did not make any reference on this point to *Kahveci and Inan*, cit., while the argumentation is identical and the wording extremely similar.

80 *Lounes*, cit., para. 59 (emphasis added).

81 *Ibid.*, paras. 60–61.

III.3 *Discussion*

This case is interesting from many points of view.

Essentially, the Court ruled that a dual EU citizen who has made use of free movement rights can always rely on Art. 21, para. 1, TFEU, even in a Home MS, and that this includes *Metock*-type situations. Therefore, the TCN family member does not need to have had prior legal residence in the EU to have a derived right of residence in the Home MS. The Court further confirmed the theory presented in this *Chapter*, of giving effect to nationality and the mobility quality.

It is curious, though, that for certain issues, and especially concerning the integration argument, the Court seems to draw considerable inspiration from *Kahveci and Inan*, but does not refer to it at all. This is even more surprising considering that the referring Court had explicitly relied on this case.

It also left both *Shirley McCarthy* and *O and B* standing in full, which will cause some new legal questions, as will be explained below.

a) For the Directive: Home MS rank nationality highest. As regards giving effect to nationality according to the Directive, the Court made it absolutely clear with its detailed analysis that the Home MS rank nationality gains absolute priority over any other nationality. With this, the Court limited *Shirley McCarthy* even further, by excluding the MS rank nationality of a dual EU citizen from being applicable to the Directive in a Home MS, even if they have made use of their free movement rights.[82] As explained above in section II.4, the Court had already done this in *O and B*, but without direct reference to it also being applicable to dual EU citizens.
Thus, the Court has now confirmed that the Directive is not applicable in a situation such as above, concerning circular dual EU citizens moving between the two Home MS. This is the case even if the first move is to the other Home MS, and where no other link exists with that Member State except for the nationality.

b) Confirmation of giving effect to a nationality and the mobility quality. As the Directive is not directly applicable, one has to check whether the mobility quality is activated, which puts the MS rank nationality above the Home MS rank nationality, for the purpose of Art. 21, para. 1, TFEU.

82 In *Shirley McCarthy*, cit., para. 39, the Court still concluded that "*in so far as the Union citizen concerned has never exercised his right of free movement* and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Art. 3(1) of Directive 2004/38, so that that directive is not applicable to him" (emphasis added). This "in so far as" could be considered as a limitation that excluded her from the scope. With *Lounes* it is now confirmed that even if she had made use of the free movement rights Shirley McCarthy would not have been covered directly by the Directive.

> The Court stated in *Lounes* that "[a] Member State cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement".[83]

This as such is nothing new, considering that in *Micheletti* and in *Zhu and Chen* the Court had already stated that a Member State cannot restrict the rights derived from an MS rank nationality. The rights are thus attached to the MS rank nationality and are "triggered" by the exercise of free movement rights, which means the mobility quality becomes activated.

IV "New" Issues

There are some problems in this judgment, with possibly large implications, because on some points, the Court was not very clear, while on others, it was too detailed.

This especially concerns the type of nationality acquisition and retention of the other MS nationality.

In its conclusion, the Court set out certain conditions. These were based on the manner in which the questions had been phrased by the referring Court. The Court should maybe have deviated a bit from this, since it makes certain issues unclear, meaning that these conditions will have to be reinterpreted at a later stage.

The Court stated that a TCN family member of an EU citizen who:

a) has made use of the free movement rights, specifically Art. 7, para. 1, or Art. 16, para. 1, of the Directive; and
b) has acquired the nationality of the Member State of residence; and
c) has retained the nationality of the other Member State; and
d) marries several years later with the TCN; and
e) continues to reside in "that Member State", meaning the Member State of naturalisation, has no right of residence under the Directive, but has that right under Art. 21, para. 1, TFEU for which the conditions on entry and residence may not be stricter than under the Directive.

Here, the Court was too specific and there will surely be national courts who will interpret this as follows: "It is now clear that a dual EU citizen who has moved to another Member State and who acquires that Member States nationality, while keeping his first nationality, still has the rights accorded to him by the Directive by analogy afterwards in the Member State of naturalisation".

83 *Lounes*, cit., para. 55.

In all other situations, this right of residence might be refused, even though this would be a very narrow and incorrect interpretation of *Lounes*.

Instead, the Court should have stated something like:

- The Directive is never applicable to an EU citizen holding the nationality of the Member State of residence, irrespective of whether such an individual also holds the nationality of another Member State.
- The TCN family member of an EU citizen who holds, irrespective of the timing and mode of acquisition of these, the nationality of more than one Member State, and who has exercised his/her freedom of movement by residing either in a Member State other than that of which (s) he is a national, under Article 7(1) or Article 16(1) of the Directive, irrespective whether the EU citizen later acquired the nationality of this Member State, or, in a Member State of which he is a national other than the Member State in which he was born, while fulfilling the conditions as provided for in Article 7(1) of the Directive applied by analogy, shall have a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a TCN who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

This is a bit more technical, but would have solved multiple issues, which are unclear because of the specific wording of the Court.

In the following analysis, the multiple questions left open by *Lounes* will be considered.

IV.1 *Does* Lounes *Apply Only in the Member State of Naturalisation? – Geographical Scope*

If read strictly, one might consider that Mrs García Ormazábal retained her rights due to the fact that she never left the UK again after her naturalisation.

Such consideration must be denied. As stated above, the Court held that there does exist a link with EU law for dual EU citizens who reside in a Home MS, based on *Freitag*. The Court consequently ruled that a dual EU citizen, who has exercised the free movement rights in a Member State other than the Member State of origin – which one should read as Member State of birth – continues to rely on the rights derived from Art. 21, para. 1, TFEU, "also against one of those two Member States".[84]

84 *Ibid.*, para. 51. In French, the language of drafting at the Court it also contains the specific numericals: "compris à l'égard de l'un de ces deux États membres".

One could take this literally, as meaning that the dual EU citizen can rely on it against one of the two, but not against both. Against the other Member State of nationality, rules like the ones set out in *O and B* would apply. This cannot, and may not, be argued.

Freitag concerned a dual EU citizen moving between the two Home MS, who wanted a civil status, the name, which had been changed in one Home MS during a period similar to Art. 6, para. 1, of the Directive, to be recognised in the other Home MS, where he resided. Consequently, it applies in both Home MS.

If it were to mean that it applied only in the Home MS of naturalisation, and only for as long as the naturalised dual EU citizen does not move away again, this would have as a consequence that once again moving to another Member State would become very unattractive, since afterwards, the less favourable case-law would apply. It would also mean that the naturalised dual EU citizen might have to prove when applying for a residence permit for the TCN spouse, that (s)he has not yet made use of the free movement rights by moving to another Member State since the naturalisation. It can be quite cumbersome, if not even impossible, to prove a negative.

Lounes consequently must apply both in the Home MS of origin and the Home MS of naturalisation. Thus, the case *Lounes* applies only to applications of family reunification in any Home MS. A dual EU citizen in an MS country has an MS/MS combination and consequently either the *Zhu and Chen* or the *Micheletti* constellation applies.

This, however, could also mean that the Home MS of origin would have to treat a dual EU citizen who naturalised in another Member State differently from someone who did not naturalise in the host Member State and then returns, since *O and B* would still be applicable to the latter.

This leads to an essential question: to whom exactly does *Lounes* apply?

IV.2 *To Whom Does* Lounes *Apply? – Individual Scope*

More specifically, the question is: does *Lounes* only apply to dual EU citizens, or also to any naturalised EU citizens who previously had the nationality of another Member State and subsequently lost this nationality? To get to the latter part, one must first consider what the consequences would be if *Lounes* were to apply only to dual EU citizens.

a) Does *Lounes* apply only to naturalised dual EU citizens? This question is going to be crucial.

According to Art. 5, para. 2, of the European Convention on Nationality (ECN), to which many Member States are party, "[e]ach State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently".

According to the Explanatory Report to the Convention, "shall be guided by" indicates a declaration of intent and not a mandatory rule. The explanatory report further clarifies that it is aimed at "eliminating the discriminatory application of rules in matters of nationality between nationals at birth and other nationals, including naturalised persons". It then explicitly states that Art. 7, para. 1, let. b), is an exemption from this rule, which concerns loss of nationality because of acquisition by fraudulent means.[85] One should thus consider that only profound reasons could allow for a deviation from this general principle of non-discrimination based on the mode of acquisition.

If *Lounes* were to apply only to dual EU citizens who acquired the nationality of another Member State at a later point in life through naturalisation, it would put naturalised dual EU citizens in a better position than "birth" dual EU citizens, which is prohibited by Art. 5, para. 2, ECN.

This would be unfair also because a "birth" dual EU citizen cannot "upgrade" his nationality status.

Limiting the scope of *Lounes* to naturalised dual EU citizens does not seem to have been the intention of the Court, as it states in para. 54 that "denying [the dual EU citizen] that right would amount to treating him in the same way as a citizen of the host Member State who has never left that State [read Shirley McCarthy], disregarding the fact that the national concerned has exercised his freedom of movement by settling in the host Member State". Even though it might not be the Court's intention to limit the effects of *Lounes* to naturalised dual EU citizens, we should still have a look at all the consequences that different forms of limited interpretation of the judgment might have concerning naturalisation.

b) Does *Lounes* apply to a specific mode of nationality acquisition or does it require a certain genuine link with the nationalities? Mrs García Ormazábal was naturalised, which requires a certain period of residence and proof of integration. The Court emphasised in its judgment that she had sought to become more "deeply integrated" or "permanently integrated". The Court also stated that there is an "underlying logic of gradual integration that informs Article 21(1) TFEU". She therefore retained her rights as EU citizen, because she had integrated.

However, only the ordinary naturalisation requires integration, whereas other modes of acquisition do not necessarily, especially where nationality is acquired abroad *iure sanguinis*, but also for facilitated naturalisations or acquisition by option.

85 Explanatory report to the ECN of 6 November 1997, paras. 45–46.

The nationality codes of the Member States are very diverse, and in each and every single one of them there are modes of facilitated acquisition of nationality, which require a shorter period of residence, or even no residence. With this, I do not refer only to Investment Citizenship, but also to any form of facilitated naturalisation e.g. spouses of nationals, children born out of wedlock if they do not acquire the nationality automatically upon recognition, or persons where a family member in ascending line was a national. This is even required by Art. 6, para. 4, ECN.

Could a Member State now refuse to give effect to the MS rank nationality of a dual EU citizen in the Home MS, because it was acquired via a facilitated mode of acquisition instead of through the ordinary naturalisation?[86]

It definitely could not. This would be an additional condition for recognition of the nationality of another Member State, as prohibited by the Court in *Micheletti*.

Furthermore, when applying for naturalisation, a person does not really have a choice for one mode of acquisition or another. If (s)he fulfils the conditions of a facilitated naturalisation that mode is applied, even though the higher set of conditions for another mode of acquisition would also be fulfilled.

On top of this, it would be legally impossible for a person to "upgrade" the nationality acquired by one mode, to the same nationality acquired by another mode. This is because nationals have to be treated equally, irrespective of how they acquired the nationality from the Home MS. The Member State of nationality is therefore even prohibited from providing for such an "upgrade", as that would explicitly acknowledge a different rank in status based on the mode of acquisition of nationality.

One should also consider that the Court accepted only on one occasion that a nationality of a Member State would not be applied, because of the way in which it had been acquired. However, there it concerned the Home MS rank nationality acquired *ex lege* by marriage to a national, which would otherwise have resulted in a loss of rights derived from the MS rank nationality.[87]

Furthermore, there are modes of facilitated naturalisation that do not require any residence. Would *Lounes* not be applicable in such a case?

Imagine the following situations:

– what if, a person of Hungarian origin would naturalise in Hungary in accordance with Section 4, para. 3, of the Act on Hungarian Citizenship, which

86 A similar question was asked by Steve Peers in his comment on the judgment. See: Peers, S. (2017). Dual Citizens and EU Citizenship: Clarification from the ECJ. *EU Law Analysis*, available at eulawanalysis.blogspot.com.

87 This was the *Airola* case. Court of Justice, judgment of 20 February 1975, case 21/74, *Airola v. Commission*.

does not require residence, but only knowledge of the language, while still residing in the other Member State of nationality?[88]

– what if, a child is born in a Member State of which it automatically acquires the nationality, and only at a later moment acquires the nationality of another Member State *iure sanguinis*, by registration, as that Member State has no automatic *iure sanguinis* abroad if only one parent is a national e.g. the situation of Slovenian nationality?

All these questions have the same answer.

Based on the principle of recognition of nationality and national jurisdiction concerning nationality, a Member State has to recognise the grant of nationality by another Member State and consequently that the person involved has become a dual EU citizen.

As was established in *Lounes*, what is important is that the person has had the mobility quality. If (s)he has never made use of the free movement rights, *Shirley McCarthy* applies.

Therefore, if at any moment before in life, a person has made use of free movement rights, he or she can derive rights from Art. 21, para. 1, TFEU on acquiring the nationality of the other Member State and becoming a "Home MS/MS residence Home MS/Home MS". In the latter situation though, the person must be a returner; thus, it would be rather curious that the mobility quality would first be dormant upon return, and only the rights previously used would be retained, because of attachment to the Home MS rank.[89] Conversely, without movement, but by acquiring the nationality of another Member State, the mobility quality would become reactivated for eternity, because of automatic attachment to the MS rank.

As will be explained, the Court must change its approach in *O and B,* where it concerns the application of rights after return.

Lounes must, at the minimum, be applied to any dual EU citizen, irrespective of the mode of acquisition of the nationalities. It therefore not only applies to ordinary naturalisations, but also to any form of naturalisation, as well as to "birth" dual EU citizens who have the mobility quality.

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88 Act LV of 1993 on Hungarian Citizenship of 15 June 1993 as amended by Act XLIV of 26 May 2010 (Hungary), 2010, *Évi XLIV. törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról.*

89 Has made use of the free movement rights means once upon a time "MS movement .../MS"; as the person resides at the time of acquisition of the other nationality in the Home MS, the person must have come back "Home MS movement MS/Home MS" and then consequently after acquisition of the other MS nationality become "Home MS/MS residence Home MS".

c) Must the individual have retained the other Member State nationality? The condition of retention of the previous Member State nationality is where the main crux in this story is. The Court emphasises on multiple occasions in the judgment concerning Art. 21, para. 1, TFEU that Mrs García Ormazábal had retained her nationality of origin.[90] Considering how restrictively certain national courts and governments interpret CJEU judgments, this can lead to the conclusion that, if the EU citizen does not retain the other MS rank nationality when naturalising in the Member State of residence, the case is not applicable.

Many Member States have introduced rules with exceptions for retention of the original nationality upon naturalisation if the original nationality is of one Member State, and/or have created an exception to the automatic loss of their nationality upon acquisition of another nationality, if this is the nationality of another Member State.

A logical reaction of the Member States to *Lounes* would be that these rules would once again be abolished. For, if Mrs García Ormazábal had not retained her Spanish nationality, the mobility quality would not have been attached to her MS rank nationality, but to the Home MS rank nationality. Consequently, as was seen in *O and B*, only the rights used before would have been retained, and the mobility quality for future use would have been lost, correct?

According to the Court's judgments in *Micheletti* and in *Rottmann*, Member States must, "when exercising their powers in the sphere of nationality, have due regard to European Union law".[91] The judgment of *Rottmann* has been discussed a lot in the literature and was considered by some to be surprising, despite the fact that this exact line of reasoning had already been put forward as far back as the 1980s and 90s.[92] One could thus wonder whether a duty to renounce the other Member State nationality upon naturalisation, or the automatic loss of the original Member State nationality, would be in accordance with EU law.

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90 *Lounes*, cit., paras. 49, 54, 60, and 62.

91 Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*, para. 45.

92 Greenwood, C. (1987). Nationality and the Limits of the Free Movement of Persons in Community Law. *Yearbook of European Law* 7 (1), pp. 185–210; Evans, A.C. (1982). Nationality Law and the Free Movement of Persons in the EEC. *Yearbook of European Law* 2 (1), pp. 173–189; Hartley, T.C. (1978). *EEC Immigration Law.* Amsterdam: North Holland Publishing Co., p. 78. According to Síofra O'Leary these authors argued that "[s]ince nationality is a means to define the personal scope of free movement and since it is also a means chosen by the Community, they argue that it is also a question for Community law, or at least on which Member States cannot unilaterally dispose of without reference to Community law". This is exactly what has happened in later case-law. O'Leary, S. (1992). Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows. *Yearbook of European Law* 12 (1), pp. 353–384.

d) Presuming that *Lounes* only applies to dual EU citizens: automatic loss upon acquisition of the nationality of another Member State. Automatic loss or withdrawal of one nationality upon acquisition of another used to be quite common practice back when dual nationality was still considered a bad thing. However, many Member States abandoned that practice,[93] although in some exceptional cases they then (re)introduced it.[94]

Art. 7, para. 1, let. a), ECN provides that such a mode of loss is permitted. However, if *Lounes* applies only to dual EU citizens, automatic loss of the original Member State nationality upon acquisition of another Member State's nationality would mean that EU citizens who "have acquired rights under [Art. 21, para. 1, TFEU] as a result of having exercised their freedom of movement, must forgo those rights [...] because they have sought, by becoming naturalised in [the other] Member State, to become more deeply integrated in the society of that [other] State".[95]

Therefore, one should consider the first case that truly concerned loss of EU citizenship based on loss of the nationality of a Member State: *Rottmann*.[96]

In that case, the Court decided that:

> [t]he provis[ion] that due regard must be had to European Union law does not compromise the principle of international law previously

93 Globalcit Database ground of loss L5. It was abandoned by Denmark in 2015 (law no. 1496 of 23 December 2014 (Denmark), *Lov om ændring af lov om dansk indfødsret* (*Accept af dobbelt statsborgerskab og betaling af gebyr i sager om dansk indfødsret*), in force since 1 September 2015). It still exists in Austria (Art. 27); Estonia (Art. 29); Ireland, but only for naturalised nationals who subsequently acquire another nationality (Art. 19, para. 1, let. e)); Germany, but is not applicable when acquiring the nationality of another Member State (Art. 17, para. 1, sub-para. 2, and Art. 25. The exception is mentioned in Art. 25, para. 1); Latvia, but provides that when one acquires the nationality of *i.a.* an EU Member State one retains Latvian nationality (Art. 23, para. 2, and Art. 24, para. 1, sub-para. 1. The exception for the nationality of another EU Member State is provided in Art. 9, para. 1, sub-para. 1); Lithuania (Art. 24, para. 2, and Art. 26); the Netherlands (Art. 15, para. 1, let. a), and Art. 16, para. 1, let. c) and e)); Slovakia (Art. 9, para. 1, let. b)); Spain, loss happens after three years of acquisition, but one can make a declaration within this period to retain the Spanish nationality (Art. 24, para. 1).

94 E.g. Slovakia in 2010 in response to the Hungarian changes on the grant of its nationality. Act no. 40/1993 on Citizenship of the Slovak Republic of 19 January 1993 as amended by Act no. 250/2010 of 26 May 2010 (Slovakia), *Zákon, ktorým sa mení a dopĺňa zákon Národnej rady Slovenskej republiky č. 40/1993 Z. z. o štátnom občianstve Slovenskej republiky v znení neskorších predpisov. Zbierka zákonov Slovenskej republiky č. 250/2010*.

95 With slight alterations, *Lounes*, cit., para. 58.

96 It is generally accepted that *Kaur* (Court of Justice, judgment of 20 February 2001, case C-192/99, *Kaur*) did not concern a loss of EU citizenship because she never had it. Therefore, *Rottmann* is the only case up until *Tjebbes*.

> recognised by the Court, [...] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law.[97]

The Court further stated in *Rottmann* "that the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality".[98]

This means that judicial review by the Member State of origin would also have to be applied if it wants to take away rights derived from EU law. A similar issue was under consideration in *Tjebbes*.[99] That case concerns the ground for automatic loss of the Dutch nationality for dual nationals while residing outside of the EU and without applying for a new Dutch identity document within ten years. Next to Dutch nationality, several of the applicants also have Swiss citizenship and reside in Switzerland. If the Swiss courts were to apply *Lounes*, which conflicts with their own recent case-law, a situation as in *Tjebbes* would mean that they had EU citizen rights, in Switzerland – irrespective of the fact that these were denied by the Swiss authorities – and would have lost them, due to the automatic loss resulting from living outside the territories of the EU.[100] The Court, however, in its judgment did not take this into consideration and even stated that all applicants had never made use of the

97 *Rottmann*, cit., para. 48.

98 *Ibid.*, para. 62.

99 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes*.

100 Up until 2016 dual EU-Swiss (EU-CH) citizens were considered to fall within the ambit of the bilateral treaties even when they had not made use of the free movement rights. Swiss Federal Supreme Court, judgment of 28 January 2016, C2_296/2015. See also Epiney, A., and Nüesch, D. (2016). Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen. In: Achermann, Amarelle, Caroni, Epiney, Künzli, and Uebersax, eds., *Jahrbuch für Migrationsrecht 2015/2016.* Bern: Stämpfli Verlag, p. 310. This changed when the courts decided to apply *O and B, S and G* and *Shirley McCarthy* to similar situations in Switzerland, while applying it to a dual EU-CH citizen who had made use of the free movement rights before. Swiss Federal Administrative Court, judgment of 10 February 2016, C-3189/2015; Swiss Federal Supreme Court, judgment of 20 January 2017, C2_284/2016.

free movement rights and, therefore, excluded Art. 21 TFEU from the scope of the case.[101]

In *Rottmann*, the Court stated that "[h]aving regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation [read 'the nationality'] it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union".[102]

Considering the fact that in *Lounes*, the Court accepted that the naturalised dual EU citizen continues to have family reunification rights derived from Art. 21, para. 1, TFEU, this has to include future family members. It is unfortunate, that the Court did not take the issue of Art. 21 TFEU into consideration in *Tjebbes*. While the Court decided that the nationality of a Member State may be lost while residing in a Third Country as long as certain conditions are fulfilled, it should have strongly distinguished this from the same person residing in a Member State or a TC+. By the exclusion of Art. 21 TFEU from the scope of the judgment, one might derive that different rules would have been applicable if such a loss by residence abroad could occur while residing in another Member State. The Court, however, should have replaced the application of Art. 21 TFEU, with the application of the Bilateral Treaties with Switzerland which do grant free movement rights.

If an automatic loss in a Member State would be permitted, it would also mean that persons from Member States which provide for automatic loss upon acquisition of another nationality would be less inclined to become "fully integrated" in another Member State, because they would lose their original Member State nationality and consequently any rights they derive from having an MS rank nationality. These EU citizens would be thus at a disadvantage compared to nationals from Member States that allow the retention of their nationality.

Although an instance of reverse discrimination, here the reason for the loss would be because the persons had made use of the free movement rights.

e) Presuming that *Lounes* only applies to dual EU citizens: duty to renounces the other Member State nationality. This question is maybe more straightforward than the previous one.

If *Lounes* only applies to dual EU citizens, then such a duty to renounce the other Member State nationality would mean that the EU citizens would have to forgo his acquired rights in order to naturalise in another Member State.

101 *Tjebbes*, cit., para. 28.

102 *Rottmann*, cit., para. 56.

Consequently, such a duty to renounce the other Member State's nationality upon naturalisation may not be required.

f) Presuming that *Lounes* only applies to dual EU citizens: conclusion. If *Lounes* only applies to dual EU citizens, it must have consequences for national rules concerning loss and acquisition of nationality. Specifically, it must have consequences for the rules on automatic loss of nationality upon acquisition of another nationality, and for the rules on duty to renounce the previous nationality upon acquisition.

One should take into account that these rules should not only apply where the previous nationality is the nationality of a Member State, but also where the previous nationality is of a TC+. It should furthermore apply to candidate states – which are already mostly TC+ – and also to any possible future candidate states. If not to the latter, these candidate states should, upon becoming Member States, create an option possibility for any former nationals who acquired the nationality of a Member State and consequently lost the former candidate state's nationality. The reacquisition of the nationality would not result in a loss of the Member State's nationality, since it would have been an acquisition of the nationality of another Member State.

g) Presuming that *Lounes* applies to any EU citizen who had the nationality of one Member State when acquiring the nationality of another Member State. Let us now look at the other side, and presume that *Lounes* applies to any EU citizen who had the nationality of one Member State when acquiring the nationality of another Member State, thus including individuals who had lost their original Member State nationality due to naturalisation. This yields an entirely different set of results and issues.

If *Lounes* were to apply only to naturalised EU citizens, it would mean that *Lounes* would clearly give an advantage to naturalised EU citizens, compared to those who did not acquire the nationality by naturalisation, but by another mode of acquisition. This is incompatible with Art. 5, para. 2, ECN.

Next to the legal problem, there are also practical implications. Either a Member State would have to check for every returner in turn whether the individual had acquired the nationality by naturalisation and what the previous nationality was, or the individual would have to prove this. The first option means that the Member State would actively have to make a distinction in its law and practice on registration between certain groups of its own nationals.

As this is not allowed, the Court would have to change its approach concerning *O and B* and also give the same rights as dual EU citizens in the Home MS to persons who only had one nationality at birth and subsequently never acquired another one. The Court recently decided on three cases concerning the right to return. The *Coman* case concerns the right to return as regards

same-sex marriages and the *Banger* case concerns the right to return as regards non-marital relationships.[103] In these cases, the Court could have considered the issue. It has not been addressed specifically in either case though, and the Court did not deal with it.[104]

However, in *Altiner and Ravn*, it concerns exactly the question of whether the mobility quality stays active after return.[105] The case concerned a Danish national married to a TCN, who resided together in Sweden. They returned to Denmark and were covered by the right to return. After a while, they requested family reunification with the son of the TCN spouse from a previous marriage, who was also covered as a privileged family member under Art. 2, para. 2, let. c), of the Directive. The son did, however, not reside with them in Sweden and consequently would be excluded from the scope set by *O and B*. This would have been the perfect opportunity for the Court to overrule or enlighten its judgment in *O and B*.[106]

That *Lounes* would apply to any naturalised EU citizen who previously held another Member State's nationality has, however, also other consequences. It means that the Court will have to rethink its case-law in other fields as well, like the *Baldinger* case.[107] This case concerned war victim benefits that were granted to Austrian nationals. Mr Baldinger was an Austrian national in the

103 Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and others*; Court of Justice, judgment of 12 July2018, case C-89/17, *Banger*.

104 In *Coman* the Court did refer multiple times to *Lounes* concerning the right to return in general. From this one can deduct that *Lounes* also applies in the Member State of birth and not only in the Member State of naturalisation. However, when it concerned the particular situation, the Court only referred to *O and B*. This distinction is probably due to fact that it concerned an accompanying family member and not a joining family member. *Coman and others*, cit., para. 24 compared to paras. 18, 20, 22, 23, 25.

105 Court of Justice, judgment of 27 June 2018, case C-230/17, *Altiner and Ravn*. It concerns a Danish national who had resided in Sweden with her Turkish spouse. They return to Denmark and later request family reunification with the son from a previous marriage of the Turkish spouse, which was denied by the Danish authorities based on *O and B*.

106 *Altiner and Ravn* was decided without an Opinion of AG Wahl. This means that AG Wahl probably considered that the "return" case-law, meaning *O and B*, is clear and should be applied directly to this case. This would mean that no "new" family reunification would be granted after return to Denmark. The Court followed this approach. Consequently, this means that there is a different line of case-law applicable to dual EU citizens and "single" EU citizens. This must have as a consequence that Member States are no longer permitted to provide for automatic loss of their nationality upon acquisition of another Member State's or TC+'s nationality, nor may the condition for acquisition be made that the previous nationality is renounced, where this nationality is of a Member State or TC+, as was explained *supra*.

107 Court of Justice, judgment of 16 September 2004, case C-386/02, *Baldinger*. I would like to thank Dominik Düsterhaus for drawing my attention to this case.

Second World War and was taken prisoner of war. Later, he moved to Sweden and naturalised. As Austria has a strict single nationality policy, Mr Baldinger subsequently automatically lost Austrian nationality. Because of this loss of nationality, Mr Baldinger was considered not to fall within the scope of Austrian war victim benefits. The Court accepted this. In a subsequent case, *Tas-Hagen*, it also concerned the refusal of war victim benefits, but in this case it was based on residence abroad while the applicant had retained the nationality of the country granting the benefit – the Netherlands – while residing in Spain.[108] In that case, the Court considered that the condition of residence in the Member State granting the benefit was incompatible with the right to free movement.[109]

Therefore, using the free movement rights may not impede continuous access to certain benefits from the Home Member State while retaining the nationality; however, losing the nationality by acquiring the nationality of another Member State was considered an acceptable reason to discontinue the grant of these benefits. With *Lounes,* this might become a dubious stance of the Court.

h) Conclusion: *Lounes* should apply not only to dual EU citizens, but to all EU citizens. If one compares the two consequence analyses of whether *Lounes* applies to only dual EU citizens or to any EU citizen who naturalised and previously already had the nationality of a Member State, it becomes clear that both are quite burdensome.

If it applies only to dual EU citizens it must have consequences on the freedom of Member States to decide on grounds of loss of their nationality and on conditions of renunciation of the previous nationality. On the other hand, if it applies to any EU citizen who has moved, because it cannot apply only to naturalised EU citizens as was already explained above, this means that not only the "return" case-law has to be revisited, but any case-law where it concerned a person who had lost the nationality of a Member State upon naturalisation in another Member State.

IV.3 *Emphasis on Having the Mobility Quality*

The Court in *Lounes*, just like in *Shirley McCarthy*, emphasised the importance for dual EU citizens of having made use of the free movement rights, consequently of having the mobility quality. In certain constellations, this might give rise to some issues.

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108 Court of Justice, judgment of 26 October 2006, case C-192/05, *Tas-Hagen*.

109 Cousins, M. (2007). Citizenship, Residence and Social Security. *European Law Review* 32, pp. 386–395, 393.

a) Catherine Zhu naturalises and Shirley McCarthy renounces. What if Catherine Zhu would naturalise in the UK while retaining her Irish nationality? The child at first would be using the free movement rights. However, afterwards she would be in the same situation as Shirley McCarthy, since she would live in the Home MS in which she was born and has always resided.

As the mobility quality had been active before acquisition of the Home MS rank nationality, the mobility quality would be attached to the MS rank nationality and consequently, a lifetime of rights derived from Art. 21, para. 1, TFEU would be granted.

This also means that it would theoretically be possible to maximize the applicability of EU law by influencing the order of acquisition of nationality, each resulting in another legal basis for residence.[110] It also means that a child who is born and resides in a Member State of which it does not have the nationality, but acquires the nationality of two other Member States at birth *iure sanguinis*, automatically is covered by Art. 21, para. 1, TFEU for its entire life.[111]

The only way to prevent this automatic coverage by Art. 21, para. 1, TFEU for a child who only has the nationality of another Member State at birth, but not the one of residence, would – rather ironically – be that the Member State of residence grants its nationality to such a child at birth *iure soli*. Only after the child would make use of the free movement rights by moving somewhere else would it gain lifetime coverage of Art. 21, para. 1, TFEU.

It would of course be peculiar to grant nationality in order to prevent a child from deriving rights from EU law. For, what the Member State in essence wants is to prevent family reunification with TCN spouses based on EU law. One might consider it a bit premature and excessive to grant nationality to a child at birth in order to prevent it from having "family reunification with the spouse". Especially since the child who has reached the age of majority when it is allowed to marry might easily circumvent the rules by moving to another Member State and by later returning to the Member State of birth. Member States would do better, to simply accept the fact that, if a child like Catherine Zhu naturalises in the Member State of birth, it has a lifetime coverage of Art. 21, para. 1, TFEU.

Purely theoretically, a Member State could also in such a case, retroactively to the time of birth, grant its nationality to the child, when it requests for family reunification. The subsequent time of residence in between the time of birth and the time of the retroactive grant of nationality would have to be

110 This influencing can only be done where the nationality of a Member State is only acquired upon registration with the authorities of that Member State.

111 Thus "MS/MS residence MS".

considered as if it had been spent as a national and not based on the Directive. However, this would be an absolute abuse of the grant of nationality by the Member State in order to prevent a person from exercising his rights derived from Art. 21, para. 1, TFEU.

Another issue is the question what if Shirley McCarthy had renounced her British Citizenship based on Section 12 of the 1981 British Nationality Act?[112]

In that case, she would have been in a similar position as Catherine Zhu, and the Directive would have applied, had she been a worker.[113] This renouncement would technically speaking be an *abus de droit*. The rules on *abus de droit* state that an action by an EU citizen, which is entirely artificial and only done to come within the ambit of EU law is prohibited. But one can hardly argue that renouncing a Member State's nationality should be required to fall within the ambit of EU law. This would be paradoxical.

What makes this similar to *Lounes* is that it should also be considered whether Mrs McCarthy could afterwards have re-acquired or resumed her British citizenship based on Section 13, para. 3, of the British Nationality Act, or if she could have re-naturalised.[114] This Section requires approval from the Secretary of State, who might refuse to grant resumption because the renouncement was only made in order to fall within the ambit of EU law, which might be considered abusive.

However, refusing to grant nationality on the grounds that the person wanted to fall within the ambit of EU law and make use of the free movement rights would again be a restriction of Art. 21 TFEU.

b) Other methods that the Court could have used in *Lounes*. The Court could have also handled *Lounes* in other ways, and might still use these to overcome the *O and B* restrictions.

Over the years, the Court seems to have only concentrated on Arts 18 and 21 TFEU, and has put its own case-law related to the other free movement rights on a back shelf. To refer again to the words of Szpunar and Blas López – Union citizenship has become a victim of its own success.

When a case concerning dual EU citizens is pending, the Court should remember that the Directive has five legal bases:

112 Maas, W. (2014), The Origins, Evolution, and Political Objectives of EU Citizenship. *German Law Journal* 15 (5), pp. 797–820, 816.

113 The formula would be "MS residence Home MS/MS". As renouncement would lead to the fact that she would no longer be a dual EU citizen, only a single MS is entered.

114 Resumption based on Section 13, para. 1, is not possible as this requires that the renouncement was made in order to acquire or retain another nationality based on Section 13, para. 1, let. b). Section 13, para. 3, allows for the resumption of British citizenship on the discretion of the Secretary of State.

a) Art. 12 EC (now Art. 18 TFEU) – principle of non-discrimination based on nationality;
b) Art. 18 EC (now Art. 21 TFEU) – EU citizenship;
c) Art. 40 EC (now Art. 46 TFEU) – Free movement of workers;
d) Art. 44 EC (now Art. 50 TFEU) – Free movement of establishment;
e) Art. 52 EC (now Art. 59 TFEU) – Free movement of services.

It is curious that where a *Carpenter*[115] and *S and G*[116] constellation exists for a person who only has the nationality of the Home MS, Art. 45 TFEU is applicable, and therefore the Directive is also applicable by analogy. If the person is a dual EU citizen, the Court only considers Art. 21 TFEU, and consequently is mostly more restrictive on any application of the Directive.

Another option of what the Court could have done is applying *Micheletti* more strictly. Before the *Shirley McCarthy* case, this was also considered an *acte clair* by the national courts, with the exception apparently of the British courts. The requirement of not-having-the-nationality-of-the-Member-State-of-residence was considered an additional requirement to the "recognition" of the nationality of another Member State. Some courts even applied this principle to persons who naturalised at a moment when their State of nationality had not yet acceded to the EU.[117] They considered that from the moment that State had joined, the person, although already a national of the resident Member State, was exercising the free movement rights.[118]

One could argue that the wording of Art. 3, para. 1, of the Directive is substantially different from the wording of Art. 1 of its predecessor Regulation 1612/68,[119] and that therefore its scope is also different. However, in

115 *Carpenter*, cit.
116 Court of Justice, judgment of 12 March 2014, case C-457/12, *S and G.*
117 Dutch Council of State, judgment of 25 March 2013, BZ7520.
118 *Ibid.*, para. 5.2: "Het standpunt van de minister dat de referente is genaturaliseerd voordat Bulgarije tot de Europese Unie toetrad en zij om die reden geen rechten kan ontlenen aan haar Bulgaarse nationaliteit, veronderstelt dat het bezitten van de Nederlandse nationaliteit kan afdoen aan de rechten die referente aan haar hoedanigheid van burger van een andere lidstaat aan het Unierecht ontleent. Voor die veronderstelling bestaat, gelet op jurisprudentie van het Hof, geen grond". Similar also Dutch Council of State, judgment of 28 January 2013, BZ0412, para. 2.2. See for the case-law up to 2013: van Rosmalen, A. (2013). Conditional Citizenship of the Union? Family Migration for EU citizens and the Outdated Notion of "Internal Affairs". *Hanneke Steenbergen Scriptieprijs,* available at steenbergen-scriptieprijs.nl.
119 Art. 1 of Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community: "1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action

Scholz,[120] which concerned a dual German-Italian citizen in Italy, the Court stated that:

> It should be borne in mind, first of all that Article 7 of the Treaty [now Art. 18 TFEU], which prohibits any discrimination on grounds of nationality, does not apply independently where the Treaty lays down, as it does in Article 48(2) [now Art. 45 TFEU] in relation to the free movement of workers, a specific prohibition of discrimination. [...] In addition, Articles 1 and 3 of Regulation No 1612/68 merely clarify and give effect to the rights already conferred by Article 48 of the Treaty. Accordingly, that provision alone is relevant to this case.[121]

This means that under Art. 45 TFEU, a dual EU citizen can invoke the Directive by analogy against the Home MS, while under Art. 21 TFEU this might not be possible, even though this article incorporates the rights under Art. 45 TFEU.

In that case, the Court also held that "[a]ny Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of the aforesaid provision".[122]

The application of Art. 45 TFEU would be a system of creating a "mobility quality". If a dual EU citizen is a worker, self-employed or has sufficient means, (s)he gains access to the quality. If (s)he becomes unemployed, loses the business or resources, this mobility quality continues to have effect for as long as the Directive provides under Art. 9, but is lost afterwards, except if more favourable conditions are applicable.

However, the option taken by the Court is the most favourable by a simple reference to the name case-law, which it did by referring to this sentence from *Freitag* which is similar to *Scholz*, but based on Art. 21 TFEU: "[a]ccording to settled case-law, a link with EU law exists in regard to nationals of one Member State lawfully resident in the territory of another Member State [...]. That is the case as regards the applicant in the main proceedings, who is a Romanian national and is resident in the territory of the Federal Republic of Germany, of which he is also a national".[123] It should be remembered, though, that for

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governing the employment of nationals of that State. 2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State".

120 Court of Justice, judgment of 23 February 1994, case C-419/92, *Scholz*.

121 *Ibid.*, para. 6.

122 *Ibid.*, para. 9.

123 *Freitag*, cit., para. 34.

the name case-law, actual movement, and therefore the mobility quality, is not required.

V Conclusion – a Choice: Nationality Competence or Abandonment of Reverse Discrimination

In *Lounes,* the Court decided in favour of European integration, by making it clear that integration – and therefore naturalisation – does not affect the future applicability by analogy of Directive 2004/38/EC.

It must be reiterated that, had the Court decided against European integration instead, it would have been remarkable that a UK-EU dual citizen would have had more rights in the other Member State of nationality after Brexit, as a TC+, than before.

With *Lounes* it is now clear that the mobility quality always gets attached to a present MS rank nationality even when a Home MS rank nationality is present. In the absence of an MS rank nationality though, it gets attached to the Home MS rank nationality which only allows rights to be retained which were previously used while it was an MS rank. This differentiation between the MS and Home MS ranks cannot stand in the long run. Only when they are treated equally can EU citizenship become a reality.

Even though the ruling in *Lounes* is favourable, it has its flaws, which will manifest themselves sooner or later. These flaws are created by the fact that the Court did not make clear how *O and B* and *Lounes* are interlinked, except where it concerned the documentation required. This will create an imbalance between the rights of dual EU citizens and of "single" EU citizen returners. Furthermore, is it detrimental for EU citizens with certain nationalities who would lose the original Member State nationality compared to those who can retain it.

The Court has now an uncomfortable choice. If the Court considers that *Lounes* only applies to dual EU citizens, this means that it has to limit the competence of the Member State in the field of nationality law. If it does not want to do so, it has no choice but to revoke the previous family life requirement for returners established in *O and B*. This would mean though that any EU citizen who has ever made use of the free movement rights would be covered by the Directive by analogy for a lifetime, for example after doing an Erasmus.

The earliest option for the Court to make this choice was *Coman*, *Banger* or *Altiner and Ravn*. Especially in *Altiner and Ravn* the Court seems to have made the choice that *Lounes* is not applicable to "single" EU citizens. The Court did relax the residence requirement to some extent by replacing the Art. 7, para. 2,

residence requirement with a previously in the host Member State established and uninterrupted family life requirement.[124] In *Tjebbes* the Court should have made a distinction between those applicants living in a third country and those living in a privileged third country. Since it has not done so, this will have consequences for future relations with the UK after Brexit.

The Court has to keep in mind that, based on the ECN, naturalised persons and persons who had the nationality at birth have to be treated equally and that the same principle applies to dual EU citizens.

To the question of how the Court should take dual EU citizens into account, I would like to state the following: the Court (and the EU legislator) should refrain from making not-having the nationality of the Member State of Residence a condition for the applicability of secondary legislation. If it does, under no circumstances may it make – like it did in *O and B* – previous applicability of that secondary legislation conditional on future application in a Member State of nationality. Such a double condition is only detrimental for dual EU citizens.

The Court should also, in cases of recognition of names, be very careful where it allows for a restriction based on constitutional values, because this might lead to a conflict of national Constitutions.[125] It should especially be

124 The Court held in *Altiner and Ravn* that the TCN family member can also join the EU citizen at a later in the Home Member State (*Altiner and Ravn*, cit., paras. 29 and 31). The TCN family member would no longer have a derived right based on the Directive in the host Member State when the EU citizen leaves (Court of Justice, judgment of 16 July 2015, C-218/14, *Singh*, para. 58; Court of Justice, judgment of 30 June 2016, case C-115/15, *NA*, paras 34 and 35). This means that a previous Art. 7, para. 2, residence right cannot be required when the TCN family member joins the EU citizen in the Home Member State. Consequently, if the TCN family member stayed in the host Member State after the EU citizen left, this also means that (s)he must have had an independent residence right there. In certain circumstances this independent residence right can be indirectly derived from the previous worker status of the EU citizen family member in the host Member State, e.g. the continued residence status to continue education. Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast*; Court of Justice, judgment of 23 February 2010, case C-310/08, *Ibrahim*; *NA*, cit., paras. 58 and 59. See Hoogenboom, A. (2017). *Balancing Student Mobility Rights and National Higher Education: Autonomy in the European Union.* Leiden, Boston: Nijhoff, pp. 127–128.

125 For example: what if Ilonka Sayn-Wittgenstein had next to the Austrian nationality also the nationality of Germany? The prohibition and the "grant" of the title of nobility would have been based on each Constitution. Unfortunately, both the Regional Administrative Courts of Salzburg and of Oberösterreich did not request a preliminary ruling when they were confronted with exactly this issue and decided that the Austrian Constitution applies. Regional Administrative Court of Salzburg, judgment of 25 January 2017, 405–10/200/1/4-2017; Regional Administrative Court of Salzburg, judgment of 28 June 2017, 405–10/265/1/7-2017; Regional Administrative Court of Oberösterreich, judgment of 4 December 2017, LVwG-750471/3/BP/SA.

careful where it is aware that there is a third party who is a dual EU citizen and would be directly affected by the case. For, did the Court ever consider in, for example, *Runevič-Vardyn*,[126] what would happen to the son?[127]

It is regrettable that this son was not also an applicant in this case, for, would the Lithuanian authorities have issued a document for the child with his father's surname in its original form? No, they would not have. In fact, they refused to do so! In April 2016, the District Court of Vilnius ruled in a case where the authorities refused to register the name of a dual Lithuanian-Polish national who was born in Belgium, whose father is Polish and mother is Lithuanian, with the name Wardyn.[128] The District Court decided that the name had to be entered with the "W" and thus the Polish spelling was to be used. Additional five years of litigation could have been saved if the Court had taken the effects of its judgment on this child into consideration.[129]

Dual EU citizenship is a symptom of European integration. European integration has led to EU citizens moving to other Member States and meeting and falling in love with nationals from these Member States. This, in combination with gender equality in nationality transmission, and acceptance of retention of other Member State's nationalities, leads to the logical consequence of an increasing number of dual and multi EU citizens. More and more cases on the free movement and dual citizenship will arise, because of a simple reason: we are nearing the final stages of full European integration.[130]

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126 *Runevič-Vardyn*, cit.

127 In the Opinion of AG Szpunar in *Sean Ambrose McCarthy* he makes a similar example, but states that the person only has Lithuanian nationality and consequently not the Polish nationality (Opinion of AG Szpunar *Sean Ambrose McCarthy*, cit., para. 67). This is not entirely correct. It is true that Art. 3, para. 4, of the Lithuanian nationality code prohibits in general dual nationality. Exceptions to this are listed in Art. 7, one of them being that the other nationality was also acquired at birth and the person has not yet reached the age of 21. Upon reaching the age of 21 Lithuanian citizenship is lost by such persons if they have not renounced the other citizenship until that moment in accordance with Art. 24, para. 8. Another way to have dual citizenship in accordance with Art. 7, para. 5, is when the other nationality was acquired *ex lege* upon marriage.

128 Vilnius District Court, judgment of 12 April 2016, 2-01-3-11866-2010-1. Original decision available at: www.e-tar.lt; English translation of this decision (without name redaction) is available at: en.efhr.eu.

129 It is especially strange that the Court did not take this child into consideration as its existence and dual citizenship is mentioned in the judgment, *Runevič-Vardyn*, cit., para. 54.

130 E.g. *Tjebbes and others*, cit., concerning loss of a Member State's nationality of a dual national while living abroad.

PART 2

Free Movement and Its Limits

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CHAPTER 6

The Court, the Legislature and the Co-Construction of a Status of Social Integration

*Stephen Coutts**

Introduction

25 years after its introduction, Union citizenship has demonstrated a remarkable capacity for dynamism. As a legal institution its history has been marked by an almost constant development prompted first by the Court and later developed by the legislature. Originally considered a mere cipher,[1] Union citizenship constituted the vehicle by which rights previously the preserve of the economically active were extended to the non-economically active. In this way a novel transnational membership status has been progressively developed. As noted by the Kostakopoulou, its development is best understood as a constructive process, with Union citizenship evolving through the contributions of different actors at different stages of its development.[2] The purpose of this contribution is to assess the respective roles of the Court and the legislature in the development of Union citizenship. It will be argued that both institutions have contributed in a largely complementary fashion to the development of this institution and to its current shape. Particular emphasis is placed on the development of Union citizenship as a transnational status of social integration.

An important consideration here is the debate that was triggered by the *Dano* line of caselaw regarding the appropriate interpretative role of the Court of Justice in this field, which is characterised by an unsettled hierarchy of norms

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1 Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *Modern Law Review* 68 (2), pp. 233–267, 234–235. For a prescient account of an 'incipient' European citizenship, developed from free movement of persons provisions in the early years of the internal market see Plender, R. (1976). An Incipient Form of European Citizenship. In: Jacobs, ed., *European Law and the Individual.* Amsterdam: North-Holland Publishing Company.

2 Ibid and Kostakopoulou, D. (2013). Co-Creating European Union Citizenship: Institutional Process and Crescive Norms. *Cambridge Yearbook of European Legal Studies* 15, pp. 255–282.

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between primary and secondary law. This contribution is related to that debate and the analyses of van den Brink,[3] Mortiz and Carter[4] and Muir[5] are relied upon here.[6] However, the focus of this chapter is not so much on the interpretive techniques of the Court of Justice, its activism or otherwise, and whether or not this is appropriate in the context of Union citizenship but instead on the development of Union citizenship as an institution of transnational and supranational membership, the respective contributions of the legislator and the Court to this construction and the interaction between their respective contributions. The conclusion is that both have contributed to giving constitutional shape to this institution in a broadly collaborative and symbiotic manner. However, before engaging in a discussion of the respective contributions of the Court and the legislator it is necessary to clarify the constitutional context. The next section will therefore assess the roles attributed to these actors by the relevant Treaty provisions, noting in particular the unusual position of secondary law and hence the legislature in this scheme. Section II will assess the role of the legislator and the contribution made in the form of Directive 2004/38/EC to the development of Union citizenship as a transnational status of integration. Section III will address the manner in which the Court of Justice has engaged with and utilised this directive in its jurisprudence and ongoing development of the institution of Union citizenship. A final section will draw some conclusions.

3 See Van den Brink, M. (2019). Justice, Legitimacy and the Authority of Legislation within the European Union. *Modern Law Review* 82 (2), pp. 293–318.

4 Moritz Jesse and Daniel Carter in this volume. See also an analysis of this question in Níc Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship. *Common Market Law Review* 52 (4), pp. 889–937, and Spaventa, E. (2017). Earned Citizenship: Understanding Union Citizenship through its Scope. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press.

5 Elise Muir in this volume.

6 The pieces relied upon here relate to the question of interpretation and the relationship between the legislature and the Court in the field of Union citizenship. This debate was triggered by the Court's jurisprudence in the field of access to social benefits, especially Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* and related judgments. This restrictive turn in the case law was not uncriticised, including in the new, more deferential role adopted by the Court of Justice. See for example Spaventa, E. (2017). Earned Citizenship: Understanding Union Citizenship through its Scope, cit., and O'Brien, C. (2017). The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom. Common Market Law Review* 54 (1), pp. 209–243. See also the contributions in Thym, D., ed. (2017). *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford/Portland: Hart Publishing, for a discussion of this development.

1 The Constitutional Context and the Roles of the Court and the Legislature

Before evaluating any contribution of the Court and legislature to the construction of Union citizenship it is necessary to first assess the constitutional context and legal framework for the establishment and elaboration of this institution. Union citizenship is an institution provided for and established by primary law, a point that has been reemphasised in the line of Article 20 TFEU judgments, starting with *Rottmann*[7] and most recently reaffirmed in *Tjebbes*.[8] Article 20 TFEU provides quite simply that 'Union citizenship is hereby established', performing an important constitutional speech act[9] and one that has had important implications for the nationals of Member States, who now enjoy a complementary set of membership rights in other Member States. Some of these rights are then articulated in Article 21 TFEU, most importantly the rights to free movement and residence. A number of aspects of Articles 20 and 21 TFEU have implications for the roles of the Court and the legislature respectively.

It is worth noting the relatively open-textured nature of Article 20 TFEU and to a lesser extent Article 21 TFEU. This is a feature of constitutional law and of Union law especially. Union citizenship is established and a set of rights are associated with it, especially free movement and residence. And yet the precise nature of Union citizenship is not entirely clear, especially how it relates to the broader composite constitution of the Union.[10] For some it was simply a repackaging of internal market rights of free movement and establishment.[11]

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7 Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottmann v. Freistaat Bayern*.

8 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes and others*. See paras. 30–31 and 44 ff in which the Court lays down criteria against which any decision withdrawing Member State nationality must be assessed, thus underlining the fact that loss of nationality falls within the framework of Union law. It should be noted however that the judgment is deferential regarding the operation of nationality law and in particular the reasons for withdrawal, leading some to criticise the judgment. See Kochenov, D. (2019). The *Tjebbes* Fail. *European Papers Forum*, available at http://www.europeanpapers.eu/en/europeanforum/the-tjebbes-fail.

9 As noted by Kostakopoulou 'EU citizenship is not the product of mimesis; it is an actor original creation'. See Kostakopoulou, D. (2013). Co-Creating European Union Citizenship, cit., 258.

10 Besselink, L. (2007). *A Composite European Constitution*. Groningen: Europa Law Publishing.

11 See Kostakopoulou, D. (2007). European Citizenship: Writing the Future. *European Law Jounal* 13 (5), pp. 623–646, 624 speaking of the 'minimalist assessments' of Union citizenship made by scholars in its early years.

Alternatively, it may have contained the seeds for a supranational fully-fledged federal citizenship, for all intents and purposes replacing national citizenship as the operative status of individuals. Or was it intended to be a transnational citizenship that somehow went beyond the market freedoms? There are some hints in the treaty provisions; Union citizenship's relationship with nationality was underlined as complementary, as noted by the shift in language to 'additional to'. The rights that were listed for Union citizenship were free movement and residence; the heritage of the internal market is hard to deny[12] and indeed influenced profoundly the Court's early post-Maastricht jurisprudence, including adopting various internal market related assumptions into the operation of Union citizenship.[13] However, as Kochenov and Plender point out, these assumptions and the general trajectory of Union citizenship as an outgrowth of the internal market, were never dictated by the text of the Treaty itself, which left the precise contours of Union citizenship undefined and opened a space for its future construction.[14]

The fact that the status of Union citizenship and certain of its rights are found in primary law and hence enjoy a constitutional nature is relevant for the role of the Court of Justice. As put by Níc Shuibhne 'a constitutional court has a responsibility to protect and to further the objectives and values enshrined in "its" *constitution* – essentially to ensure that the rights and responsibilities that a constitution promises are realized … and to discharge these tasks on behalf of and for the benefit of the constitutional subjects'.[15] There is therefore a very legitimate role bestowed by the Treaties, understood as the Union's constitutional text, for the Court in giving expression to and shaping an institution established to integrate the individual as a key component in the Union's constitutional order. In light of its role as a constitutional court, the

12 Indeed, for many years academic debates centred precisely on its relationship with and difference from internal market freedoms. See for example Jacobs, F. (2007) Citizenship of the European Union – A Legal Analysis. *European Law Jounal* 13 (5), pp. 591–610 noting the movement towards replicating classic free movement rights (ie prohibitions on discrimination and on restrictions on movement) in a non-market context. The template of the internal market is impossible to deny here in the imagination of contributors. See also Wollenschläger, F. (2011). A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration. *European Law Jounal* 17 (1), pp. 1–34.

13 Kochenov, D., and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? *European Law Review* 37, pp. 369–396, 375 ff.

14 See ibid, also noting that it was not until the judgment in *Rottmann* that the Court fully acknowledged the implications of introducing citizenship status into the Treaties.

15 Níc Shuibhne, N. (2013). *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*. Oxford: Oxford University Press, p. 8.

Court has not only a role but a duty to contribute to the construction of Union citizenship and to give meaning to this institution in light of the broader constitutional context.

A further implication of the primary law nature of these rights is that the interventions of the Court, depending on their manner – enjoy a constraining capacity and anterior role vis-à-vis the legislature. This is perfectly logical and a necessary consequence of entrenching a status and set of rights in a constitution.[16] The very purpose of entrenchment and having a constitutional status is to insulate that status from political pressures and ordinary legislative discretion. Having said that, we should be mindful of the other aspects of Níc Shuibhne's conception of the responsibilities of the Court as a constitutional court. In the passage cited above she also notes that a constitutional court has the right and duty to give expression to the values inherent in its constitution but also 'to respect the checks and limits built into it.'[17] Likewise, the constitutional subject, while certainly including individual Union citizens also include the Member States,[18] who it must be recalled, represent citizens of the Union in their capacity of nationals and the collective interests of those national communities.

16 Although we should be mindful of the particular problems of entrenchment in context of the European Union. On the one hand the Treaties contain provisions which would ordinarily not find themselves into a constitutional text. On the other the Treaties are particularly difficult to amend. This problem is compounded when the Court, employing a teleological interpretative technique, develops Treaty provisions in particular, politically important ways (see for example Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval*). The Court's interpretation of treaty provisions can constrain not only the Union legislature but Member State governments, a very present problem in the area of Union citizenship, as discussed in Schmidt, S.K. (2017). Extending Citizenship Rights and Losing it all: Brexit and the Perils of Over-Constitutionalisation. In Thym, ed., *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the* EU, cit. This danger of over-constitutionalisation or inappropriately entrenching particular political choices and ideologies leads to their removal from the realms of political contestation, generating difficulties of legitimacy for the Union. See for example in the context of the Eurocrisis Wilkinson, M.A. (2013). The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union. *German Law Journal* 14 (5). pp. 527–560 and Wilkinson, M.A. (2013). Political Constitutionalism and the European Union. *Modern Law Review* 76 (2), pp. 191–222. See also Přibáň, J. (2015). The Evolving Idea of Political Justice in the EU: From Substantive Deficits to the Systemic Contingency of European Society. In De Búrca, Kochenov and Williams, eds., *Europe's Justice Deficit?* Oxford/Portland: Hart.

17 Ibid, 8.

18 For a discussion of the multi-faceted nature of the 'constitutional subject' see Rosenfeld, M. (2010). *The Identity of the Constitutional Subject*. Abingdon/New York: Routledge.

This leads to the unusual position of the legislature in the field of Union citizenship law. On the one hand this is an entrenched status and rights, which should and has enjoyed protection from the intervention by the legislator through the interpretation and application of primary law by the Court of Justice. On the other hand, the precise manner of this entrenchment in the Treaties is ambiguous, with Article 20 TFEU also providing that the rights associated with the status of Union citizenship 'shall be exercised in *accordance with the conditions and the limits* defined by the Treaties and *by the measures adopted thereunder*' while Article 21 TFEU provides a legislative basis for secondary legislation to facilitate the rights contained in that provision.[19] Secondary legislation is given the unusual capacity of limiting and conditioning rights established by primary law. The legislature has a legitimate and constitutionally allocated role not only in in articulating detailed rules for its operation but in giving overall shape to Union citizenship. This unusual position of the legislature in Article 21 also introduces an ambiguity in the relationship between primary and secondary law, unsettling the classic hierarchy of laws. The caselaw has shifted from relying on the primary law nature of the rights created by Articles 20 and 21 TFEU – constraining the operation of secondary legislation and its application by Member States[20] – to more recently respecting the special task allocated to the legislator in light Articles 20 and 21 TFEU by restricting itself to an analysis of secondary law and a more literal application of the conditions and limits it contains.[21]

The Treaties have therefore given a somewhat more prominent role to the legislature in shaping the institution of Union citizenship than might be expected and that might arise from a simple 'primary-secondary' law dichotomy. It also lays the normative foundation for a greater role for the legislator in designing and fashioning what is a constitutional status. On one view this gives the Member States the possibility of protecting or balancing their interests against those of mobile Union citizens.[22] Although such a view establishes what might be a false opposition between the rights of mobile Union citizens and the interests of Member States.[23] More importantly, the legislature has

19 Art 20 TFEU.

20 For an excellent analysis of this see Dougan, M. (2006). The Constitutional Dimension to the case law on Union Citizenship. *European Law Review* 31 (5), pp. 613–641.

21 See Jesse and Carter in this volume and especially Muir in this volume.

22 See paragraph 107 of Opinion of AG Wathelet delivered on 20 May 2014, case C-333/13, *Dano*, describing it as part of the legislature's intention to allow Member States to refuse to extend social assistance to non-national Union citizens.

23 More than anything they respond to the political imperatives faced by governments in Member States, in an environment hostile to EU migration. See for example the discussion of the so-called 'safeguard' offered the United Kingdom in the event of a vote to

a key role in 'putting flesh on the bones' of Union citizenship,[24] pouring real normative content into the shell provided by the Treaties, in designing what might be called the underlying philosophy of Union citizenship and ultimately shaping its contours. In this sense the legislature is a genuine 'co-interpreter' of the Treaties[25] and enjoys a role alongside the Court as a co-constructor of this constitutional status. This importance attributed to the legislature has been affirmed by its approach, which has been to adopt an overarching framework law, providing not simply a set of rules guiding the operation of Union citizenship but containing within it a relatively coherent conception of Union citizenship as one based on transnational social integration.[26] Directive 2004/38/EC does more than merely elaborate technical rules and procedures in the fulfilment of some 'detail-filling' role subject to the parameters of a constitutionally determined status but gives shape to the underlying choices left open by the ambiguity inherent in Articles 20 and 21 TFEU on the nature of Union citizenship.

11 The Legislature and Directive 2004/38/EC

Directive 2004/38/EC was an important moment in the constitutional development of Union citizenship not only in codifying previous disparate pieces of legislation and detailing the rules surrounding the enjoyment of the various rights contained in the Directive but in contributing to the articulation of the constitutional form of Union citizenship as a status of transnational social integration. In adopting Directive 2004/38/EC, the Union legislature therefore played the role both of elaborating and reforming the law and of contributing in

remain in the European Union and the dangers of what this implies regarding the status of Union citizenship in Reynolds, S. (2017). (De)Constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment. In: Thym, ed., *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, cit.

24 To borrow a phrase from Síofra O'Leary when discussing the intervention of the Court in Court of Justice, judgment of 12 May 1998, case C-85/96, *Maria Martínez Sala* (see O'Leary, S. (1999). Putting flesh on the bones of European Union Citizenship. *European Law Review* 24 (1), pp. 68–79).

25 See Davies, G. (2018). Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation. *European Law Journal* 24 (6), pp. 358–375 referring primarily to the relationship between national courts and the Treaties.

26 For an account of Union citizenship as a status of social integration see Azoulai, L. (2010). La Citoyenneté Européenne, un Statut d'Intégration Sociale. In: Cohen-Jonathan and others, eds., *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué*. Paris: Dalloz.

a meaningful and constructive way to the constitutional construction of Union citizenship. Moreover Directive 2004/38/EC displays a clear engagement with the jurisprudence of the Court of Justice. In adopting Directive 2004/38/EC the legislature endorsed the nascent conceptualisation of Union citizenship developed by the Court in its foundational citizenship judgments, especially *Martinez Sala*[27] and *Grzelcyk*[28] by codifying the principles developed in those cases. Its contribution went beyond mere codification however but amounted to a genuine contribution to the shape of Union citizenship through crystallising the concept of a progressively enhanced citizenship status operating along the vector of social integration, as evidenced most strongly by the major innovation of the Directive, namely the status of permanent residence.

Firstly, Directive 2004/38/EC codified the law on Union citizenship. As identified by de Bruycker at the time,[29] it did so in two ways. Firstly, the Directive incorporated and replaced most but not all of the diverse instruments that had heretofore regulated the position of the free movement of persons under the internal market and replaced it with a single instrument regulating the position of mobile Union citizens. Important gaps remained in its coverage, both regarding some aspects of the position of free movement of workers, which remained regulated by Regulation 1612/68/EEC[30] (since replaced by Regulation 492/2011/EU)[31] and more crucially the position of the non-mobile or static Union citizen.[32] It also reproduced within the status of Union citizenship some of the categories it was purporting to abolish through the imposition of variable conditions to different individuals depending on the basis of their stay in other Member States. Nonetheless, despite these deficiencies, the Directive 2004/38/EC remains a significant piece of codification providing an overarching framework for the free movement of persons and does so importantly under the rubric of the status of Union citizenship, performing an important symbolic shift from the language of workers, establishment and service provides

27 *Martínez Sala*, cit.

28 Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*.

29 De Bruycker, P. (2006). La Libre Circulation des Citoyens Europeens Entre Codification et Reforme. In: Carlier and Guild, eds., *L'Avenir de la libre circulation des personnes dans l'UE/ The Future of Free Movemenet of Persons in the EU*. Brussels: Bruylant.

30 Regulation 1612/68/EEC on freedom of movement for workers within the Community, *OJ L 257*, 19.10.1968, p. 2–12.

31 Regulation 492/2011/EU on freedom of movement for workers within the Union (codification), *OJ L 141*, 27.5.2011, p. 1–12.

32 See Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L 158*, 30.4.2004, p. 77–123, art 3(1).

to that of citizenship itself, indicating that these rights were to be enjoyed, at least potentially, by all citizens of the Union rather than simply market actors. The importance of this codification was acknowledged by the Court in *Metock* which found that the Directive aims to '*strengthen*' and improve on the rights of free movement compared to the earlier directives it replaced.[33] In *Metock* '[t]he Court has … given a distinctly positive and forward looking role to Directive 2004/38. The Directive is understood as a development on pre-existing legislation, giving expression to the primary citizenship rights.'[34]

Secondly, in elaborating the Directive the legislator codified various elements of the early jurisprudence of the Court of Justice, which had (as is explored further below) begun to explore and define the contours of Union citizenship, building on[35] but exceeding the limits of the internal market freedoms. Provisions on the exercise of the public policy exception were heavily revised from the by then out of date Directive 64/221/EC[36] and, alongside updating considerably the procedural safeguards afforded individuals subject to expulsion and exclusion measures, incorporate large elements of the Court of Justice's jurisprudence.[37] The engagement with the Court's jurisprudence is even more remarkable in relation to equal treatment in the field of social welfare where the legislature incorporated wholesale the somewhat ambiguous approach towards the relationship between equal treatment rights and residence adopted in *Grzelczyk*.[38] As put by de Bruycker this incorporation was 'autant plus remarquable que cette decision absolument fondamentale s'inscrit dans une série d'arrêts audacieux, voire téméraires'.[39]

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33 Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock v. Minister for Justince Equality and Law Reform*, para. 59.

34 Muir in this volume at 173.

35 For a critique of this approach linking post Maastricht Union citizenship with assumptions derived from the internal market see Kochenov, D., and Plender, R. (2012). EU Citizenship: Citizenship From an incipient form to an incipient substance? The discovery of the Treaty Text, cit.

36 Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, *OJ 56*, 4.4.1964, p. 850–857.

37 See for example the proportionality test as elaborated in Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01 *Georgios Ofanopoulos et al and Raffaele Oliveri v. Land Baden-Würtemberg* and the definition of a threat to public policy as a 'genuine and sufficiently serious threat affecting one of the fundamental interests of society' articulated in in Court of Justice, judgment of 27 October 1977, case 30/77 *Regina v. Pierre Bouchereau*.

38 *Grzelczyk*, cit.

39 See De Bruycker, P. (2006). La Libre Circulation des Citoyens Europeens Entre Codification et Reforme, p. 40.

This went beyond a mere codification of jurisprudential developments but involved an incorporation of the underlying philosophy articulated in the early jurisprudence of the Court regarding the position of mobile Union citizens and their relationship with the host Member State, a relationship that should be characterised by integration and solidarity. Despite its perhaps vague and somewhat contradictory nature, the Directive codified the rule of *Grzelczyk*, permitting Member States to withdraw a right of residence but not as an automatic consequence of recourse to social assistance.[40] This reflected an acceptance of the embryonic philosophy of Union citizenship being articulated in the first wave of judgments of the Court of Justice. These set of cases were developing Union citizenship as a status which offered something to the non-economically active Union citizens and imbued it with an underlying vocation to extend rights to the non-economically active Union citizen. This rested on a particular vision of the relationship between the mobile Union citizen and the host Member State which went beyond a market focused instrumentalism and instead focused on solidarity and inclusion. The beginnings of a transnational status of integration could be discerned. The important point here is that in its codification of these rules in Directive 2004/38/EC, the legislator responded to and endorsed this developing vision of Union citizenship.

Not only did it endorse the vision of Union citizenship advanced by the Court up to that point, in its contribution in Directive 2004/38/EC the legislature went further and brought its own contribution to that construction. Aside from simplified administrative burdens,[41] the major innovation of the Directive was the introduction of the status of permanent residence. Acquired after 5 years of residence, those enjoying permanent residence are no longer subject to conditions on their residence nor to limitations on the right to equal treatment. On a doctrinal level is important for the security of residence it brings[42] (although certainly not absolute, as was argued for by the Commission in the legislative process)[43] and for equal treatment.[44] On a broader level regarding

40 Grzelczyk, cit., para. 43.

41 De Bruycker, P. (2006). La Libre Circulation des Citoyens Europeens Entre Codification et Reforme, p. 32.

42 See Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L 158*, 30.4.2004, p. 77–123, art 28(2).

43 See 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, *OJ C 270E*, 25.9.2001, p. 150–160, art 26(2). Under the Commission's initial proposal absolute protection from expulsion would attach to permanent residence.

44 See Directive 2004/38/EC, cit., art 24(1).

the nature of Union citizenship it is explicitly linked to the vocation for Union citizenship to be a 'genuine vehicle of integration' for the individual Union citizen into the society of the host Member State. As such it is a distinct contribution to the shaping of Union citizenship as a transnational status intended to facilitate the full inclusion of the individual into the society of the host Member State.

The Directive established a progressive status whereby rights were gradually acquired after periods of residence in the host Member State (under certain conditions) with three broad categories of citizens enjoying different levels of rights depending on their period of residence. The scheme established by the Directive is well known. What is worth stressing for present purposes is the general philosophy underpinning the Directive as one of gradual inclusion of the individual through the attribution of rights, acquired over time and one premised on integration, albeit an integration that is only manifested by time and place.[45] The relationship between rights and integration has certainly been unsettled, with social integration shifting from a *goal* of rights attribution (rights in order to secure integration) to a precondition for rights.[46] While this is an important development, what is emphasised here is the legislator's contribution to the shaping of Union citizenship not as a status of migration based on a particular activity – as existed before in the fragmented legislative landscape of the internal market – but as a fundamental status with the vocation of securing the inclusion and integration of the mobile Union citizen in the society of the host Member State, with this inclusion and integration to be secured and rewarded via a gradual acquisition of rights.

III The Role of the Court

If the legislature has played a singularly important role Directive 2004/38/EC, which can rightly be termed an organic law, endorsing a particular conceptualisation of Union citizenship, namely as a transnational status of integration,

45 Somek, A. (2007). Solidarity Decomposed: Being and Time in European Citizenship. *European Law Review* 32 (6), pp. 787–818.

46 Secure residence rights, family reunification and broad equal treatment might be conceived of as facilitating integration. Since the 'reactionary turn' in Union citizenship law however, the security of residence rights and equal treatment in the field of social assistance have now become contingent on a particular form and level of social integration. See broadly Coutts, S. (2018). The Absence of Integration and the Responsibilisation of Union Citizenship. *European Papers* 3 (2), pp. 761–780.

what has been the role of the Court in the development of this institution? The Court's role has been threefold in its interaction with the Directive and by implication the legislature. Firstly, the Court has, taking seriously the primary law nature of the rights and status of Union citizenship, acted as the catalyst for the development of Union citizenship rights and shaping its basic principles. Secondly, it has played a key role in the interpretation of Directive 2004/38/EC, not simply in giving expression to the will of the legislature as reflected in the text of the Directive but rather in interpreting the Directive in light of the broader nature of Union citizenship as a status of social integration. Finally, reflecting the key role of Directive 2004/38/EC in shaping the concept Union citizenship, the Court has also borrowed from the Directive, applying it 'by analogy' in areas not covered by the Directive itself.

a) ***Catalyst for Constitutional Construction***

The original role of the Court was to act as a catalyst for the development of Union citizenship as a meaningful status and in providing initial guiding principles regarding its operation. This was originally performed in relation to the transnational dimension of Union citizenship as expressed in the rights contained in Article 21 TFEU. It has recently reprised this role in relation to the developing further the legal implications of the status of Union citizenship contained in Article 20 TFEU.

The initial introduction of Union citizenship in the Treaty of Maastricht carried with it few additional rights to those found in the free movement of persons under internal market law. The foundational judgments of *Martínez Sala*,[47] *Grzelczyk*[48] and *Bidar*[49] significantly altered that situation and developed the status of Union citizenship into one of transnational social integration, a conception which, as described in the previous section, was endorsed and further developed by the legislature. The rights of free movement and residence were linked with a broader guarantee of non-discrimination, introducing the notion of equality – so central to the operation of citizenship as a concept – to the transnational context, providing the opportunity to force open national communities and in the words of Kostakopoulou render the boundaries between national communities more open and flexible.[50] *Baumbast and*

47 *Martínez Sala*, cit.

48 *Grzelczyk*, cit.

49 Court of Justice, judgment of 15 March 2005, case C-209/03, *The Queen* (*on the application of Dany Bidar*) *v. London Borough v. Ealing, Sec. of State for Education and Skills*.

50 Kostakopoulou, D. (2007). European Citizenship: Writing the Future. *European Law Jounal* 13 (5), pp. 623–646, 634 ff.

R insisted on the primary law nature of the rights of free movement and residence and their direct effect, a move which allowed the Court to constrain the operation of the earlier secondary legislation and open it up to proportionality assessments.[51] *Grzelczyk* found that Members States have accepted a certain degree of solidarity with mobile Union citizenship. In *Bidar*,[52] this was combined with an emphasis on proportionality which itself was linked with the notion of integration; equal treatment should be guaranteed for individuals in accordance with their level of social integration in the society of the host Member State. Emerging from these cases is firstly the constitutional nature of Union citizenship and its rights and secondly the beginnings of a vision of Union citizenship based on transnational social integration, a vision which was taken and further developed by the legislature in Directive 2004/38/EC as described in the previous section.

More recently, the Court has also performed the role of catalyst in a further development of Union citizenship under Article 20 TFEU. In *Rottmann*,[53] *Ruiz Zambrano*,[54] *Chavez-Vilchez*[55] and *Tjebbes*,[56] the Court has, relying on the status of Union citizenship, developed the so-called 'genuine enjoyment test'. While clearly linked to the rights of free movement and residence contained

51 Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*.

52 *Bidar*, cit.

53 Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottmann v. Freistaat Bayern*. For a comment see Kochenov, D. (2010). Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010. *Common Market Law Review* 47 (6), pp. 1831–1846.

54 Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* (*ONEm*). For a comment see Níc Shuibhne, N. (2011). Seven Questions for Seven Paragraphs. *European Law Review* 36 (2), pp. 161–162. See also Azoulai, L. (2011). "Euro-Bonds" The Ruiz Zambrano judgment or the Real Invention of EU Citizenship. *Perspectives on Federalism* 3, pp. 33–39.

55 Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*. For a comment see Staiano, F. (2018). Derivative Residence Rights for Parents of Union Citizen Children under Article 20 TFEU: *Chavez-Vilchez*. *Common Market Law Review* 55 (1), pp. 225–241.

56 *Tjebbes,* cit. For comments see Coutts, S. (2019). Bold and Thoughtful: the Court of Justice intervenes in Nationality Law, Case C-221/17 *Tjebbes*. *European Law Blog*, available at https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes; Van den Brink, M. (2019). Bold, but Without Justification? *Tjebbes*. *European Papers* 4 (1), pp. 409–415; Kochenov, D. (2019). The *Tjebbes* Fail, cit. and Platon, S. (2019). L'insoutenable légèreté de la citoyenneté de l'Union européenne: l'arrêt *Tjebbes* et la perte de nationalité pour les personnes résidant à l'étranger. *Journal d'Actualités de Droit Européen*, available at http://revue-jade.eu/article/view/2535.

in Article 21 TFEU, it does provide a certain baseline of protection for Union citizens, especially non-mobile Union citizen minors. It also reflects a right to place associated with Union citizenship, where that place is the Union territory.[57] Perhaps more significantly it carries within it significant potential for future development of Union citizenship.[58]

The Court has therefore played its legitimate constitutional role, affirming the constitutional nature of the status, elaborating and protecting basic principles and rights contained in the constitutional text and developing from them an underlying philosophy – of transnational social integration in the area of Article 21 TFEU rights and of the right to a place in the field of Article 20 TFEU. At least in the case of Article 21 TFEU rights, this underlying conception of Union citizenship has ultimately found expression in Directive 2004/38/EU which clearly reflects a gradualist approach towards the acquisition of rights of the mobile Union citizen in the host Member State, leading ultimately to the quasi-full membership under the status of permanent resident.

b) *Interpreting Directive 2004/38/EC*

In asserting and operationalising the rights found in primary legislation, the Court has performed a classic duty of a constitutional court, as outlined by Níc Shuibhne above. It has also informed the further development of Union citizenship. However, as is noted above, the legislature is given a key role to play in articulating and developing the status of Union citizenship. In its engagement with the Directive, the Court has respected the role of the legislature, both in the normative choices it made with respect to specific provisions but also in the broader contribution it has made and the vision of Union citizenship the Directive reflects.

The debate on the interpretation of the Directive, particularly after the *Dano* line of caselaw, is often focused on an activist interpretation of secondary legislation or a more deferential, literalist approach.[59] From this perspective, we witness inconsistencies in the approach of the Court either across

57 Coutts, S. (2020). The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights. *Cambridge Yearbook of European Legal Studies* 21 pp 318-341.

58 For a particularly progressive and expansive vision of the potential of Union citizenship see Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press.

59 See Van den Brink, M. (2019). Justice, Legitimacy and the Authority of Legislation within the European Union, cit.

time, or even across the Directive itself. As noted by van den Brink, a literal approach towards interpretation is taken in social assistance judgments, such as *Dano* and *Alimanovic*, at the same time as a purposive or more active approach is taken in the area of public security, such as in *PI* and *Onukwere*.[60] However, while seen from the point of view of interpretative approach there is a degree of inconsistency in the Court's approach, what is consistent in the interpretation of the Court is its adherence to the concept of social integration as the guiding principle of the Directive and of Union citizenship more broadly. What we have witnessed is an engagement with the text of the Directive and the choices made in that legislation and an appreciation of the constitutionally allocated role of the legislature in this area.

In the field of social assistance, we have certainly witnessed a shift or at least a marked development in the jurisprudence of the Court.[61] This has been characterised by a more deferential approach to the legislature, with the Court now relying primarily on secondary rather than primary law provisions,[62] a fact that is also reflected in a more textualist approach to the interpretation of that Directive.[63] However, it is submitted that there remains an purposive dimension to the Court's approach. The underlying philosophy of social integration still aminates the Court's approach towards transnational citizenship matters, the difference is that it is more deferential to the legislature's choices regarding how that integration is to be measured; behind a literal approach lies a teleological backdrop. As noted by Jesse and Carter, *Förster* (which can be instructively contrasted with *Bidar*) is an early indication of this approach.[64] In *Förster* the Court, applying its traditional approach towards equal treatment based on a degree of social integration, found that five years residence period was appropriate to ensure that an individual had a certain connection with the society of the host member state, in this case the

60 Ibid at 305. These judgments are not uncontested and have been criticising not simply for introducing an exclusionary and discriminatory dynamic into the operation of Union citizenship but also for contradicting the spirit of the Directive itself. See for example Spaventa, E. (2017). Earned Citizenship: Understanding Union Citizenship through its Scope, cit., and Kostakopoulou, D. (2014). When EU Citizens become Foreigners. *European Law Jounal* 20 (4), pp. 447–463.

61 For a contrary view see Davies, G. 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) Journal of European Public Policy 25 (10), pp.1442–1460.

62 See Muir in this volume.

63 See Jesse and Carter in this volume and Van den Brink, M. (2019). Justice, Legitimacy and the Authority of Legislation within the European Union, cit.

64 Jesse and Carter in this volume at ··.

Netherlands. It was explicitly inspired in this approach by the five-year period contained in the Directive in order to acquire permanent residence, a status which in turn guarantees unconditional equal treatment.[65] This is not a simple application of a black letter rule found in the legislation but reflects for the Court an aspect of the underlying logic of integration that animates the Directive as a whole. The five-year rule contained in the Directive is used as a proxy for the degree of integration an individual has achieved in the society of the host Member State.

The line of cases starting with *Dano* can certainly be understood as a restrictive turn in the Court's jurisprudence,[66] protecting the interests of states vis-à-vis mobile Union citizens in a period of hostility to migration. In the abandonment of the individualised proportionality test they also provide more certainty to individuals and especially to administrations.[67] Finally, they are also a case of a more faithful and deferential approach to the text of the Directive itself, abandoning references to primary law and the need to assess the proportionality not only of the secondary law but of its application in individual cases that began in *Baumbast*.[68] These cases represent all of these things. However, in them the Court does not abandon the social integration approach but instead defers to the legislative choices regarding the criteria for assessing whether or not that integration is achieved. An early indication of this approach can be found in *Dias* where the conditions contained in Article 7 of the Directive were said to represent 'qualitative elements relating to the level of integration in the host Member State'.[69] Understood against this characterisation of the Article 7 conditions it is evident that *Dano*, in making equal treatment contingent on residence in compliance with the conditions found in Article 7 of the Directive, was in effect making access to social assistance contingent on the level of integration in the host Member State. Only now, the criteria for the integration of the individual were those found in the Directive itself. Echoing this, in *Alimanovic*, the Court found that an individual assessment was unnecessary as 'Directive 2004/38, establishing a gradual system … itself takes into consideration various factors characterising the individual of

65 Court of Justice, judgment of 18 November 2008, case C-158/07, *Jacqueline Förster v IB Groep*, para. 55.

66 See generally the contributions in Thym, D., ed. (2017). *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford/Portland: Hart Publishing.

67 See Jesse and Carter in this volume.

68 *Baumbast and R*, cit.

69 Court of Justice, judgment of 21 July 2011, case C-325/09, *Secretary of State for the Home Department v. Maria Dias,* para. 64.

each applicant for social assistance and in particular, the duration of the exercise of any economic activity'.[70]

That the Court is concerned with the underlying philosophy of the Directive rather than a close and literal approach towards its interpretation is evidenced by its approach in public security matters, which as van den Brink notes were characterised by an interpretative approach which appeared to contradict the literal meaning of the Directives provisions. In *Tsakouridis*[71] and *PI*,[72] the Court gave an interpretation to the term 'public security' which was broader than the term is normally understood and appeared to contradict the distinction the legislature wished to establish between public policy and public security.[73] It is arguable that what lay behind this determination was not a security-orientated Court, although this is certainly a possibility, but also an understanding of the relationship between rights acquisition, appropriate behaviour and integration. As is articulated in the Opinion of AG Bot in *PI*, under a scheme which is characterised by a gradual acquisition of rights on the basis of social integration, it is difficult to rationalize a heightened level of protection from expulsion for those individuals who through their behaviour have demonstrated a distinct absence of integration with the society of the host Member State.[74] While the Court did not follow the Advocate General in denying PI the protection offered by Article 28(3) of the Directive, in its interpretation of the concept of public security it achieved a similar result, radically diminishing the importance of this heightened protection for those who have committed particularly serious crimes.

Similarly, in cases relating to imprisonment and the acquisition of this heightened protection under Article 28(3) Directive 2004/38, the Court has insisted on the link with the social integration of the individual. Heightened protection is acquired after ten years residence in the host Member State.

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70 Court of Justice, judgment of 15 September 2015, case C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, para. 60.

71 Court of Justice, judgment of 23 November 2010, case C-145/09, *Land Baden-Wurttemberg v Panagiotis Tsakouridis*.

72 Court of Justice, judgment of 22 May 2012, case C-348/09, *PI v. Oberburgermeisterin der Stadt Remscheid*.

73 See Kostakopoulou D., and Ferreira, N. (2014) Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship. *Columbia Journal of European Law* 20 (3), pp. 167–192 and Azoulai, L., and Coutts, S. (2013). Restricting Union Citizens' Residence Rights on Grounds of Public Security. *Common Market Law Review* 50 (2), pp. 553–570.

74 Opinion of AG Bot delivered on 6 March 2012, case C-348/09, *PI v. Oberburgermeisterin der Stadt Remscheid* paras. 53–62.

However, first in *Onukwere*[75] and later confirmed (and nuanced) in *B and Vomero*[76] these ten years can be broken by the conviction and imprisonment of the individual. In order to determine if an individual benefits from the heightened protection an assessment of the interrogative links he or she enjoys with the society of the host Member State should be carried out, an assessment that should take into account various factors, including the nature of the offence and conduct while in prison.[77] The contrast with the social assistance cases is marked, not only in reading additional conditions into a Directive which contains a simple ten-year rule, but also in introducing a standard based test and the associated administrative uncertainty, which the new approach in *Dano* is intended to remove. What links both sets of cases however is an overall faithfulness to the underlying conception of Union citizenship as a status of social integration, a conception reflected in the Directive.

c) *Applying the Directive by Analogy*

A further aspect of the Court's engagement with Directive 2004/38/EC has been the use of the Directive in areas not covered by the Directive itself, extending in effect the choices inherent in Directive 2004/38/EC to novel situations. This both underlines the central importance of the Directive and the vision of Union citizenship it reflects and ensures a greater coherence across Union citizenship law.

Firstly, the conditions under Article 7 of the Directive have been used by the Court of Justice in situations of family reunification and circular migration. Here an individual travels to another Member State, enjoys a family life there, and seeks to maintain that family life upon return to his or her home Member State. Such situations, dealing with the situation of Union citizens in their home Member State, are not governed by Directive 2004/38/EC, and yet the Court of Justice has relied on the conditions in Article 7 as criteria to ensure than an individual has enjoyed 'genuine residence' in the second Member State and that family life is 'created or strengthened in that Member State' as a result.[78] Only under these conditions can an individual then return to his or

75 Court of Justice, judgment of 16 January 2014, case C-378/12, *Nnamdi Onuekwere v. Secretary of State for the Home Department*.

76 Court of Justice, judgment of 17 April 2018, joined cases C-316/16 and C-424/16, *B v. Land Baden-Württemberg and Secretary of State for the Home Department v. Vomero*.

77 Ibid, paras. 70–75.

78 See Court of Justice, judgment of 12 March 2014, case C-456/12, *O v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B*, para. 51 and Court of justice, judgment of 5 June 2018, case C-673/16, *Coman and ors v. Inspectoratul General pentru Imigrări and ors*, para. 24.

her Member State. Furthermore, the provisions of the Directive are to apply by analogy to govern the family reunification right upon return to the home Member State.[79] This logic and a similar use of the Directive was also extended to dual nationals Union citizens in *Lounes*,[80] at least where nationality of the Member State of residence was acquired on foot of previous free movement.[81]

The use of the rules contained in the Directive has also occurred in the field of expulsion matters where an individual who enjoys a right to reside under Article 20 TFEU. In *Rendon-Marin*[82] and in *CS*,[83] the Court of Justice found that removal of the parent of a Union citizen would lead to the deprivation of the genuine enjoyment of the Union citizenship rights of the minor child.[84] A right of residence for those parents would therefore need to be provided. However, it also found that that right could be restricted for reasons of public policy and public security. Without explicitly mentioning Directive 2004/38, in outlining the conditions under which such as assessment should take place, the Court drew heavily on its jurisprudence developed in the context of mobile Union citizens and especially in its interpretation of analogous provisions under Directive 2004/38/EC.[85] While the possibility of expulsion in Article 20 TFEU cases is not unproblematic, in light of the removal of the Union citizen child from the territory of the Union as a whole, the approach adopted by the Court at least has the merit of ensuring a degree of coherence across Union citizenship law, principally based on rules developed on the basis of the Directive.

IV Conclusion

The early years of Union citizenship were marked by a certain tension between the Court and the legislature. *Grzelczyk*, *Trojani*, *Baumbast & R* and *Bidar* all appeared to at least limit or modify conditions contained in the secondary law

79 *O&B*, cit., para. 50 and *Coman*, cit., para. 24.

80 For a discussion see De Groot, D. (2018). Free Movement of Dual EU Citizens. *European Papers* 3 (3), pp. 1075–1113, who points out the complications created by this judgment for dual nationals of various types and the need for it to be reconciled with *O & B* and the situation of returnees in particular.

81 Court of Justice, judgment of 14 November 2017, case C-165/16, *Toufik Lounes v. Secretary of State for the Home Department*.

82 Court of Justice, judgment of 13 September 2016, case C-165/14, *Alfredo Rendón Marín v. Administración del Estado*.

83 Court of Justice, judgment of 13 September 2016, case C-304/14, *Secretary of State for the Home Department v. CS*.

84 Ibid, para. 32 and *Rendón Marín*, cit., para. 78.

85 See especially *CS*, cit., paras. 39–49.

in force at the time, namely the residence Directives. Kay Hailbronner was particularly critical at the time, seeing a clear contradiction between the text of the Directives and the position of the Court of Justice in extending welfare assistance to individuals who failed to fulfil the relevant conditions.[86] What is apparent is that in these judgments, the Court of Justice was performing its allocated constitutional role, identifying and making meaningful the primary law nature of the status of Union citizenship and the rights that accompany it. Dougan at the time also noted the constitutional significance of the judgments and their treatment of secondary legislation, insisting on a proportionality assessment on the actions of Member States even when they were acting within the strict text of the Directives; thereby imposing indirectly subjecting the secondary legislation of the Union to constraints.[87]

The adoption of Directive 2004/38/EC represented a clear turning point in the approach of the Court. As put by Níc Shuibhne '[t]he negotiation and adoption of this measure restored a sense of institutional mutuality, reviving the legislative-judicial interplay that characterised the regulation of personal free movement in earlier times.'[88] The Directive respected the Court's earlier interventions by codifying its jurisprudence and developing its underlying understanding of Union citizenship as a status of social integration. The underlying concept of Union citizenship as a status of social integration, establishing various rights and responsibilities between the mobile Union citizen and the host Member State is its basic operating principle. This is reflected not only in the gradualist scheme underpinning the Directive and the creation of various categories of citizens but also in the main innovation of the Directive, namely the status of permanent residence. The Directive therefore occupies an important place in Union citizenship law. This is a function of its codifying and comprehensive character, offering not only a coherent set of detailed rules but also an underlying philosophy of the status. It marks a distinct legislative intervention in the field, seeking to contribute to the constitutional construction of Union citizenship and give direction to its development. It is also a function of the unusual position of secondary legislation and hence the legislature in the constitutional framework established by Articles 20 and 21 TFEU, which acknowledges an ability to establish limits and conditions to constitutional

86 See Hailbronner, K. (2005). Union Citizenship and Access to Social Benefits. *Common Market Law Review* 42 (5), pp. 1245–1267.

87 Dougan, M. (2006). The Constitutional Dimension to the case law on Union Citizenship, cit.

88 Níc Shuibhne, N. (2012). The Third Age of EU Citizenship. In: Syrpis, ed., *The Juriciary, the Legislature and the EU Internal Market*. Cambridge: Cambridge University Press, pp. 333–334.

rights. The legislature therefore enjoys a therefore a constitutional mandate to shape the institution.

Perhaps mindful of this position, the Court in its engagement with the Directive has been largely respectful of its limits but more importantly has engaged with the underlying philosophy of the Directive. The relationship between the mobile Union citizen and host Member States based on rights and increasingly responsibilities and operating before a backdrop of social integration is one taken seriously by the Court. This helps explain the different approaches to the interpretation of the Directive we have witnessed in the latest, so-called restrictive, phase of Union citizenship. Social assistance and public security judgments display different interpretative techniques. Under normal circumstances this would indicate a variable attitude towards the position of the legislature. However, considered against the backdrop of the particular vision of Union citizenship embodied in the Directive, the divergent approaches of the Court are more understandable. In social assistance matters the Court has not so much abandoned its prior commitment to protecting a status of social integration but instead has deferred to the legislature regarding the criteria according to which such integration should be measured. This does entail a modified position for individuals, imposing requirements of economic activity and removing individual assessments. However, it is not inconsistent with the broader vision of Union citizenship pioneered by the Court of Justice in its earlier caselaw and developed further by the legislature. Similarly, its more creative approach to its interpretation of public security and heightened protection does go beyond the literal meaning of the relevant provisions of the Directive. However, its reading is informed by the centrality of social integration, only now complemented with a certain obligations of good behaviour imposed on the individual. Finally, the central position of the Directive in the operation of Union citizenship law is underlined by its use by the Court in situations not covered by the Directive, principally family reunification in situations of circular migration.

To date, Union citizenship has operated almost exclusively on a transnational plane, allowing individuals to assert rights vis-à-vis other Member States. In achieving this it has developed a status of transnational social integration. Both the Court, in its initial judgments and its deployment of powerful concepts of equal treatment and proportionality, and the legislature in providing a legislative framework which progressively awards rights to individual Union citizens based on a variety of criteria of time, residence and economic criteria, have contributed to this construction. More recently, the Court has begun to develop Union citizenship in another direction under Article 20 TFEU. In doing so it is playing its role as a constitutional court, emphasising the

constitutional nature of this status, developing its key principles and ensuring that protections offered by that status are enjoyed by individuals. We are perhaps at the beginning of a new age of Union citizenship, where its impact will be felt across a wider field of Union law.[89] What role the legislature will play is as yet uncertain. But its intervention will be crucial, not simply in providing legal certainty but in giving shape and direction to this status. The roles played by the Court and the legislature in Union citizenship have to date been largely complementary and symbiotic, characterised by mutual engagement and co-constructing a meaningful status for mobile Union citizens. It is to be hoped that a similar constructive approach will characterise the future development of this key institution for the Union.

89 See Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as the Federal Denominator, cit., and Sarmiento, D., and Sharpston, E. (2017). European Citizenship and its New Union: Time to Move On? In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*, cit.

CHAPTER 7

Life after the '*Dano*-Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law

*Moritz Jesse and Daniel William Carter**

Introduction

Welfare entitlements of EU Citizens, especially those who are not economically active, were always controversial. This chapter will show that the European Court of Justice, in a line of cases starting with the *Förster* decision,[1] started to develop quite coherent case-law based on Directive 2004/38, which linked equal treatment as regards social benefits to legal residence under Directive 2004/38.[2] Despite one or two exceptions, this approach was gradually consolidated in follow-up cases, such as *Ziółkowski* and later *Dano*. The decisions taken by the Court are of course always embedded in a complex mixture of legal and non-legal factors, which all have likely contributed to the Court's attitude and approach.[3] However, it will be shown that the *Dano* judgment can be seen as a product of rather conventional evolution of case law after the adoption of Directive 2004/38, rather than a full-on departure from the pre-existing

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1 For example, see the difference between Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication. *Journal of European Public Policy* 25 (10), pp. 1442–1460, and Hoogenboom, A. (2018). CJEU case law on EU Citizenship: normatively consistent? Unlikely! A response to Davies "Has the Court changed, or have the cases?". *EU Law Analysis*, available at http://eulawanalysis.blogspot.com/2018/11/cjeu-case-law-on-eu-citizenship.html.

2 Thym, D. (2015). When Union citizens turn into illegal migrants: the Dano case. *European Law Review* 40(2), pp. 249–262.

3 Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication, cit., p. 1443; Šadl, U., and Sankari, S. (2017). Why did the Citizenship Jurisprudence Change? In: Thym, ed., *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing.

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acquis.[4] This development evolved into the much-discussed *Dano-Trilogy* of cases,[5] which has caused quite a stir amongst academic commentators, despite limited effects in daily legal administration and practice.[6] The *Dano* cases and its follow-ups were widely criticised for abandoning the Court's traditional stance of protecting EU citizens and furthering the value of Union citizenship by interpreting the law away from its market-based confines.[7] That, either explicitly or implicitly,[8] the Court has engaged in a "swift dismantling project" of the Union Citizenship *acquis*,[9] and that through its decisions the Court is reacting to the current *Zeitgeist* by attempting to help quell the nationalist tide sweeping across Europe.[10] Another explanation included the changing

4 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship. *Common Market Law Review* 52 (4), pp. 889–937, 907; Schiek, D. (2017). Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, pp. 360–361.

5 This is defined as the series of cases concerning 'special non-contributory cash benefits', which runs through Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*; Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano*; Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic*; Court of Justice, judgment of 25 February 2016, case C-299/14, *García Nieto*.

6 See Mantu S., and Minderhout, P. (2019) Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens. *European Journal of Migration and Law* 21, pp. 313–337, 316ff., 335.

7 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship. *Common Market Law Review* 52 (4), pp. 889–937; O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*. *Common Market Law Review*, 54 (1), pp. 209–243; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge, Cambridge University Press.

8 See, amongst others, Van den Brink, M. (2019). The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU? In: Bauböck, ed., *Debating European Citizenship*. Cham: Springer; Lenaerts, K. (2011). European Union Citizenship, National Welfare Systems and Social Solidarity. *Jurisprudencia* 18 (2), pp. 397–422; Thym, D. (2017). The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development. In: Thym, ed., *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing; Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit.; Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication, cit.

9 O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 210.

10 Šadl, U., and Sankari, S. (2017). Why did the Citizenship Jurisprudence Change? In: Thym, ed., *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing, p. 109; O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit.

nature of cases reacting the Court and the increasingly un-deserving nature of the applicants which have led to controversial decisions such as *Dano* and *Alimanovic*.[11]

This chapter will argue amongst a more orthodox, less political line to explain the *Dano*-Evolution: The three cases of the *Dano*-Trilogy are not *the* revolutionary cases that they are asserted to be. Instead, the developments both before and after *Dano* can be attributed to a natural evolution of the case-law following the introduction of Directive 2004/38. In this respect, it will be argued that the alleged "patchwork" of citizenship case-law is in fact rather coherent,[12] the reasoning and outcomes of the judgments are on the whole convincing.[13] In order words, setting aside the fractious normative and political arguments surrounding the cases, it will be claimed that legal developments can be explained as mostly logical and predictable evolution of the law. This 'evolution' can be best explained as *'interpretation cessat in claris'*, and conforms to the standard method of legal reasoning used by the Court. This dictates that so long as the wording of a legal text is clear, there is no reason to search for a more purposive or teleological meaning beyond its ordinary understanding. This is what has happened after the adoption of Directive 2004/38.[14]

Thereafter, the chapter will introduce some of the inevitable consequences of the new formalistic interpretation of Directive 2004/38 will have for economically active and not economically active EU Citizens. Also, the anatomy of a decrease of individualized proportionality tests and automatic tests of legal residence under the Directive, as well as the ever-broadening scope of social assistance and the range of social benefits that can be subjected to residence tests will be looked at.

It will be concluded that despite the problems associated with a strict interpretation of the Directive, particular for certain groups of EU Citizens, it has to be acknowledged that the Court is increasing legal certainty *and* predictability of judgments. The Court is accepting the political choices made by the EU legislature, and by applying such rules as laid down in secondary legislation, the

11 Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication. *Journal of European Public Policy* 25 (10), pp. 1442–1460, 1443.

12 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*. Oxford: Hart Publishing, p. 35.

13 Neergaard, U. (2016). Europe and the Welfare State – Friends, Foes, or …? *Yearbook of European Law* 35 (1), pp. 341–381, 377.

14 Lenaerts, K., and Gutiérrez-Fons, J.A. (2013). To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice. *EUI AEL Working Papers 2013/9*, p. 7.

Court is sticking to its standard method of legal reasoning. As such, any criticism of the legal situation of EU Citizens under Directive 2004/38, which may be valid and justified, may be better placed against the EU legislature rather than the judiciary.

1 The Evolution that Led to the *Dano*-Triloygy

1.1 *The Early Cases:* Martínez Sala, Baumbast, *and* Trojani

Accessing a Member State's "circle of solidarity" has never been open-ended or unconditional for economically inactive EU Citizens.[15] Traditionally, workers, the self-employed, and their family members, were awarded equal treatment not only with regard to accessing employment and working conditions in the strict sense, but also with regard to all other social advantages enjoyed by domestic workers and Member State nationals,[16] including accessing all manner of social benefits. Other categories of individuals moving throughout the EU were not granted such far-reaching equal treatment rights.[17] Following the introduction of EU Citizenship in the Treaty of Maastricht, academic discussion was divided about its precise nature in this regard, and it took a while before the Court stepped into this discussion in the 1990s with a series of judgments which defined the value of EU Citizenship.[18]

In *Martínez Sala*, the Court held that a Spanish national residing lawfully in Germany for over 20 years could not be denied equal treatment with regard

15 Verschueren, H. (2015). Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano? *Common Market Law Review* 52 (2), pp. 363–390, 364.

16 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ L 257*, 19.10.1968, p. 2–12; See Plender, R. (2005). Citizenship and Immigration. *European Business Law Review* 16 (3), pp. 559–590, 566–567.

17 This was the case even after the adoption of the 'Residency Directives': Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180*, 13.7.1990, p. 26–27; Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ L 257*, 19.10.1968, p. 13–16; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students, *OJ L 317*, 18.12.1993, p. 59–60; See Kostakopoulou, D. (1999). Nested "Old" and "New" Citizenships in the European Union. *Columbia Journal of European Law* 5 (3), pp. 389–414, 404–405.

18 For example, see Shaw, J. (1997). The Many Pasts and Futures of Citizenship in the EU. *European Law Review* 22 (6), pp. 554–572; Weiler, J. (1996). European Neo-Constitutionalism: In search of Foundations for the European Constitutional Order. *Political studies* 44 (3), pp. 517–533; Kostakopoulou, D. (1996). Towards a Theory of Constructive Citizenship in Europe. *Journal Political Philosophy* 4 (4), pp. 337–358.

to social (security) benefits in the form of a child benefit,[19] solely because her residence permit granted on the basis of national law had expired and she was yet to receive a new one. In this seminal case, the Court first linked the freedom of EU Citizens to move and reside throughout the Union with the principle of equal treatment.[20] The decision excited many commentators about the prospect of equal treatment being extended beyond the realms of economic activity and to arise solely on the basis of residence.[21] At first, this seemed attainable, as the scope of Union Citizenship and the link between any kind of legal residence and equal treatment was extended further in the cases of *Baumbast* and *Trojani*.

In *Baumbast*, even though no social benefit was at stake, the Court found a national measure rejecting a right of residence for Mr Baumbast's Colombian wife disproportionate, even though he arguably failed to meet the conditions laid down in the Residency Directive 90/364. His health insurance did not cover *all* risks, as was technically required by this predecessor to Directive 2004/38.[22] The Court held that he could nevertheless rely directly on Article 18 TEC (Article 21 TFEU) to obtain a right to reside and consequently equal treatment.[23] *Baumbast* showed that Directive 90/364, a Directive adopted *before* EU Citizenship was introduced into the EC Treaty, did not limit the wider application of Article 18 TEC to persons who arguably had no right of residence under secondary legislation.

The Court developed this line of argument further in *Trojani*, where a Frenchman residing in Belgium and working for the Salvation Army in return

19 Defined as a family benefit under Article 1(u)(i) Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, *OJ L 149*, 5.7.1971, p. 2–50; see also Court of Justice, judgment of 12 May 1998, Case C-85/96, *María Martínez Sala*, para. 24.

20 Articles 8(2) EC (now Articles 20 & 21 TFEU) and Article 6 EC (now Article 18 TFEU) respectively.

21 Shaw, J. (2010). A View of the Citizenship Classics: Martinez Sala and Subsequent Cases on Citizenship of the Union. In: Maduro and Azoulai, eds., *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart; see also Closa, C. (1992). The Concept of Citizenship in the Treaty of the European Union. *Common Market Law Review* 29 (6), pp. 1137–1169; Vincenzi, C. (1995). European citizenship and free movement rights in the United Kingdom. *Public Law*, pp. 259–275; Meehan, E. (1993). Citizenship and the new European Community. *Political Quarterly* 64 (2), pp. 172–186.

22 Art. 1 Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

23 Court of Justice, judgment of 17 September 2002, C-413/99, *Baumbast;* See Timmermans, C. (2010). Martinez Sala and Baumbast revisited. In: Maduro and Azoulai, eds., *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart p. 345–355.

for 'pocket money', food, and shelter was denied access to the Belgian 'minimex' social assistance benefit. In its decision, the Court outlined three situations in which an application for social assistance must be granted. The first is if they can be classified as a worker and are engaged in 'genuine' economic activity. The second is if the individual has resided in the host-Member State for a "period of time" (à la *Martínez Sala*). *Trojani* added a third situation, where the individual was in possession of a residence permit granted on the basis of *national* law. This was held to be enough to demonstrate lawful residence also from the perspective of EU law, with all the benefits that that status entails. This again demonstrated that a right of residence could be established outside the conditions under applicable secondary legislation. As shall be seen, this far-reaching approach that blurs the distinction between national and EU-based residence, is now obsolete in the wake of Directive 2004/38.

Even during this period in which cases were mostly decided in favour of the applicants, the Court nonetheless reiterated the ability of Member States to protect their welfare system from unreasonable burdens posed by EU Citizens. In *Baumbast*, the Court emphasized that the whilst the preamble to Directive 90/364 stated that individuals must not become an unreasonable burden on the host Member State, this was not the case with either Mr Baumbast or the members of his family.[24] In *Trojani*, the Court again emphasised that the right to move and reside is not unconditional, and can be limited to ensure the EU Citizen has "sufficient resources to avoid becoming a burden on the social assistance system",[25] even if Mr Trojani's specific situation was not considered.[26] These formative cases emphasised the independent legal value of Union Citizenship by linking what is now Article 21 TFEU directly with the right to equal treatment under Article 18 TFEU. National residence status was also linked with equal treatment, with primary law seemingly trumping both EU secondary legislation, which at the time proceeded the introduction of Union Citizenship, as well as national legislation, with any restriction having to be judged in the light of proportionality.[27]

1.2 *The Reign of Vague Legal Formulas:* Grzelczyk, Bidar, *and* Brey

The next wave of cases that reached the Court before the adoption of Directive 2004/38 concerned a variety of categories of social benefits ranging from

24 *Baumbast*, cit., paras. 90 – 92.

25 Court of Justice, judgment of 7 September 2004, Case C-456/02, *Trojani*, para. 33.

26 *Trojani*, cit., paras. 32 – 33.

27 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit.

student loans to unemployment benefits. Whilst the legal environments which governed the access to these benefits were quite different, the Court dealt with this variety of social benefits in a surprisingly similar fashion. In *Grzelczyk* and *Bidar*, two cases which concerned the rights of students in accessing minimum subsistence benefits and student financing,[28] the Court developed complicated formulae to test when individuals can access equal rights regarding access to social benefits and when such access can be denied. On paper, these formulas recognized the legitimate interest of Member States to protect the financial sustainability of their welfare systems. However, in practice they strengthened the position of individual applicants *vis-à-vis* the State, again arguably circumventing conditions contained in applicable secondary legislation. It should be noted that in the case of students, Directive 93/96 was adopted shortly before the Treaty of Maastricht entered into force in November 1993, and is slightly different from the situation in stage 1 where the relevant secondary law was adopted clearly before Maastricht.

Grzelczyk concerned a French student in Belgium claiming minimum subsistence assistance in the final year of his studies. Article 1 Directive 93/96 stated that students must assure national authorities that they were in possession of sufficient resources to avoid becoming a burden on the host-state's social assistance system, whilst Article 4 further stated that students would have a right of residence so long as these conditions were met. Despite this, the Court held that denying a right of residence could never be the 'automatic consequence' of a mere request of social assistance,[29] and that the Member State in question must demonstrate 'a degree of financial solidarity' with the migrant, assuming the difficulties are temporary and the individual does not become an 'unreasonable' burden on the public finances of the host state.[30] In doing so, the Court introduced a subtle distinction between burdens that could be considered 'reasonable' and those so '*un*reasonable' as to break this bond of financial solidarity between the host-state and the migrant student,[31] even if Belgium could in theory still revoke or refuse to renew Mr Grzelcyk's residence permit.[32] However, the decision gave no real indication as to how to define the

28 Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*; Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar*.

29 *Grzelczyk,* cit., para. 43.

30 *Grzelczyk,* cit., para. 44.

31 Kostakopoulou, D. (2007). European Union Citizenship: Writing the Future. *European Law Journal* 13 (5), pp. 623–646; O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK,* cit.

32 *Grzelczyk,* cit., paras. 42 – 43.

terms 'unreasonable burden', 'automatic consequences', and 'temporary problems'. This was not helpful to national administrators, and created a constant threat as denying such an application for social assistance benefits who claim to be hit by temporary financial difficulties could be subsequently found to breach the bonds financial solidarity as it would not constitute an *unreasonable* burden in the particular case.

In *Bidar,* the Court reiterated that a 'genuine link' between the applicant and the host society which could expressed through a 'sufficient level' of integration, which would allow economically inactive students to access student financing in the host state. The UK rule, which required three years' residence to establish such a link was held in principle to be legal.[33] However, it was too restrictive as it made it impossible for nationals of other Member States to demonstrate 'integration' in any way *other* than three years' residence.[34] Assessing Mr Bidar's situation, the Court found that as he had undergone a significant portion of his secondary education in the UK, a 'genuine link' with British society could be established.[35] Like in *Grzelczyk*, the Court did not define the terminology used. Authorities only knew that (1) three years' residence was *not* suitable as an exclusive category for determining a 'sufficient degree of integration'; and that (2) such a sufficient degree of integration existed after undergoing a significant portion of secondary education in the host state. Member States could theoretically protect their social assistance systems from unreasonable burdens by denying claims from individuals with an insufficient links to the host societies. However, the vague formulae provided by the Court always meant that they faced an elevated risk of violating EU law.[36] A similar formula was constructed in the context of jobseekers' allowances under the free movement of workers, without any of the terminology being concretely defined. In *Collins*, the Court held that a period of working in the UK for 15 years *before* a claim for a jobseeker's allowance was lodged was too distant to establish a 'sufficiently close connection' with the UK's labour market. However, a 'genuine link' between the jobseeker and the employment market could be established through a 'reasonable period' of residence within which the candidate 'genuinely' sought work.[37] This would oblige the Member State to

33 *Bidar,* cit., para. 52.

34 *Bidar,* cit., para. 61.

35 *Bidar,* cit., paras. 60 – 62.

36 Nic Shuibhne, N. (2016). What I tell you three times is true: Lawful Residence and Equal Treatment after Dano. *Maastricht Journal of European and Comparative Law* 23 (6), pp. 908–936, 920.

37 Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*, para. 69.

grant social benefits "intended to facilitate access to employment in the labour market".[38]

The Court has intermittently used such an approach after the adoption of Directive 2004/38, with the most recent example being *Brey*, decided in 2013.[39] It is argued here that this case is more of an outliner inspired by the older purposive approach of the Court. The case concerned yet another form of social benefit, this time a pension supplement, however, the Court used the same vague formulae to determine its accessibility. Austria rejected the claim of retired German couple, stating that that they did not have legal residence under Directive 2004/38 due to their insufficient income. In its judgment, the third chamber of the Court emphasised the link between Article 7 Directive 2004/38 and the requirement not to rely on welfare benefits in the country of residence. However, it also stated the common *dictum* that an 'automatic' denial of social assistance based on the presumption of insufficient resources is not permitted. Instead, the Member State in question must assess on a case-by-case basis whether an individual places an unreasonable burden on the welfare system of the state as a whole, by reference to the personal circumstances of the individual, and must comply with the principle of proportionality.[40] This therefore required national authorities to assess every single claim, even during the first three months of residence where Directive 2004/38 rules out social assistance,[41] against the impact such granting would have on the financial stability of the national welfare system overall. The formula put a heavy burden on the Member States and authorities while handing a significant advantage to individual applicants, and presupposed assessments that many (decentralized) administrations in charge of granting social benefits will find impossible to perform in practice.[42] *Brey* was rendered by the Third Chamber of the Court in the year 2013 and seems out of place compared to subsequent developments. By 2014 the Grand Chamber of the Court had already moved on and adjusted

38 *Collins*, cit., para. 63.

39 Minderhoud P., and Mantu, S. (2017). Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive. In: Thym, ed., *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing, p. 197–198.

40 *Brey*, cit., para. 63–64.

41 Art. 6 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

42 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit.; O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., p. 49; see also O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 216.

its approach not only in *Dano* but also in *Förster* and *Ziolkowski*. This suggests that *Brey* is the 'swansong' of the Court's old qualitative approach, sang solely by the Third Chamber, rather than a signal of continuity of the orthodox approach.[43]

1.3 *The Turning Point toward Legal Certainty:* Förster

Directive 2004/38/EC had the purpose of unifying the fragmented legal landscape consisting of several Directives and Regulations for various groups of EU citizens into one coherent piece of legislation.[44] Furthermore, it sought to codify case-law interpreting the rights of EU Citizens, which was mostly interpreting treaty provisions directly. At the same time it must also be seen as the expression of the EU legislator fulfilling its role under Articles 20 and 21 TFEU to adopt secondary legislation providing for the enjoyment, but also for the limitation and conditions of free movement rights, as opposed to pre-existing Directives. It was adopted specifically on the Union Citizenship and Equal Treatment bases, giving further effect to these primary law rights. We argue here that the Court of Justice effectively took the adoption of Directive 2004/38 as opportunity to review and adjust its case-law. This is akin to what happened in the first step described above, albeit the mirror image of the early cases of the Court, when the Court took the introduction of Union Citizenship as an occasion to re-define its approach to free movement in the light of newly established Treaty provisions. The first opportunity the Court had to do this reversal was the *Förster* case rendered in 2008, although the facts of the case took place prior to the adoption and transposition of Directive 2004/38.[45]

Jacqueline Förster was a German national who had studied in Amsterdam. Because she was working, she was able to claim Dutch study benefits as she was an EU worker and therefore entitled to all 'social advantages' under Article 7(2) Regulation 1612/68. However, during a regular check at a later stage of her studies the Dutch authorities discovered that Ms Förster was not employed for a short period of time and asked her to re-pay the benefits she received during

43 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 892, 905–907; Schiek, D. (2017). Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity, cit., p. 360–361.

44 As stated in the Directive, it amends Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

45 See for more information on the case Golynker, O. (2009). Case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008. *Common Market Law Review* 46 (6), pp. 2021–2039.

these months. Relying on the *Bidar* case, Ms Förster argued that she had a sufficient degree of integration and genuine links with the Netherlands and could not be obliged to repay the benefits received. The case seemed an appropriate opportunity to merge the elements of allowing for access to social benefits because of a 'certain degree of integration' known from *Bidar* with the elements of temporal financial solidarity known from *Grzelczyk*.[46] However, this did not happen. Instead, the Court dramatically changed the substance of the 'certain degree of integration' test to access the welfare system of the host-Member State as an economically inactive student, while the very wording of the test used by the Court stayed exactly the same. In *Bidar*, three years' residence was just *one* indicator allowed to consider if a genuine link existed. In *Förster*, the Court accepted the Dutch rule defining five years' legal residence as *the only way* of proving a sufficient degree of integration. This condition was by itself held proportionate to the legitimate aim of guaranteeing a genuine link.[47]

In its reasoning, the Court signalled the importance of permanent residence under Article 16(1) Directive 2004/38, which also requires five years of legal and continuous residence, even though the Directive was not applicable to the facts of the case.[48] It is remarkable that the Court was able to shift from a qualitative to a quantitative test that assumes a sufficient level of integration only after five year's residence without changing one word in how the reasoning is formulated.[49]

Rather, by linking it to the Directive, it was the entire meaning of the concepts that changed. The decision meant in practice that students needed to either be economically active or have permanent residence status under Article 16(1) of the Directive before they were entitled to student grants and loans. This decision by the Court immediately created more legal certainty and made things much easier for national administrators. It also signalled to Member States that a strict word-for-word transposition of the Directive including restrictions to access public benefits for students would not be struck down by

46 On this issue, see Jesse, M. (2011). The Legal Value of 'Integration' in European Law. *European Law Journal* 17 (1), pp. 172–189; O'Leary, S. (2009). Equal Treatment and EU Citizens: A new chapter on cross-border educational mobility and access to student financial assistance. *European Law Review* 34 (4), pp. 612–627; see also Hoogenboom, A. (2018). CJEU case law on EU Citizenship: normatively consistent? Unlikely! A response to Davies "Has the Court changed, or have the cases?", cit.

47 *Förster,* cit., paras. 52–54.

48 *Förster,* cit., para. 55.

49 Jesse, M. (2011). The Legal Value of 'Integration' in European Law, cit.; O'Leary, S. (2009). Equal Treatment and EU Citizens: A new chapter on cross-border educational mobility and access to student financial assistance, cit., p. 622.

the Court on the basis of primary EU law and earlier decisions such as *Bidar*. The rules as contained in the Directive, particularly those relating to permanent residence and student financing were a key part of the political compromise leading to the Directive's adoption.[50] As later case-law has shown, this promise was lived-up to by the Court.

1.4 *The* (*New*) *Dominance of Directive 2004/38:* Ziółkowski & Szeja

The next step in our evolution was *Ziółkowski & Szeja*, decided in 2011 and which concerned the nature of the newly established permanent residence status under the Directive.[51] In particular it threw light on the issue of which forms of residence gives access to permanent residence rights under Article 16(1), and whether the qualifying residence period of five years could have started before Directive 2004/38 had entered into force and transposed by Member States, or even before the EU Citizen's Member State of origin joined the EU. The Court had already established previously in *Lassal* that residence completed "in accordance with earlier European Union law instruments" should be considered when determining whether there has been five years residence under Article 16(1).[52] However, *Ziółkowski & Szeja* concerned the relationship between Article 16(1) permanent residence and residence on the basis of *national* humanitarian law, even though the applicants were economically inactive and did not have sufficient resources under Article 7. In his Opinion, the Advocate General cited the Court's reasoning in *Dias*,[53] which stated that permanent residence under Directive 2004/38 was above all a tool to assist with the integration of EU Citizens in the host Member State. In his opinion, this meant that length of residence on the basis of national law as well as EU law should be considered, as well as taking into account other 'qualitative factors'.[54]

However, the Court continued on the path of a more textual, formalistic interpretation of the Directive. Instead of accepting at all types of legal residence under EU *and* national law, the Court held that the definition of 'legal' and 'continuous' residence for 5 years under Article 16(1) of the Directive must

50 See Jesse, M. (2012). Joined Cases C-424/10, *Tomasz Ziółkowski v. Land Berlin*, and C-425/10, *Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin*. *Common Market Law Review* 49 (6), pp. 2003–2017.

51 Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziółkowski* & *Szeja*.

52 Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*, para. 40.

53 Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64; Opinion of Advocate Genera Bot delivered on 14 September 2011, joined cases C-424/10 and C-425/10, *Ziółkowski* & *Szeja,* para. 53.

54 Opinion of Advocate Genera Bot, *Ziółkowski* & *Szeja,* cit., paras. 53–54.

be interpreted autonomously from national law. There is, after all, no reference to national law in Articles 7 or 16(1) of Directive 2004/38. Hence only residence in conformity with Article 7 of the Directive can lead to permanent residences status under Article 16(1). This includes, however, periods of residence in compliance with the conditions mentioned in Article 7 before the entry into force of the Directive and even before the accession of new Member States.[55] In *Ziółkowski*, the applicants could not prove that they had sufficient resources in the 5-year period before requesting permanent residence, hence their residence did not comply with the conditions of Article 7 of the Directive and permanent residence under Article 16(1) could not be established.

Neither the Advocate General nor the Court mentioned the *Förster* judgment in *Ziółkowski*. Others have therefore marked *Ziółkowski* and not *Förster* as the turning point from a '*rights-opening*' to a '*rights-closing approach*' only.[56] Yet, it is our claim that both cases form a continuum. The absence of *Förster* in *Ziółkowski* may be because the subject matter in each case was different, or because, at least officially, the Directive did not yet apply in *Förster*. Whilst *Förster* dealt with student grants, it did touch upon permanent residence under Directive 2004/38 indirectly as five years of legal residence was the *only* way under Dutch law to show the required 'degree of integration'. However, the seeds sowed in *Förster* in 2008 fell on fertile ground in *Ziółkowski*, which confirmed the closed system to define the conditions for legal residence and resulting equal treatment exclusively on Directive 2004/38. After these two judgments the Directive emerged as the only frame within which the Court establishes legality of residence of EU Citizens. In *Förster*, this link was more indirect, by validating Dutch law which transposed the Directive.[57] In both cases, however, only the Directive and the choices made by the EU legislator therein were looked at to determine the status of the applicant in a distinct departure from

55 *Ziółkowski* & *Szeja,* cit., para. 63; see also Jesse, M. (2012). Joined Cases C-424/10, *Tomasz Ziółkowski v. Land Berlin*, and C-425/10, *Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin*, cit.

56 Šadl, U., and Sankari, S. (2017). Why did the Citizenship Jurisprudence Change?, cit., p. 91; Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 917.

57 In para. 55 of the *Förster* judgment the Court explicitly discusses permanent residence in the context of Article 24(2)of the Directive: 'Directive 2004/38 (…) provides in Article 24(2) that, in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families (i.e. students) the host Member State is not obliged to grant maintenance assistance for studies, including vocational training, consisting in student grants or student loans, to students who have not acquired the right of permanent residence'.

the above mentioned pre-*Förster* jurisprudence on Union Citizenship. After these two judgments, the *Dano*-Trilogy was the inevitable next step.

1.5 *The Inevitable and Logical Next Step:* Dano*,* Alimanovic*, and* Garcia Nieto

Our final step is the *Dano* case and subsequent decisions of the Court. In *Dano*, the Court allowed Germany to refuse social minimum assistance benefits for an unemployed Romanian mother, because she did not meet the conditions for legal residence in Article 7 Directive 2004/38. She was neither a worker nor did she have sufficient resources at her disposal. Therefore, she could not rely on the right to equal treatment under Article 24(1).[58] Simply put, *Dano* confirmed that individuals cannot claim equal treatment under Article 24 unless they have a right to reside under Article 7 of Directive 2004/38, at least within the first 5 years of their residence in the host Member State.[59] As in *Ziółkowski*¸ the Court assessed legal residence and equal treatment rights exclusively within the framework created by Directive 2004/38. It declined to consider any potential quantitative or qualitative factors or 'links' between Ms Dano and Germany outside of the Directive.

After *Förster* and *Ziółkowski*, the judgment in *Dano* was inevitable. If Union Citizens, after *Ziółkowski,* need to comply with the conditions laid down in Article 7 Directive 2004/38 in order to obtain long-term residence status under Article 16(1), then it stands to reason that they must comply with the conditions of Article 7 *during* the initial 5 year period of residence if they wish to claim equal treatment and social benefits under the same legal instrument. Separate concepts of legal residence for the purposes of Articles 6, 7, 16(1), and/or 24 of Directive 2004/38 would be detrimental to legal certainty and coherence, which the Directive was meant to introduce. Put in simple terms, after *Förster, Ziółkowski,* and *Dano*, access to permanent residence, legal residence, and equal treatment, including access to social benefits for economically inactive EU citizens, depends entirely on the *same* form of legal residence under Directive 2004. Primary EU law effectively plays no more role in this regard.

The Court followed the same logic in 2015 in *Alimanovic*.[60] The case concerned a Swedish mother and her daughters, who returned to Germany in 2010

58 *Dano*, cit., para. 82.

59 Thym, D. (2015). When Union citizens turn into illegal migrants: the Dano case. *European Law Review* 40(2), pp. 249–262; Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit.

60 *Alimanovic*, cit.

after some years' absence. They worked intermittently for 11 months before they lodged an application for social minimum subsistence benefits.[61] The question was whether, as jobseekers who were formerly employed years ago and for 11 months just prior to their application, they should retain the status of worker, or be treated as jobseekers. Against the advice of Advocate General Wathelet,[62] the Court upheld the link made in *Dano* between residence in conformity with Article 7 and equal treatment under Article 24(1) of the Citizens' Directive. As in *Dano* and *Ziółkowski*, their residence and equal treatment rights were assessed under the Directive only, with primary EU law playing no role. The Court then proceeded to apply the rules on retaining worker status as laid down in the Directive. According to Article 7(3)(c) Directive 2004/38, Union citizens retain the status of worker for a minimum of 6 months, after employment of less than 12 months. Hence Ms Alimanovic and her daughter could not retain worker status for longer than 6 months. Whilst they still could reside as a jobseeker under Article 14(4)(b), the express derogation in Article 24(2) allowed Germany to deny them social assistance. Whilst not decisive in the case itself, the Court also established a new test for determining what is an 'unreasonable' burden under the Directive. It moved away from a duty to establish that each individual claim of social security benefits would amount to an unreasonable burden, and instead held that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[63]

The final case of the *Dano*-Trilogy is *Garcia Nieto*.[64] The case concerned two Spanish nationals that moved to Germany in 2012. The couple were neither married nor in a civil partnership, but did have a child together. The mother moved in April 2012 with their common child in order to work, whilst the father moved in June of the same year with his child from a previous relationship. After arriving in Germany, the father applied for a minimum subsistence social assistance under the German Social Law, i.e. the *Hartz-4* benefit under the German Social Code II (SGB II), the same social benefits as in *Dano,* from July until September. His claim was denied because he had not been residing

61 See also the excellent summary by Nic Shuibhne, N. (2016). What I tell you three times is true: Lawful Residence and Equal Treatment after Dano, cit., p. 911–913.

62 Opinion of Advocate General Wathelet delivered on 26 March 2015, case C-67/14, *Alimanovic*, paras. 99–109.

63 *Alimanovic*, cit., para. 62.

64 *García Nieto*, cit.

in Germany for longer than three months.[65] The Court held that father and son were not entitled to this social assistance benefit as Article 24 Directive 2004/38 contained an explicit derogation whereby the host Member State is not obliged to grant social assistance during the first three months of residence.[66] The Court emphasized, as did the Advocate General,[67] that this limitation according to Recital 10 of the Directive seeks to maintain the "financial equilibrium of the social assistance systems of the Member States".[68] The Court also makes a link with the system of retention of worker status in *Alimanovic*, asserting that Directive 2004/38 approach by confirming that the German rule excluding such persons from social assistance claims guarantees a "significant level of legal certainty and transparency … while complying with the principle of proportionality".[69] The Court here also confirms the new approach taken in *Alimanovic* to determining what is an unreasonable burden.[70]

After these initial three cases, the Court has followed its line and remained answering questions posed about Citizenship of the Union exclusively through a textual interpretation of Directive 2004/38 as when they fall within the scope of application of the Directive.[71] This has been done, for example, in *Diallo*, to limit the rather lose interpretation of procedural deadlines in the Directive the Belgian State had in place,[72] or *Tarola*, about retention of worker status after becoming involuntary unemployed after a short period of work only.[73] Also in many cases of return, where the Directive is not applicable as such, the Court referred to it as frame of reference in analogy.[74]

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65 It should also be noted that mother and common child were entitled to such benefits due to the mother's economic activity, however, father and son were not seen as 'family members' deriving rights under the Directive.

66 *García Nieto*, cit., para. 44.

67 Opinion of Advocate General Wathelet delivered on 4 June 2015, case C-299/14, *García Nieto*, para. 70.

68 *García Nieto*, cit., para. 45.

69 *García Nieto*, cit., para. 49.

70 *García Nieto*, cit., para. 50.

71 See for an updated commentary on case-law of the CJEU in, *inter alia*, the fields of EU Citizenship and free-movement rights, Van den Bogaert, S., Jesse, M. et al. (2019). Kroniek van het Europees materieel recht. *Nederlands Juristen Blad* 10.

72 Court of Justice, judgment of 27 june 2018, case C-246/17, *Diallo v. Belgium*.

73 Court of Justice, judgment of 11 april 2019, case C-483/17, *Tarola v. Ireland*.

74 See for example Court of Justice, judgment of 12 July 2018, case C-89/17, *Banger v. VK*, or Court of Justice, judgment of 27 June, 2018, case C-230/17, *Deha-Altiner & Ravn v. Denmark*.

1.6 *Constitutional Aspects and the Relationship between Primary and Secondary Law over Time*

After describing the evolution of case law throughout the above mentioned five steps, it is necessary to reflect on the changing legal framework for EU Citizenship during this period. The Court has had to define the temporal and constitutional relationship between pre-existing secondary EU law,[75] the provisions on Union Citizenship,[76] as well as Directive 2004/38. The introduction of EU Citizenship in 1993 did not immediately lead to a revision of pre-existing secondary law by the EU legislator. As such, it was not until 2004 that the full range of rights and conditions applicable to EU Citizens was codified. Beforehand, the Court was required to "fill out" the Treaty provisions on EU Citizenship and define their precise relationship with secondary pre-existing secondary legislation in its *acquis*,[77] as has been shown above in Steps 1 and 2. The Court did not overrule existing secondary law or bluntly ignored it. Instead, it merely adopted its case-law to a new legal situation after the introduction of the primary law rights contained in the provisions on EU Citizenship through a teleological interpretation of the law.[78] What happened in Steps 3, 4, and 5 with and after the *Förster* and *Ziółkowski* cases is the mirror image to this development. Directive 2004/38 was adopted on a host of legal bases, *inter alia* Article 18 TEC (now Article 21 TFEU), and concerns the rights and obligations of all EU Citizens. The Directive codified parts of the Court's case-law and also introduced new ideas and wishes of the EU legislator, such as those of permanent residence status and a specific provision on equal treatment.[79] Such notions are absent from the pre-existing Directives as well as the primary law provisions on Union Citizenship.[80] Directive 2004/38 is therefore much clearer in defining the precise status and rights, including equal treatment rights, of *all* European migrants, which were the result of the Union's (albeit imperfect) democratic decision making process,[81] at least when compared to the loose

75 In particular, the Residency Directives 90/364/EEC; 68/360/EEC; and 93/96/EEC.

76 See above steps 1 and 2.

77 Lenaerts, K., and Gutiérrez-Fons, J.A. (2013). To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice, cit., p. 25.

78 See for example, Nowak, T. (2018). *The rights of EU Citizens: a legal-historical analysis*. In: Van der Harst et al., ed., *European Citizenship in Perspective*. Cheltenham/Northhampton MA: Edward Elgar.

79 Art. 16(1) Directive 2004/38, plus Recital (17); Article 24 Directive 2004/38.

80 With the exception of the Revised Student Residency Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

81 Van den Brink, M. (2019). The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?, cit., p. 134.

combination of primary law rights combined with pre-existing secondary legislation. From this perspective it is logical that the new legal situation after the adoption of Directive 2004/38 would influence the evolution of the case law. Just like after the introduction of Union Citizenship, a new legal environment new was created, and the Court took note and adjusted its approach accordingly, shifting towards a more formal, strict reliance on the wording of the Directive.

This is not a radical departure from the Court's traditional approach to legal reasoning, but rather its explicit, albeit largely theoretical, approach.[82] This is based on the 'classic' textual, contextual, and purposive approach applied by other national courts.[83] This suggests that, assuming the ordinary meaning of the text is clear, that the Court need not develop further contextual or teleological interpretations of the law. That being said, the Court of Justice is not always consistent in the weight or ranking it gives to textual or purposive interpretations, and whether it has relied purely on the wording of the text in question, or primarily purposive criteria.[84] However, the Court broadly applies the same reasoning as other courts, and contrary to what some commentators suggest, evidence from its case-law suggests that it does focus most heavily on textual arguments when deciding cases, a trend which has increased significantly in recent years.[85] The Court's approach must therefore be seen as part of this overall trend.

A strict literal interpretation of the law is not unproblematic. It ignores the context and real-life consequences of individual cases, as well as the social or historical circumstances behind the adoption of the text, including the weight given to multiple purposes associated with it, and the context in which the applicable word or phrase is placed. As such, a level of purpose is inherent when interpreting any legal rule.[86] In fact, even in *Dano* the Court felt the need to look at the purpose of Article 7 of the Directive, which is intended to prevent persons from becoming an unreasonable burden.[87] This is suggested to

82 Lenaerts, K., and Gutiérrez-Fons, J.A. (2013). To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice, cit.

83 Beck, G. (2013). *The Legal Reasoning of the Court of Justice of the EU*. Oxford: Hart Publishing, p. 281.

84 *Ibid,* p. 280–283.

85 *Ibid,* p. 285–287.

86 Schlag, P. (2018). On Textualist and Purposivist Interpretation (Challenges and Problems). In: Perišin and Rodin, eds., *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*. Oxford: Hart Publishing, p. 19, 24–27.

87 *Dano*, cit., para. 71.

deviate from other situations in which the Court has considered the purpose of Directive 2004/38.[88] However, to stray too far away from the ordinary meaning of the Directive's rules would effectively ignore its adoption entirely and could create a situation where no social benefits could ever be denied from EU migrants.[89] It would also run counter to the principles of legal certainty and inter-institutional balance enshrined in Article 13(2) TEU.[90] It sometimes seems that the Court is criticised simply for giving meaning to Directive 2004/38. For example, it is suggested that the Court has contributed towards the more widespread and sustained recent shift from a "*predominantly* rights-opening to *predominantly* rights-curbing assessments of citizenship rights".[91] This is expanded upon by Shuibhne in more detail: "the Court poured the content of the primary right to equal treatment into a statement in secondary law. That method turns the standard approach to conditions and limits on its head – the latter no longer temper equal treatment rights; they constitute the rights".[92] Under this perspective, the Directive is brought up to 'constitutional level', and yet the Court does not apply a constitutional level review because it fails to review the legitimacy of legislative acts *vis-à-vis* the Treaty and wider general principles. As such, it is no longer clear that individuals residing on the basis of national law, but not EU law, will be able to benefit from equal treatment rights outside the Directive. In simple terms, the criticism is that the Court seems to have abandoned its case law based on primary EU law because of provisions found in secondary EU law, i.e. Directive 2004/38, an inferior source of law to the Treaties.[93]

The problem with such criticism is that the primary EU law itself explicitly mentions that Union Citizens can only exercise their rights "in accordance with the conditions and *limits* defined by the Treaties and *by the measures adopted thereunder*".[94] Free Movement rights are "subject to the *limitations* and conditions laid down in the Treaties *and by the measures adopted to give*

88 Thym, D. (2015). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens. *Common Market Law Review* 52 (1), pp. 17–50, 25.

89 Van den Brink, M. (2019). The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?, cit., p. 134.

90 Lenaerts, K., and Gutiérrez-Fons, J.A. (2013). To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice, cit., p. 7.

91 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 902.

92 *Ibid*, p. 909–910.

93 *Ibid*, p. 915; O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit.

94 Article 20 last sentence TFEU, ex art. 17 TEC.

them effect".[95] Both Articles 20 and 21 TFEU suggest that the Directive merely fulfils its constitutional role laid down in the Treaties in defining the conditions and limitations under which EU Citizens can move. This is different to the pre-existing secondary legislation which did not "give effect" to such primary rights. In other words, within the clear mandate given to the EU legislator in the Treaties, and on the basis of all legal bases related to the free movement of persons, the Directive comprehensively covers residency and equal treatment rights, as well as the limits thereof for all groups of EU Citizens moving to another Member State. It is therefore the explicit objective of the Directive to codify and harmonise the precise conditions for the enjoyments of free-movement rights of all EU Citizens as laid down in the Treaties. The Directive effectively sets a floor of minimum standards that the Member States must abide by, e.g. providing for six months' retained worker status after a period of less than 12 months employment,[96] but will allow the Member States discretion to go beyond this once they meet these minimum conditions.[97] Crucially, however, Member States cannot be forced to do so based on case law preceding the Directive. A different approach in the line of cases starting with *Förster* and ending with the above mentioned '*Dano*-trilogy' based on earlier case law would have meant that the Court would have gone against the exact wording of Directive 2004/38, which has to be seen as the expression of the EU legislator based on a firm mandate in the Treaties.[98] It would be strange for the Court to act as if this did not exist by relying on case-law from the preceding era. If this was the standard of judicial review in the future, the room of manoeuvre for the EU legislator would be significantly limited. Bearing these legal facts in mind, it seems unfair to solely criticise the Court for applying the law of the land in the form of Directive 2004/38, albeit strictly, rather than the EU legislator for adopting the Directive in its current form.

95 Article 21 TFEU, ex 18 TEC.

96 See article 7(3) Directive 2004/38; as was at issue in *Alimanovic*. See also O'Brien, C., Spaventa, E., and De Coninck, J. (2015). *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*. Project Report, Brussels: European Commission.

97 See Article 37, Directive 2004/38 explicitly states that it shall not affect any laws, regulations or administrative provisions "which would be more favourable to the persons covered by this Directive".

98 Thym, D. (2017). The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development. In: Thym, ed., *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing; Van den Brink, M. (2019). The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?, cit.

1.7 *Interim Conclusion: Evolution, Not Revolution*

The five-step evolution of the case-law leaves Union Citizens in the following position: *First,* access to equal treatment, including social benefits, and access to permanent residence depend on legal residence. *Second*, legal residence is exclusively determined with reference to Directive 2004/38. In other words, without legal residence under Article 7 Directive 2004/38, with very limited exceptions,[99] neither equal treatment nor permanent residence can be successfully claimed. *Third,* the *Dano* 'revolution' was an example of a quite ordinary evolution of judicial interpretation. This evolution began with the *Förster* judgment, when the Court first started to assess the legal situation of applicants exclusively within the system created by Directive 2004/38 itself, and continued with *Ziółkowski*, *Dano, Alimanovic*, and other subsequent cases. The Court clearly no longer considers that it its role is to create teleological concepts such as 'genuine links' or 'sufficient degrees of integration' to determine the rights of applicants directly under the Treaties. Instead, all that is required is a strict reliance on the normal meaning of the wording contained in Directive 2004/38. From this perspective, the decisive and exclusive reference to Directive 2004/38 has contributed to legal certainty and is judicially coherent and in fact the comparative lack of attention in the recent discussion on the *Ziółkowski* and *Förster* cases, at least when compared to *Dano,* is surprising.[100]

Whilst interesting for academic debate and providing a lot of room for manoeuvre for lawyers, the vague formulas described in Step 2 above were next to useless in daily administrative practice. As Shuibhne notes, "case-by-case assessments are far from perfect, especially from the perspectives of legal certainty and workability".[101] They give very little guidance as to precisely *when* a claim can be denied.[102] This makes it difficult for authorities to know exactly when they can legally deny a claim to protect integrity of the national welfare system, something that was always permissible, at least in theory, according to

99 A notable exception being Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*, where the Court held that a women could retain the status of worker after leaving work due to the "physical constraints of the late stages of pregnancy" as long as she returns to work within "a reasonable period" – see hereunder.

100 See on the development of case law and the importance of this judgment, Šadl, U., and Sankari, S. (2017). Why did the Citizenship Jurisprudence Change?, p. 91–109.

101 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 913.

102 Schmidt, S.K. (2017). Extending Citizenship Rights and Losing it All: Brexit and the Perils of 'Over-Constitutionalization'. In: Thym, ed., *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing, p. 19, 23.

the Court.[103] As the Court has explained, the shift in approach was indeed to create a more legally certain system. In *Alimanovic* and *Garcia Nieto*, the Court asserts that the German rule at hand enables those concerned to know "without any ambiguity, what their rights and obligations are", and as such guarantees "a significant level of legal certainty and transparency in the context of the award of social assistance".[104] The idea is that creating strict identifiable rules, rather than vague formulas is beneficial for national administrators and applicants alike as everyone knows where they stand. Member State legislators are also reassured since the *Förster* case, as mentioned above, that if they comply with the words of the Directive, their implementation and decisions taken based on it will not be second-guessed by the Court of Justice as they were in the past.

From this perspective, one way in which the *Dano* decision is 'revolutionary' is that it constitutes a reversal of the system as it was previously understood, whereby Member States would engage on the "thorny path" of granting social benefits but then subsequently expelling EU citizens that become a burden on the social system of the host-Member State. Instead, now Member States may now withhold equal treatment from "any category" of European citizens making use of their free movement rights.[105] This is a valid critique, and indeed this article will discuss in the following section some of the implications of the Court's reasoning in terms of determining when an individual has sufficient resources and/or is an unreasonable burden. However, it should initially be emphasised that in *Dano* it was already established in the facts of the case that the applicant did not have a right to reside under the Directive.[106] As such, the Court was merely called upon to ask whether these individuals should be entitled to rely on the principle of equal treatment under Article 24. The Directive is clear that this provision is only available to those citizens "residing on the basis of this Directive". Moreover, unlike Article 6 residence which should not be lost "as long as they do not become an unreasonable burden", Article 7 residence is only valid "as long as they meet the conditions set out therein".[107] This approach would also conform with the analysis of whether individuals meet the conditions for permanent residence under Article 16(1). Lastly, it has

103 *Grzelczyck*, cit. paras. 42–43; see also Šadl, U., and Sankari, S. (2017). Why did the Citizenship Jurisprudence Change?, cit., p. 98.

104 *Alimanovic*, cit., para. 61; *Garcia Nieto*, cit., para. 49.

105 Schiek, D. (2017). Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity, cit., p. 361.

106 *Dano*, cit., para. 44.

107 See Article 14 Directive 2004/38 on the Retention of a Right of Residence.

to be questioned whether being able to make a claim for social assistance but having the possibility of it being rejected without losing a right to reside is really a worse situation for the individual in question, rather than automatically being entitled to social assistance only to subsequently find that granting this granting has resulted in their residence status being rescinded entirely and an expulsion order made against them?

2 The Consequences of the Evolution: beyond the *Dano*-Trilogy

2.1 *The Marginalization of the Precariat and the Janus-Faced Approach of the Court*

The five-step evolution explained above is for the most part judicially coherent, and the increase in legal certainty can be seen as a positive development. Yet, there are certain consequences that are problematic. It cannot be emphasised enough that a direct consequence is the potential exclusion from legal residence and equal treatment of various vulnerable groups of EU citizens. A system that focusses almost exclusively on legal stay under Article 7 Directive 2004/38 will inherently have the same built-in bias for economically active and wealthier individuals as the Directive itself. Economically active individuals, as the original actors on the common and then internal market, have always had a privileged position over economically inactive EU citizens.[108] This differentiation is deeply ingrained in EU free movement rights, and leads to situations where EU law distinguishes between the 'good' or 'deserving' citizen on the one hand, and the 'bad' or 'undeserving' ones on the other hand.[109] This means that the Directive falls short of being a tool for *positive* citizenship, or *receptive* solidarity, which argues that in order to achieve equality and fully realise social citizenship individuals, particular more vulnerable groups of persons, require positive rights such as welfare entitlement.[110] Instead, the conditional nature of Directive 2004/38 results in the potential exclusion from protection of those EU Citizens who in fact would need protection the most.

108 See Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (4), pp. 1597–1628; O'Brien, C. (2016). Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights. *Common Market Law Review* 53 (4), pp. 937–978.

109 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 928.

110 Schiek, D. (2017). Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity, cit., p. 349.

This arguably goes against the very idea of 'citizenship' as a philosophical concept and the creation of 'equality' between all fellow-citizens as one of its central tenets. EU citizenship, as Kochenov writes, "virtually never protects the weak and the needy" based on their human needs alone. As such, it does not empower but merely informs the "dogmatic ideal of a good market citizen".[111] In a cruel irony, EU Citizenship rights become available only for those "who do not need them and only when they do not need them".[112] This becomes even more problematic as, as other scholars have rightly pointed out, EU Citizens falling foul of such strict conditionality will most likely be minority groups; women and disabled persons;[113] and low-pay, marginal workers.[114] In other words, those already on the margins of society are stigmatised even more as 'undeserving' and stand to lose out most in terms of residence and equal treatment rights.

In practice, this doctrinally defensible stance may not just lead to the granting or denial of a social benefit, but can result in unlawful residence and even social exclusion. This is particularly so because those who do not meet the requirements laid down in Directive 2004/38 will not only be denied equality as regards access to social benefits, but can be held to fall outside the scope of EU law entirely if their social benefit claim is denied because their residence is deemed illegal under article 7 Directive 2004/38. In some cases, these individuals will become 'tolerated' citizens,[115] who are not or cannot be expelled but whose legal status is nevertheless technically irregular. They may form a class of "illegal migrants, living unlawfully in other Member States without equal treatment guarantees".[116] This EU *Lumpenproletariat*[117] has no right to residence and equal treatment, and even no rights under the Charter of

111 Kochenov, D. (2017). The Citizenship of Personal Circumstances in Europe. In: Thym, ed., *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing, p. 51.

112 Minderhoud P., and Mantu, S. (2017). Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive, cit., p. 207.

113 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., pp. 92–102.

114 O'Brien, C., Spaventa, E., and De Coninck, J. (2015). *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, cit.; O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., pp. 149–159.

115 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., pp. 926–927.

116 Thym, D. (2015). When Union citizens turn into illegal migrants: the Dano case, cit.

117 Schiek, D. (2017). Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity, cit., p. 360.

Fundamental Rights as they fall outside the scope of application of EU Law,[118] a (non-)status so far unknown in EU Law.

On the other hand, cases like *Gusa*,[119] *Saint-Prix*,[120] and *Dakneviciute*,[121] suggest that the Court is not seeing the Directive as a tool to 'cut-off' rights for EU Citizens in need. All these cases concerned dealt with entitlements of EU Citizens under Directive 2004/38 after they became unemployed of incapable of continuing to work as self-employed persons. The problem was, that the Directive wording of the Directive was unclear about retention of rights of self-employed persons, see *Gusa*, or workers or self-employed persons, who could not continue their economic activity due to pregnancy, see *Saint-Prix* and *Dakneviciute* respectively. In all cases the Court ensured that the citizen could retain worker status through an interpretation of the Directive or reference to art. 45 TFEU itself, if the Directive would not resolve the situation satisfactorily, is vaguely formulated, or, as was the case in *Saint-Prix* and *Dakneviciute*,[122] simply does not deal with pregnancy as a cause for ceasing economic activity is significant. It is important to emphasize, however, that all three applicants *were* economically active before and wanted to retain their status; the cases did not concern *access* to legal residence and, as a consequence, equal treatment as regards access to social benefits under Directive 2004/38.

2.2 *Increasing Rights for Some under Directive 2004/38*

That being said, the denial of equal rights to access social assistance and problematic rights of residence to EU Citizens who have never worked, have no intention to work, and have no independent funds at their disposal, as in *Dano,* is quite normal.[123] Furthermore, criticism that the European Union is a 'rich person's club' that only benefits the affluent few over the many is hardly a novel critique and omits the fact that the freedoms enjoyed by all EU Citizens on the internal market go far beyond anything available in other legal regimes. Such developments do not signal that the Court has 'abandoned' EU citizens, as is

118 As the Court made explicit in *Dano*, cit., paras. 89–91; See Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., pp. 914–915.

119 Court of Justice, judgment of 20 December 2017, case C-442/16, *Gusa v. Ireland*.

120 Court of Justice, judgment of 19 June 2014, case C-507/12, *Jessy Saint-Prix*.

121 Court of Justice, judgment of 12 September 2019, case C-544/18, *UK v. Dakneviciute.*

122 See, *Saint-Prix,* cit., paras. 26–39 and *Dakneviciute,* cit., paras. 27–30.

123 Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication, cit. See also on this issue Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship, cit.

suggested.[124] In fact, the exclusive focus on Directive 2004/38 by the Court has a Janus-face. Whilst *Dano* and *Alimanovic* can be seen as, on balance, *reducing* the rights available to EU citizens, there are other cases wherein a strict application of the Directive actually lead to an *increase* of rights for EU Citizens. For example, in *Metock*,[125] differentiations between family reunification and family formation, which were allowed under the pre-Directive *Akrich* case,[126] were ruled out by the CJEU because such differentiations would not re-appear in Directive 2004/38.[127] The EU legislator refrained from codifying the *Akrich* rule in Directive 2004/38 and therefore Member States were prohibited from applying it. Whilst *Metock* is mostly seen as a decision which fits with the classic paradigm of cases in which the CJEU gradually *strengthens* the rights of EU citizens,[128] such analysis overlooks the decisive and exclusive dominance the Court awarded to rules and conditions contained in Directive 2004/38 in its judgment, particularly emphasizing the choices made by the EU legislator.

Another case which fits into this line is the recent case of *Coman*. This decision was widely applauded for recognizing the rights of same-sex spouses, married in a Member State allowing for same-sex marriages, to travel and reside with their partner throughout the EU, including return to the home state.[129] The Court reasons that Directive 2004/38, which applies in analogy in situations or return to the home state,[130] would allow the Member States leeway as regards the recognition of 'registered partnerships' entered into in other Member States only. The recognition of these are 'subject to national

124 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, p. 936.

125 Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others.*

126 Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich.*

127 See about this practice of 'gold-plating', Valcke, A. (2019). EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law. *European Journal of Migration and Law* 21, pp. 289–312, 297ff.

128 Minderhoud P., and Mantu, S. (2017). Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive, cit., p. 192; see also Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 989.

129 Court of Justice, judgment of 5 June 2018, Case C-673/16, *Coman*, para. 25; Court of Justice, judgment of 12 March 2014, case C-456/12, *O & B,* paras. 50, 61.

130 This builds upon the 'Singh principle', which states that EU rights "cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse … when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law", Court of Justice, judgment of 7 July 1992, case C-370/90, *Singh,* para. 23; see also, *O & B,* cit.

law'. However, no such reference to national law is made in the Directive as regards the term 'spouse'. The Court in *Coman* focussed solely on the wording of Article 2 Directive 2004/38, finding that Member States cannot rely on national legislation as regards the recognition of a marriage entered into in another Member State.[131] The analogous and strict application of Directive 2004/38 is also beneficial for 'returning citizens' who since its adoption have found that their conditions of entry "should not, in principle, be more strict than those provided for by Directive 2004/38".[132]

The fact that the *Metock,* and *Coman*, cases are simultaneously characterised as 'rights-enhancing' judgments, while *Förster*, *Ziółkowski*, *Dano* and *Alimanovic* are seen as diminishing rights, but all nevertheless share Directive 2004/38 as the exclusive framework within which the Court establishes legal residence and integration shows the Janus-faced results of the evolution of Court's case law. On the one hand, access to rights is made stricter with reference to legal residence under Directive 2003/38 exclusively, while on the other hand, the reach of rights obtained when residence is legal under the Directive is increased. The Court is in fact building a legally certain and coherent system of assessing legal residence and access to rights for EU Citizens based on the provisions of Directive 2004/38 alone, even if its application means some EU citizens lose out.[133]

2.3 *Less Room for Individual (Proportionality) Assessments and Automatic Findings of Illegality*

The Court's approach to interpreting Directive 2004/38 has been criticised for denying applicants individual proportionality assessments in their cases. This is particularly so when determining whether the burden placed by that specific EU citizen is 'reasonable' or 'unreasonable'.[134] In this regard, the Court has

131 *Coman*, cit., para. 36. Thereafter the Court looks at potential justifications of a restriction to free movement of persons and holds them all to be inapplicable.

132 See in this regard *O & B,* cit., paras. 50, 61, with reference to *Singh*, cit., para 20: "He would in particular be deterred from (exercise his free movement rights) if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State"; Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*, paras. 60–61; Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*, para. 55; Court of Justice, judgment of 12 July 2018, case C-89/17, *Banger*, para. 35.

133 As mentioned before the Court actively interprets the Directive in favor of applicants, for example in case of family life and children adopted under the Algerian Kafala system, see Court of Justice, judgment of 26 March 2019, case C-129/18, *S.M. v. UK*.

134 As the Court formulated in *Grzelczyk* and other cases; see O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit.

completely departed from its individualistic test last used in *Brey*,[135] which was held to be "unworkable" and redundant.[136] Instead, it has opted for a more 'systemic' test in *Alimanovic*,[137] which asserts that that a single applicant for welfare benefits could "scarcely be described as an 'unreasonable burden', however, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[138] In doing so, it has been claimed that the status of individual assessments is "radically downgraded",[139] and that proportionality / individual assessments have not been "set to work" as was the case in earlier cases.[140] O'Brien is strongest in her criticism claiming that the Court uses "a sledgehammer to crack an already cracked nut",[141] by deciding the cases without any regard given to sufficient resources or applying proportionality "at any stage" in either *Dano* or *Alimanovic*.[142]

It is true that in both *Dano* and *Alimanovic* there was a distinct lack of individual assessment as to the position of the applicants at hand. However, in *Dano* the Court was merely determining whether those already deemed to be without sufficient resources, as the referring court had already established, could under the Directive rely on the principle of equal treatment to claim social assistance.[143] In this situation, the Court did emphasise that her the financial situation should be specifically examined without taking into account the benefit claimed.[144] The Court did not, however, feel the need to consider the reasonableness of Ms Dano's burden. This omission is strange especially as Ms Dano is a stark example of an individual that is not entitled to social assistance or residence rights under EU law,[145] as she only entered Germany to

135 see Section 11.2 above.

136 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., p. 49; see also O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 216.

137 To use the terminology as applied by Thym, D. (2015). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens, cit.

138 *Alimanovic*, cit., para. 62.

139 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 913.

140 Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication, cit., p. 1445.

141 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., p. 49.

142 *Ibid*, p. 51, 55.

143 *Dano*, cit., para. 44.

144 *Dano*, cit., para. 80.

145 Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication, cit., p.1454.

obtain social assistance despite the fact she did not have sufficient resources to claim a right of residence.[146]

In *Alimanovic* again the Court did not assess the individual situation of the applicants, and nor did it test the German rule against the principle of proportionality after finding that it was in conformity with the wording of the Directive 2004/38. This approach differs indeed from earlier cases, such as *Baumbast*, which was decided under article 18 EC (now Article 21 TFEU) and outside the scope of Directive 90/364. Back then, the Court held that any limitations to that Treaty right must be in accordance with the general principle of proportionality.[147] In *Alimanovic*, however, the legal situation under Article 45 TFEU received little attention.[148] The Court held that the Directive itself established a system which considers various factors, guarantees a significant level of legal certainty, and complies with the principle of proportionality.[149] Whilst it is not clear just how many 'various factors' Directive 2004/38 actually considers,[150] the comparison between *Alimanovic* and *Baumbast* is not entirely appropriate. As explained above and unlike Directive 90/364, Directive 2004/38 has as its legal bases both Articles 45 *and* 18 TFEU, and sets minimum standards on EU Citizens' rights including retaining worker status, which the Member States cannot go below. A literal interpretation and application of this Directive should not be seen as disproportionate in the context outlined above.[151] As such, the Court's decision to apply the standards and conditions codified by the EU legislator based on several legal bases in Directive 2004/38 is a coherent interpretation of the rules in force. The message for the Member State remains the same since the *Förster* decision: a word-by-word implementation of the Directive will not be second guessed by the Court.

That is not to say that the lack of individual proportionality assessments is unproblematic. It carries the danger of endorsing, albeit tacitly, national systems which employ circular arguments permitting authorities to either block economically inactive EU citizens from obtaining certain social benefits, or at least allowing said authorities to systematically check individuals' residence status upon their application for social assistance. Every application for social benefits might in such a situation automatically lead to an assessment of legal

146 *Dano*, cit., para. 78.

147 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., p. 42–43.

148 *Ibid,* p. 51.

149 *Alimanovic*, cit., para. 61.

150 Article 7(3), the Article that decided *Alimanovic*, is being based almost exclusively on time spent in genuine employment.

151 See section II.6. above.

residence of the applicant under Directive 2004/38, which in turn might lead to a finding of 'illegal residence' under the Directive.[152] As Thym notes, the *Dano* decision can be understood as meaning that "any recourse to social assistance pre-empts legal residence status", as is the case in Germany.[153] Indeed, without any kind of assessment of individual circumstances, the mere application for social assistance is potentially enough to exclude their eligibility for such benefits as this by itself demonstrates their lack of resources.[154] Moreover, whilst Ms Dano was denied a SGB II (Jobseeker) benefit as she was not actively looking for work and only entered Germany in order to claim social assistance benefits, *Alimanovic* also concerned SGB II (Jobseeker) benefits, and yet the applicants who *were* actively seeking employment were again denied such benefits due to the exception contained in Article 24(2). This reasoning means that SGB II (Jobseekers) benefits are seemingly inaccessible to all economically inactive EU citizens.[155]

Another clear example of this circular reasoning can be seen in *Commission v UK*,[156] which concerned the legality of the UK's 'habitual residence test', that effectively imposes an Article 7 right-to-reside test upon claimants before granting Child Benefit and Child Tax Credit social benefits. The Commission claimed this *legal* test was not permitted under Article 11(3)(c) of Regulation 883/2004, which imposed solely a *factual* test of residence. However, the Court found that Regulation 883/2004 does not harmonise the conditions for granting social security benefits, and that the UK right-to-reside test was an "integral part" of the eligibility criteria for these social benefits, which is outside the scope of the Regulation.[157] Part of the Commission's complaint was that by checking individuals' residence status upon application for the benefits in question, this constituted "systematic checking" of individuals residence status, prohibited under Article 14(2) Directive 2004/38. However, the Court disagreed with this.[158] The decision has been criticised strongly by O'Brien, who

152 Thym, D. (2015). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens, cit.

153 *Ibid*, p. 42.

154 Although, it should be emphasized that whilst Ms Dano was excluded from social assistance benefits, she continued (before and after the decision) to receive Child Benefit (social security) for her son, which was unaffected by her social assistance claim.

155 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., pp. 53–56.

156 Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

157 *Commission v. United Kingdom*, cit., para. 69. See also O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 221.

158 *Commission v. United Kingdom*, cit., para. 84.

claims that the UK procedures essentially mean that no economically inactive EEA migrant, who is applying for social benefits, can ever have a right to reside, because "any benefit application is deemed to dissolve any claim to self-sufficiency".[159] In other words, the mere application for social benefits results in a finding that the EU citizen in question does not have a right-to-reside under Article 7 Directive 2004/38. Furthermore, "there is no starting presumption of lawful residence, or starting position of citizenship-based eligibility that is then limited and in some cases checked".[160] In fact, the individual's status is checked purely *because* they apply for such a benefit, meaning in effect there is actually a presumption of *illegality*. Given that a rejection of the social benefit results in the individual being outside the scope of application of the EU free movement rules,[161] the UK system is likely to have a chilling effect on social benefit claims by economically inactive EU citizens, disproportionality affecting some of the most vulnerable persons in society.

2.4 *The Ever Increasing Scope of 'Social Assistance' under Directive 2004/38*

The formalised approach of the Court and the new status of the Directive has also impacted upon the range of social benefits that can be subjected to a right-to-reside test on the basis of Article 7 Directive 2004/38. Directive 2004/38 itself only refers to 'social assistance', with 'social security' benefits being coordinated by Regulation 883/2004 and its predecessors. Given that the 2004 Regulation as opposed to earlier versions, which only applied to workers, also applies to "the new category of *non-active* persons",[162] it was considered that Regulation 883/2004 would apply to anyone subject to the legislation of one or more Member states, regardless of economic activity.[163] The Regulation was

159 O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 212.

160 *Ibid.*

161 See Thym, D. (2015). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens, cit., p. 21.

162 Recital (42) Regulation 883/2004 on the coordination of social security systems, *OJ L 166*, 30.4.2004, p. 1–98; See O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 222.

163 Article 2, Regulation 883/2004; see also Article 11 of Implementing Regulation No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ L 284*, 30.10.2009, p. 1–42; see also Internal Labour Organisation (2010). *Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009*. Switzerland: International Labour Office, p.7.

considered to be triggered by a *factual* test of residence, rather than a *legal* test of lawful residence.[164]

The cases of *Brey*, *Dano, Alimanovic* and *Garcia-Nieto* all concerned 'special non-contributory cash benefits'. Whilst not classified as 'social security' in the strict sense, these benefits are included under Article 70 Regulation 883/2004, and are suggested to have the nature of both social security and social assistance.[165] In these cases the Court rejected the European Commission's initial argument that social assistance, and consequently right-to-reside tests on the basis of Directive 2004/38, could only be applied to social benefits not mentioned in Regulation 883/2004 and therefore outside its scope of application.[166] Rather, it held that social assistance should have its own definition under EU law and that special non-contributory cash benefits met this definition.[167] In the aforementioned *Commission v United Kingdom* case, the Court was confronted with the application of a right-to-reside test to Child Benefit and Child Tax Credits. These were clearly not special non-contributory cash benefits,[168] but rather fell under Chapter 8 of Regulation 883/2004 on Family Benefits and "must be regarded as social security benefits".[169] However, the Court still held that there is "nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to (a right to reside test)".[170] According to the Court, the applicants failed to fulfil the conditions of entitlement of the benefit. The Court's reasoning suggests that potentially any social benefit, so long as it has *some characteristics* of social assistance, such as being taxpayer funded or non-contributory in nature, can be subjected to a right-to-reside on the basis of Article 7 Directive 2004/38, regardless of the benefit's classification under Regulation 883/2004.[171]

The application of Article 7 criteria to social security benefits has been criticised for undermining the political compromise at the heart of both pieces of

164 Verschueren, H. (2013). Free Movement or Benefit Tourism: The Unreasonable Burden of Brey. *European Journal of Migration* 16 (2), pp. 147–79.

165 See Opinion of Advocate General Wahl delivered on 29 May 2013, case C-140/12, *Brey*, para. 48.

166 See *Brey*, cit., para. 48.

167 *Brey*, cit., paras. 58–59.

168 Indeed, the original complaint included special non-contributory cash benefits, but these were removed following the *Brey* and *Dano* decisions. See *Commission v. United Kingdom*, cit., para. 27.

169 *Commission v. United Kingdom*, cit., para. 60.

170 *Commission v. United Kingdom*, cit., para. 68.

171 *Commission v. United Kingdom*, cit., para. 51. See also O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 220.

legislation adopted in 2004 as well as the differentiation between the two types of social benefits that flow from it.[172] Furthermore, in *Commission v United Kingdom* the Court relies upon paragraphs 83 of *Dano* and 44 of *Brey* to come to this conclusion. However, both cases concern special non-contributory cash benefits, which are a special category within Regulation 883/2004. The Court ignores the differentiation of benefits within the Regulation and applied them as if there was one general rule applicable to all social benefits. As a result, the conflation of the two legal instruments makes the equal treatment provision in Article 4 Regulation 883/2004 almost redundant.[173] At the same time, the Court has made relying on the equality clause in Article 24 of Directive 2004/38 difficult in cases involving applications for social security benefits for inactive EU Citizens regardless of the status of the benefit in question under Regulation 883/2004. Potentially *all* applications for social benefits can be subjected to a right-to-reside test, with all problems attached to the circular application of such tests outlined in the previous section.

3 Conclusion

Contrary to what is sometimes claimed, this article has made the argument that the Court is not working to "advantage the few, excluding the many".[174] Recognising that the Court is caught between a "rock and a (very) hard place",[175] and unable to please everybody, it has been shown that at least for the most part the Court's reasoning is logical and judicially coherent. The development of legal residence and accessing social benefits has developed from the initial introduction of secondary legislation, to the establishment of Union Citizenship, and the adoption and interpretation of Directive 2004/38 through five major steps. Where this chapter departs from much other scholarly opinion is by asserting that in fact the major factor in the Court's evolving approach is the adoption and subsequent implementation, application, and interpretation of Directive 2004/38. In this respect, the Court is merely following its traditional

172 Verschueren, H. (2013). Free Movement or Benefit Tourism: The Unreasonable Burden of Brey, cit., pp. 159–165; see also O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit.

173 O'Brien, C. (2017). *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, cit., p. 51.

174 Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope, cit., p. 223.

175 Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, cit., p. 916.

method of interpreting EU rules by sticking to a formal, textual interpretation of the law following the adoption of secondary legislation. Criticism that the Court is re-establishing the dichotomy between economically active and inactive individuals often misses the point that these differences are clearly manifest in Directive 2004/38, which also adds categories of citizens who benefit from equal treatment without economic activity, such as persons with sufficient means and permanent residents. The Directive has been interpreted to create a closed system for the definition of legal residence whereby, with very limited exceptions, only residence that is considered lawful under the Directive itself will be accepted by the Court. Only legal residence as defined by the Directive can lead to permanent residence, as stated in *Ziółkowski*, and only such legal residence gives access to equal treatment with Member State nationals, as can be seen in *Dano* and *Alimanovic*. Yet, this exclusive reference to the Directive can also be beneficial for other groups of EU Citizens, as for example the *Metock* and *Coman* cases have shown.

The reliance on Directive 2004/38 has changed the dynamics of law governing EU Citizenship. First, as has been shown, the Court is building a coherent and simplified approach to rights enjoyed by EU Citizens based on a strict interpretation of Directive 2004/38. This will increase legal certainty for applicants and national authorities involved in decision making. *Second*, by following the wording of the Directive and accepting literal implementations of the Directive by the Member States since the *Förster* case, the Court has achieved two things. It has assured Member States that their implementation of the Directive, if true to its wording, is safe from being second guessed by the Court on grounds of primary law. Member States can always provide more rights than prescribed by the Directive, however, they will not be forced to do so. In addition, the Court has taken itself out of the line of fire in the sensitive political discussions about access to social benefits for (economically inactive) EU Citizens. It may be that the Court is suffering from "a certain degree of 'citizenship exhaustion" and has "put the brakes on a liberal interpretation of free movement rights".[176] After decades of acting as the motor for European integration in the field of EU citizenship, the Court might reasonably now believe that its job is done and that further developments have to be driven by all political actors in the new governance structures created by the Treaty of Lisbon.[177] Moreover, it could be argued that the Court does not see the core of Union citizenship in residence and access to social welfare of economically

176 Sarmiento D., and Sharpston, E. (2017). European Citizenship and Its New Union: Time to Move on? In: Kochenov, ed., *EU Citizenship and Federalism – The Role of Rights*, cit., p. 229.

177 *Ibid*, p. 230, 241.

inactive Citizens, but in 'constitutional principles' such as "the protection of fundamental rights, the development of democracy, and the Rule of Law".[178] Notwithstanding a poor attempt at playing politics by intervening in the Brexit debate by releasing the *Commission v United Kingdom* judgment one week before the referendum,[179] the Court seems much less willing to 'legislate' in this area in addition to the European legislator. Instead, it persistently defers back to the words approved by Council and Parliament in Directive 2004/38. When compared to other issues connected to Citizenship, such as the need to preserve the legal position and ensure the continuity of rights for the four million UK nationals and EU Citizens potentially affected by Brexit,[180] cases concerning social assistance claims by economically inactive citizens can seem marginal. Furthermore, the fully justified criticism of the law as it stands may be more wisely directed at the EU legislator, and future improvements to the precarious situation of Union Citizens should be expected foremost from amendments and/or revisions to Directive 2004/38, as opposed to expecting developments to arise solely from the Court.

178 *Ibid*, p. 227.

179 O'Brien, C. (2017). The ECJ Sacrifices EU citizenship in vain: *Commission v United Kingdom*, cit., p. 209.

180 See Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman*, para. 64.

CHAPTER 8

EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit

*Elise Muir**

1 Introduction

It is often observed that EU law is highly "constitutionalised". The embedding of many EU rights in its "constitutional charter",[1] in other words the EU treaties, has two related effects. It allows for the granting of a high degree of protection to selected rights. Simultaneously, it limits the ability of the EU legal order to process disagreement on the content and scope of such rights through ordinary political channels. Academic writings regularly and critically examine the high level of legal protection afforded to economic rights in the EU, in particular the four freedoms.[2]

To date, little attention has been devoted to non-economic rights enshrined in EU constitutional norms. As illustrated by the reservations of the UK, Poland and the Czech Republic on the justiciability of the "Solidarity" Title of the Charter of Fundamental Rights of the European Union (Charter), owing to its Protocol 30,[3] the legal status of non-economic rights in the EU legal order is often lower than that of economic rights. Furthermore, and

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1 Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste "Les Verts" v European Parliament*, para. 23.

2 E.g. Scharpf, F.W. (2009). The Double Asymmetry of European Integration; or: Why the EU Cannot Be a Social Market Economy. *MPIfG Working Papers*, no. 12, p. 5.

3 Art. 2 of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European union to Poland and to the United Kingdom and Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic, in Annex 1 of European Council Conclusions of 29–30 October 2009.

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precisely for that reason, the argument usually is that the legal rank of non-economic rights should be upgraded to act as a counter-weight to EU economic rights.[4]

Yet, the EU 'constitutional charter' does include provisions protecting a number of non-economic rights, in particular those of EU citizens. These have been actively used over the past few years. How do these constitutional norms protecting non-economic rights[5] interact with related EU legislation in this field?

This chapter investigates the relationship between primary rights, understood as rights enshrined in the EU Treaties or in EU law having the same rank, and secondary rights, understood as rights enshrined in EU legislation, by analysing some of the most controversial aspects of EU citizenship law over the past few years. This will serve as a basis for reflection on how high-level political disagreement on such non-economic rights,[6] as exemplified in the campaign in favour of Brexit,[7] is addressed within the EU legal order.

1.1 *Mapping out the Constitutional and Legislative Framework for EU Citizenship Law*

At the outset, it is useful to briefly map out the key legal provisions and the relationship between them as provided in EU primary law. Art. 18 of the Treaty on the Functioning of the European Union (TFEU) prohibits any discrimination on grounds of nationality within the scope of application of the treaties and *without prejudice to any special provisions* contained therein. The scope of application of the treaty is *inter alia* determined by Art. 21, para. 1, TFEU on the EU citizens' right to move and reside freely, but this right is also *subject to limitations and conditions laid down* in the Treaties and measures adopted to give them effect (i.e. legislation for our purpose, as will be explained below). The same holds true for Art. 20 TFEU, which establishes EU citizenship, lists a

4 For recent overviews and critical discussions of the matter see: Garben, S. (2017). The Constitutional (Im)balance Between 'the Market' and 'the Social' in the European Union. *European Constitutional Law Review* 13 (1), pp. 23–61 and Schiek, D. (2017). Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market. *European Constitutional Law Review* 13 (4), pp. 611–640.

5 The material scope of the research is defined by reference to the UK Settlement, see *infra*.

6 It is acknowledged that political disagreement also relates to economic rights; these however are not the focus of the present paper as explained above.

7 See for instance the thoughts of Barnard, C., and Butlin, S.F. (2018). The Future of Free Movement of Persons in the UK (Part 1). *EU Law Analysis*, available at eulawanalysis.blogspot.com/2018/06/the-future-of-free-movement-of-persons.html, section Introduction.

set of related rights and refers to the *conditions and limits defined* by the Treaty and by the measures adopted thereunder.

Adding to the constitutional dimension of EU citizens' rights, the prohibition of nationality discrimination within the scope of application of the treaties and without prejudice to any of their specific provisions is mentioned in the Charter in Art. 21, para. 2. The right to move and reside freely within the territory of the Member States is also "reaffirmed" as a fundamental right in Art. 45, para. 1, of the Charter.[8] Interestingly for our discussion below, Art. 45, para. 2, of the Charter states that "freedom of movement and residence may be granted, in accordance with the treaties, to nationals of third countries legally resident in the territory of a Member State".

Art. 21 TFEU on EU citizenship has been read in conjunction with Art. 18, para. 1, TFEU to prohibit discrimination on the grounds of nationality against certain non-economic actors.[9] It has also been asserted that "Union citizenship is destined to be the fundamental status of nationals of the Member States"[10] and Art. 21, para. 1, TFEU is directly effective.[11] The CJEU has repeated on multiple occasions that the treaty provisions on EU citizenship shall only be relied upon if it is not possible to rely on the economic freedoms,[12] although it does not always examine the applicability of economic freedoms in detail before turning to Art. 21 TFEU. In the present analysis of the non-economic rights of EU citizens, much of our attention will be devoted to Art. 21, para. 1, TFEU.[13] Furthermore, impediments to the right conferred by Art. 21 TFEU to move and reside freely within the territory of the Member States ought to be checked before relying on Art. 20, para. 1, TFEU.[14] Art. 20, para. 1, TFEU is thus a "fall back" category to which little attention will be devoted in the present paper.

As will be further explained and as naturally derives from the wording of the treaty and Charter provisions thereby identified, the rights of non-economically active citizens are closely intertwined with EU legislation. The main legislative

8 E.g. Court of Justice, judgment of 7 October 2010, case C-162/09, *Secretary of State for Work and Pensions v Taous Lassal*, para. 29.

9 E.g. Court of Justice, judgment of 12 May 1998, case C-85/96, *María Martínez Sala v Freistaat Bayern*.

10 Court of Justice, judgment of 20 September 2001, case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para. 31.

11 Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, para. 86.

12 Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 45.

13 On the rights of economic migrants as provided for in the EU Treaties see: Arts 45, para. 2, 49, para. 1, and 56, para. 1, TFEU.

14 Court of Justice, judgment of 5 May 2011, case C-434/09, *Shirley McCarthy,* paras 48–49.

instrument is Directive 2004/38[15] of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38). It amends and replaces a set of earlier instruments[16] but it is the first legislative instrument designed to comprehensively regulate the rights of EU citizens as such. It also co-exists with Regulation 492/2011 (formerly 1612/68) of the European Parliament and of the Council on freedom of movement for workers within the EU.

Clarifying the relationship between the Directive, treaty provisions on citizenship and other legislative instruments, the CJEU made clear that Directive 2004/38 "aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive fewer rights from that directive than from the instruments of secondary legislation which it amends or repeals".[17] The CJEU has therefore given a distinctly positive and forward looking role to Directive 2004/38. The Directive is understood as a development on pre-existing legislation, giving expression to the primary citizenship rights.[18]

1.2 *The Multiple Constitutional Functions of Art. 21 TFEU*

The constitutional anchorage of EU citizens' rights as just briefly described has important implications. Treaty articles such as Art. 21 TFEU perform three functions in the EU legal order.[19] First, Art. 21 TFEU can be seen as a benchmark against which the activities of EU and national organs falling within the scope of EU law may be reviewed, and in light of which such activities must be interpreted. In that respect, this Treaty provision largely overlaps with relevant

15 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

16 As is clear from the title of Directive 2004/38 itself.

17 E.g. *Secretary of State for Work and Pensions v Taous Lassal*, cit., para. 30. See also Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock*, para. 59.

18 Note that a number of EU directives give expression to the fundamental right not to be discriminated against; see further: Muir, E. (2018). *EU Equality Law: The First Fundamental Rights Policy of the EU.* Oxford: Oxford University Press, Chapter IV.

19 Reflecting on the different functions on Treaty provisions on non-discrimination: Muir, E. (2018). *EU Equality Law: The First Fundamental Rights Policy of the EU,* cit., Chapter III.A.

Charter provisions and corresponding general principles. In addition, Art. 21, para. 1, TFEU defines the scope and content of EU regulatory intervention in domestic policies to the extent that it is directly effective.[20] Thirdly, Art. 21, para. 2, TFEU constitutes a legal basis for the adoption of further legislation. This multiplicity of functions distinguishes this source of rights and obligations from other categories of instruments which only perform some of these functions. This also explains why the dividing line between secondary legislation and primary rights in this field is not always clear, as will be further illustrated below.

Such ambivalence is not uncommon in the EU legal order.[21] The normative content of the EU treaty performs the function of a constitutional benchmark (in the same way as the Charter). Meanwhile, as a 'derivative' legal order,[22] the exercise of EU powers depends upon the allocation of specific competences so that the EU constitutional charter provides a set of provisions defining the scope of EU regulatory intervention. The process of European integration has resulted in embedding an atypical amount of normative content in the very same provisions that define the scope for EU regulatory intervention. This means that the scope and content of EU intervention are often actually merged, leading to the high level of constitutional protection mentioned above.

The existence or absence of legislation as referred to in the treaty provisions on citizenship may also mark the cut-off point of active intervention by the EU. The interpretation of the content and scope of legislation has direct implications on the relationship between domestic and EU competences. The judicial interpretation of the parameters of EU legislation giving expression to EU citizens' rights is a delicate exercise: the process by which political institutions have thought to circumscribe EU intervention may be reviewed against the very primary right that the legislation is intended to shape. The CJEU's views on the primary law version of the right at hand thus more ostensibly competes

20 On the first two functions, see *Baumbast*, cit., para 86: 'the application of the limitations and conditions acknowledged in Art. 18, para. 1, EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Art. 18, para. 1, EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn*, para. 7).

21 E.g. In relation to EU sex equality law see for instance Art. 157 TFEU; e.g. Hervey, T.K. (2005)., Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards. *Maastricht Journal of European and Comparative Law* 12 (4), pp. 307–325.

22 Walker, N. (2001). Human Rights in a Post-National Order: Reconciling Political and Constitutional Pluralism. In: T. Campbell, K. D. Ewing and A. Tomkins, eds., *Sceptical Essays on Human Rights,* Oxford: Oxford University Press, p. 129.

with those expressed by political authorities. There is also a risk of hindering or swaying political debate by significantly interfering with the content and scope of rights defined in legislation through the interpretation of EU constitutional norms. In a derivative legal order such as that of the EU, the interpretation of legislation adopted at the supranational level therefore unquestionably raises questions of a constitutional nature.

As a consequence, by its very nature, Art. 21 TFEU places the constituent powers and the CJEU as well as the EU legislature in a position to jointly drive EU citizenship forward. This form of institutional collaboration is particularly interesting as it relates to the fleshing out of the concept of EU citizenship that is intended to legitimise the edifice of the European Union. However, the way forward may be bumpy: How does EU law address disagreement on such a symbolic concept?

1.3 *Tensions between Primary and Secondary Law: the UK Settlement as an Illustration*

The Settlement for the UK from 2016 (UK Settlement)[23] offered an occasion to test the relationship between the primary and secondary rights of EU citizens. It explored the boundaries of what could be adjusted within EU law in order to address the concerns of the UK with minimal constitutional impact. The nature of this exercise may remind us of similar sorts of "constitutional dialogues"[24]: such as that leading to the adoption of the Barber protocol[25] or the insertion of Art. 157, para. 4, in the TFEU.[26] Although the UK Settlement did not enter into force,[27] it is the latest illustration of the ability to organise

23 Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18–19 February 2016.

24 See further: Muir, E. (2018). *EU Equality Law: The First Fundamental Rights Policy of the EU,* cit., Chapter III.

25 Protocol no. 2 concerning Art. 119 of the Treaty Establishing the European Community. See further: Curtin, D. (1993). The Constitutional Structure of the Union: A Europe of Bits and Pieces. *Common Market Law Review* 30 (1), pp. 17–69.

26 It was inserted by the Treaty of Amsterdam, see also Declaration no. 28 on Art. 119(4) of the Treaty establishing the European Community. See Howard, E. (2008). The European Year of Equal Opportunities for All-2007: Is the EU Moving Away from a Formal Idea of Equality?. *European Law journal* 14 (2), pp. 168–185, 175–176; Maduro, M. (2005). La Cour de justice des Communautés européennes et la législation d'anti-discrimination. *Revue du droit Européen Relatif à la Non-Discrimination*, pp. 25 *et seq.*

27 Section E.2., of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18–19 February 2016.

a political response to challenges to EU citizens' rights within existing EU primary law.[28] The UK Settlement therefore provides a most useful opportunity to reflect on the constitutional design of EU citizenship law.[29]

It is noteworthy that of the various controversial aspects of the debate surrounding the Brexit referendum and in the UK Settlement, two were related to the non-economic rights of EU citizens and tested the relationship between primary and secondary law in that respect – more specifically the relationship between Art. 21 TFEU and Directive 2004/38. These aspects will be the focus of the present chapter. Selected excerpts from the UK Settlement are reproduced here for the ease of the reader.[30]

The first aspect of the UK Settlement of interest to this paper[31] relates to the rights of non-economically active persons and sought to address concerns about the burden on the social assistance system of the host Member State that these persons represent. Annex I, Section D on "Social benefits and free movement", point 1, of the UK Settlement reads as follows:

> (b) Free movement of EU citizens under Article 21 TFEU is to be exercised subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect.
>
> The right of economically non-active persons to reside in the host Member State depends under EU law on such persons having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and on those persons having comprehensive sickness insurance.
>
> Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement *solely*

28 The objective was 'to settle, in conformity with the Treaties, certain issues raised by the United Kingdom': Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18–19 February 2016.

29 Case law developed exclusively on the basis of Treaty provisions is left aside as it leaves little room for interaction with legislation. See for instance the line of cases developed on the basis of Art. 20 TFEU and the ruling in Court of Justice, judgment of 8 March 2011, case C-34/09, *Zambrano*. See also Court of Justice, judgment of 12 March 2019, case C-221/17, *M.G Tjebbes et al. v Minister van Buitenlandse Zaken*.

30 Others related to the free movement of workers (e.g. the indexation of child benefits, alter and safeguard mechanism) and the notions of public policy or public security.

31 Other important aspects of the UK Settlement such as the safeguard mechanism related to in-work benefits for workers are not discussed in this paper devoted to the rights of non-economic actors.

> in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence. [...] (emphasis added)

The second aspect of the UK Settlement relates to the rights of third-country national family members of an EU citizen with no prior lawful residence, with a view to countering fears of circumvention of national immigration rules. Annex VII of the UK Settlement reads as follows:

> The Commission intends to adopt a proposal to *complement* Directive 2004/38 on free movement of Union citizens *in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State* before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host Member State's immigration law will apply to the third country national. This proposal will be submitted after the above Decision has taken effect [...] (emphasis added)

The two themes thereby addressed by the UK Settlement and related to Art. 21 TFEU provide interesting case studies for the purpose of examining the relationship between primary and secondary rights in the context of intense political disagreement on non-economic rights. The challenges thereby identified – on the one hand, free movement of EU citizens v. fear of burdens on the social assistance system, and on the other, free movement of EU citizens v. national immigration law – have been framed in two different, if not opposing, ways in EU constitutional law.

On the one hand, on the issue of access to social benefits for non-economically active persons (Section II), the case law of the CJEU has progressively proceeded to a "deconstitutionalisation" process (i.e. shifting attention from the right enshrined in primary law to the rights provided for in secondary law) on which the UK Settlement could subsequently comfortably rely. The UK Settlement could indeed rely on an interpretation of Directive 2004/38 which is favourable to the requests of the UK with little fear of breaching primary law.

On the other hand, the precise legal status of the rights of EU third-country national family members of EU citizens with no prior lawful residence was blurred. This allowed the UK Settlement to propose a political solution to address the claims of the UK – i.e. of a legislative nature – but case law suggests that this approach could be in breach of EU primary law. Indeed, the rights of

third-country national family members of an EU citizen are seemingly protected by the EU Treaty rights as we shall see (Section III).

After spelling out the constitutional setting in relation to both types of rights, we will seek to draw lessons for the constitutional design of non-economic rights of EU citizens when treaty and legislation co-exist (Section IV). It will be argued that whenever possible, emphasis shall be placed on legislative guidance so as to allow for political dialogue.

II Deconstitutionalising the Perimeters of EU Citizenship Law: from *Martínez Sala* to *Brey* et al. as Reflected in the UK Settlement

In a now well-known series of recent cases on the rights of mobile EU citizens that do not perform an economic activity, the CJEU "deconstitutionalised" its understanding of key aspects of the prohibition of nationality discrimination (enshrined in Art. 18, para. 1, TFEU). In other words, the CJEU moved the discussion to the secondary law level, having kept it at the primary law level for many years.[32]

II.1 *Enshrining EU Citizens' Rights in EU Primary Law: 'Constitutional Engineering'*

The story starts in the late 1990s when the CJEU's ruling in *Martínez Sala*[33] captured the imagination of lawyers by asserting that a mobile EU citizen[34] "lawfully resident in the territory of the host Member State, can rely on [Art. 18 TFEU] in all situations which fall within the scope ratione materiae of [Union] law".[35] Furthermore, a situation would fall within the scope *ratione materiae* of Union law if the "Member State delays or refuses to grant to that claimant a benefit [covered by Regulations 1408/71[36] and 1612/68[37]] that is provided to all

32 Elements of the following sections build on Muir, E. (2018). *EU Equality Law: The First Fundamental Rights Policy of the EU,* cit., Chapter III.B.2.c.ii.

33 *María Martínez Sala v Freistaat Bayern*, cit.

34 Ibid., para. 61.

35 Ibid., para. 63.

36 Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, *OJ L 149*, 5.7.1971, p. 2–50.

37 Regulation (EEC) 1612/68 of 15 October 1968 of the Council on freedom of movement for workers within the Community, *OJ L 257*, 19.10.1968, p. 2–12. Please note that this regulation has now been repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ L 141*, 27.5.2011, p. 1–12.

persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State".[38]

The CJEU thereby decoupled the personal scope of the EU prohibition of nationality discrimination from specific requirements established by EU legislative instruments regulating its material scope.[39] It was now enough to be an EU citizen lawfully residing in another Member State *under the law of that Member State*[40] to benefit from the prohibition of nationality discrimination (Art. 18, para. 1, TFEU), in order to obtain a benefit covered by specific EU legislation. This was remarkable progress for non-economically active and mobile EU citizens. Before that, their equal treatment rights did not have constitutional status in EU law and only legislative instruments setting specific *ratione personae* requirements applied to them before they could be granted a limited set of rights.[41] This framed the debate on EU mobile and non-economically active citizens' equal treatment rights in constitutional terms, despite the provision in the treaty articles on EU citizenship (Arts 20, para. 2, and 21, para. 1, TFEU) and the general prohibition of nationality discrimination (Art. 18, para. 1, TFEU) referring to the limits of the Treaty and to its scope of application as possibly defined in legislation.

11.2 *The Adoption of New Legislation: Fresh Political Guidance*

In interpreting the principle of equal treatment for mobile EU citizens in such an innovative way, the CJEU limited the possibility for the EU legislature to influence the personal scope of the said principle. In 2004, the European Parliament and the Council adopted Directive 2004/38.[42] According to this Directive and building on earlier legislative guidance, a pre-condition for a non-economically active person to have lawful residence for more than three months in another Member State *under EU law* is to have "sufficient resources for themselves and their family members not to become a burden on the social

38 *María Martínez Sala v Freistaat Bayern*, cit., para. 63.

39 Ibid., paras 45 and 56–62. See further O'Leary, S. (1999). Putting Flesh on the Bones of European Union Citizenship. *European Law Review* 24 (1), pp. 68–79, 77–78.

40 *María Martínez Sala v Freistaat Bayern*, cit., para. 47.

41 See Directive 90/366/EEC of the Council of 28 June 1990 on the right of residence for students, *OJ L 180*, 13.7.1990, p. 30–31; Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, *OJ L 180*, 13.7.1990, p. 28–29 and Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence, *OJ L 180*, 13.7.1990, p. 26–27.

42 Directive 2004/38, cit.

assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".[43]

Lawful residents would then enjoy equal treatment on the ground of nationality; this was repeated in Art. 24, para. 1, of the Directive subject to certain conditions, including an exception to the effect that: "the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) [establishing specific conditions for work seekers] to persons other than workers, self-employed persons, persons who retain such status and members of their families".[44] In other words, the Member States' concern to protect their social assistance systems against overburdening influenced both the conditions to obtain lawful residence in another Member State under EU law and equal treatment rights.

Although the Directive was only to apply in the Member States from 2006, the provisions adopted could have prompted the Court to give greater emphasis to the Union legislature's attempt to circumscribe the conditions under which free movement rights could be exercised. Nevertheless, the CJEU continued to reason directly on the basis of Treaty provisions on issues concerned with equal treatment rights of mobile and non-economically active EU citizens.[45] In doing so it largely disregarded the concern expressed by political institutions to make non-economically active migrants' residence – and therefore equal treatment rights under EU law – conditional upon having a "sufficient" level of resources.[46]

11.3 *Legislation Acting as a Gateway to EU Citizenship Rights*

A move away from the constitutional approach described in the past section and towards deconstitutionalisation, or greater emphasis being placed on

43 Art. 7, para. 1, let. b, of Directive 2004/38, cit.

44 Art. 24, para. 2, of Directive 2004/38, cit.

45 E.g. Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani*, para. 39 and Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar*, para. 46. The position of the CJEU can usefully be contrasted to that of the Advocate General in that case: Opinion of AG Geelhoed delivered on 19 February 2004, case C-456/02, *Trojani*. See further Van der Mei, A.P. (2005). Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State, Comments on Trojani (Case-456/02 of 7 September 2004) and Bidar (Case C-209/03 of 15 March 2005). *European Journal of Migration and Law* 7 (2), pp. 203–211, 209.

46 Note that, and I am grateful to Gillian More for stressing this, there were also elements in the Directive intended to balance this approach such as Art. 14, para. 3, Directive 2004/38 according to which: 'An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'.

secondary legislation, was initiated by the *Brey* case of 2013.[47] This redirection was confirmed in three subsequent cases.[48] The characteristics of this new case law can be summarised as follows. To start with, the CJEU now declines to reason on the basis of treaty provisions on citizenship and nationality discrimination; it focuses instead almost exclusively on guidance provided in secondary legislation. Although this is visible in all four cases,[49] it is particularly clear in *Dano* where the CJEU had been specifically asked to reason on the basis of EU constitutional law but refused to do so. The CJEU indeed raised the fact that the Charter could only be applied within the scope of Union law. As the situation was not covered by EU secondary legislation, this condition was not fulfilled in the case at hand.[50] In other words, the CJEU refused to look at whether the treaty provisions on EU citizenship and nationality discrimination could bring the matter within the scope of EU law despite the limitations enshrined in secondary legislation. The CJEU further explained elsewhere in the ruling that protection of non-economically active mobile citizens against nationality discrimination when this occurred outside the scope of Directive 2004/38 would run counter to one of the Directive's objectives: to prevent such citizens from becoming an unreasonable burden on the social assistance system of the host Member State.[51] In other words, the CJEU did a methodological U-turn on its earlier case law, whereby such equal treatment rights were granted to all with direct reference to the treaty provisions on nationality discrimination and EU citizenship.

Secondly, from the EU secondary law sources, the CJEU places particular emphasis on Directive 2004/38 which lays down – *inter alia* – the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by EU citizens.[52] Not only does this emphasis result from the move away from treaty provisions, but it can also be read as a

47 Court of Justice, judgment of 19 September 2013, case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*.

48 Court of Justice, judgment of 11 November 2014, case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*; Court of Justice, judgment of 15 September 2015, case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*; Court of Justice, judgment of 25 February 2016, case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*.

49 See for instance: *Pensionsversicherungsanstalt v Peter Brey,* cit., paras 46–47 and 53–56; *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, cit., para. 50; *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, cit., para. 39.

50 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., para. 90.

51 Ibid., para. 74, see also paras 60–62.

52 Art. 1, let. a), of Directive 2004/38, cit.

clarification of certain aspects of the relationship between this Directive and Regulation 883/2004 on the coordination of social security systems.[53] Directive 2004/38 is given precedence when it comes to defining EU citizens' rights of residence in another Member State.[54] As a consequence, the Directive acts as a gateway to EU equal treatment law on the grounds of nationality for non-economic actors[55] which, in the view of the CJEU, is indeed in line with one of the central objectives of the said Directive.[56]

Thirdly, in seeking guidance from Directive 2004/38, the CJEU sticks as closely as possible to the spirit, wording and gradual system established by it when possible.[57] When no such specific scheme exists, the CJEU provides guidance to the competent national authorities on how to ensure compliance with the general requirements of the Directive after closely examining its overall internal dynamics.[58] For instance, the Directive establishes that residence for more than three months[59] and less than five years for non-economically active persons who do not have a more specific and beneficial status[60] is dependent *inter alia* upon having "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State".[61] In *Brey*, the CJEU indicated that this must be understood as requiring "an overall assessment of the specific burden which [a national of another Member State requesting a particular social assistance benefit[62]] would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the

53 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ L 166*, 30.4.2004, p. 1–123.

54 *Pensionsversicherungsanstalt v Peter Brey, cit.,* paras 50 and 53–54.

55 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig, cit.,* para. 83; see also: Court of Justice, judgment of 14 June 2016, case C-308/14, *European Commission v United Kingdom of Great Britain and Northern Ireland*, para. 68. For critical comments on that approach see Verschueren, H. (2015). Preventing "Benefit Tourism" in the EU: a Narrow or Broad Interpretation of the Possibilities Offered by Dano. *Common Market Law Review* 52 (2), pp. 363–390, 377 *et seq.*

56 Art. 1, let. a), of Directive 2004/38, cit.

57 See Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman*.

58 E.g. *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., paras 69–73 and 77.

59 Note that in *Brey* the applicant for social benefits desired to reside for more than three months, see *Pensionsversicherungsanstalt v Peter Brey*, cit., para. 53.

60 See the other recitals of Art. 7 of Directive 2004/38, cit. The specific situation of those having involuntarily lost employment or workseekers is discussed further below.

61 Art. 7, para. 1, let. b), of Directive 2004/38, cit.

62 As defined under Directive 2004/38, cit.: *Pensionsversicherungsanstalt v Peter Brey*, cit., paras 60–63.

person concerned".[63] This amounts to requiring a case-by-case evaluation from the perspective of: (i) the national social assistance system; as well as, (ii) the specific situation of the individual, and keeping in mind, (iii) the specific nature of the benefits requested by the applicant. This case law seems to hold true, although the CJEU applied this test fairly strictly in the *Dano* case.[64]

In contrast, when more detailed guidance is provided in the form of a 'gradual system' the CJEU actually relies on the legislature's choices.[65] In *Alimanovic*, the CJEU referred to and stuck to the gradual system established by the Directive: namely the retention of the status of 'worker' and the relevant conditions to retain the right to reside and be given access to social assistance. That included the duration of the exercise of any economic activity.[66] The CJEU stressed that the advantage of such a scheme is to be unambiguous. As it is enshrined in legislation, it guarantees a significant level of legal certainty and transparency; and as it is gradual, it also complies with the principle of proportionality.[67] The CJEU rejected further attempts to call into question the balance performed by the EU legislature between individuals' right to free movement, and the burden that mobile EU citizens who have lost their employment status may constitute on the national system of social assistance.[68]

The same approach was adopted in *García-Nieto* in relation to jobseekers; the Court re-asserted that the Directive provides a set of detailed and gradual rights.[69] The CJEU may thus be ready to accept a rather inflexible system of allocation of rights if it is progressive and set in a way that ensures legal certainty and transparency.[70] In that sense, the CJEU defers to political guidance and departs from its constitutional case law which provided more individualised solutions, but which were also less predictable.[71]

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63 E.g. *Pensionsversicherungsanstalt v Peter Brey*, cit., para. 64, see also the detailed analysis of the interplay between different provisions of the Directive at paras 65–72 and 77.

64 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., paras 81 and 83. Here the CJEU entitled a Member State to refuse to grant social benefits when the applicant exercise their right to freedom of movement solely in order to obtain social assistance: *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., paras 76 and 78.

65 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, cit., paras 59–60. See also Court of Justice, judgment of 11 April 2019, case C-483/17 *Neculai Tarola v Minister for Social Protection*, paras. 43 and 45–57.

66 Ibid., para. 60.

67 Ibid., para. 61.

68 Ibid., paras 60 and 62.

69 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, cit., paras 47–48.

70 See Opinion of AG Wathelet, *Coman*, cit., para. 62.

71 Providing interesting analyses proposing to reconcile the old and new lines of cases: Davies, G. (2016). Migrants and Social Assistance: Trying to be Reasonable About

11.4 *Interim Conclusion: Deconstitutionalisation*

Some have lamented that this novel approach constitutes a step backwards when compared to the early cases in which the CJEU developed a protective approach to equal treatment for EU citizens directly grounded in primary law.[72] Critics point out that the post-*Brey* case law may have been triggered by fears of social tourism and Eurosceptic debates in several Member States.[73] The point made here is more modest. This line of cases sheds light on the ability of the CJEU to reframe the interplay between primary and secondary law as well as between the judicial and political guidance. The post-*Brey* case law on access to social benefits provides a remarkable example of deconstitutionalisation following a period of intense constitutionalisation.

It may be added that the desire expressed in the UK Settlement from 2016 to "settle, in conformity with the treaties, certain issues raised by the United Kingdom in its letter of 10 November 2015",[74] sat comfortably with the post-*Brey* case law and in particular with the rulings in *Dano* (11 November 2014) and *Alimanovic* (15 September 2015). These cases indeed made it possible to accommodate the UK demands within the existing state of EU law and without there even being need for legislative reform. The UK Settlement recalled the wording of Art. 21 TFEU referring to the limitations and conditions laid down, inter alia, in legislation. As allowed by the deconstitutionalisation process resulting from the aforementioned rulings, the right of non-economically active persons grounded in EU secondary law is dependent, among other things, on having sufficient resources for themselves and their family member. Member States can therefore refuse to grant social benefits to persons who exercise their right of movement solely in order to obtain social assistance if they do not have a right to residence under EU law.[75]

Self-Sufficiency. *College of Europe Research Papers in Law*, no. 2/2016 and Davies, G. (2018). Has the CJEU Changed or Have the Cases? The Deservingness of Litigants as an Element in CJEU of Justice Adjudication. *Journal of European Public Policy* 25 (10), pp. 1442–1460.

72 E.g. Shuibhne, N. N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape Of Union Citizenship. *Common Market Law Review* 52 (4), p. 889.

73 E.g. Peers, S. (2014). Benefit Tourism by EU citizens: the CJEU Just Says No. *EU Law Analysis*, available at eulawanalysis.blogspot.com/2014/11/benefit-tourism-by-eu-citizens-cjeu.html.

74 Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18–19 February 2016.

75 Exploring how this could impact a future agreement with the UK: Barnard, C., and Butlin, S.F. (2018). Fair movement of people: equal treatment? (Part Two). *EU Law Analysis*, available at eulawanalysis.blogspot.com/2018/06/fair-movement-of-people-equal-treatment.html.

III Constitutionalising the Perimeters of EU Citizenship Law: from *Metock* to *Lounes*, via the UK Settlement

The relationship between treaty provisions, Directive 2004/38, related case law and the dialogue initiated by the UK Settlement took a different shape in relation to the rights of third-country national family members of mobile EU citizens.

III.1 *EU Legislation and the Rights Attached to EU Citizenship: from* Singh *to* Akrich

This second part of our story starts with the *Surinder Singh* ruling by the CJEU in 1992. The CJEU asserted that a national of a Member State might be deterred from leaving his country of origin if, on returning, the conditions of his entry and residence in his home State would constitute obstacles to his right of movement and establishment as provided in Arts 48 and 52 EECT at the time.[76] This would be particularly so if children and spouses – nationals of a third country – were not permitted to enter and reside in the State of origin under conditions at least equivalent to those granted in the host country under secondary legislation available at the time.[77]

In *Surinder Singh* as well as in a number of subsequent cases,[78] EU free movement rules were relied upon to enhance the (albeit derived) rights of third-country national family members. The main feature of these cases was the CJEU's heavy reliance on the EU legislature's attachment to protecting the family life of mobile EU citizens.[79] One question however was left unanswered: What if the third-country national family member has not yet been admitted, or is within the territory of the European Union without leave to remain before seeking to obtain a right to enter and stay as a family member of a mobile EU citizen?[80]

The answer came, in a less protective way than third-country national family members of a mobile EU citizen might have hoped for, in the *Akrich* ruling

76 Court of Justice, judgment of 7 July 1992, case C-370/90, *Surinder Singh*, paras 19 and 23. Note that the same right can now be derived from Art. 21, para. 1, TFEU; Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.,* paras 48–49.

77 *Surinder Singh*, cit., paras 20–21.

78 For a more exhaustive overview see Cambien, N. (2011). *Citizenship of the Union as a Cornerstone of European Integration: A Study of its Impact on Policies and Competences of the Member States*, Doctoral Thesis, Faculty of Law, KU Leuven, p. 207 *et seq*.

79 E.g. Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*, para. 53; Court of Justice, judgment of 14 April 2005, case C-157/03, *Commission v Spain*, para. 26.

80 Opinion of AG Geelhoed delivered on 27 February 2003, case C-109/01, *Akrich*, para. 7.

from 2003. Here, prior lawful residence by the third-country national family member of an EU citizen in the EU state of origin was deemed to constitute a prerequisite for reliance on Art. 10 of Regulation 1612/68 on freedom of movement for workers, for the purpose of being able to claim residence rights against the state of origin.[81] The regulation therefore was used to limit the rights of EU citizens to move with their third-country national family members. In the absence of prior lawful residence in the host state, the third-country national had no right under Regulation 1612/68 in the host state and could therefore claim no right "by analogy" under EU law in the state of origin.[82] This approach was supported with reference to "the structure of Community provisions seeking to secure the freedom of movement for workers within the Community".[83]

III.2 *Ambiguities on the Sources of Rights: the Adoption of a New Legislative Framework and* Revirement *in* Metock

As is well known, the *Akrich* ruling was openly overruled in *Metock.*[84] In the latter ruling, the CJEU made clear that the right of an EU citizen to move within the EU with a third-country national family member cannot depend on the prior lawful residence of such a family member in the EU.[85] The CJEU explained its decision to reconsider the *Akrich* ruling[86] with reference to political guidance taken from the text of the (then) new Citizenship Directive:[87] the Directive does not distinguish between the status of various family members and entry to the territory of the host state must be possible even in the absence of a residence card. Furthermore, the Directive is understood as a tool that strengthens the right of free movement and residence of Union Citizens.[88] This heavy emphasis on political guidance could have indicated that the rights of EU citizens to move to and reside freely in another Member State with their third-country national spouse – with no need for prior lawful residence – are enshrined in the Directive.[89]

Yet, the ruling in *Metock* is ambiguous on that point. On the one hand, the CJEU explains that the legislature has competence to regulate the conditions

81 Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich*, para. 50.
82 Ibid., para. 54.
83 Ibid., para. 51.
84 *Metock*, cit., para. 58.
85 Ibid.
86 See for instance, *Metock,* cit., paras 55–57 on earlier case law of the CJEU as well as para 69 on the comparison with family reunification for third country nationals.
87 Ibid., paras 50–54.
88 Ibid., para. 59.
89 See also Opinion of AG Maduro delivered on 11 June 2008, case C-127/08, *Metock*, para.13.

for entry and residence of family members of EU citizens.[90] On the other hand, in paragraph 62 (to which we will come back below), the CJEU stresses that "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed *by the Treaty* would be seriously obstructed" (emphasis added).[91] As a consequence, although the CJEU largely reasons on the basis of Directive 2004/38 throughout the ruling, the reference to treaty protection of the right to free movement suggests a constitutional anchorage of the possibility for EU citizens to move within the EU with third-country national family members irrespective of their prior lawful residence. The content of Directive 2004/38 on that point could thereby be subsumed in EU primary law. Importantly, and unlike in certain earlier cases,[92] there is *no* statement from the CJEU in that ruling according to which such constitutional protection should be justified with reference to the fundamental right to family life. In fact, the case law of the European Court of Human Rights focusing on the fundamental right to family life was in that sense less generous than that of the CJEU focusing on freedom of movement. The European Court of Human Rights indeed limited interferences into domestic migration policy on behalf of family life to exceptional family circumstances; it built on the assumption that family life may be possible in other States than the one refusing entry or residence.[93]

The important treaty provision referred to in *Metock* is Art. 21 TFEU as well as more specific treaty provisions for mobile economic actors.[94] Before delving further into the role of Art. 21 TFEU in the subsequent UK Settlement, it shall be made clear that the CJEU has consistently held that EU citizens may not rely on Directive 2004/38 against their state of nationality – as will be the case in several cases discussed below – as the Directive applies to "Union citizens who move and reside in a Member State other than that of which they are nationals".[95] However, Art. 21 TFEU protects the rights of mobile EU citizens to return to their country of origin.[96] The CJEU traditionally applies the content of EU

90 *Metock*, cit., para. 61.

91 Ibid., para. 62.

92 I am most grateful to Jonathan Tomkin for pointing that out; eg. *Baumbast*, cit., para 72 and see further: Guild, E., Peers, S. and Tomkin, J. (2014). *The EU Citizenship Directive: A Commentary.* Oxford: Oxford University Press, p.133.

93 European Court of Human Rights, judgment of 2 August 2001, no. 54273/00, *Boultif v. Switzerland*, paras 52–55. See also Opinion of AG Geelhoed, *Akrich*, cit., para. 147. See further: Cambien, N. (2011). *Citizenship of the Union*, cit., p. 222.

94 *Metock*, cit., para. 61.

95 Art. 3, para. 1, of Directive 2004/38, cit.

96 This approach could already be observed in cases such as *Surinder Singh*, cit., paras 19–21.

legislation on free movement "by analogy" to rule on the rights of returning EU citizens under Art. 21 TFEU.[97] Nevertheless, as a consequence of the lack of clarity of the reversal of case law in *Metock*, it is not clear whether the entitlement of EU citizens to move freely with their third-country national family member with no prior lawful residence is derived from the content of Directive 2004/38 applied directly (in case of movement to a host Member State), or by analogy (in case of movement back to the Member State of nationality), or from Art. 21 TFEU *per se*.

III.3 *Shifting to Art. 21, Para. 1, TFEU: from the UK Settlement to* Lounes

The UK Settlement, as quoted in the Introduction, ignored (it may be presumed intentionally) the possible constitutional anchorage of the rights of third-country national family members. It built on the assumption that the solution in *Metock* was a matter of EU secondary law *only*. The UK Settlement proposed to address the challenge to EU law on that point through legislative intervention. The UK Settlement indeed included a declaration by which the European Commission intended to adopt a proposal to "complement" Directive 2004/38.[98] The proposal to have been supported by the Member States within the Council would have been intended to undo the *Metock* ruling. Indeed, a new instrument would be proposed in order to "exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen, or who marry a Union citizen only after the Union citizen has established residence in the host Member State".[99] The UK Settlement thereby built on the assumption that reversing *Metock* could be achieved through legislative intervention. It was hoped that the European Parliament, as a co-legislator, would support this initiative.

Yet, in the *Lounes* case from 2017,[100] the CJEU adopted a different reading of its ruling in *Metock*. Ms Ormazabal, a dual national from Spain and the UK, sought to derive a right of residence in the UK for her husband from her EU citizenship status. The latter, Mr Lounes, was not lawfully residing in that country

97 See also early cases such as Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*, paras 39–45.

98 This was perhaps deemed as less difficult than re-opening a full negotiation of Directive 2004/38 in the near future: see for instance the more distant proposal made "on the occasion of a future revision of Directive 2004/38" in relation to the notions of public policy and public security (Annex 7, of European Council Conclusions of 18–19 February 2016).

99 Annex 7 of European Council Conclusions of 18–19 February 2016.

100 Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*.

at the time of their marriage.[101] Ms Ormazabal, in the view of the CJEU, could not rely on Directive 2004/38. Although she had moved from Spain to the UK in her capacity as a Spanish national, she had subsequently acquired British citizenship before marrying Mr Lounes. The UK had thereby become her country of nationality[102] and she had an unconditional right of residence in the UK under international law.[103]

Although she could not rely on EU secondary law against her country of nationality, the CJEU found that Ms Ormazabal could rely on Art. 21, para. 1, TFEU. While in the past, similar findings were based on the risk of hindering the freedom of movement of EU citizens,[104] the CJEU here reasoned that "[a] national of one Member State who has moved to and resides in another Member State cannot be denied that right merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined".[105] The CJEU then went on to substantiate this finding.[106]

Leaving aside aspects of the rulings related to the specific case of mobile EU citizens acquiring the nationality of the host state and possibly related to the Draft Withdrawal Agreement[107] (as discussed elsewhere by Davies),[108] what is of particular interest in this chapter is the anchorage of Ms Ormazabal's rights in Art. 21, para. 1, TFEU. These rights of EU citizens include "the right to lead a normal family life, together with their family members".[109] To support that finding, the CJEU reasoned by analogy to paragraph 62 of the ruling in *Metock*.[110] The CJEU insisted that for the rights conferred by Art. 21, para. 1, TFEU to be effective, citizens in a situation such as Ms Ormazabal must continue to enjoy the right to "build a family life with their third-country-national

101 Ibid., para. 16.

102 See *supra, Eind,* cit.

103 *Lounes*, cit., paras 37 and 41.

104 As acknowledged by the CJEU in *Lounes*, cit., para. 48. See also *supra, Surinder Singh*, cit.

105 *Lounes*, cit., para. 53.

106 Ibid, paras 54–59.

107 Art. 9, of European Commission (2018). *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, TF50 (2018) 35 – Commission to EU27.

108 For an analysis of other aspects of the ruling in the context of Brexit see Davies, G. (2018). Lounes, Naturalisation and Brexit. *European Law Blog*, available at europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/. That discussion relates to mobile EU nationals having acquired the nationality of the host state, that aspect of the ruling is therefore beyond the scope of the current paper.

109 *Lounes*, cit., para. 52.

110 Ibid., para. 52.

spouse, by means of the grant of a derived right of residence to that spouse" under that provision.[111] Although there is no explicit reference to the lack of prior lawful residence, the ruling in *Lounes* can be read as bringing an end to the ambiguity created by paragraph 62 in *Metock*.

III.4 *Interim Conclusion: Constitutional Protection?*

The rights of EU citizens to be with their family members from a third country in the host state, irrespective of the absence of prior lawful residence – as the facts of both *Metock* and *Lounes* indicate – would thereby be anchored in Art. 21, para. 1, TFEU. This approach implies that disagreement on the scope of free movement rights for EU citizens with third-country nationals with no prior lawful residence in a Member State cannot be addressed without treaty reform, contrary to the underlying logic of the proposal in the UK Settlement.

However, the ruling in *Lounes* replaces one ambiguity with another. Although that ruling is mostly structured around Art. 21, para. 1, TFEU, the CJEU concludes its reasoning in paragraph 61 by stating that the conditions for granting a derived right of residence to the third-country national spouse should not be stricter than those provided in Directive 2004/38, and that the Directive should be applied "by analogy".[112] This suggests that although the rights of EU citizens such as Ms Ormazabal are anchored in Art. 21, para. 1, TFEU, the CJEU puts flesh on the bones of EU primary law with the political guidance enshrined in EU legislation. This raises the following questions: Would a modification of EU legislation (or other legal instrument of the EU ranking beyond primary law) favourable to domestic migration policies lead to a change of case law in a case such as *Metock* or *Lounes*? Or would the legislation be found to breach the constitutional right of EU citizens to move with their family members, even in the absence of prior lawful residence in a Member State?

IV Soul Searching: Acknowledging the Political Dimension of EU Citizenship Law and Locating the Debate at Legislative Level

The analysis of the first set of rights – access to social benefits for non-economically active persons – showed how the CJEU reframed its initial approach grounded in EU constitutional provisions in order to discuss such rights in the context of Directive 2004/38. To the contrary, the analysis of the second

111 Ibid., para. 60.
112 Ibid., para. 61.

set of rights – of third-country national family members of an EU citizen with no prior lawful residence – has shown that this set of rights is seemingly being elevated to EU primary law. The practical outcome of these divergent processes is usefully illustrated with reference to the UK Settlement: while controversies to do with the first set of rights could be addressed with reference to the legislation, as things currently stand, controversies related to the second set of rights could presumably *not* be addressed through legislative change. How can we reconcile or coherently articulate these two approaches?

IV.1 *Art. 21, Para. 1, TFEU and Directive 2004/38: the Directive as a Gateway to EU Primary Rights?*

As noted in Section II, the recent case law of the CJEU on access to social benefits for non-economically active persons espouses the structure of Directive 2004/38 and acknowledges that the Directive acts as a gateway to equal treatment rights for EU citizens in the host State. In contrast, Section III pointed at the possibility that the rights derived by third-country nationals with no prior residence from EU citizens are being anchored directly in Art. 21, para. 1, TFEU – although the wording of paragraph 61 of the ruling in *Lounes* leaves open the possibility of articulating the relationship between Directive 2004/38 and the primary right differently. It is submitted that, as far as the rights of EU citizens to move with third-country national family members with no prior lawful residence are concerned, Directive 2004/38 should remain the main point of reference to define the scope of the rights of EU citizens – be it "by analogy".[113]

This would allow discontent to be addressed through political dialogue as was proposed by the UK Settlement. This would also allow the approach of the CJEU in relation to third-country national family members to be brought closer to that adopted in the cases on social benefits examined above, while keeping in line with the European Court of Human Rights' approach to the fundamental right to family life.[114] This would finally allow for a better alignment of the related case law with the general approach of the CJEU as it has been shaping up over the past few years in other areas of EU citizenship law related to Art. 21 TFEU.

113 See for instance Court of Justice, judgment of 12 July 2018, case C-89/17, *Secretary of State for the Home Department v Rozanne Banger*, paras 29 *et seq*. Exploring the limits of reasoning by analogy, where requested by the wording of Directive 2004/38 itself, see Court of Justice, judgment of 10 September 2019, case C-94/18, *Nalini Chenchooliah v Minister for Justice and Equality*, paras 71–88.

114 See for instance *Akrich*, cit., paras 58–60.

The CJEU is indeed increasingly consistently[115] using Directive 2004/38, and its Art. 7 in particular, as a gateway to access EU citizenship rights when the two layers of norms can inform each other. (Understandably, this has not been done in the context of rights anchored directly in treaty provisions and where the provisions of EU legislation were irrelevant).[116] Useful recent examples are the three Grand Chamber rulings in *O. and B.*, *Marín* and *Chavez-Vilchez*.[117] In *O. and B.*, the CJEU investigated the ability of EU citizens to derive rights for third-country national family members in their country of origin from the exercise of the freedom of movement. Although such rights would be anchored in Art. 21, para. 1, TFEU – as the Directive cannot be relied upon against the state of origin – the CJEU firmly asserted that the provisions of Directive 2004/38 would act as a gateway to Art. 21, para. 1, TFEU.[118] Directive 2004/38 was being applied by analogy[119] but with a detailed analysis of its provisions.[120] Indeed, for rights to be derived from the treaty, it is necessary that "residence of the Union Citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State".[121] For that purpose, "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Art. 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State, and goes hand in hand with creating and strengthening family life in that Member State".[122] In contrast, residence

115 E.g. Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, paras 27–28 and 46; *Eind*, cit., paras 39–40; Court of Justice, judgment of 10 October 2013, case C-86/12, *Alokpa*, paras 29–30.

116 See for instance Art. 20 TFEU and the case law developed on the basis of the ruling in *Zambrano,* cit. In such cases though, there is very limited space for dialogue – to which this contribution is devoted – between European key players on the content of the rights. There are also naturally cases in which EU citizenship law is not applicable; e.g. Court of Justice, judgment of 8 November 2012, case C-40/11, *Yoshikazu Iida v Stadt Ulm*, paras 73 *et seq*. or judgment of 25 July 2018, case C-679/16, *A*. It is acknowledged that there also exist situations where Art. 21, para. 1 TFEU cannot be used in conjunction with EU legislation. For recent examples see Court of Justice, judgment of 10 April 2018, case C-191/16, *Pisciotti* and judgment of 13 November 2018, case C-247/17, *Denis Raugevicius*.

117 See also for instance the ruling by the Court of Justice, judgment of 30 June 2016, case C-115/15, *NA*, para. 78.

118 See also Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G. *Common Market Law Review* 52 (3), pp.753–777, 767 and 769.

119 *O. and B.*, cit., para. 50.

120 See also: Court of Justice, judgment of 27 June 2018, case C-230/17, *Erdem Deha Altiner and Isabel Hanna Ravn v Udlaendingestyrelsen*, paras 27 *et seq*.

121 *O. and B.*, cit., para. 51.

122 Ibid., para. 53.

under Art. 6, para. 1, would not be enough.[123] The CJEU insists that the conditions in Art. 7, paras 1 and 2, of Directive 2004/38 must be met for the effectiveness of the right of the EU citizen, under Art. 21, para. 1, TFEU, to return with a family member who is a third-country national to be protected.[124] This applies *a fortiori* for residence pursuant to Art. 16, paras 1 and 2, of Directive 2004/38.[125]

This approach of using Directive 2004/38 as a gateway to Art. 21, para. 1, TFEU is further exemplified by the CJEU's efforts to rephrase preliminary questions raised by domestic courts so as to articulate its reasoning with reference to both Art. 21, para. 1, TFEU and Directive 2004/38. The case in *Marín* concerned the residence rights in Spain of a third-country national who was primary carer of two children, one with Spanish nationality, the other with Polish nationality. Although the domestic court asked the CJEU for guidance on Art. 20 TFEU,[126] the CJEU rephrased the question so as to be able to start the analysis with an examination of Art. 21 TFEU and Directive 2004/38.[127] The Polish nationality of the daughter living in Spain brought her within the personal scope of Directive 2004/38.[128] The CJEU derived from this observation that the daughter was therefore entitled to "rely on Article 21(1) TFEU and the measures adopted to give it effect"[129] and, therefore, that her right to reside in Spain was in principle conferred by Art. 21, para. 1, TFEU and Directive 2004/38.[130] Having acknowledged that the two provisions had to be read in conjunction, the CJEU went on to check if the conditions contained in the Directive were met with a particular focus on whether the daughter fulfilled the conditions under Art. 7, para. 1, let. b), of the Directive.[131] That provision was therefore used as a gateway to EU citizenship rights.[132] The CJEU further relied on Directive

123 Ibid., paras 52 and 59. The CJEU also secures the role of Art. 7 of Directive 2004/38 as an entry point by rejecting arguments based on the recognition of a residence card given by the host state to the third country national in the absence of a right derived from the EU citizen (para. 60). Furthermore, the third-country national must have been a family member in the host state before being able to indirectly derive rights from the EU citizenship through Art. 21, para. 1 TFEU and using Directive 2004/38 by analogy (para. 63).

124 *O. and B.*, cit., para. 54.

125 Ibid., para. 55.

126 Court of Justice, judgment of 13 September 2016, case C-165/14, *Marín*, para. 23.

127 Ibid., paras 34–35.

128 Ibid., para. 41.

129 Ibid., para. 43.

130 Ibid., para. 44.

131 Ibid., para. 46.

132 This is particularly clear at: *Marín*, cit., para. 52. See also: Court of Justice, judgment of 2 October 2019, case C-93/18, *Ermira Bajratari v Secretary of State for the Home Department*, paras 26, 28–29 although Article 21 TFEU is also mentioned at paras 42 and 47 to shed light on the broader context in which Directive 2004/38 ought to be interpreted.

2004/38 to examine the derived rights of the third-country national family member.[133]

The *Chavez-Vilchez* judgment also provides an illustration of the Grand Chamber of the CJEU's efforts to articulate the relationship between Art. 21, para. 1, TFEU and Directive 2004/38 in a similar way. The case arose from eight disputes surrounding the residence rights of third-country nationals who were primary carers of children in the latter's country of nationality. Once again, although the domestic court asked for guidance on Art. 20 TFEU, the CJEU brought Art. 21 TFEU and Directive 2004/38 as a preliminary point for analysis for the one child who had exercised his free movement right.[134] The child had then returned to the country of nationality and Directive 2004/38 could not therefore apply as such; instead Art. 21, para. 1, TFEU would apply and the content of the Directive would be applied by analogy.[135] The CJEU then emphasised that the national court would therefore have to check if the conditions listed under Arts 5 to 7 of Directive 2004/38 were fulfilled before the child could claim derived rights from Art. 21, para. 1, TFEU and Directive 2004/38 for her third-country national carer. In other words, once again, the provisions of Directive 2004/38 were used as a gateway to EU citizenship rights.[136]

These cases illustrate not only that Art. 21 TFEU shall be given priority over Art. 20 TFEU, but also that Directive 2004/38 acts as an entry point to primary EU citizenship rights, even when the Directive is only applied by analogy, as in *O. and B.* and *Chavez-Vilchez* regarding returning EU citizens. This is precisely what the design of the treaty provisions call for by referring to the limitations and conditions defined in instruments adopted thereupon. This approach does not neglect the requirement for legislation to comply with primary law and fundamental rights such as the fundamental right to family life, this remains a pre-condition for the validity of EU secondary law. Nor does this approach prevent direct reliance on Art. 21, para. 1, TFEU.[137] It is more modestly argued that when legislation *co-exists* with primary rights, reliance on guidance enshrined in legislative instruments makes it possible to more easily address accusations

133 *Marín*, cit., paras 54, 57, 62 and 67. It may be noted that the reasoning on limitations to EU citizenships rights granted by Art. 20 TFEU in that case also seems to be strongly inspired from the content of Directive 2004/38 although the Directive is not explicitly mentioned. See also Court of Justice, judgment of 13 September 2016, case C-304/14, *CS*, para. 36 *et seq*. The author is grateful to Stephen Coutts for pointing that out.

134 Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*, paras 49–50.

135 Ibid., paras 54–55.

136 This is particularly clear at: *Marín*, cit., para. 56.

137 *Baumbast*, cit., para. 86.

of over-constitutionalisation of EU law and empowers actors to address challenges through political dialogue.

It is therefore suggested that, following the trend initiated by the post-*Brey* case law in relation to social benefits, the relationship between Art. 21 TFEU and Directive 2004/38 in the context of claims in favour of third-country national residents with no prior lawful residence could be clarified by placing stronger emphasis on legislative guidance. The constitutional status of EU citizenship would thereby be present and recognised with reference to Art. 21, para. 1, TFEU, but the precise scope of the rights at hand would rely on stronger political guidance that could be modified in case of disagreement subject to compliance with higher norms such as the fundamental right to family life as understood by the European Court of Human Rights.

It is in light of this last caveat on fundamental rights' compliance that the recent ruling in *Coman*[138] may be understood and reconciled with the approach proposed in this chapter. The Grand Chamber of the CJEU was asked several questions on Directive 2004/38, as well as the Charter.[139] The national court asked for guidance on the possibility of a mobile EU citizen returning to his home country with a third-country national whose status as a family member was unclear. Indeed, the same-sex couple had lawfully married in Belgium but same-sex marriage is not recognised by the Member State of origin of the EU citizen where the couple now wants to return. Once again, the CJEU reframed the dispute and focused on Art. 21 TFEU as well as Directive 2004/38 applied by analogy to the situation of a returning EU citizen.[140] The CJEU initially examines the term of "spouse" enshrined in Directive 2004/38 to conclude that national law cannot exclude same-sex couples lawfully married in another Member State "for the sole purpose of granting a derived right of residence to a third-country national".[141] While this first part of the ruling answers the call for emphasis on legislative instruments expressed above,[142] the CJEU then moves on to examining the domestic measure restricting the EU citizen's mobility in light of Art. 21 TFEU.[143] This shift towards a constitutional level of protection of the right is surprising in light of the cases discussed above

138 Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman*.

139 Ibid., para. 17.

140 Ibid., paras 18–27.

141 Ibid., para. 36.

142 This is irrespective of the details of the CJEU's analysis of the actual wording of the Directive. See further Opinion of AG Wathelet, *Coman*, cit., paras 43–76.

143 *Coman*, cit., paras 40 *et seq.* Note the interesting reference to national identity, which is beyond the scope of this contribution, at paras 42–46.

which were more exclusively focused on Directive 2004/38. Yet, reference to the constitutional rights of EU citizens can be understood with reference to the fundamental right to family and private life of same-sex couples that may under specific circumstances be protected in the same way as that of heterosexual couples in similar situations as recognised by the European Court of Human Rights.[144]

IV.2 *Concluding Remarks on the Relationship between Primary and Secondary Rights*

Looking beyond the cases discussed so far, several broader lessons can be drawn from the post-*Brey* and post-*Metock* case law as regards the role of key EU actors in shaping the contours of EU law. To come back to the initial concerns against the over-constitutionalisation of EU law, the post-*Brey* cases illustrate that the CJEU may be ready to engage in deconstitutionalisation processes, to thereby make more space for political dialogue. What influences the readiness of the EU judiciary to adopt such an approach? Several important factors in the hands of the drafters of the Treaty and EU political institutions can be identified.

Firstly, in the cases discussed above, the wording of the relevant treaty provisions clearly identified the need for further political guidance. As the CJEU itself observed in *Dano*: (i) Art. 18, para. 1, TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the treaties, and without prejudice to any special provisions contained therein"; (ii) the second subparagraph of Art. 20, para. 2, TFEU expressly states that the rights conferred on EU citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder", and; (iii) under Art. 21, para. 1, TFEU the right of EU citizens to move and reside freely within the territory of the Member States is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".[145] All key treaty provisions thus call for further political guidance.

Secondly, and importantly, the secondary legislation relied upon in the deconstitutionalisation process described above has a strong organic link with the relevant treaty provisions (Arts 18, 20 and 21 TFEU). Arts 18 and 21 TFEU

144 *Coman*, cit., paras 48 (Charter) and 50 (European Court of Human Rights). See in particular European Court of Human Rights, judgment of 14 December 2017, nos. 26431/12, 26742/12, 44057/12 and 60088/12, *Orlandi and others v. Italy*. The Court of Justice does not however elaborate further on its approach to the fundamental rights at hand.

145 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., para. 60.

count among the legal bases for Directive 2004/38.[146] Furthermore, Art. 24 of Directive 2004/38 constitutes a specific expression of the principle of non-discrimination laid down generally in Art. 18 TFEU[147] for the benefit of EU citizens (as defined in Art. 20 TFEU), who exercise their right to move by virtue of Art. 21 TFEU. This organic link may make it easier for the judiciary to shift from one level of analysis to the other; that is from primary to secondary law. Now, this observation can work the other way around as illustrated by the ambiguities created by the rulings in *Metock* and *Lounes* examined above. It is submitted that, when treaty provisions and legislative guidance co-exist, emphasis shall be placed on the latter.

Thirdly, the CJEU places specific emphasis on the quality of the legislative materials it is relying upon and deferring to. In cases such as *Alimanovic* and *García-Nieto*, the CJEU indeed endeavours to highlight the progressive (and thus presumably proportionate) nature of the system of allocation of rights under Directive 2004/38; it also stresses the unambiguous wording that ensures transparency and legal certainty.[148] A similar emphasis on the gradual approach enshrined in Directive 2004/38 is clear from the *O. and B.* case. The CJEU emphasised the link between settling in another Member State in accordance with Art. 7 of Directive 2004/38 – and *a fortiori* under Art. 16 (permanent residence after five years) of that instrument – and creating and strengthening family life in that same Member State.[149] On the contrary, the absence of an intention to settle when movement is based on Art. 6 of Directive 2004/38 (residence of less than three months) excludes the possibility of residence that would be "sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State".[150] Importantly, in establishing the gradual system in Directive 2004/38, and on which the *Lounes* case also insists,[151] the EU legislature made the policy implications of its choices sufficiently clear for the Court to be willing to defer to it. Critics of the system established by the Directive may then argue for changes in the legislation itself.

This analysis of the respective role of the drafters of the treaty, the EU's judicial, and political institutions in shaping EU citizenship law therefore sheds light on three elements that determine the pre-conditions for a healthy

146 Recital 1, of Directive 2004/38, cit. (note that the numbering of Treaty articles mentioned herein is pre-Lisbon).

147 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, cit., para. 61.

148 See *supra*, n. 65 *et seq*.

149 *O. and B.*, cit., paras 51–56 and 59.

150 Ibid., paras 51 and 59.

151 *Lounes*, cit., paras 56–57.

balance between the constitutional value of the relevant right, and the political dimension of decision-making on fundamental rights: the constitutional norm itself ought to explicitly call for political guidance. Building on such a constitutional mandate, political institutions ought to achieve a fine balance between acknowledging the existence of the constitutional right and giving it shape through legislation. It is submitted that this may be best done by asserting the policy implications of decision-making in the field and the policy arguments justifying choices made in EU legislation. Furthermore, the internal coherence, clarity and nuanced nature of the rights thereby regulated will make it easier for political guidance to be deferred to. As for the judiciary, when the constitutional framework is clear and the relevant political guidance fulfils the procedural requirements set therein, it may be encouraged to defer to that legislative framework.

CHAPTER 9

Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal

*Nathan Cambien**

1 Introduction

Around the time of the Brexit referendum on 23 June 2016, there were around 3.6 million citizens from other EU Member States living in the United Kingdom[1] and likely around one million UK nationals living in other EU Member States.[2] Until Brexit, all these citizens were EU citizens and enjoyed, in that capacity, together with their family members, far-reaching rights of free movement and residence. In this connection, it was not required that EU citizens were economically active. EU citizenship grants even non-economically active EU citizens and their family members the right to reside in another Member State under certain conditions. A well-known example are the numerous British pensioners residing in southern Europe: according to estimates, around the time of the Brexit referendum, there were 247,000 UK nationals aged 65 and

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1 Based on Eurostat figures: see http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_pop1ctz&lang=en.

2 A precise estimate is not, to my knowledge available. According the Office for National Statistics (ONS), around 900,000 UK citizens were long-term residents in other EU countries in 2010 and 2011 (Office for National Statistics (2017). What information is there on British migrants living in Europe?. Section 5. Number of British citizens living in Europe in 2011, by age. https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatinformationisthereonbritishmigrantslivingineurope/jan2017#number-of-british-citizens-living-in-europe-in-2011-by-age). More recent figures from the UN show that, in 2017, around 1.3 million people born in the UK were living in other EU Member States (Full Fact (2018). Brits abroad: how many people from the UK live in other EU countries? https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/). See also the discussion in Carrera, S., Guild, E. and Luk, N.C. (2016). What does Brexit mean for the EU's Area of Freedom, Security and Justice? *Center for European Policy Studies* www.ceps.eu.

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over living in other EU countries, around 121,000 of which were living in Spain alone.[3]

The fate of these rights after Brexit is most uncertain, and has been intensely debated in academic and political circles ever since the Brexit referendum was announced. At the moment of writing this chapter, free movement and residence rights are fully guaranteed by the Withdrawal Agreement until the end of the transition period[4], but the full set of arrangements governing these rights after that period will still need to be fleshed out. In this chapter, I will try to shed some light on the legal arguments underlying this debate. On the one hand, I will examine arguments deriving from international law or EU law on the basis of which, according to some authors, EU citizens, UK nationals and their family members could continue to enjoy the residence rights attached to citizenship after Brexit. On the other, I will analyse arguments according to which these rights can be protected under an agreement between the UK and the EU and, in particular, legal principles the parties to such an agreement have to take into account.

Throughout this chapter, I will use the expression "EU citizens" to refer to persons having the nationality of one or more of the EU Member States and the expression "UK nationals" to refer to British nationals who, before Brexit, were EU citizens.[5] Since I will be specifically examining the situation of UK nationals who have lost their EU citizenship after Brexit, I will not analyse the situation of UK nationals who also have the nationality of one or more of the EU Member States. Moreover, as far as the family members of EU citizens are concerned, I will focus on family members coming from third countries, in order to distinguish their situation from that of EU citizens.[6]

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3 Office for National Statistics (2017). Pensioners in the EU and the UK. https://www.ons.gov.uk/economy/investmentspensionsandtrusts/articles/pensionersintheeuanduk/2017-09-05.

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I, 12.11.2019, p. 1–184. The transition period will in principle end on 31 December 2020, but it may be extended. For a detailed discussion, see the Chapter by G. More.

5 Due to the complexity of British nationality laws, not all categories of UK nationals had EU citizenship. See in this regard, the declaration by the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals", annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

6 Some family members of EU citizens are, obviously, EU citizens themselves.

11 EU Citizens and Their Family Members: "Autonomous" vs. "Derived" Residence Rights?

The provisions on EU citizenship, as first introduced by the Maastricht Treaty, are set out in Part Two of the TFEU. It follows from Art. 20(1) TFEU that every national of a Member State is also an EU citizen.[7] That provision also sets out the rights enjoyed by EU citizens, the most prominent of which is without a doubt the right to move and reside freely, subject to certain limitations and conditions, within the territory of the Member States.[8]

Not only EU citizens themselves, but also their close family members enjoy a right of free movement and residence in the EU Member States, regardless of whether those family members are EU citizens themselves or not. The categories of family members which enjoy these rights are listed in Art. 2(2) of Directive 2004/38.[9] There are three categories of such "privileged family members": (i) the spouse or the registered partner of the EU citizen; (ii) the direct descendants of the EU citizen who are under the age of 21 or are dependent and those of the spouse or partner; and (iii) the dependent direct ascendants and those of the spouse or registered partner.[10] Besides, Art. 3(2) of Directive 2004/38 provides that the Member States have to facilitate entry and residence for what one could call "non-privileged family members", i.e. (i) other family members 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 and (ii)

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7 See also Art. 9 TEU.

8 See, e.g., Court of Justice, judgment of 13 July 2017, case C-193/16, *E*, para. 16.

9 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

10 There is some scope for discussion about the precise extent of this category. For instance, according to some authors, the category of ascendant-primary carer could be interpreted broadly to cover non-biological ascendants such as a stepparent or an adoptive parent or even foster parents or unmarried partners. See Barrett, G. (2003). Family Matters: European Community law and Third-country Family Members. *Common Market Law Review* 40 (2), pp. 369–421, 391, footnote 81, Toner, H. (2004). *Partnership Rights, Free Movement and EU Law.* Oxford: Hart Publishing, pp. 81–82 and 229–231.

the partner with whom the Union citizen has a durable relationship, duly attested.[11] In this chapter, I focus exclusively on the category of "privileged family members".

The conditions governing the right of residence for EU citizens and their family members are further fleshed out in Directive 2004/38. In the most basic terms, every EU citizen is entitled to move to another Member State and reside there, together with his family members for periods exceeding three months if he can prove that he is either economically active or has sufficient financial resources at his disposal.[12] Essentially, therefore, the right to free movement and residence of EU citizens is subject to two main conditions.[13] First, it can only be invoked by EU citizens once they leave their Member State and move to another Member State.[14] Second, EU citizens can only reside in another Member State for longer periods of time if they are self-sufficient, i.e. if they have a job or can fall back on sufficient personal means to support themselves and their family members.

However, in its seminal *Ruiz Zambrano* judgment,[15] the Court of Justice held that Art. 20 TFEU, in exceptional circumstances, grants even residence rights to EU citizens who do not satisfy these conditions. Indeed, the Court ruled that Art. 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of an EU citizen, which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as EU citizens.[16] Accordingly, an EU citizen can derive family reunification rights from EU law where the denial of such rights would deprive him of the genuine enjoyment of his EU citizenship rights even in a situation where he has not left the territory of its Member State and even where he is not economically active or self-sufficient. The Court

11 See, in this regard, Court of Justice, judgment of 5 September 2012, case C-83/11, *Rahman and Others*. See also Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman and Others*, paras. 83–84.

12 See Art. 7 of Directive 2004/38.

13 For a discussion, see Cambien, N. (2012). Union Citizenship and Immigration: Re-Thinking the Classics? *European Journal of Legal Studies* 5 (1), pp. 10–37.

14 See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 34.

15 Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* (*ONEm*). For a detailed discussion of the case see Hailbronner, K., and Thym, D. (2011). Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011. *Common Market Law Review* 48(4), pp. 1253–1270.

16 There is an abundant literature on this case law. See, e.g. the contributions in Kochenov, D., ed.(2017). *EU Citizenship and Federalism: The Role of Rights.* Cambridge: Cambridge University Press.

of Justice has confirmed and clarified this principle in a number of follow-up cases.[17]

In this connection, the Court has made an important distinction between the nature of the free movement and residence rights of EU citizens, on the one hand, and those enjoyed by their family members who are not EU citizens themselves, on the other hand. While the Treaties confer autonomous rights on EU citizens, the rights conferred on third-country family members are not autonomous rights but rights derived from those enjoyed by the EU citizen.[18] The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with an EU citizen's freedom of movement.[19] This distinction is also relevant in the context of the debate about the residence rights that will be enjoyed by EU citizens and their family members after the end of the transition period.

In the following, I will first analyse arguments according to which the residence rights enjoyed by EU citizens and their family members could be considered to be "inalienable" rights which, as such, "survive" Brexit and the transition period. Next, I will analyse the possibility of protecting these rights under an agreement negotiated between the UK and the EU.

III Residence Rights Enjoyed by EU Citizens as Inalienable Rights?

The first question to ask is whether or to what extent the residence rights currently enjoyed by EU citizens and their family members can still be enjoyed after

17 Some of these cases deal with (third country) family members of adult EU citizens: e.g. Court of Justice, judgment of 5 May 2011, case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, Court of Justice, judgment of 15 November 2011, case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres.* For a discussion, see Shuibhne, N.N. (2012). Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011. *Common Market Law Review* 49 (1), pp. 349–379, and Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci. *European Law Review* (37) 2, pp. 176–190. Other cases deal with minor EU citizens and their primary carer: e.g. Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.*, Court of Justice, judgment of 10 October 2013, case C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*.

18 See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 33.

19 Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others*, para. 62 and case law cited.

the end of the transition period in the absence of an agreement guaranteeing the continued enjoyment of these rights. In this context, it is necessary to make a distinction between, on the one hand, the residence rights enjoyed by UK nationals and their family members in the EU Member States and, on the other hand, the residence rights enjoyed by EU citizens and their family members in the UK.

1 *Residence Rights of UK Nationals and Their Family Members in the EU*

A number of scholars have argued that the rights attached to EU citizenship are of such a fundamental nature that, once acquired, they can no longer be taken away.[20] This would mean that the rights enjoyed by UK nationals residing in the EU Member States, would continue to exist after the end of the transition period. Consequently, UK nationals and their family members would continue to have a right of residence in these Member States under the same conditions as those applicable before Brexit.

Two lines of argument have been put forward to defend this point of view. In the first place, it has been pointed out that EU citizenship is, according to settled case law of the Court of Justice, the "fundamental status" of nationals of the Member States.[21] In its *Rottmann* judgment, the Court has famously held that a Member State cannot under EU law withdraw its nationality if such withdrawal entails the loss of EU citizenship, unless that withdrawal is in line with general principles of EU law, such as the principle of proportionality.[22] Hence, it could be argued that once EU citizenship has been acquired, it can no longer be withdrawn, and that, consequently, Brexit cannot entail, for UK nationals, a loss of EU citizenship.[23] However, according to other authors, this argument fails to convince. One principal reason for this is that, after Brexit, UK nationals are no longer nationals of a Member State,

20 See, e.g., the arguments discussed in the report by Roeben, V., Snell, J., Minnerop, P., Telles, P., and Bush, K. (2017). The Feasibility of associate EU citizenship for UK citizens post-Brexit, A study for Jill Evans MEP, available at http://www.jillevans.net/the_feasibility_of_associate_eu_citizenship_for_uk_citizens_post_brexit.pdf.

21 See, for an early example, Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

22 Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottmann v. Freistaat Bayern*, paras. 41–59, as recently confirmed in Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes*. For an analysis, see Cambien, N. (2011). *Janko Rottmann v. Freistaat Bayern. Columbia Journal of European Law* 17 (2), pp. 375–394.

23 See the discussion in Davies, G. (2016). Union Citizenship – Still Europeans' Destiny After Brexit. *European Law Blog*, available at http://europeanlawblog.eu/2016/07/07/union-citizenship-still-europeans-destiny-after-brexit/.

and, as a logical consequence, no longer EU citizens.[24] That consequence does not derive from the action of a Member State, but flows directly from the Treaties. Indeed, in accordance with Art. 20 TFEU, "Every person holding the nationality *of a Member State* shall be a citizen of the Union". Moreover, it has been argued that there is nothing in Art. 50 TEU which provides that, in the event of a withdrawal, the rights attached to EU citizenship should continue to be guaranteed. As Eeckhout and Frantziou point out, at the Constitutional Convention, a number of delegates had proposed amendments that safeguarded existing rights, but these were not adopted.[25] It can be concluded, therefore, that, considered purely from the perspective of EU law as it currently stands, it is most doubtful that the residence rights enjoyed by UK nationals in the EU in their capacity of EU citizens will survive the end of the transition period.

It should be remarked that there is a possibility that the Court of Justice will have the opportunity to pronounce itself on the legal consequences of Brexit for the rights enjoyed by UK nationals and their family members residing in the EU Member States, if questions for a preliminary ruling on that matter were referred to it. With this purpose, a group of UK nationals living in the Netherlands had seized a Dutch court, which, initially, had agreed to questions to ask the CJEU if Brexit would lead to an automatic loss of rights attached to EU citizenship, in the absence of a negotiated solution agreed between the EU and the UK.[26] However, after an appeal by the Dutch government, the Dutch court eventually decided not to refer the said questions.[27] The possibility cannot be

24 See, e.g. Kochenov, D. (2016). Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris. *Verfassungsblog*, available at http://verfassungsblog.de/brexit- and-the-argentinisation-of-british-citizenship-taking-care-not-to-overstay-your-90-days-in-rome-amsterdam-or-paris/.

25 Eeckhout, P., and Frantziou, E. (2017). Brexit and Article 50 TEU: A Constitutionalist Reading. *Common Market Law Review* 54 (3), pp. 695–733, 718. See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, "Part I of the Constitution: Article 59", 39, http://european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf.

26 Court of Amsterdam, judgment of 7 February 2018, C/13/640244 / KG ZA 17–1327, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605&showbutton=true&keyword=brexit.

27 For a discussion, see Garner, O. (2018). Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244 / KG ZA 17–1327 of the Rechtbank Amsterdam ('The Amsterdam Case'). *European Law Blog* available at https://europeanlawblog.eu/2018/02/19/does-member-state-withdrawal-from-the-european-union-extinguish-eu-citizenship-c13640244-kg-za-17-1327-rechtbank-amsterdam-the-amsterdam-case/.

ruled out, however, that the matter will come before the Court of Justice or the General Court in the context of a different case.[28]

In the second place, it has been argued that the rights attached to EU citizenship, such as the residence rights for EU citizens and their family members, are covered by the international law doctrine of "acquired rights".[29] In accordance with that doctrine, international law protects certain rights acquired under a Treaty, notwithstanding the termination of the Treaty.[30] This doctrine is not only vested in customary international law,[31] but is also codified to some extent in Art. 70(1)(b) of the Vienna Convention on the Law of Treaties (VCLT), which provides as follows: "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention, does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". There is little doubt that the VCLT applies to a Member State withdrawing from the EU Treaties under Art. 50 TEU.

Some authors argue, on this basis, that certain EU citizenship rights, such as the right of permanent residence, are protected acquired rights.[32] Most commentators agree, however, that the rights enjoyed by EU citizens under the Treaties are not protected under the doctrine of acquired rights.[33] On one view, this is because Art. 50 TEU forms a *lex specialis* which contracts out on international rules on acquired rights, rendering the latter inapplicable in the

28 For a more detailed discussion, see the Chapter by A.P. van der Mei.

29 See, on this issue, European Parliament, Committee on Constitutional Affairs (2017). The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU(2017)583135_EN.pdf; the arguments discussed in the report by Roeben, V., Snell, J., Minnerop, P., Telles, P., and Bush, K. (2017). The Feasibility of associate EU citizenship for UK citizens post-Brexit, A study for Jill Evans MEP, cit.; the arguments discussed in House of Lords, European Union Committee (2016). Brexit: Acquired Rights. *House of Lords Paper* 82, available at https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf.

30 For a discussion, see, e.g., Sik, K. (1977). The Concept of Acquired Rights in International Law: A Survey. *Netherlands International Law Review* 24 (1–2), pp. 120–142.

31 See Lalive, P.A. (1965). The Doctrine of Acquired Rights. In: Bender, ed., *Rights and duties of private investors abroad*. New York: International and comparative law center, p. 183.

32 Waibel, M. (2017). Brexit and Acquired Rights. *AJIL Unbound* 111, available at https://www.researchgate.net/publication/322311461_Brexit_and_Acquired_Rights, pp. 440–444.

33 See, e.g., Repasi, R. (2017). Die Rechte der Unionsbürger und ihr Fortbestehen nach dem Brexit. *ifo Schnelldienst* 70 (11), pp. 30–33, Douglas-Scott, S. (2016). What Happens to "Acquired Rights" in the Event of a Brexit? *U.K. Constitutional Law Blog,* available at https://ukconstitutionallaw.org/; PIRIS, J.C. (2015). Should the UK withdraw from the EU: legal aspects and effects of possible options. *European Issues* 355, p. 10.

case of a Member State withdrawal from the EU. In this connection, it has been observed that Art. 70(1) VCLT explicitly states "Unless the treaty otherwise provides or the parties otherwise agree".[34] Another reason relied on to support this view is that under the VCLT, EU citizens are third parties with respect to the EU treaties, while Art. 70(1)(b) of the VCLT only applies to the rights, obligations, or legal situations of the state parties to the EU Treaties. In this connection, it can be pointed out that the International Law Commission, in its commentary on the scope of the identically worded predecessor to Art. 70.1(b) (Art. 66 draft Vienna Convention) clarified that:

> On the other hand, by the words 'any right, obligation or legal situation of the parties created through the execution of the treaty', the Commission wished to make it clear that paragraph l(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the 'vested interests' of individuals.[35]

It follows that it is unlikely that the international law doctrine of acquired rights could be successfully relied upon after the end of the transition period by UK nationals and their family members residing in the EU Member State in order to preserve the full spectrum of residence rights attached to EU citizenship.

2 *Residence Rights of EU Citizens and Their Family Members in the UK*

The situation, after Brexit, of EU citizens residing in the UK is different from that of UK nationals residing in one of the 27 Member States. Indeed, in contrast to the latter group, EU citizens preserve their EU citizenship, in accordance with Art. 20 TFEU and Art. 9 TEU, even after Brexit. However, the arguments for considering that EU citizens could preserve the full spectrum of their residence rights in the UK on the basis of EU law in the absence of a negotiated solution, would not appear to be altogether convincing.

First of all, since the UK is no longer a Member State after Brexit, it is no longer bound by EU law, neither by primary law provisions on EU citizenship nor by secondary EU law, such as Directive 2004/38. Consequently, EU citizens residing in the UK will no longer be able to rely on their EU citizenship rights

34 See, e.g., House of Lords (2017). Brexit and the EU Budget. *House of Lords Paper* 125, available at https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/125/125.pdf.

35 International Law Commission, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, Vol. II., 1966, p. 265.

in the UK, which in, in effect, has become a third country. It does not appear that there is a provision of EU law, including Art. 50 TFEU, which allows them to continue to enforce these rights before national courts in the UK or before the CJEU, which will no longer have jurisdiction over the UK.

Second, it is not evident, for the same reasons as those outlined above, that the international law doctrine of acquired rights could be successfully relied upon after Brexit by EU citizens and their family members residing in the UK in order to preserve the full spectrum of their residence rights attached to EU citizenship.

3 *Intermediary Conclusion*

It follows from the analysis above that it is far from certain that the various arguments discussed in order for EU citizens and their family members to be able to continue to rely (fully) on the residence rights would succeed if they were invoked before a national court, for instance by a UK national who wanted to continue to enjoy his residence rights as an EU citizen in one of the EU Member States after the end of the transition period. If, indeed, the residence rights attached to EU citizenship cannot be considered to be "acquired" rights, which continue to be enforceable after Brexit, these rights only continue to be enjoyed if that is provided for in an agreement negotiated between the EU and the UK. That possibility will be analysed in part 4, below.

For the sake of completeness, it must be pointed out that, if no negotiated solution would be reached between the EU and the UK governing the situation after the end of the transition period, UK nationals and their family members, residing in the EU Member States, would, in any event, still enjoy the rights conferred by the EU on third country nationals. More in particular, they would enjoy the residence rights governed by a number of directives, such as the Family Reunification Directive,[36] the Long Term Residence Directive[37] or the Blue Card Directive.[38] The conditions laid down in these directives are, however, less beneficial than those governing the residence rights of EU citizens and their family members.[39] EU citizens residing in the UK, by contrast, would

36 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ L 251*, 3.10.2003, p. 12–18.

37 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *OJ L 16*, 23.1.2004, p. 44–53.

38 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155*, 18.6.2009, p. 17–29.

39 For an analysis, see *inter alia* Mindus, P. (2017). *European Citizenship after Brexit*: *Freedom of Movement and Rights of Residence*. Palgrave Macmillan, ch. 3.

no longer have a claim to any rights derived under EU law. As third country nationals, they could still derive residence rights under UK law, but the conditions governing these would likely be stricter in many circumstances than those governing their prior residence rights as EU citizens.[40]

Moreover, both groups of citizens could still derive rights from the ECHR, since both the UK and all the EU Member States are party to that convention and will continue to be parties for the foreseeable future. In this connection, some scholars have argued that the rights enjoyed by EU citizens up until Brexit will be "cemented" and protected after Brexit under the ECHR.[41] More particularly, as far as residence rights are concerned, reference is made to the judgment of the European Court of Human Rights in Case Kurić and others v. Slovenia,[42] which concerns the rights of former nationals of Yugoslavia in Slovenia. In that case, that Court held that Slovenia had breached Art. 8 ECHR by suddenly taking away the rights of certain groups of these nationals. In this connection, it pointed out (at para. 355 of the judgment) that "measures restricting the right to reside in a country may, in certain cases, entail a violation of Art. 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned". However, it is well-known that Art. 8 ECHR allows Member States a rather broad margin of discretion and it seems fair to say that the residence rights enjoyed by EU citizens and their family members are not entirely protected under Art. 8 ECHR.[43] In addition, specifically as regards UK nationals, it is sometimes argued that the ECHR can be relied upon, in certain circumstances, to prevent the withdrawal of EU citizenship. While it is true that the European Court of Human Rights has held that, in certain circumstances, the loss of citizenship may fall within the ambit of Art. 8 ECHR,[44] it cannot be inferred with certainty from

40 See the discussion in Schrauwen, A. (2017). (Not) losing out from Brexit. *Europe and the World: A Law Review* 1 (1), available at http://hdl.handle.net/11245.1/c8ab4b3b-eedf-4b67-bf56-23b3ea053f20, pp. 8–13 and in Kilkey, M. (2017). Conditioning Family-life at the Intersection of Migration and Welfare: The Implications for 'Brexit Families'. *Journal of Social Policy* 46(4), pp. 797–814.

41 See, e.g., González, G.M. (2016). "Brexit" Consequences for Citizenship of the Union and Residence Rights. *Maastricht Journal of European and Comparative Law* 23 (5), pp. 796–811.

42 European Court of Human Rights, judgment of 26 June 2012, no. 26828/06, *Kurić and Others v. Slovenia*.

43 See Schrauwen, A. (2017). (Not) losing out from Brexit, cit., p. 6: "Thus in any event the doctrine would not apply to those who have not yet acquired the right to permanent residence, and might imply a weaker position for those who recently decided to move abroad, arguably for the most part young people".

44 See, e.g., European Court of Human Rights, decision of 7 February 2017, no. 42387/13, *K2 v. the United Kingdom*.

that case law that the loss of EU citizenship would be in breach of Art. 8 ECHR, especially given the fact that the said case law is concerned with national citizenship. According to the House of Lords European Union Committee, it may be concluded that Art. 8 ECHR cannot be relied on to prevent the status of EU citizenship from being removed as a consequence of Brexit.[45]

In conclusion: while arguments derived from the ECHR would perhaps be more successful than arguments relying exclusively on EU law or the international law doctrine of acquired rights, these arguments do not provide a solid basis to fully protect the residence rights currently enjoyed by EU citizens and their family members. A comprehensive solution could only be reached by an agreement concluded between the UK and the EU.

IV Brexit and Residence Rights: an Essential Issue for Any Negotiated Solution

The idea of negotiating a new set of rules to resolve some of the UK's concerns regarding the EU legal framework is not a new phenomenon, of course. It is well-known that the UK has managed to negotiate so-called "op-outs" in important areas of EU law, including in the so-called Area of Freedom, Security and Justice. When then Prime Minister David Cameron decided to hold the "Brexit" referendum, his idea was to achieve a new "deal" with the EU before the date of that referendum, a deal intended to sway many of the UK concerns regarding the impact and working of the EU, and, as a consequence, to convince a majority of voters to stay in the EU. Not surprisingly, the new deal focused to a large extent on free movement and EU citizenship related issues. The European Council conclusions of February 2016 stated, *inter alia*, that the references in the Treaties and their preambles to the process of creating "an ever closer union among the peoples of Europe" would not apply to the United Kingdom, and they proposed to amend the existing rules on EU citizens and their family members in order to make them somewhat more restrictive.[46] Annexed to these conclusions was a declaration in which the Commission set out

45 House of Lords, European Union Committee (2016). Brexit: Acquired Rights, cit;, Mindus, P. (2017). *European Citizenship after Brexit*: *Freedom of Movement and Rights of Residence*cit., ch. 7, p. 108.

46 See the European Council Conclusions of 18 and 19 February 2016, *A new settlement for the United Kingdom within the European Union* and the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18–19 February 2016.

its intention to adopt a proposal to complement Directive 2004/38 in order to exclude from the scope of free movement rights certain third country nationals resorting to an abuse of rights.[47]

However, the proposed settlement was rejected when, on 23 June 2016, a small majority of British votes was cast in favour Brexit. On 29 March 2017, the United Kingdom officially notified the European Council of its intention to leave the European Union. In accordance with Art. 50 TEU this notification was followed by negotiations to set out the precise arrangements for withdrawal. These negotiations could last, in principle, no more than two years,[48] but they could be extended in common accord. Accordingly, the initial deadline of 29 March 2019 was extended to 31 October 2019.[49] Moreover, both sides have agreed to have subsequent to the negations a so-called "transition period" in order to avoid an abrupt change of the legal regime applicable to the UK and the EU Member States.

As far as the EU is concerned, it was apparent from the outset that EU citizenship would have to play a central role in these negotiations, as is clearly stated, for instance, in the guidelines for Brexit negotiations of the European Council[50] and the negotiation directives of the Council.[51] In fact, the Council, the European Parliament and the Commission repeatedly stated that one of the first priorities for the negotiations would be to agree on guarantees to protect the rights of EU citizens, and their family members, that are affected by Brexit. For instance, the Council's press release of 22 May 2017 explicitly stated that the first priority for the negotiations is to agree on guarantees to protect the rights of EU and UK citizens, and their family members, that are affected

47 See the Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, in Annex 7 of European Council Conclusions of 18–19 February 2016. For a more in-depth analysis, see the chapter by E. Muir.

48 See Art. 50(3) TEU, which provides: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".

49 See European Council decision taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3)TEU.

50 European Council Guidelines of 29 April 2017, following the United Kingdom's notification under Article 50 TEU, available at: http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/.

51 Council Directives of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, available at: http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/.

by Brexit.[52] At the same time, the UK made it clear from the outset that it wants to limit the rights of EU citizens and their family members in the UK, in particular their right to free movement and residence. Accordingly, a white paper published in February 2017 by the UK government stated unequivocally: "We will design our immigration system to ensure that we are able to control the numbers of people who come here from the EU. In future, therefore, the Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law".[53]

It is inevitable, therefore, that, in the context of the Brexit negotiations, the concept of EU citizenship, which is destined to be the fundamental status of all Member State nationals, was deeply challenged. It remains to be seen how the concept of EU citizenship and the rights attached to it emerge from the negotiations.

While Part Two of the Withdrawal Agreement governs the residence rights of EU citizens, UK nationals and their family members which were triggered before of the end of the transition period, arrangements governing future residence rights will have to be set out in an agreement on the future EU-UK Partnership, to be negotiated and concluded during the transition period. The aim of this section is not to provide a critical analysis of the current state of negotiations, and neither to predict their outcome. At the moment of the writing of this chapter, it is impossible to know what the outcome of the negotiations will be, or even to know whether a negotiated solution will be reached, in particular since, in order to do so, a number of important hurdles must still be overcome.[54] Moreover, even the arrangements set out in the Withdrawal Agreement could (partially) disappear, if a pending challenge against it before the General Court would be successful[55]. Rather, this section purports to examine, from a legal point of view, some of the legal principles that any negotiated solution would have to take into account, including the Withdrawal Agreement and its implementation schemes.

52 Council (Art 50) authorises the start of Brexit talks and adopts negotiating directives, in Council Press release 286/17 of 22 May 2017, available at http://www.consilium.europa.eu/en/press/press-releases/2017/05/22/brexit-negotiating-directives/.

53 See, the Government of the United Kingdom (2017). The United Kingdom's exit from and new partnership with the European Union – White Paper, available at https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper, 5.4.

54 For a general discussion of some of these hurdles, see Editorial comments: Polar exploration: Brexit and the emerging frontiers of EU law (2018). *Common Market Law Review* 55 (1), p. 1–16.

55 Available at https://www.thelondoneconomic.com/politics/exclusive-uk-campaigners-file-case-to-prove-withdrawal-agreement-cannot-remove-eu-citizenship/27/04/.

1 *Changing Citizenship Statuses at the EU Level*

One radical – though given the current political context mostly theoretical – way of dealing with the issue of residence rights for EU citizens after Brexit would be to change the status of citizenship at the EU level, or the access to it, in such a way that after Brexit, UK nationals remain citizens of the EU, and preserve the current rights associated to that status. Various options can be considered in this connection.[56] I will limit myself to discussing the three most important ones.

The first option would be to turn EU citizenship into a truly independent form of citizenship, by decoupling it from Member State nationality.[57] In other words: having the nationality of a Member State would no longer be required in order for a person to be an EU citizen. Such an arrangement could allow UK nationals to remain EU citizens after Brexit, and hence to continue to enjoy the residence rights attached to that status in the EU Member States. This first option might be very interesting from an academic point of view, but it is, to my mind, not viable from a political perspective, for a number of reasons. First of all, implementing this option would require changing the Treaties, and in particular Art. 9 TEU and Art. 20 TFEU. However, it is clear from the available documents that the Member States, at the time of the conclusion of the Maastricht Treaty, were not prepared to have an independent form of EU citizenship which would potentially become more important than their own nationality. Hence the clear wording of Art. 9 TEU and Art. 20 TFEU to the effect that "Citizenship of the Union shall be additional to and not replace national citizenship". It is unlikely that in the current context, in which anti-EU feelings have grown in intensity compared to past decades, Member States would change their mind on this issue. Moreover, even in the implausible event that Member States would be willing to make the said Treaty changes, those changes would not do anything to guarantee the residence rights of EU citizens in the UK, which will become a third country after Brexit. From a political perspective, the said Treaty changes would only be acceptable, therefore, if the UK would reciprocate by accepting to continue to guarantee the current residence and

56 See the discussion in Kochenov, D. (2016). EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?. *LSE 'Europe in Question' Discussion Papers Series* No.111/2016., available at http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper111.pdf.

57 This idea has been suggested for a long time by some legal scholars. See the literature referred to in Kostakopoulou, D. (2017). *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens Journal of Common Market Studies* 56 (4), pp. 854–869, 858.

free movement rights attached to EU citizenship for EU citizens. However, that commitment would clearly go against the intentions repeatedly stated by the UK government and would, at least for some people, defeat the purpose of Brexit.

A second option would be to create a form of "associate citizenship" for UK nationals, which would allow UK nationals to keep (some of) the rights associated with EU citizenship after Brexit.[58] This option would be less far-reaching than the first one, as it would not change the EU citizenship status as such, but would entail the creation of a separate status, with possibly more limited and a more static set of rights.[59] Moreover, acquiring this status could be made subject to an individual opt-in, by UK nationals satisfying certain conditions, such as, for instance, the payment of a fee.[60] This second-option, while it would most likely also require an amendment of the Treaties,[61] would not require an overhaul of the existing EU citizenship concept, as interpreted in the case law of the European Court of Justice. Still, from a political level, granting associate citizenship to (certain) UK nationals would likely be acceptable only if the UK reciprocated, for instance by granting a form of associate British citizenship.[62] However, such reciprocal commitments are considered to be problematic by many observers,[63] for the same reasons as outlined above.

A third option would be to facilitate access to EU citizenship for UK nationals after Brexit, for instance by granting the right to UK nationals residing for more than five years in a given Member State to obtain the nationality of that Member State – and, therefore, EU citizenship – by mere registration or

58 See the discussion in Miller, V. (2018) Brexit and European Citizenship. *House of Commons Briefing Paper n° 8365,* available at https://researchbriefings.files.parliament.uk/documents/CBP-8365/CBP-8365.pdf, pp. 24 et seq.

59 For a critical discussion, see Van den Brink, M, and Kochenov, D. (2019) Against Associate EU Citizenship. *Journal of Common Market Studies*.

60 See e.g. European Parliament Draft Report of 9 November 2016, Possible evolutions of and adjustments to the current institutional set-up of the European Union, amendment nr. 882 by MEP Charles Goerens, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-592.348+02+DOC+PDF+V0//EN&language=DE.

61 See the discussion in Roeben, V., Snell, J., Minnerop, P., Telles, P., and Bush, K. (2017). The Feasibility of associate EU citizenship for UK citizens post-Brexit, A study for Jill Evans MEP, cit.

62 See the discussion in Roeben, V., Snell, J., Minnerop, P., Telles, P., and Bush, K. (2017). The Feasibility of associate EU citizenship for UK citizens post-Brexit, A study for Jill Evans MEP, cit.

63 See, e.g., the chapters by A.P. van der Mei and G. More in this special issue.

declaration.[64] This option, while again interesting from an academic perspective, is problematic for a number of reasons. First, it would require harmonisation, to some extent, of Member State nationality laws, something that is unlikely to be accepted by the Member States. Indeed, so far the Member States have always resisted any interference of EU legislation in their nationality laws. This has led the Court of Justice to hold that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, while at the same time, Member States must unconditionally recognize each other's nationality.[65] Second, this solution could be problematic in Member States which do not allow dual nationality, because in those Member States UK nationals would lose their UK nationality upon acquiring the nationality of their host Member State, which would present them with a difficult choice between two less than satisfactory options. Third, there is the issue of the absence of reciprocity on behalf of the UK.

2 *Preserving Residence Rights for EU Citizens/UK Nationals and Their Family Members*

If the (access to the) citizenship status at EU level is left unchanged, the residence rights of EU citizens and UK nationals after Brexit become the subject of the negotiations between the EU and the UK. The content of any agreement will be based to a large extent on political considerations. Yet, the negotiators also have to take into account a number of legal principles which are, arguably, relevant for the subject of residence rights after Brexit, as I will examine in what follows. The negotiated solution has to deal, on the one hand, with the situation of EU citizens who have moved to the UK or UK nationals who have moved to another Member State before Brexit (or before the end of the transition period) and, on the other hand, of those EU citizens or UK nationals who will move after Brexit (or after the end of the transition period). In this section, I am dealing mostly with the situation of persons who have moved before Brexit (or before the end of the transition period), as, in my view, this group has the strongest claims on the basis of the said principles.

EU citizens and their family members who move to another Member State can enjoy three different types of residence rights, which are subject to different conditions. First, EU citizens and their family members can move to another Member State and reside there for periods up to three months without any conditions or any formalities other than the requirement to hold a valid

64 Kostakopoulou, D. (2017). *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens,* cit., p. 8.

65 Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti e.a.*, para. 10.

identity card or passport (see Art. 6 of Directive 2004/38). Second, for periods of residence longer than three months, they must, as was pointed out above, be economically active or self-sufficient (see Art. 7 of Directive 2004/38). Third, the strongest, most complete form of residence right is the so-called "permanent residence", which is acquired, in principle, after the Union citizen has resided legally for a continuous period of five years in the host Member State.[66]

As I will analyse in what follows, there are a number of legal principles which the Withdrawal Agreement and its implementation schemes would, according to some scholars, have to respect and which, arguably, could provide arguments to the effect that EU citizens who reside in the UK or UK nationals having a right of residence in one of the EU Member States, especially those having acquired of right of permanent residence, would be entitled to preserve this under the agreement. Some of these legal principles are, in my view, binding on both the UK and the EU Member States, whereas other legal principles only bind the latter.

First of all, the Withdrawal Agreement and its implementation schemes have to respect fundamental rights as laid down in the European Convention of Human Rights, to which both the UK and the EU Member States are a party.[67] The right to protection of family life laid down in Art. 8 ECHR precludes, under certain circumstances, residence rights being taken away. In this regard, the degree of integration in the host State certainly is a relevant consideration in assessing whether deportation is allowed under Art. 8 ECHR. Hence, this argument could work in favour, especially of UK nationals having acquired a right of permanent residence in one of the EU Member States or EU citizens who are integrated in the UK.

Second, one could argue that "integration" itself is a guiding legal principle of EU law. In this context, one could refer to the objective stated in the preamble to the TEU of continuing "the process of creating an ever closer union among the peoples of Europe". The free movement of EU citizens plays a very important role for the achievement of this objective, and one could argue that respecting this principle requires to some extent guaranteeing residence rights for UK nationals in the EU Member States after the end of the transition period. Again, this argument seems to be most convincing with regard to UK nationals having acquired a right of permanent residence. In this connection, it should be pointed out that recitals 17 and 18 of the preamble to Directive

66 See Art. 16 of Directive 2004/38. See also the derogations laid down in Art. 17 of the Directive 2004/38.

67 See also *supra,* under III.3. for an analysis of the implications of the ECHR even in the absence of a withdrawal agreement.

2004/38 make it clear that permanent residence is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union and 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. As such, this legal principle could provide some support for the view that, UK nationals who are sufficiently integrated in the society of one of the home Member States should be entitled to residence in the EU even after Brexit. A similar argument could not be made in favour of EU citizens residing in the UK, since the UK will no longer be bound by any "integration" principle.

Third, the implementation of the Withdrawal Agreement should take into account the principle of legitimate expectations to claim a continued right of residence.[68] According to settled case-law of the Court, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union and must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives. The right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him.[69] It could be argued, on this basis, that UK nationals and their family members who had acquired a permanent right of residence in one of the EU Member States or were on track to acquire this, have a legitimate expectations that they would be able to continue to reside there. However, it would seem that the principle would not have to be taken into account by the UK as regards EU 27 citizens residing in the UK. This argument is implicit in the policy paper of the UK government, entitled "Safeguarding the position of EU citizens in the UK and UK nationals in the EU",[70] which states that "those EU citizens who arrived after the specified date will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – *but this group should have no expectation of guaranteed settled status*"[71].

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68 See in this regard the discussion in Garner, O. (2018). Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244 / KG ZA 17–1327 of the Rechtbank Amsterdam ('The Amsterdam Case'), cit.

69 Court of Justice, judgment of 26 July 2017, case C-560/15, *Europa Way and Persidera*, paras 79–80.

70 Government of the United Kingdom(2017). The United Kingdom's exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU, available at https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu.

71 See however, Art. 15 of the Withdrawal Agreement.

Fourth, one could add that if the Withdrawal Agreement would not guarantee the continued right of permanent residence after Brexit for UK nationals in the EU Member States under the same conditions as currently applicable, the *effet utile* of that right would be compromised. Admittedly, that right, as such would no longer be applicable to them. However, one could argue that, by suddenly taking away this right, one would compromise the *effet utile* of the build-up of that right which happened *in tempore non suspecto,* i.e. before Brexit. Indeed, UK nationals who moved to one of the EU Member States with a view to residing there in accordance with the conditions laid down in Directive 2004/38 will have done so with a view to settling in that Member State and to creating and strengthening family life in that State.[72] This whole purpose, which was in most case undertaken before any realistic prospect of Brexit came about, would, arguably be defeated if, after Brexit, the said nationals would be stripped of their right of residence. The *effet utile* of EU law is, therefore, another principle which the negotiating parties have to take into account when reaching an agreement on the residence rights of EU citizens and their family members. As was the case for the second principle discussed above, this principle could be invoked by UK nationals living in the EU, but not, conversely, by EU citizens in the UK, as the UK will arguably no longer have an obligation under EU law to respect the *effet utile* of provisions of EU law.

In this connection, it must be pointed out that, since Directive 2004/38 will no longer apply as such to UK nationals after the end of the transition period, they could be made subject to certain administrative formalities in order to have their permanent right of residence as an EU citizen transformed into a similar right on the basis of the withdrawal agreement. However, those formalities should not be overly burdensome, in order not to compromise the *effet utile* of the right of permanent residence. Interesting to note in this regard is that paragraph 23 of the joint technical notes on EU-UK positions on citizens' rights that have been published after the second and third round of negotiations[73] stated: "In order to obtain status under the Withdrawal Agreement by application, those already holding a permanent residence document issued under Union law at the specified date will have that document converted into

72 Court of Justice, judgment of 12 March 2014, case C-560/15, O., para. 54. For a discussion, see Cambien, N. (2014). Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the inter-state requirement for EU citizens?. *European Law Blog,* available at http://europeanlawblog.eu/2014/04/11/cases-c-45612-o-and-b-and-c-45712-s-and-g-clarifying-the-inter-state-requirement-for-eu-citizens/.

73 These joint technical notes are available at https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en.

the new document free of charge, subject only to verification of identity, a criminality and security check and confirmation of ongoing residence". Similarly, Art. 18(1)(h) of the Withdrawal Agreement provides that "persons who, before the end of the transition period, hold a valid permanent residence document issued under Article 19 or 20 of Directive 2004/38/EC or hold a valid domestic immigration document conferring a permanent right to reside in the host State, shall have the right to exchange that document [...] for a new residence document upon application after a verification of their identity, a criminality and security check [...] and confirmation of ongoing residence; such new residence documents shall be issued free of charge". It could be wondered whether, in order fully to preserve the *effet utile* of the right to permanent residence, this exchange of documents should not happen in a more automatic fashion.[74]

Fifth, another principle which has to be taken into account, by the EU side, is the principle of equal treatment and non-discrimination, which is a general principle of EU law, and which is also laid down in Arts 20 and 21 of the Charter. More in particular, the arrangements governing the residence rights for UK nationals and their family members should obviously not be more disadvantageous than those applying to other third country nationals, except where these nationals can benefit from certain advantageous arrangements in, for instance, association agreements with the EU.[75] As such, the principle of equal treatment and non-discrimination provides a sort of lower limit: negotiating residence rights for UK nationals after the transition period which fall short of those already enjoyed by third country nationals, does not seem to be possible.

V Concluding Remarks

The precise arrangements governing the residence rights of EU citizens and their family members after the transition period will be governed by the Withdrawal agreement and, possibly, by an agreement on the future EU-UK Partnership to be concluded between the EU and the UK. Those arrangements will in any event have to respect a number of key legal principles discussed in this

74 See the criticisms voiced by Peers, S. (2018). EU and UK citizens' acquired rights in the Brexit withdrawal agreement: detailed analysis and annotation. *EU Law Analysis*, available at http://eulawanalysis.blogspot.lu/2018/03/eu27-and-uk-citizens-acquired-rights-in.html.

75 See the examples given in Kochenov, D. (2016). Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris, cit.

chapter. Moreover, there is little doubt that, on a political level, any residence rights granted to UK nationals and their family members would only be accepted by the EU if the UK reciprocates and grants equal residence rights to EU citizens and their family members. This paper has not examined in detail the situation of EU citizens and UK nationals who move after Brexit. It would seem that they cannot, or not to the same extent, rely on the legal principles examined to continue to enjoy the same residence rights as those applicable before Brexit and it is likely that their rights will be restricted compared to the current residence rights enjoyed by EU citizens.

This chapter has focused on the issue of residence rights. For the sake of completeness, it should be pointed out that, besides residence rights, there is the issue of the free movement between Member States. The most pressing question in this regard, is the following one: will UK nationals and their family members who enjoy a right of residence in one of the EU Member States after the end of the transition period, equally have the right to freely move between and reside in other EU Member States? This issue may find a negotiated solution in an agreement on the future EU-UK Partnership. It would seem that the arguments examined above are not conclusive in this regard. Obviously, the principle of equal treatment precludes granting UK nationals more restrictive free movement rights than those generally enjoyed by third country nationals. Yet those rights are considerably less in scope than those enjoyed by EU citizens. Moreover, as Kochenov has pointed out, the UK is not in a position to reciprocate on free movement rights, since it is leaving the EU on its own.[76] Interesting to note in this connection is that Art. 32 of the draft Withdrawal Agreement of 15 March 2018 provided as follows: "In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States".

One option that could be envisaged as a solution to the residence and free movement-related issues after the end of the transition period is a carefully tailored most favoured nation clause and a requirement of reciprocal treatment. In international law, reciprocal treatment is primarily envisaged as a means of protecting nationals or things,[77] although most-favoured-nation clauses

76 Kochenov, D. (2018). Misguided 'Associate EU Citizenship' Talk as a Denial of EU Values. *Verfassungsblog*, available at https://verfassungsblog.de/misguided-associate-eu-citizenship-talk-as-a-denial-of-eu-values/.

77 International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, Yearbook of the International Law Commission, Vol. II., part two, 1978, p. 17.

are nowadays primarily used in the WTO context, as well as in the bilateral trade and investment treaties.[78] The said clauses are defined in the broadest of terms[79] which is why they should be used with caution.[80] When it comes to the EU, these types of clauses are often found in bilateral cooperation agreements, such as the one between the EU and the member parties to the Cartagena Agreement.[81] The downside of these types of clauses is that they can seldom be relied upon directly by the individuals.[82] If this type of a clause were to be introduced into an agreement with the UK, UK citizens moving to and living in the EU, but also EU citizens moving to and living in the UK could be granted preferential treatment in certain respects (e.g. free movement and residence rights similar to those enjoyed by EU citizens in the EU Member States) while no longer being entitled to the rights currently enjoyed by EU citizens in others.

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78 International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, Yearbook of International Law Commission, Vol. II., part two, 2015, p. 2.

79 Radi, Y. (2007). The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse" *European Journal of International Law* 18 (4), pp. 757–774, 758.

80 International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, cit., p. 20.

81 Council Regulation 1591/84 of 4 June 1984 concerning the conclusion of the Cooperation Agreement between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela – of the other part, *OJ L 153*, 8.6.1984, p. 1–1.

82 Although the Court of Justice did not definitively exclude such a possibility for the most-favoured-nation clause in general, the clause was not given direct effect in its judgment of 20 May 2010, case C-160/09, *Ioannis Katsivardas – Nikolaos Tsitsikas*, para. 45.

CHAPTER 10

Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination

*Hester Kroeze**

1 Introduction

The Maastricht Treaty in 1992 marked "a new stage in the process of creating an ever closer union among the peoples of Europe".[1] Before 1992, European integration was built upon economic premises, which translated into the four fundamental freedoms of goods, persons, services and capital.[2] Rights that were given to individuals were aimed at realizing the economic goals that were part of the EEC's design.[3] The right to family reunification for workers, for instance, was granted to facilitate their integration into the host

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1 Art. A of the 1992 Treaty on European Union (Maastricht Treaty). It is debated whether the Maastricht promise has realized its full potential. See e.g. Kochenov, D., and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? *European Law Review* 37, pp. 369–396.

2 Now Arts 30, 34, 45, 49, 56 and 63 TFEU. Barnard, C. (2013). *The Substantive Law of the EU: The Four Freedoms.* Oxford: Oxford University Press. Despite its economic premises, the European Economic Community (EEC) was a political project that was meant to further peace and welfare after the Second World War. An economic approach was chosen, however, because political integration was not feasible, and the original plan to establish a European Political Community and/or a European Defence Community was rejected by the French Parliament. Koopmans, R., and Statham, P., eds. (2010). *The Making of a European Public Sphere: Media Discourse and Political Contention*. Cambridge: Cambridge University Press, p. 16 *et seq*.

3 First the EEC, later the Economic Community (EC), and now the European Union. Tryfonidou, A. (2009). *Reverse Discrimination in EC Law.* Alphen aan den Rijn: Kluwer Law International, p. 5 *et seq*.; Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law: A Comparative Institutional Analysis.* London: Bloomsbury Publishing, p. 4.

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Member State and to further the economic purpose of their movement.[4] Therefore, it was only available to those who move to or reside in a Member State of which they are not a national.[5] The Maastricht Treaty broadened the sphere of European cooperation by establishing the EU, and introduced EU citizenship.[6]

This contribution departs from the premise that one of the qualities that citizenship confers is equality before the law.[7] It is shown, however, that equality before the law collides with another constitutional principle of EU law. The principle of conferral implies that some competences are conferred to the EU and others are retained by the Member States.[8] As a result, the legal position of citizens differs, depending on whether they are subject to national or European rules. This differentiation may cause inequality.[9]

Because of its unique position at the intersection of free movement, immigration policy, fundamental rights, limited Union competence, and political controversy, familly reunification is one of the areas in which differentation between citizens occurs on the basis of whether they are a subject to EU law or

4 Berneri, C. (2017). *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens.* London: Bloomsbury Publishing, p. 8; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law.* Cambridge: Intersentia, p. 30.

5 Now: Art. 3 of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

6 Among other institutional changes, such as the introduction of new policy areas by the Maastricht Treaty.

7 Kochenov, D. (2010). Citizenship Without Respect: The EU's Troubled Equality Ideal. *Jean Monnet Working Paper* No. 8, p. 12 *et seq.*; Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as a Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, pp. 5, 9; De Búrca, G. (1997). The Role of Equality in European Community Law. In: Dashwood and O'Leary, eds., *The Principle of Equal Treatment in EC Law.* London: Sweet & Maxwell, p. 16; Marshall, T.H. (1992). *Citizenship and Social Class*. London: Pluto Press.

8 Art. 4, para. 1, and Art. 5, paras 1–2, TEU and Arts 2–6 TFEU.

9 Garben, S., and Govaere, I. (2017). The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future. In: Garben and Govaere, eds., *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future.* Oxford: Hart, p. 3 *et seq.*; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 6; Also see the contribution of H.U. Jessurun D'Oliveira in this volume on the current division of competences between EU law and national law in citizenship matters.

not.[10] Family reunification in the EU is defined as the situation in which a third-country national family member of a resident of one of the Member States acquires a residence title to reside with the family member who is already legally in the EU.[11] The family member in the EU can either be a third-country national or an EU citizen. This contribution only examines family reunification between third-country nationals and EU citizens. The legal regime for family reunification between third-country nationals who are legally residing in the EU and their third-country national family members is not discussed.[12]

Directive 2004/38 regulates the right of EU citizens and their family members to move and reside freely within the territory of the Member States. EU citizens who move to or reside in a Member State of which they are not a national benefit from its protection, which includes the possibility for family reunification under very lenient conditions.[13] Family reunification between third-country nationals and EU citizens who do not move to or reside in a Member State of which they are not a national is regulated by the Member State of which the EU citizens is a national. Some Member States impose requirements for family reunification for their own nationals that are far stricter than the requirements EU law imposes on EU citizens who exercise their free movements rights.[14] This phenomenon is called reverse discrimination.[15]

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10 Faull, J. (2011). Prohibition of Abuse of Law: A New General Principle of EU Law. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law. A New General Principle of EU Law?* Oxford: Hart, p. 291 *et seq*., especially p. 293.

11 The term "third-country national" refers to anyone who does not have the nationality of one of the Member States.

12 Third-country national residents in the EU can rely on Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification, *OJ L 251*, 3.10.2003, p. 12–18.

13 When an EU citizen resides in a Member State in compliance with Directive 2004/38, his family members can join him without the need to fulfill any conditions, except for the obligation to have health insurance. See Art. 7 of Directive 2004/38, cit.

14 See Neergaard, U., Jacqueson, C., and Holst-Christensen, N., eds. (2014). *Union Citizenship: Development Impact and Challenges. The XXVI FIDE Congress in Copenhagen.* Copenhagen: DJØF Publishing, available at fide2014.eu; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 120 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union: A Recurring Balancing Act.* Cambridge: Intersentia, p. 4 *et seq*., 39 *et seq*.; Berneri, C. (2017). *Family Reunification in the EU*, cit., p. 7.

15 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 13 *et seq*., p. 117 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 3 *et seq*.; Davies, G. (2003). *Nationality Discrimination in the European Internal Market.* Alphen aan den Rijn: Kluwer Law International; Poiares Maduro, M. (2000). The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination. In: Kilpatrick, Novitz, and Skidmore, eds., *The Future of European Remedies.* London: Bloomsbury Publishing; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention: EU

When a national of a Member State cannot comply with the strict conditions for family reunification in national law, EU law allows to benefit from more lenient rules by moving to another Member State, after which EU law is applicable. Case-law of the Court of Justice provides that upon return to the home Member State of the EU citizen (in a return situation), his family members retain their residence rights. The only condition to retain these rights is that residence in the host Member State must have been genuine. If that is the case, the family continues to fall within the scope of EU law and does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[16] If the conditions are fulfilled, this

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Citizenship and Family Reunification Rights. *European Journal of Migration and Law* 13 (4), pp. 443–466; Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe. *Legal Issues of Economic Integration* 35 (1), pp. 43–67; Hanf, D. (2011). Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice? *Maastricht Journal of European and Comparative Law* 18 (1–2), pp. 29–61; Oosterom-Staples, H. (2012). To What Extent Has Reverse Discrimination Been Reversed? *European Journal of Migration and Law* 14 (2), pp. 151–172; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin. In: Guild, Rotaeche, and Kostakopoulou, eds., *The Reconceptualization of European Union Citizenship.* Leiden/Boston: Martinus Nijhoff Publishers; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law. *Irish Jurist* 44, pp. 13–46; Spaventa, E. (2009). Seeing the Wood Despite the Trees, On the Scope of Union Citizenship and Its Constitutional Effects. *Common Market Law Review* 45(1), pp. 13–45; Costello, C. (2011). Citizenship of the Union: Above Abuse? In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. 321 *et seq*.

16 Court of Justice, judgment of 7 July 1992, case C-370/90, *Singh*; judgment of 23 September 2003, case C-109/01, *Akrich*; judgment of 11 December 2007, case C-291/05, *Eind*; judgment of 25 July 2008, case C-127/08, *Metock and Others*; judgment of 12 March 2014, case C-456/12, *O. and B.*, paras. 51–61; judgment of 5 June 2018, case C-673/16, *Coman and Others*, paras. 24, 40, 51–53; judgment of 27 June 2018, case C-230/17, *Altiner and Ravn*; judgment of 12 July 2018, case C-89/17, *Banger*; Watson, P. (1993). Free Movement of Workers – A One Way Ticket? Case C-370/90 *The Queen v. Immigation Appeal Tribunal and Surinder Singh*. *Industrial Law Journal* 22 (1), pp. 68–77; Bierbach, J. (2008). European Citizens' Third-Country Family Members and Community Law: Grand Chamber decision of 11 December 2007, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind* – The return of the member state national and the destiny of the European citizen. *European Constitutional Law Review* 4 (2), pp. 344–362.; Costello, C. (2009). *Metock*: Free Movement and "Normal Family Life" in the Union. *Common Market Law Review* 46 (2), pp. 587–622; Cambien, N. (2009). Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform. *Columbia Journal of European Law* 15 (2), pp. 321–342; Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers: *O and B*, and *S and G*. *Common Market Law Review* 52 (3), pp. 753–777; Van Eijken, H. (2014). De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten. *Nederlands Tijdschrift voor Europees Recht* 10, pp. 319–324.

construction makes it possible to circumvent the national family reunification rules by temporarily moving to another Member State and then come back, which exempts the family from the applicability of national law.

Circumventing national legislation on family reunification by acquiring residence rights in another Member State and then return with them without intervention of national law[17] is called the "Europe-route".[18] The availability of the Europe-route empowers EU citizens to change the legal regime that applies to them and thereby partly remedies the inequality that exists between EU citizens that benefit from EU law and those who do not. Thereby it could offer a form of reconciliation for reverse discrimination. At the same time, however, the availability of the Europe-route curtails the competence of the Member States to regulate the position of their own nationals.[19] To prevent express circumvention of applicable national immigration law through use of the Europe-route, art. 35 of Directive 2004/38 gives Member States the possibility to classify the use of EU rights as abuse of law and refuse or withdraw the residence rights EU citizens' family members derive thereof.[20] The legitimate

17 Faull, J. (2011). Prohibition of Abuse of Law, cit., p. 291 *et seq*., especially p. 293; COSTELLO, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin, cit., p. 169 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*. Circumvention of EU law may also be relevant when national law does not allow for gay marriage. In *Coman and Others*, cit., the Court decided that gay marriage and the pertaining rights that are obtained in another Member State can also be brought back to the home Member State, thereby evading the impossibility of gay marriage that exists in some Member States. See: Tryfonidou, A. (2018). Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment. *European Law Blog*, available at europeanlawblog.eu; Kroeze, H.H.C., and Safradin, B. (2019). Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest. *Nederlands Tijdschrift voor Europees Recht* 1–2, pp. 51–59. A precondition that is set to bring rights back home is that residence in the host Member State has been genuine. See *O. and B.* cit., paras. 51–61 and *Coman and Others*, cit., paras. 24, 40, 51–53.

18 Member States did not receive this decrease in their competence with open arms, and a discourse arose about "closing the Europe-route". In this discourse it is suggested that (purposeful) circumvention of national family reunification rules by temporarily moving to another Member States to fall within the application of the more lenient EU law on family reunification should be a ground to refuse the rights that are pursued. Most notably in the Netherlands. See Parliamentary Document 29 700, Amendment of the Immigration Law 2000 with regard to the integration requirement, no. 31: Letter from the Minister for Immigration and Integration to the Parliament, zoek.officielebekendmakingen.nl. Also see: Costello, C. (2009). Metock, cit., p. 587 *et seq*.

19 And it makes less favorable treatment of nationals who cannot bring themselves within the scope of EU law even more pronounced. See the argument below.

20 *Singh*, cit., para. 24, see infra; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive: A Commentary*. Oxford: Oxford University Press, p. 296 *et seq*.

concern of Member States to avoid circumvention of their national laws can be contrasted with the individual's wish to live together with his family, which is protected by human rights law. The European Convention of Human Rights protects the right to family life and the right to marry. These rights are not absolute and do not impose "a general obligation [...] to respect the choice by married couples of the country of their matrimonial residence or to authorise family reunification on its territory".[21] Yet, since the beginning of the 21st century, the European Court of Human Rights demonstrated a "readiness to extend the protective reach of Article 8 [of the European Convention on Human Rights (ECHR)] in the field of immigration".[22] In light of the protection of the family, it is uncomfortable in itself that the EU legal system is so fragmented that EU citizens are in need of circumventing their national laws to be together with their loved ones in the first place.[23] A tension exists between the citizen's right to love,[24] and the Member State's "right to control the entry of non-nationals into its territory", which limits the possibilities the circumvent their national law.[25] To protect the Member States' discretion in defining and maintaining

21 European Court of Human Rights, judgment of 28 May 1985, nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 68; judgment of 31 January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107.

22 THYM, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? *International & Comparative Law Quarterly* 57 (1), pp. 87–112, 111; e.g. European Court of Human Rights, judgment of 21 December 2001, no. 31465/96, *Sen v. the Netherlands*; judgment of 1 December 2005, no. 60665/00, *Tuquabo-Tekle et al v. the Netherlands*.

23 Much can be said about this perspective. One insight is that EU law is an institute of exclusion, be-ause it only privileges the "good citizens" who add to the establishment of the internal market. Kochenov, D. (2017). On Tiles and Pillars, cit., pp. 59–62; Azoulai, L. (2017). Transfiguring European Citizenship: From Member State Territory to Union Territory. In: Kochenov, ed., *EU Citizenship and Federalism*, cit.; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship Through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 220 *et seq.*; O'Brien, C. (2017). *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK.* London: Bloomsbury Publishing. Also see: Iglesias Sánchez, S. (2017). A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement. In: Kochenov, ed., *EU Citizenship and Federalism*, cit.

24 D'Aoust, A.M. (2014). Love as Project of (Im)Mobility: Love, Sovereignty and Governmentality in Marriage Migration Management Practices. *Global Society* 28 (3), pp. 317–335; Karst, K.L. (1980). The Freedom of Intimate Association. *The Yale Law Journal* 89 (4), pp. 624–692.

25 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

their national policy choices, they can us the concept of abuse of rights[26] to limit the circumvention of national law. Abuse of law is defined as a situation in which the conditions to acquire a right are formally fulfilled, whereas the conduct that led to conferral of the right does not meet the purpose for which the right was conferred.[27] Since abuse of law is characterized by the fact that the conditions to acquire a right are formally fulfilled, limiting those rights on the ground of that abuse may be contrary to the principle of legal certainty.[28] In the interest of legal certainty, and in the interest of the individual's right to love and live with his family, it is therefore necessary to carefully delineate the scope of application of abuse of law in the context of EU family reunification, which is the main purpose of this contribution. By determining the width of the scope of EU law, the remaining discretionary competence that is left to the Member States also becomes clearer.[29] When abuse of law is given a broad interpretation, Member States can more easily rely on it and have more leeway in enforcing their national rules at the expense of limiting the rights that derive from EU law. Conversely, when abuse of law is given a narrow interpretation, it is more difficult for Member States to rely on it and is more difficult to take away EU rights. A broad interpretation of abuse of law thus favours Member States' interests in protecting their competence to regulate the legal position of their nationals, and a narrow interpretation favours the effectiveness of EU law, and the individual's right to love and live with his family.

This research addresses abuse of EU law in the context of family reunification between a third-country national and an EU citizen to acquire a residence right. The main research question is how genuine use of EU law for the purpose of family reunification, and abuse of EU law that is used to circumvent national immigration law can be distinguished. Two types of possible abuse are considered, the conclusion of marriages of convenience and the circumvention of national law through use of the Europe-route. Both types of conduct are aimed at bringing a case of immigration or family reunification within the scope of EU law to benefit from a more lenient immigration/family reunification regime. Social welfare tourism as a form of abuse of free movement law is excluded from the analysis, with the exception of those cases that are

26 Abuse of law and abuse of rights are used interchangeable in this contribution.

27 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. 296. See infra.

28 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*., especially p. 296; Poiares Maduro, M. (2011). Foreword. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. vii.

29 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 7.

conducive to understanding the concept of abuse of law in the context of family reunification.[30] Art. 35 of Directive 2004/38 also mentions fraud a a reason to refuse, terminate or withdraw rights. Fraud "may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence".[31] Abuse of law, on the other hand, refers to "an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules".[32] Therefore, the difference between fraud and abuse is that in case of abuse, the conditions for acquiring a right are fulfilled, whilst in the case of fraud, information is falsified to make it seem like they are fulfilled when they are not. This contribution only deals with abuse of law and not with fraud.

The second chapter of the contribution will introduce the legal and political context in which reverse discrimination and (ab)use of rights for the purpose of family reunification are positioned. Particular attention will be given to the federalist-citizenship contraposition that is apparent in the EU constitutional struggle and mitigated by the introduction of the concept of abuse of law. This part will also explore the role of the ECHR as a complementary source of protection when situations fall outside the scope of EU law. The third chapter of this contribution addresses the Member States' concern about circumvention of their national immigration laws. To deal with this circumvention, they may classify the use of free movement rights as abuse of EU law and refuse or withdraw residence rights that are derived thereof. Doing so, however, may compromise legal certainty. Chapters four until seven apply the concept of abuse in a family reunification context, and aims to delineate te scope of abuse in

30 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*., especially p. 300 *et seq*.; Mantu, S.A., and Minderhoud, P.E. (2016). Exploring the Limits of Social Solidarity. Welfare Tourism and EU Citizenship. *UNIO – EU Law Journal* 2 (2), pp. 4–19.

31 Communication COM(2009) 313 final of 2 July 2009 from the Commission on the application of Directive 2004/38, p. 15, point 4.1.1; Court of Justice, judgment of 5 June 1997, case C-285/95, *Kol v. Land Berlin*, para. 29; judgment of 27 September 2001, case C-63/99, *Gloszczuk*, para. 75; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*. especially p. 296.

32 Communication COM(2009) 313, cit., p. 15, point 4.1.2; Court of Justice, judgment of 14 December 2000, case C-110/99, *Emsland-Stärke*, para. 52 *et seq*.; judgment of 9 March 1999, case C-212/97, *Centros*, para. 25.

this area of the law. The seventh chapter elaborates on the question when residence in another Member State is sufficiently genuine to retain family members' residence rights upon return to the home Member State of the EU citizen. It is demonstrated that the creation and strengthening of family life is the central criterion that needs to be taken into account. The eighth section evaluates these conditions and further elaborates upon the distinction between abuse of law and noncompliance with the applicable conditions for family reunification. The nineth and last section, finally, discusses the most recent case-law of the Court which deals with the personal scope of family reunification under EU free movement law in return situations, and in general. The importance of the research is to add to the understanding of abuse of law in a family reunification context and to inquire about its implications for legal certainty and judicial protection in the EU. In addition, the research aims to position the theme of reverse discrimination in a broader constitutional context. Last but not least, the contribution sheds light on the complexities of the return situation and further discusses under which circumstances a residence right can be derived after the exercise of free movement rights upon return in the home Member State of the EU citizen.

II Reverse Discrimination: Colliding Constitutional Principles in EU Law

It can be deduced from the text of the Treaties,[33] and many sources of secondary law, that European law-makers in the past and in the present have attached great importance to equality in EU law.[34] In fact, it is considered to be "one of the fundamental values people throughout Europe can agree upon" as a result of a "longstanding tradition of egalitarian discourse […] on the old continent".[35] "As a consequence, European equality law opens up a space in which European citizens feel included in the broader integration project".[36] Citizenship as the manifestation of equality may, however, collide with other constitutional principles of the EU, which as an international organization goes further than merely intergovernmental cooperation and very much resembles a federalist

33 E.g. Art. 2 TEU; Art. 18 TFEU; Title III on Equality, Charter of Fundamental Rights of the European Union (Charter).

34 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 1 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 162–166.

35 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 3.

36 Ibid., p. 1 *et seq*. (citations on p. 3).

entity.[37] Upholding the federal balance requires a compromise between the need of the EU to have sufficient competences to achieve the common goals for which it was established, and preserving the sovereignty of its Member States.[38] The competences of the EU are, therefore, limited by the principle of conferral, which is translated into the division of competences.[39] Through this principle, the EU is shaped into a type of multi-level governance system, which pursues an optimal allocation of regulatory competences. Allocation of these competences is directed by the principle of subsidiarity, which means that competences are exercised at the level of government that is best positioned to regulate a specific issue. The EU may only intervene if it is able to act more effectively than the Member States at their respective national or local levels.[40]

Contrary to the notion of equal citizenship, the division of competences implies the possibility of unequal treatment among citizens, because the rules that are applicable to an individual may vary according to the level of governance where the competence to regulate the situation rests. The attachment of European decision-makers to equality does not preclude differentiation, since "the simple fact that we may agree that equality takes up a prominent place in European law tells us little about its functioning or how we should evaluate its application".[41] Its functioning seems to be limited to the protection of equality within a legal regime – either in the EU or in a Member State – without real consideration for the differences that exist between these legal regimes. Thus, a tension exists between equal citizenship and the division of competences. In the EU this tension is particularly noticeable when EU citizens who reside in their own Member State and do not fall within the scope of EU law enjoy less protection than those who reside in a Member State of which they are not a

37 Kochenov, D. (2017). On Tiles and Pillars, cit., p. 1 *et seq*., especially pp. 16–35; Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 147 *et seq*., especially p. 148; Zweifel, T.D. (2002). *Democratic Deficit? Institutions and Regulation in the European Union, Switzerland, and the United States in Comparative Perspective.* Oxford: Lexington Books; Menon, A., and Schain, M. (2006). *Comparative Federalism: The European Union and the United States in Comparative Perspective.* Oxford: Oxford University Press; Lenaerts, K. (1997). Federalism: Essential Concepts in Evolution. *Fordham International Law Journal* 21 (3), pp. 746–798.

38 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship, cit., p. 147 *et seq*., especially p. 149; Lenaerts, K. (1997). Federalism, cit., p. 746 *et seq*., 775.

39 Arts 4, para. 1, and 5, paras. 1–2, TEU, Arts 2–6 TFEU.

40 Art. 5, para. 3, TEU; Protocol no. 2 on the application of the principles of subsidiarity and proportionality; SCHÜTZE, R. (2009). Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism? *The Cambridge Law Journal* 68 (3), pp. 525–536.

41 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 2.

national. The occurrence of this inequality causes the reverse discrimination, which was mentioned in the introduction.[42] "Reverse" means that the group that is being discriminated against is an unexpected group, which is treated less favourably in comparison with another group which normally would receive the inferior treatment.[43] More specifically, it is normally expected that "insiders" enjoy more privileges than "outsiders", but when citizens are reversely discriminated, the opposite situation exists.[44]

Reverse discrimination occurs

> due to the fact that, in order to further the Community's central aim of establishing a common market, [EU] law […] grants rights to [persons] that fall within its scope by virtue of their contribution to the construction of the internal market, that are more generous or flexible than those that are provided by national laws to persons […] that are deemed to fall within the scope of application of national law, as a result of the application of the purely internal rule. […] Accordingly, there may be a difference in treatment.[45]

In other words, because the EU originated from an economic rationale, the Union's competence only extends to the legal position of EU citizens who move between Member States, because they contribute to the establishment of the internal market.[46] Purely internal situations, which are confined in all

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42 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 13–18; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 3–10; Davies, G. (2003). *Nationality Discrimination in the European Internal Market*, cit.; Poiares Maduro, M. (2000). The Scope of European Remedies, cit.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention, cit.; Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations, cit.; Hanf, D. (2011). Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?, cit.; Oosterom-Staples, H. (2012). To What Extent Has Reverse Discrimination Been Reversed?, cit.; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin, cit.; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit.; Spaventa, E. (2009). Seeing the Wood Despite the Trees, cit.; Costello, C. (2011). Citizenship of the Union, cit.

43 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 3, 14; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 3.

44 Carens, J.H. (2013). *The Ethics of Immigration.* Oxford: Oxford University Press, p. 185 *et seq*.

45 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 14.

46 Ibid., p. 7, 129 et seq., p. 166; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 69–70; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law: We the Burden?* London: Bloomsbury Publishing, p. 15 *et seq*.; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (6), pp. 1597–1628,

relevant aspects to a single Member States, on the other hand, fall outside the scope of EU law.[47]

The purpose of introducing the right to family reunification as an ancillary to free movement rights was to facilitate the movement that would contribute to the establishment of the internal market. Not being able to bring one's family was considered to be an obstacle to move, and removing that obstacle by facilitating family reunification was expected to increase the chance that workers and self-employed would go abroad. Moreover, it was thought that being able to enjoy family life in the host country would diminish the need to retain strong ties to the home Member State, which would stimulate integration in the host Member State and, again, facilitate free movement.[48] Nationals who resided in their own Member State, on the other hand, did not contribute to the establishment of the internal market. They were thus not protected by EU law and not eligible for the family

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1614; Dautricourt, C., and Thomas, S. (2009). Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope? *European Law Review* 34 (4), pp. 433–454, 454, 436; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit., p. 13 *et seq*.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule: Time to Move On. *Common Market Law Review* 39 (4), pp. 731–771. An exception to this economic rationale for conferring family reunification rights seems to have emerged in the Ruiz Zambrano case-law, in which a residence right was granted to the Colombian parents of Belgian children by virtue of them being an EU citizen and enjoying the right to reside, rather than contributing to the economic objectives of the internal market. To discuss these rights falls outside the scope of this contribution, however, which focuses only on the applicability and analogous applicability of Directive 2004/38, after exercising free movement rights. For reliance on these rights the requirement to make use of free movement rights has persisted. Also see infra, footnote 58.

47 Art. 3, para. 1, of Directive 2004/38, cit.; case-law e.g., Court of Justice, judgment of 7 February 1979, case 115/78, *Knoors v. Staatssecretaris van Economische Zaken*, para. 24; judgment of 28 March 1979, case 175/78, *The Queen v. Saunders*, para. 11; judgment of 27 October 1982, joined cases 35 and 36/82, *Morson and Jhanjan*, para. 18; judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Uecker and Jacquet*, para. 16; *O. and B.*, cit., para. 36; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 7–10, 42–44, 49–50; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 5–6, 19, 21–26, 69–70; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 49; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit., p. 13 *et seq*.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule, cit., p. 731.

48 Berneri, C. (2017). Family Reunification in the EU, cit., p. 8; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 30; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 96 *et seq.*; Recitals 18, 23–24 of the Preamble of Directive 2004/38, cit.

reunification rights guaranteed by EU free movement law. Additionally, it was assumed they did not need EU law protection to secure their right to reside and work, because by virtue of their national citizenship they already enjoy those rights indiscriminately.[49] The rights that were provided to them by national law did not always, however, include a right to family reunification that was comparable to the equivalent right in EU law. As a result, when the national legislation that applies to these citizens offers other or less rights than EU law does, they are reversely discriminated in comparison with nationals from other Member States who do benefit from EU law for the purpose of family reunification.[50]

In general, Member States do not "want to discriminate against their own nationals", but reverse discrimination occurs "because [Union] law obliges States to treat nationals of other Member States in a way which – by reasons of their own policies and aims – they did not originally intend to treat their own nationals".[51] Thus, when national legislation infringes EU free movement law, it must only be set aside for EU citizens who, by virtue of their movement to another Member State, fall within the scope of EU law. Nationals of the concerned Member State who did not make use of free movement rights, on the other hand, fall outside the protection of EU law, so to them the national legislation continues to apply and as a result they are reversely discriminated. "Reverse discrimination is [thus] a side effect of the limited scope of application of EU law".[52] In other cases, reverse discrimination may be "a deliberate choice of the national legislator to (continue to) apply stricter conditions to purely internal situations in order to pursue their own national policy".[53] For family reunification, this deliberate choice is made by several of the Member States, including Belgium and the Netherlands.[54]

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49 Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras. 28–29; *O. and B.*, cit., para. 42; Art. 3 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto.

50 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 7; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 69 *et seq.*; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 15 *et seq.*; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship, cit., p. 1597 *et seq.*, especially p. 1614.

51 Poiares Maduro, M. (2000). The Scope of European Remedies, cit., p. 127; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 4.

52 Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 42.

53 Ibid., pp. 4–5. In some cases, Member States may introduce stricter requirements to advantage their own nationals (i.e. requiring stricter qualifications of specific professionals as a quality guarantee) but this is not the case in family reunification law.

54 Ibid.

The viability of continuing to uphold the economic premises on which the EU was built and to continue to allow the existence of reverse discrimination can be questioned, of course, and if the EU does not start to prioritize the inclusion of its citizens more than it does now, its legitimacy may be seriously undermined.[55] At the same time, the EU Treaties provide constitutional protection to EU citizenship and the principle of equality, as well as to the division of competences. Reconciliation of these principles should, therefore, take place within the boundaries of those Treaties, within the EU's constitutional system. In exploring possible reconciliation, some scholars have examined whether reverse discrimination should fall within the scope of Art. 18 TFEU, which prohibits discrimination on the grounds of nationality.[56] The Court of Justice rejected this possibility, however, because the difference in treatment did not constitute "an obstacle to the construction of the internal market".[57]

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55 E.g. Kochenov, D. (2010). Citizenship Without Respect, cit.; Kochenov, D. (2008) Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights. *Columbia Journal of European Law* 15 (2), pp. 169–238; Kostakopoulou, D. (2007). European Union Citizenship: Writing the Future. *European Law Journal* 13 (5), pp. 623–646; Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *The Modern Law Review* 68 (2), pp. 233–267; Kostakopoulou, D., and Kostakopoulou, T. (2001). *Citizenship, Identity, and Immigration in the European Union: Between Past and Future.* Manchester: Manchester University Press; O'Brien, C. (2017). *Unity in Adversity*, cit.

56 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law,* cit., p. 18 et seq.; Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*, paras. 123–150; Spaventa, E. (2004). From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution. *Common Market Law Review* 41(3), pp. 743–773, 771; Spaventa, E. (2017). Earned Citizenship, cit., p. 204 et seq., especially p. 204; Spaventa, E. (2009). Seeing the Wood Despite the Trees, cit., pp. 13–45; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., pp. 16–19; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on *Dereci*. *European Law Review* 37 (2), pp. 176–190, 188 *et seq*.

57 Court of Justice, judgment of 18 February 1987, case 98/86, *Ministére public v. Mathot*, paras. 7–8; judgment of 15 January 1986, case 44/84, *Hurd v. Jones*, paras. 54–56; judgment of 23 October 1986, case 355/85, *Driancourt v. Cognet*, paras. 10–11; judgment of 16 June 1994, case C-132/93, *Steen v. Deutsche Bundespost*; judgment of 29 January 2004, case C-253/01, *Krüger*; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 18 *et seq*.; VERBIST, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 25 *et seq*.; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 16 *et seq*.; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States, cit., p. 188 *et seq*.; Spaventa, E. (2017). Earned Citizenship, cit., p. 204 *et seq*. The restricted applicability of Art. 18 TFEU is also mentioned in the provision itself, which limits its applicability to those cases that fall "within the scope of the Treaties". See: Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 18 *et seq*.

An alternative option for reconciliation could be that reverse discrimination can exist within reasonable boundaries of equality. These reasonable boundaries are not to be considered as fixed limits to reverse discrimination that should be enforced by the EU or its Member States, but as a balancing exercise that mitigates some of the inequality that is caused by the system without defying the division of competences. In this way, a solution could be found in finding "a way around" reverse discrimination and become more equal, so to say. For family reunification rights, the Court seems to have adopted such an approach in its case-law.[58] It did so, for instance, by making the entitlement to the status of a worker dependent on a communitarian concept of being a worker instead, which ruled out the relevance of national interpretations.[59] Expanding the scope of the freedom of workers also expanded the scope of potential beneficiaries to the family reunification rights that are attached to

58 Here I only discuss family reunification rights on the basis of Art. 21 TFEU and Directive 2004/38, cit. Family reunification rights derived from Art. 20 TFEU pursuant to the *Ruiz Zambrano* line of case-law is left out of the analysis. *Ruiz Zambrano* concerned a purely internal situation which was brought within the scope of EU law, because expulsion of the Colombian parents would force their Belgian children to leave the territory of the EU (in order to follow the parents), which would deprive them of the genuine enjoyment of the substance of the rights they enjoy by virtue of their citizenship. In literature it has been discussed extensively whether and to what extent the Art. 20 TFEU case-law could remedy the lack of protection for EU citizens who reside in their own Member State and have never made use of free movement law. E.g. Kochenov, ed. (2017). *EU Citizenship and Federalism*, cit., discusses among other issues the question to what extent this line of case-law has added to give true meaning to European citizenship through a critical lens. Other examples of relevant sources are: Hailbronner, K., and Thym, D. (2011), Case C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*. *Common Market Law Review* 48 (4), pp. 1253–1270; Van Elsuwege, P. (2011). Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law – Case No. C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*. *Legal Issues of Economic Integration* 38 (3), pp. 263–276; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States, cit., p. 176 *et seq*.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention, cit.; Van Eijken, H., and DE Vries, S. (2011). A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano. *European Law Review* 36 (5), pp. 704–721; Kochenov, D. (2013). The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal* 19 (4), pp. 502–516; Kochenov, D. (2011). A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1), pp. 56–109; Kroeze, H.H.C. (2019). The Substance of Rights – New Pieces of the Ruiz Zambrano Puzzle. *European Law Review* 41 (2), pp. 238–256.

59 Court of Justice, judgment of 3 July 1986, case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, para. 21; judgment of 23 March 1983, case 53/81, *Levin v. Staatssecretaris van Justitie*, para. 23; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*.; Barnard, C. (2013). *The Substantive Law of the EU*, cit., p. 240.

the status of a worker. Similarly, the Court has always refused to introduce a fixed income requirement for family reunification. Instead, sufficient resources are assessed on a case-by-case basis.[60] Additionally, and most important for this contribution is the earlier mentioned line of case-law which entails that when an EU citizen who has made use of the free movement of persons rights returns to his home Member State, the situation is no longer considered purely internal and is brought within the scope of Union law. The benefit that stems from continuing to fall within the scope of EU law is that EU citizens' family members who acquired a residence right in the host state can retain those rights when they return to the home Member State of their EU family member. The only condition to retain these rights is that residence in the host Member State must have been genuine.[61] If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[62] The case-law is motivated by the same economic discourse on which European integration was built, and in essence, entails that effectively exercising economic freedoms also implies the possibility to rely on EU law upon return to the home Member State. Safeguarding the effectiveness of EU law is critical because otherwise an individual could be deterred from using his rights in the first place.[63]

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60 Art. 7, para. 1, let. b), of Directive 2004/38, cit.; Court of Justice, judgment of 10 April 2008, case C-398/06, *Commission v. Netherlands*; judgment of 19 September 2013, case C-140/12, *Brey*; Minderhoud, P.E. (2015). Sufficient Resources and Residence Rights Under Directive 2004/38. *Nijmegen Migration Law Working Papers Series* 3/2015.

61 *O. and B.*, cit., paras. 51–61; *Coman and Others*, cit., paras. 24, 40, 51–53.

62 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Departmen*t, cit.; *Akrich*, cit.; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.; *Coman and Others*, cit.; *Altiner and Ravn*, cit.; *Banger*, cit.; Watson, P. (1993). Free Movement of Workers – A One Way Ticket? Case C-370/90 The Queen v. Immigation Appeal Tribunal and Surinder Singh. *Industrial Law Journal* 22 (1), pp. 68–77; Bierbach, J. (2008). European Citizens' Third-Country Family Members and Community Law, cit., p. 344 *et seq*.; Costello, C. (2009). Metock, cit.; Cambien, N. (2009). Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, cit., p. 321 *et seq*.; Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers, cit., p. 753 *et seq*.; Van Eijken, H. (2014). De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten. *Nederlands Tijdschrift voor Europees Recht* 10, pp. 319–324.

63 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., paras. 19–20; *Akrich*, cit., paras. 53–54; *Eind*, cit., paras. 35–36; *Metock and Others*, cit., paras. 64, 89–92; *O. and B.*, cit., paras. 46, 52–54; *Coman and Others*, cit., para. 24; *Altiner and Ravn*, cit., *Banger*, cit., para. 28; for a closer look upon the rationale of this doctrine, see the Opinion of AG Bobek delivered on 10 April 2018, case C-89/17, *Rozanne Banger*, paras. 27–47; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 10–13, 41, 96–106, 114–118; Davies, G. (2003). *Nationality Discrimination in*

The case-law of the Court empowers individual citizens to bring themselves within the scope of EU law and benefit from more lenient rules applicable to family reunification, and can, thus, be considered as a form of reconciliation for those who are reversely discriminated. At the same time, this reconciliation requires movement to another Member State which can be unaffordable (due to finances or language barriers), in particular, because residence in the host state must be genuine before rights can be retained in the home Member State.[64] This means that EU citizenship and the pertaining family reunification rights are reserved for the privileged "good" citizens who can afford to move and thus contribute to the internal market.[65] Another issue that is revealed when the scope of EU law is enhanced, is that it becomes increasingly difficult to justify why some citizens are still not included.[66] It is acknowledged that the approximation of legal regimes and the empowerment of citizens is limited and compromised by these liabilities but it may be as much as is feasible within the constitutional limitations of EU law. Further remedies to reverse discrimination should then come from the legislator and ultimately from the Member States.[67] They should take their responsibility in the EU as a co-legislator in the Council of Ministers or – when the EU lacks the competence to do so – outside the EU by resolving reverse discrimination on the basis of national law. Some of the Member States such as France, Italy and Austria, indeed, assumed this responsibility when their respective national courts decided that the principle of equality, that is protected by their own constitution, prohibits reverse discrimination.[68] This approach has led to the extended application of EU law to those situations, on the basis of national law. The solution does not eliminate the purely internal rule but it does eliminate reverse discrimination. It is called "voluntary adoption", "spontaneous harmonization" or "renvoi".[69]

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the European Internal Market, cit., p. 119 *et seq*.; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship, cit., p. 1612.

64 *O. and B.*, cit., paras. 51–61; *Coman and Others*, cit., paras. 24, 40, 51–53.

65 Kochenov, D. (2017). On Tiles and Pillars, cit., pp. 59–62; Azoulai, L. (2017). Transfiguring European Citizenship, cit., p. 178 *et seq*.; Spaventa, E. (2017). Earned Citizenship, cit., p. 220 et seq.; O'Brien, C. (2017). *Unity in Adversity*, cit.

66 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 116 et seq.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule, p. 731 *et seq*.; Nic Shuibhne, N. (2002). The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body? In: Beaumont, Lyons, and Walker, eds., *Convergence and Divergence in European Public Law.* Oxford: Hart Publishing, 2002, pp. 177, 192.

67 For instance on the basis of Art. 79 TFEU.

68 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 121–123.

69 Ibid., p. 123.

Another component of the protection of the family that mustn't be forgotten, lastly, is the protection of Art. 8 ECHR. The Court of Justice recalled in its case-law that if EU law does not provide entitlement to a residence right "regard must be had to respect for family life under Article 8" of the ECHR.[70] As was mentioned in the introduction, the protection of family life does not give an entitlement to choose the country of matrimonial residence.[71] Quite the opposite, the ECHR is intentionally silent on matters of immigration. Admission to a Member State can, therefore, only be examined "through the effects of state measures on other human rights of the foreigners concerned".[72] In addition, the Member States are awarded a margin of appreciation in their decision-making. As a result, the European Court of Human Rights only examines whether the decision was reasonable, and does not go into the choices of national policy, which are made by the Member States.[73] Nevertheless, the Court shows a readiness to "correct intolerable outcomes in individual cases",[74] which gives an alternative prospect to those who do not and cannot benefit from EU law for the purpose of family reunification.[75]

III Abuse of EU Law – Definition and Background

Since 1974, the concept of law abuse is part of EU law.[76] Its coming into being was inspired by the use of the concept in some of the Member States, even

70 *Akrich*, cit., para. 58; a few years later it mentioned in *Metock and Others*, cit., para. 79, that even though reverse discrimination does not fall within the scope of EU law, the Member States are all parties to the ECHR. In more recent cases such as *O. and B.*, cit., *Coman and Others*, cit., *Altiner and Ravn*, cit., and *Banger*, cit. the Court has neglected to refer to the ECHR but this does not mean that its complementarity ceased to exist.

71 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

72 Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 103.

73 Ibid. p. 103 *et seq*.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law* 13 (4), pp. 443–466, 461 *et seq*.

74 Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 107.

75 Van Elsuwege, P. and Adam, S. (2017). EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification. In: Kochenov, ed. (2017). *EU Citizenship and Federalism*, cit., pp. 443–467, especially p. 460 *et seq*.

76 Either as a general principle or as a "principle of construction" but, in any case, the Court of Justice takes recourse to the principle in its case-law, e.g. Court of Justice, judgment of 3 December 1974, case 33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*;

though, not all Member States are familiar with it in the same way.[77] As was mentioned above, abuse of law was introduced to resolve some of the tension between the effective use of EU law and judicial protection of those who use it while maintaining the preservation of the Member States' competence to regulate internal situations. This helps to distinguish between genuine use of EU law within the limits that are set by the Court of Justice and use of EU law that is meant to circumvent national law, which is, therefore, not a genuine use of EU rights. Member States' reliance on abuse of law thus protects the division of competences in a sensitive area of law. Nevertheless, applying abuse of law in an EU context also causes the restriction of EU rights. Therefore, invoking abuse of law is dependent on the scope of interpretation of abuse of law that is given by the Court of Justice. When EU rights are constructed and interpreted extensively by the Court, it is more difficult for the Member States to invoke abuse of law, even when their national laws are being circumvented. When these rights are more narrowly defined by the Court, it is easier to invoke abuse of law to restrict rights that go beyond their original purpose.[78] In other words, the broader the interpretation of EU free movement law, the less discretion there is to rely on abuse of law for the Member States and vice versa.[79]

This sensitivity is reflected in the development of the principle of abuse in EU law. In the course of the relevant case-law on abuse of law, a paradigm-shift can be observed from the essential purpose towards the sole purpose doctrine. The first doctrine entails that when the essential reason to invoke Union law does not tally with its purpose, this is classified as abuse of law, regardless of whether an additional legitimate purpose – which was not the essential purpose – for invoking the law can be found. Abuse of law is easily assumed.[80] The sole purpose doctrine, on the other hand, entails that abuse of law can only be ascertained when there is no other objective distinguishable

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De La Feria and Vogenauer, eds. (2011). *Prohibition of Abuse of Law*, cit.; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax. *Common Market Law Review* 45 (2), pp. 395–441, 436.

77 And those who do use the principle show considerable differences in the scope with which they apply it. De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 395.

78 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 297.

79 Ibid.

80 Court of Justice, judgment of 21 June 1988, case 39/86, *Lair v. Universität Hannover*; Vanistendael, F. (2011). Cadbury Schweppes and Abuse from an EU Tax Law Perspective. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. 295–314; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit.; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

but the circumvention of national law.[81] In that understanding of abuse of law, the mere fact that a person consciously places himself in a situation through which a certain right can be obtained does not in itself constitute sufficient basis to assume that there is an abuse of law.[82] This doctrine is based on the notion that as long as a right is invoked in a genuine and effective manner, there can be no abuse.[83] Thus here, the scope of the concept's applicability is narrow.

The Court first introduced the concept of abuse of law in 1974 in Van Binsbergen. The case concerned a Dutch lawyer who wanted to circumvent the professional rules of conduct that were applicable to him in the Netherlands by establishing himself in Belgium. Dutch law provided, however, that legal representatives should reside in the Netherlands. Van Binsbergen argued that this rule was contrary to the freedom to provide services. The Court of Justice did not follow this argument and ruled that "[a] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory [...] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state".[84] The formulation of the Court in Van Binsbergen seemed to award a broad discretion to the Member States, by implying that all circumvention of national rules could be contested and give reason to restrict the individual's rights.[85]

Van Binsbergen was followed by the so-called "Greek Challenge" cases. These cases concerned the reliance of shareholders of Greek public limited liability companies on Directive 77/91/EEC on the protection of their rights in the context of alterations in the capital of the company. The Greek government classified these claims as abuse of EU law, and the national courts asked for clarification from the Court of Justice. The Court of Justice considered that, despite the right of the Member States to combat abuse of law, reliance on this concept should not undermine the effectiveness and uniformity of EU law.[86]

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81 Court of Justice, judgment of 21 February 2006, case C-255/02, *Halifax and Others*; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit.; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

82 *Centros*, cit., para. 27.

83 *Levin v. Staatssecretaris van Justitie*, cit.; Court of Justice, judgment of 12 September 2006, case C-196/04, *Cadbury Schweppes and Cadbury Schweppers Overseas*.

84 *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit., para. 13; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 399 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 54 *et seq.*

85 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 403 *et seq*.

86 Court of Justice: judgment of 12 March 1996, case C-441/93, *Patifis and Others*, para. 68; judgment of 12 May 1998, case C-367/96, *Kefalas and Others*, paras. 22–28; judgment of

Hence, the discretionary competence to apply abuse of law was restricted and the concept started to obtain a communitarian meaning. In Centros, the Court further restricted the Member States' discretion to invoke abuse of law. The case concerned Danish entrepreneurs who established their company in the United Kingdom with the sole aim of avoiding Danish law on minimum capital.[87] When the company wanted to open a branch in Denmark, the Danish authorities refused access to the Danish market, because according to them the company had abused EU law on freedom of establishment. The Court decided differently and considered that the mere fact that a person consciously places himself in a situation through which a certain right can be obtained, does not in itself constitute an abuse of law. The right to choose the Member State with the least restrictive company law to establish a company is "inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".[88] Similarly to Van Binsbergen, the company in Centros had made use of a U-turn construction to circumvent national law. Because the Court allowed this, it follows from its judgment that circumvention of national law does not always qualify as abuse of law.[89] Where Van Binsbergen was an example of the essential purpose doctrine, with Centros the Court started to move towards a sole purpose doctrine.

It also follows from Centros that a distinction is made between use and abuse of EU law. Use of EU law cannot lead to restriction of rights, whilst abuse can. The question arose how it is possible to distinguish between use and abuse of rights. The Court answered this question in Emsland-Stärke, which can be used to determine whether a case can be classified as abuse of law. Like the earlier cases, Emsland-Stärke concerned a U-turn construction. The company exported a potato-based product from Germany to Switzerland for which it received an export refund. After the export, they immediately returned the products to Germany and sold them there. The question was whether this practice was abuse of EU law, which could justify the denial of the export refund. The Court considered: "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element

23 March 2000, C-373/97, *Diamantis*, paras. 34–39; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 404.

87 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

88 *Centros*, cit., para. 27; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

89 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it".[90] By introducing this two-component test to assess possible abuse of law, the Court strongly restricted the discretionary competence of the Member State to decide on the lawfulness of the use of EU law and gave the concept of abuse a communitarian meaning.[91] Emsland-Stärke was broadly discussed. The subjective element of the test was contested because of the difficulty to determine subjective intentions, and the question was asked whether Emsland-Stärke could be transposed to other fields of EU law.[92] The Court responded to these questions and criticism in Halifax.[93] This case concerned a banking company whose financial services were tax-exempted. Accordingly, when the company established new call-centres, Halifax could only recover 5 per cent of the Value Added Tax (VAT) paid on the construction works. By developing a system of a series of transactions involving different companies of the Halifax group, it was, nevertheless, able to recover effectively the full amount of VAT. The question in this case was whether reliance on the right to deduct VAT, when the transactions on which the right was based were solely effected for that particular purpose, would be an abuse of rights. By applying the Emsland-Stärke test to the area of VAT, it was understood that the two components test would become the standardized test for abuse of law.[94] Furthermore, Halifax seemed to respond to the criticism about the subjective element of the test by objectifying it. The Court considered: "An abusive practice will be found to exist where [...] it is apparent from a number of objective factors, such as the

90 *Emsland-Stärke*, cit., para. 52. Up until today the test is repeated in cases such as Court of Justice, judgment of 22 December 2010, case C-303/08, *Bozkurt*, para. 47; judgment of 16 October 2012, case C-364/10, *Hungary v. Slovakia*, para. 58; *O. and B.*, cit., para. 58; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 408 *et seq*.

91 Vanistendael, F. (2011). Cadbury Schweppes and Abuse from an EU Tax Law Perspective, cit., p. 295 *et seq*.; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 408 *et seq*.

92 Weber, D. (2004). Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, *EmslandStärke*. *Legal Issues of Economic Integration* 31 (1), pp. 43–55.

93 *Halifax and Others*, cit.; De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. xv-xvi; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 421 *et seq*.; Lenaerts, A. (2010). The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law. *European Review of Private Law* 18 (6), pp. 1121–1154.

94 *Halifax and Others*, cit.; Lenaerts, A. (2010). The General Principle of the Prohibition of Abuse of Rights, cit.; De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., pp. xv-xvi; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 421 et seq.

purely artificial nature of the transactions and the links between operators involved in the scheme, that the essential aim of those transactions concerned was to obtain a tax advantage".[95]

In Cadbury Schweppes, the Court extended the scope of application of the Emsland-Stärke test, again, to the field of corporate taxation. The case was similar to Centros and concerned a UK based company that exercised an economic activity on the Irish market. To counter tax-avoidance, the UK had established a tax on the income from Ireland, which was disputed before the Court of Justice. The Court reiterated the doctrine it had developed until then. It considered that nationals of a Member State are not supposed to "improperly circumvent national legislation" or "improperly or fraudulently take advantage of provisions of Community law". Yet, the establishment of a branch in another Member State "for the purpose of benefitting from the favourable tax regime [...] does not in itself constitute abuse".[96] The freedom of establishment may, thus, only be restricted to prevent "wholly artificial arrangements", equated with abuse.[97] To establish the existence of a "wholly artificial arrangement", the EmslandStärke test should be applied.[98] Cadbury Schweppes can be understood as another step of the Court from the essential purpose towards the sole purpose doctrine. This is because the existence of a purpose aside from constructing a "wholly artificial" situation to benefit from EU rights precludes classification as abuse of law. The existence of such an additional purpose, which legitimizes the use of EU law, is recognized when the objective of free movement rights has been achieved and reflected in economic reality.[99] " '[P]lanning without abuse' is a legitimate activity, [and] is reminiscent of the idea of 'legitimate circumvention' expressed both in Centros, and in the post-Centros decisions on establishment", as long as the rights are effectively exercised.[100]

95 *Halifax and Others*, cit., paras. 74, 75, 81; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 422.

96 *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit., paras. 35–37.

97 Ibid., para. 57.

98 Ibid., paras. 64–65; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 425 et seq.

99 *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit., paras. 64–65; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 427.

100 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 423 *et seq*.; For a more recent analysis of circumvention of national law for economic purposes by corporations see Costamagna, F. (2019). At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or Just Law Shopping? *European Papers* 4 (1), pp. 185–205.

IV Abuse in the Context of Family Reunification Rights

In comparison with abuse of law in the context of tax law and free movement of services, abuse of law in the context of free movement of persons is a bit of an oddity. Scholars tend to either observe the "full rejection of the impact of the concept of abuse of law within the field of free movement of workers and citizenship"[101] or its reduction to a "merely verbal acceptance as a legal principle" in free movement law.[102] The first case in which this became apparent was Lair.[103] The question was whether a short period of being a worker was sufficient to be eligible for student assistance in the host state on the basis of non-discrimination in comparison with the population of that State. German law provided that a worker would only be eligible after a period of five years of employment. The Court considered that

> [i]n so far as [...] the three Member States [...] are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question.[104]

In the field of free movement, the Court, thus, relied on the sole purpose doctrine avant la lettre, about a decade before it was further developed in Centros and subsequent case-law.

This dichotomy between free movement of persons and the other freedoms is not unique[105] and it is often defended on the basis that human beings should, indeed, be treated differently than economic transactions.[106] Nevertheless,

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101 La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., p. xviii.

102 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 306.

103 *Lair v. Universität Hannover*, cit.

104 Ibid., para. 43.

105 Snell, J. (2004). And then There Were Two: Products and Citizens in Community Law. In: Tridimas and Nebbia, eds., *European Union Law for the Twenty-first Century: Volume II*. Oxford: Hart Publishing.

106 De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., p. xix.; Opinion of AG Jacobs delivered on 8 March 1989, case 344/87, *Bettray v. Staatssecretaris van Justitie*, paras. 28-19, referring to recital 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community, *OJ L 257*, 19.10.1968, p. 2–12.

even in the context of free movement rights, the Court does not preclude the existence of abuse and the discretion of the Member State to take measures against it. On the contrary, it has repeatedly confirmed that Member States are allowed to take measures to prevent possible abuse. The question remains how such a situation can be distinguished from a genuine use of free movement rights. To answer this question, the text of Directive 2004/38 and the pertaining Communication on its application, that is issued by the Commission, are further examined, as well as the case-law of the Court of Justice.

Art. 35 of Directive 2004/38 holds that "Member States may adopt the necessary measures to refuse, terminate, or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience".[107] One type of abuse of EU law is already mentioned in the provision, namely the attainment of a residence right on the basis of a marriage of convenience.[108] The wording of Art. 35 implies, however, that potentially other unspecified usages of the Directive could also be classified as abuse. The legislator thereby created an – additional – open possibility for the limitation of rights, which leaves a legislative gap.[109] The question that is answered here is whether the U-turn construction to acquire a residence right for a family member, by relying on EU law and thereby circumventing national law, also constitutes such an abuse of law or not.

V The Case-Law of the Court of Justice on Family Reunification Law Abuse

The first case of the Court of Justice that mentioned the possibility that law may be abused in the context of family reunification was Surinder Singh.[110] In this case, the Court recognized the possibility that relying on family reunification rules, in the context of free movement, can constitute abuse of law and that Member States can act against it. It considered: "the facilities created

107 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 297 *et seq*.

108 *Akrich*, cit., para. 57.

109 Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 63; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

110 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit. This case took place before Directive 2004/38 was adopted. Hence, there was no general legislative provision for abuse yet. It may even be perceived that Art. 35 of Directive 2004/38, cit., is a codification of this aspect of Surinder Singh. Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 298; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*.

by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".[111] The Court did not yet specify what types of behaviour could constitute such abuse. Instead, it created the possibility for the use of EU law to circumvent national family reunification rules, by establishing that once a family member acquires a residence right in the host state, where an EU citizen resides, he is able to retain these rights upon return to the home state of the EU citizen, which was discussed above. Years later, the Surinder Singh exception to the purely internal situation was confirmed in Akrich, Eind, Metock and in O. and B. and continues to be applicable law.[112] How does the possibility to apply this U-turn construction in the field of family reunification relate to the general doctrine on abuse of law? Can it be considered to be abuse of law, and if yes, under which circumstances?[113]

Akrich was a first test-case in the context of free movement and family reunification and involved a British-Moroccan couple who applied the U-turn construction to legalize the residence status of the Moroccan spouse. To achieve this, the couple moved to Ireland where the British spouse took up a temporary job, entitling the Moroccan partner to a residence right. When they wanted to return to the UK, they admitted that the only reason they moved to Ireland was to acquire a residence right for the Moroccan spouse on the basis of EU law.

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111 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., para. 24; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 101.

112 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.; *Coman and Others*, cit.; *Altiner and Ravn*, cit.; *Banger*, cit.; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 58 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 101–114; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 103–106.

113 must also be noted that Art. 35, on abuse, was not in the original legislative proposal of the Commission and was added by the Council in a later stage of the negotiations (Council Common Position (EC) 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, statement of reasons on Art. 35). Although the Court had identified the issue of abuse before, it appears that its assertion by the Council was mainly symbolic, as a manifestation of their sovereignty, and they had not thought through which cases aside from marriages of convenience could constitute abuse. It is, thus, logical that this question arose later. Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 297 *et seq*.

The Court considered that when an EU citizen "pursues or wishes to pursue an effective and genuine activity",[114] this cannot constitute an abuse within the meaning of the Surinder Singh judgment. "If there is a genuine exercise of an economic activity as defined by the Court of Justice, its preconditions cannot at the same time be created artificially".[115] Moreover, for the evaluation of the nature of the activity that is pursued, "the motives [...] are of no account [...] nor are [they] relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national".[116] The Court, thus, seemed to deviate from the two-step abuse of law test that was formulated in Emsland-Stärke because, in Akrich, the subjective element of this test had become inoperative.[117] At the same time, the subjective element of the test was hollowed in Halifax and would be hollowed even further in Cadbury Schweppes, a couple of years after Akrich. Did the Court in Akrich deviate from its standing practice by completely excluding the relevance of motive to establish abuse of law in the context of free movement law? Or should the Court's leniency in this case be attributed to the general development of the EU's case law on abuse of law, in which the subjective element of the two-step abuse test from Emsland-Stärke was declining anyway?

It followed from Akrich that the use of free movement law to acquire the rights that are attached to it cannot be qualified as abuse, as long as the use of these rights is effective and genuine. This criterion is derived from the case-law on free movement of workers, which is laid down in Art. 45 TFEU. In Lawrie-Blum, the Court reiterated that the concept of a "worker" should have a communitarian meaning to avoid discrepancies in interpretation among the Member States. One of the criteria to qualify as a worker under EU law is that the provided services are effective and genuine and rewarded with a remuneration.[118] When the exercise of free movement rights is effective and genuine, there cannot be an abuse of EU law.[119] By defining a broad scope for free

114 In *Akrich*, cit., para. 55 (emphasis added).

115 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 305 *et seq.*

116 *Akrich*, cit. paras 55–56; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., pp. 59, 298; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 102.

117 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 305 *et seq*.

118 *Lawrie-Blum v. Land Baden-Württemberg,* cit., para. 21; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 300 *et seq*.; Barnard, C. (2013). *The Substantive Law of the EU*, cit., p. 240.

119 *Levin v. Staatssecretaris van Justitie*, cit., para. 23; *Akrich*, cit., para. 55; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 300 *et*

movement law, the Member States do not have much leeway to invoke abuse of law to annul the rights that are attached to having the status of a worker in EU law.[120] The circumvention of national law is permitted, provided that the use of EU law is genuine and effective. The Court did not clarify, however, under what circumstances the use of free movement right is genuine and effective, and when it is not.

The shift in the Court's approach is in line with the development of its case-law more generally. The focus on genuine use of EU law is understandable in the light of the principle of effectiveness, which precludes easy derogation from EU law by the Member States. A narrow construction of abuse of law fits these principles because otherwise, Member States could rely on abuse of law to undermine EU law. The increasing role of fundamental rights protection in the EU is also reflected in the Court's case-law. A narrow understanding of abuse of law benefits certainty about their rights and future. Maybe that is why the Court first relied on a sole purpose approach to abuse of law in the context of free movement and family reunification law.

VI The Commission Communication with Guidelines for the Implementation of Directive 2004/38

A few years after the adoption of Directive 2004/38, the European Commission undertook an investigation into the implementation of the Directive in the Member States, which showed that uniformity was lacking and that much ambiguity still existed about the obligations it imposes.[121] To remedy the faulty implementation, the European Commission drafted its guidelines "for better transposition and application of Directive 2004/38".[122]

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seq.; Barnard, C. (2013). *The Substantive Law of the EU*, cit. p. 241. The question is raised, however, how the Court came up with the criterion of a genuine use of EU law, considering that it does not appear anywhere in the Treaties or in Directive 2004/38, see: Nic Shuibhne, N. (2014). The "Constitutional Weight" of Adjectives. *European Law Review* 39 (2), pp. 153–154, 154.

120 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 297.

121 Report of 10 December 2008 from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

122 Communication COM(2009) 313 final, cit.; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 299 *et seq*.

The Communication recites the general principle that "Community law cannot be relied on in case of abuse".[123] Nevertheless,

> [EU] law promotes the mobility of EU citizens and protects those who have made use of it. There is no abuse where EU citizens and their family members obtain a right of residence under [EU] law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State.[124]

The sole purpose doctrine which the Court developed in Akrich and subsequent case-law is clearly recognizable.

The Communication continues with a description of what behaviour could constitute abuse of law. Pursuant to the text of Art. 35 of Directive 2004/38, it starts with the definition of marriages of convenience. "Recital 28 defines marriages of convenience for the purpose of the Directive as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise".[125] Nevertheless, when the marriage is genuine, it "cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage".[126] Neither is the quality of the relationship decisive for the application of Art. 35 of Directive 2004/38. Analogously, other relationships that came into being "for the sole purpose of enjoying the right of free movement and residence" can be the subject of national measures to combat abuse, such as a (registered) partnership of convenience or the adoption or recognition of a child with the sole purpose to rely on the free movement legislation to acquire a residence right.[127] On the other hand, the Commission recalls that "[m]easures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate

123 *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit.; *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Centros*, cit.

124 Communication COM(2009) 313 final, cit., p. 15.

125 Ibid., p. 15.

126 Ibid.

127 Verhellen, J. (2016). Schijnerkenningen: Internationale Families Opnieuw in de Schijnwerpers. *Tijdschrift voor Internationaal Privaatrecht* 2, pp. 89–103.

rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality".[128]

Subsequently, a set of indicative criteria is given that can be used to determine whether there is an abuse of EU law. Among these are the duration of the relationship, whether the spouses share a common language, their knowledge about each other, the existence of long-term commitments such as concluding a mortgage and cohabitation – although it follows from the Court's case-law that cohabitation is not a requirement to qualify for a residence right on the basis of family reunification.[129] Member States must give due attention to all circumstances of the individual case and may not base a decision on one single element of the situation.[130] The Commission omits to support these instructions with reference to case-law. Nevertheless, several elements are recognizable. The instructions are clearly based on the sole purpose doctrine that is developed by the Court.[131] The genuine nature of the marriage is decisive, regardless of whether it brings any advantage to the spouses. The unimportance of the quality of the relationship for the classification of abuse, furthermore, follows from the case-law in Diatta and Ogieriakhi.[132] The amplification to other relationships of convenience, on the other hand, seems to be an addition by the Commission itself. In 2014, the Commission renewed the instructions on

128 Communication COM(2009) 313 final, cit., p. 15. It is notable that marriages of convenience are only annulled when they are concluded for a migration purpose. The legality of marriages concluded for tax advantages, housing advantages, or any other reason outside of reciprocal affection, on the other hand, is never disputed.

129 Court of Justice, judgment of 13 February 1985, case 267/83, *Diatta v. Land Berlin*, para. 15; judgment of 10 July 2014, case C-244/13, *Ogieriakhi*, para. 37.

130 Communication COM(2009) 313 final, cit., p. 16 *et seq.*; *McCarthy*, cit.

131 Applying the sole-purpose approach also corresponds with the rights that are laid down in the Family Reunification Directive 2003/86 which is applicable to family members of third-country nationals legally residing in the EU. Art. 16, para, 2, let. b), gives Member States the possibility to reject, withdraw, or refuse residence to a family member, when the marriage was "contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State" (emphasis added). According to the Court in *Metock and Others*, cit. it would be paradoxical if Directive 2004/38 would not minimally offer the same protection as Directive 2003/86. In this light it makes sense to assume that if a residence right derived from Directive 2003/86 is only annulled when the marriage that brought about that entitlement was concluded for the sole purpose of acquiring a residence title, the same rule can be applied to residence rights derived from Directive 2004/38. Following this logic, these residence rights can only be annulled when the marriage that brought about this entitlement was concluded for that sole purpose. Even though, remarkably, Art. 35 of Directive 2004/38 itself does not provide a definition of a marriage of convenience.

132 *Diatta v. Land Berlin*, cit., para. 15; *Ogieriakhi*, cit., para. 37.

the consequences of marriages of convenience in the "Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens". This handbook mostly contains the same principles and instructions which were included in the Commission Communication of 2009.[133]

In addition, according to the Commission,

> [a]buse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under [EU] law. The defining characteristics of the line between genuine and abusive use of [EU] law should be based on the assessment of whether the exercise of [EU] rights in a Member State from which the EU citizens and their family member(s) return was genuine and effective.[134]

Once again, the codification of the Court's case-law in Akrich, Levin, and Lawrie-Blum, which were discussed in the above, is apparent, as well as the applicability of the sole purpose approach to abuse in family reunification law. Genuine use of EU rights can never constitute abuse of law, regardless of the purpose for which the rights are used. If a planned circumvention of national immigration law is realized through such genuine use of EU rights, the circumvention is legitimate.

The assessment of whether the use of EU law is genuine and effective "can only be made on a case-by-case basis" and can be carried out on the basis of another set of criteria provided by the Commission Communication. Previous unsuccessful attempts to acquire residence for a third-country spouse under national law can be taken into account, as well as efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment and acquiring a job. Also here, due attention must be paid to all the relevant

133 Communication COM(2014) 604 of 26 September 2014 from the Commission to the European Parliament and the Council on helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.

134 Communication COM(2009) 313 final, cit., p. 17–18.

circumstances and a decision may not be based on one single element of the case.[135] Moreover, "[i]t cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State [...] [and] [t]he mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse".[136]

Lastly, the Communication mentions that "the Directive must be interpreted and applied in accordance with fundamental rights [...] as guaranteed in the European Convention of Human Rights (ECHR) and as reflected in the EU Charter of Fundamental Rights".[137] And that investigations into alleged abuse situations "must be carried out in accordance with fundamental rights, in particular with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR (Articles 7 and 9 of the EU Charter)".[138] In the light of this obligation and the interest of the families involved to live together with their loved ones, it is sequacious that abuse of law is interpreted narrowly and in accordance with the sole purpose approach.[139] Families thus enjoy more certainty about their rights and about their future.

VII Defining Genuine Use of EU Law – O. and B.

In the years after Akrich and the publiction of the Commission Communication, the Court of Justice was relatively silent on the doctrine of abuse of law in the context of family reunification,[140] until 2014, when O. and B. was handed down.[141] In this case, the Court reiterated its abuse of law doctrine and considered:

> [T]he scope of Union law cannot be extended to cover abuses [...]. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved,

135 Ibid., p. 18–19.
136 Ibid., p. 18, with reference to *Centros*, cit., para. 27.
137 Ibid., p. 3; *Metock and Others*, cit., para. 79.
138 Communication COM(2009) 313 final, cit., p. 17.
139 See supra.
140 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 60 *et seq*; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.
141 *O. and B.*, cit.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 108 *et seq*.

> and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.[142]

The Court, thus, re-established the Emsland-Stärke test to determine whether there is an abuse of law but also reiterated that there can only be abuse when the conditions under which a right is obtained are wholly artificial, which followed from Cadbury Schweppes.[143]

In O. and B., the Court clarified the condition that residence in the host Member State must have been effective and genuine before rights can be retained in a return situation. Effective and genuine exercise of EU rights requires:

> to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State [...]. [A] Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State [...]. [...] Residence in the host Member State pursuant to and in conformity with the con ditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.[144]

A distinction is made between short-term travel and long-term settling in the host Member State in accordance with Art. 7 of Directive 2004/38. This provision determines that "[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they" qualify as a worker, selfemployed, economically not active with sufficient resources or as a student. The text of this provision seems to imply that Art. 7 can only be applicable after a minimum of three months of residence. O. and B. was, therefore, understood as the introduction of a requirement of a three months residence in the host-state, before a family member's residence right can be retained upon return to the home Member State of the EU citizen.[145]

142 *O. and B.*, cit.; para. 58 with reference to *Emsland-Stärke*, cit., para. 52; *Bozkurt*, cit., para. 47; *Hungary v. Slovakia*, cit., para. 58.

143 *Emsland-Stärke*, cit.; *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit.

144 *O. and B.*, cit., paras. 52–53.

145 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 303; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 110 *et seq.*; Van Eijken, H. (2014). De Zaken S. en G. & O. en B., cit., p. 322 *et seq.*; Cambien, N. (2014). Cases C-456/

Such an interpretation means that the genuineness of the exercise of free movement rights is made dependent on a set period of three months of residence. However, is it sensible to link duration of residence with its genuineness in itself? And – if it is installed anyway – how can a minimum period of residence be determined for the use of rights to be genuine, without being inevitably arbitrary in posing this condition? "Why can a Union citizen who has lived for 3.5 months in another Member State, in which he met his partner be joined by her when he returns to this Member State of origin and why is this not possible for the Union citizen who visits another Member State for a period of many consecutive years?".[146] It seems hard to accept that the period of residence is decisive in itself for residence to be genuine, rather than being one of the relevant criteria to decide so.[147]

This contribution proposes a different interpretation of O. and B. Article 6 of Directive 2004/38 provides the right to visit any Member State for up to three months, without the need to fulfil any conditions to exercise that right. Art. 7 of Directive 2004/38 provides the right to reside in another Member State for a period of longer than three months when certain criteria are fulfilled. Accordingly, when an EU citizen wishes to have a right to reside in the territory of another Member States for a period of longer than three months, he must comply with the criteria in Art. 7. That does not mean that an individual cannot rely on Art. 7 and reside in a Member State in accordance with the criteria in that provision before those three months elapse. Any other conclusion would imply that exercising the rights derived from Art. 6 for three months is a precondition to rely on Art. 7 and to register at the municipality of residence. This is not the case. Such a condition is not included in Directive 2004/38 and would also be very difficult to enforce. As a result, it is already possible from the first day of arrival to register as a resident in accordance with Art. 7 of Directive 2004/38. Does this mean that even one day of residence in conformity with Art. 7 would already be sufficient to derive family reunification rights in the host Member State and upon return in the home Member State of the EU citizen?[148] And a family who resides in the host Member State for much longer than three months without complying with the conditions in Art. 7 of Directive 2004/38,

12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens? *European Law Blog*, available at europeanlawblog.eu.

146 Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 112.

147 Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-456/12 and C-457/12, *O. and B. and S. and G.*, para. 111.

148 Although such a claim would give difficulty in regard of proving the existence of that right in compliance with the set conditions.

on the other hand, would be deprived of the rights provided by the directive in the host state and after return in the EU citizen's home Member State?[149]

Considering the Court's wording, it seems that the decisive criterion to retain a residence right upon return to the home Member State of the EU citizen is not the duration of residence but whether residence in the host state is "such as to create or strengthen family life in that Member State", which should be assessed on a case-by-case basis. Three months of residence in the host Member State in accordance with the conditions in Art. 7 of Directive 2004/38 could then be used as a presumption of having created or strengthened family life, rather than as a precondition. This interpretation is in line with the Court's wording in O. and B., in which it considered that "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive [...] goes hand in hand with creating and strengthening family life in that Member State".[150] Thus, creation and strengthening of family life is presumed when there is a three months residence that is in conformity with Art. 7 of Directive 2004/38, but this does not exclude the possibility that a period of less than three months could also create or strengthen family life, provided that the residence is still exercised in conformity with Art. 7 of the Directive. This approach would allow for real case-by-case assessment of the use of rights, which, aside from the duration of residence, could take other parameters into account including cohabitation, intensity of the contact and the duration of the relationship. Residence for more than three months would not automatically lead to the retention of residence rights but would need to be complemented with other evidence that family life was created or strengthened. In addition, residence for less than three months would not automatically lead to the denial of the retention of residence rights but would need to be compensated with other evidence that family life was created or strengthened to be entitled to those rights. This reading furthermore excludes the possibility that a simple one day visit across the border would be sufficient to rely on the Court's case-law for return situations, which fits the objectives of EU law. Family reunification rights and the continuation thereof are meant to facilitate free movement, and this free movement is not hindered if family can not be brought for a single day visit to another Member State.

The proposed reading of O. and B. is further supported by a more recent case of the Court of Justice, which stems from 2018. Altiner and Ravn was about a Danish-Turkish couple who resided in Sweden for a couple of years. During

149 Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers, cit., p. 769 *et seq*.

150 *O. and B.*, cit., para. 53 (emphasis added).

this time, Altiner's Turkish son visited them twice for a total period of about 3,5 months with a valid Schengen visa, and stayed with them. When Ravn and Altiner returned to Denmark, the son applied for a residence permit as a family member of a Danish citizen in a return situation. Between their return and the son's application was a time window of little less than nine months. His request was denied, because according to the Danish authorities, his application was not 'a natural consequence' of Ms Ravn's return to Denmark. The authorities did not take a position on the question of whether the stay of the son in Sweden had created or strengthened family life between him and Ms Ravn.[151] The national court therefore asked the Court of Justice whether the Member State may require that the entry of a family member is a 'natural consequence' of the Union citizen's return?[152]

In answering the preliminary question, the Court considered that it 'is true that it is the genuine residence [in accordance with Article 7(1) and (2) of Directive 2004/38] of the Union citizen and of the family member who is a third-country national in the host Member State which creates, on the return of that Union citizen to the Member State of which he is a national, a derived right of residence on the basis of Article 21(1) TFEU for the third-country national with whom that citizen has live as a family in the host Member State'.[153] The Court of Justice then recalls that to obtain a derived residence right in the host Member State, it is not relevant at what time the family member joins the EU citizen, so an elapse of time between the arrival of the EU citizen and his family member should not stand in the way of family reunification.[154] The residence right that is granted in the Member State of origin of the EU citizen is, however, different in nature, and is meant to continue family life which has been created or strengthened in the host Member State. If this family life has been interrupted before the entry of the third-country national into the Member State of which the EU citizen is a national, this may affect the residence right in that Member State. Member States are allowed to verify whether such an interruption exists, and for that purpose they may take into account that the third-country national family member entered the territory of the EU citizen's home Member State a significant period of time after that citizen's return to

151 *Altiner and Ravn*, cit., para. 10–14. For an analysis of this case see in this volume De Groot, D.A. Free Movement of Dual EU Citizens; Oosterom-Staples, H. (2018). Noot bij HvJ EU 27 juni 2018, zaak C-230/17 (Altiner en Ravn) en HvJ EU 12 juli 2018, zaak C-246/17 (Banger). *Jurisprudentie Vreemdelingenrecht* 22 (11).

152 *Altiner and Ravn*, cit., para. 18.

153 *Altiner and Ravn*, cit., para. 20 and 26.

154 *Altiner and Ravn*, cit., para. 28–29.

that territory. At the same time, it cannot be ruled out that a family life, created or strengthened between a Union citizen and a third-country national family member in the host Member State might continue despite the fact that the EU citizen has returned to the Member State of which she is a national without being accompanied by the family member in question, who may have been obliged, for reasons relating to his personal situation, profession or education, to delay his arrival in the home Member State of the EU citizen.[155]

The Court concluded that the decisive criterion for a continuation of rights would be the existence of a link between the application for a residence right and the exercise by that citizen of his freedom of movement, which should be assessed as such. The fact that the submission of the application for a residence permit was not 'a natural consequence' of the return of the EU citizen is a relevant, but not a decisive factor in this assessment. Hence, the national authorities are allowed to weigh the question whether the application of the family member is 'a natural consequence' of the return of the EU citizen to the Member State of which he is a national, provided that other factors are also taken into account in the context of an overall assessment. This assessment should particularly take account of factors that are capable of showing that family life created and strengthened in the host Member State has not ended, in spite of the time which elapsed between the return of the Union citizen to that Member State and the entry of her third-country national family member. If family life continues to exist, this would justify the acknowledgment of a derived right of residence in the home Member State of the EU citizen to continue family life that was created or strengthened in the host Member State during the period of residence that was spend there.[156]

Altiner and Ravn confirms the conclusion that was derived from O. and B. The decisive criterion to retain a derived residence right for a family member of an EU citizen after a period of residence in another Member State is the existence of family life that was created or strengthened in the host Member State and continuated after the return to the EU citizen's home Member State. All other circumstances, such as the moment in time when the family member enters the Member State, or the period of residence of the EU citizen in the host Member State (provided that this residence was in accordance with Article 7 of Directive 2004/38), are relevant to be taken into account as part of the overall assessment of the creation, strengthening and continuation of family life in the home Member State. These factors cannot, however, be used

155 *Altiner and Ravn*, cit., para. 30–33.
156 *Altiner and Ravn*, cit., para. 34–35.

as fixed criteria on the basis of which an automatically generated decision on the legality of residence after return is issued.

VIII Abuse v. Non-Applicability of EU Law

Considering the abuse of law doctrine and the case-law of the Court in the field of family reunification, the question arises how abuse of law can be distinguished from the lack of fulfilment for the conditions of a right.[157] In O. and B., the Court reiterated the Member States' competence to combat abuse of law but it did not link abuse of law to the non-fulfilment of the criterion to have created or strengthened family life in the host Member State. Rather, it formulated a condition for the possibility to rely on Directive 2004/38 by analogy for family reunification after return to the home Member State. When this condition is not fulfilled, it is not a matter of abuse of EU law but a matter of non-compliance with the conditions for retaining a residence right in the EU citizen's home Member State after his return. In that case there is no entitlement to a right, so there cannot be an abuse of rights either. *Mutatis mutandis*, when the conditions for family reunification are fulfilled, there is a right to family reunification which cannot be considered to be abuse, even if national law was circumvented.[158]

When considering the difference between failing to fulfill the applicable conditions to retain a residence right and abuse of law, there is a difference between marriages of convenience and the Europe-route. When national law is circumvented, it depends on the circumstances of the case whether it can be classified as abuse or not. When a marriage of convenience is discovered, on the other hand, then Article 35 of Directive 2004/38 automatically labels this practice as an abuse.[159] Even then, however, the question about the distinction between non-applicability and abuse can be raised. Annulment of a marriage means that there was never a family relationship.[160] Since the rights that are granted by Directive 2004/38 are declaratory, this annulment implies that the conditions for family reunification were never fulfilled and the residence right

157 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 296; Spaventa, E. (2011). Comments on Abuse of Law and the Free Movement of Workers. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. 315–320; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 310.

158 Communication COM(2009) 313 final, cit., p. 15.

159 *Akrich*, cit.; *McCarthy*, cit.

160 Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*.

never existed in the first place. Consequently, the residence right would not be withdrawn on the basis of abuse of law, but because Directive 2004/38 would simply not be applicable. This reading of Directive 2004/38 is problematic, because it positions the withdrawal or termination of a residence right that results from the discovery of a marriage of convenience outside the scope of EU law altogether, which takes away the obligation to take account of the procedural safeguards which the directive provides. The mere existence of Article 35 of Directive 2004/38 opposes this view, because it provides that the termination or withdrawal of a residence right due to the discovery of a marriage of convenience should take place in accordance with the safeguards the directive provides for. It is thus suggested that the conclusion of a marriage of convenience and the pursuant – faulty – recognition of a residence right precludes the existence of this right ex tunc but still brings the situation within the scope of Directive 2004/38. The national measures to withdraw the residence right should, therefore, be taken in accordance with Art. 35 of the Directive.[161] This means that safeguards of proportionality should be applied,[162] which are not applicable if the withdrawal of a residence right would fall outside the scope of the Directive altogether.[163] In that case, the only safeguard that would still be available for the third-country national who lost his residence right is found in general international law, most notably in Art. 8 ECHR. As was mentioned earlier, the de facto protection of residence by Art. 8 ECHR is limited because its basic premise is very different than under EU law. Art. 8 ECHR departs from the

161 This reading of Directive 2004/38 corresponds with the rights that are laid down in Directive 2003/86, which is applicable to family members of third-country nationals legally residing in the EU. In accordance with Art. 17 of Directive 2003/86, residence rights can only be rejected, withdrawn or refused when due account is taken of the personal circumstances of the person concerned and a proportionality assessment is carried out. Directive 2004/38 should minimally offer the same protection as Directive 2003/86 (*Metock and Others*, cit., para. 69). Thus, withdrawal of a residence right that was conferred upon the third-country national through concluding a marriage of convenience, should be subject to the procedural safeguards in Directive 2004/38 as well.

162 Arts 30–31 of Directive 2004/38., cit.

163 A distinction is made between non-existence of a right and non-applicability of the Directive, and national authorities may struggle with the distinction. In Belgium, for instance, there is a divergence in responses to the discovery of a marriage of convenience. Some decisions place the withdrawal of residence rights derived from Directive 2004/38 outside the scope of the Directive and the implementing law (Vreemdelingenwet), while other decisions do apply the safeguards in the law that implements the Directive. See Kroeze, H.H.C. (2018). De Link Tussen Familierecht en Europees Migratierecht: De Route van de Vernietiging van een Schijnhuwelijk naar de Intrekking van Verblijfsrecht. *Tijdschrift voor Vreemdelingenrecht* 3, pp. 243–250.

authority of the Member States to decide on the entry of non-nationals into their territory.[164] Only when there are strong social and family ties in the Member State of residence non-admission or expulsion breaches the immigrant's right to family life.[165] To determine whether this is the case, a balance must be struck between the interest of the State and the interest of the individual. Art. 8 ECHR may provide a safety net for residence for those who fall outside the scope of EU law, but this does not compensate the loss of procedural rights that would be enjoyed on the basis of Directive 2004/38.[166]

A similar reasoning can be used for an EU citizen and his family member who want to rely on Directive 2004/38 in a return situation but fail to comply with the criterion of creating or strengthening family life in the host Member State before their return. If the criteria in O. and B. are considered to be a threshold for the applicability of EU law, noncompliance with those criteria results in non-applicability of EU law. Classifying reliance on the case-law of the Court in Surinder Singh and O. and B. when the condition to create or strengthen family life is not fulfilled as a form of abuse of law, on the other hand, does trigger the applicability and the procedural safeguards of Art. 35 of Directive 2004/38. In that case, the refusal of a residence right must be proportionate and must observe the procedural requirements in the Directive.[167] Hence, it seems in the interest of the involved families in cases of marriages of convenience and in return situations to apply the concept of abuse, rather than conclude that Directive 2004/38 is not applicable. Because if Directive 2004/38 is not applicable, the implication is that a situation is purely internal to the Member State and falls outside the scope of EU law. As was explained above, in that case only Art. 8 ECHR is left to provide protection and safeguards against expulsion or non-admission, but to qualify for residence under this provision is a high threshold. When a situation is qualified as abuse of rights, on the other hand, it comes within the scope of EU law and is, therefore, no longer a purely internal situation. As a result, safeguards derived from EU law are applicable before a residence right can be refused or withdrawn, for the better of the families involved.

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164 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

165 E.g., *Sen v. the Netherlands*, cit.; *Tuquabo-Tekle et al v. the Netherlands*, cit.

166 E.g., *Jeunesse v. The Netherlands*, cit.; Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 87 et seq.; Van Elsuwege, P. and Adam, S. (2017). EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification, cit., pp. 443–467; Kroeze, H.H.C. (2019). The Substance of Rights, cit.

167 Arts 30–31 of Directive 2004/38, cit.

IX Personal Scope of Family Life

If the possibility to derive a residence right in a return situation is defined by the question whether family life was created or strengthened during the exercise of free movement rights abroad, the next question is which family members are eligible to have a family life with.[168] This question is particularly relevant, because Member States have different practices concerning which family members they entitle for family reunification, and with regard to the recognition of family relationships that originated in other (Member) States. Recently, a few cases provided new insights on this matter.

In Banger, the Court of Justice ruled on the question whether the possibility to retain a residence right in a return situation also applies to the partner with whom the Union citizen has a durable relationship, when the Member State of the Union citizen does not grant family reunification to the unmarried and unregistered partner.[169] The case at hand was about Mr. Rado, a UK national, who had resided in the Netherlands with his South-African partner, Mrs. Banger, and now wished to return to the UK with her. The Court considered that in principle, Directive 2004/38 does not require the Member States to admit the partner of an EU citizen with whom he enjoys a durable relationship. The Court's case-law on return situations, however, should be applied without any reservations.[170] Thus, even though the UK lacks a right to family reunification between EU citizens and the partner with whom they have a durable relationship, it is still obliged to recognize the validity of this relationship under EU law, for the purpose of deriving a residence right from EU law in a return situation.[171]

Coman was about the return of a Romanian national from Belgium to his home Member State, who wanted to be accompanied by his husband – a US

168 Another question that is relevant in the context of family reunification derived from exercising free movement rights in return situations and in general, concerns the applicability of EU law on citizens with multiple EU nationalities. If such an individual moves between two Member States of which he is a national, is he eligible for family reunification rights in both countries or in neither of them? And is it possible to rely on the Court's doctrine about return situations after having resided in a Member State of which the EU citizen is also a national? The current chapter does not elaborate on this issue, but David de Groot does discuss these questions in the contribution he added to this volume: Free Movement of Dual EU Citizens.

169 *Banger*, cit., para. 19. For an analysis on this case see Oosterom-Staples, H. (2018). Noot bij HvJ EU 27 juni 2018, zaak C-230/17 (Altiner en Ravn) en HvJ EU 12 juli 2018, zaak C-246/17 (Banger), cit.

170 *Banger*, cit., para. 24-34.

171 *Banger*, cit., para. 35.

citizen. Romania refused the application, because it does not recognize gay marriages, and therefore excluded the couple from the applicability of EU free movement law after Coman's return. The Romanian Constiutional Court referred the case to the Court of Justice to ask whether this practice was in accordance with EU law.[172] The Court of Justice reiterated the possibility to retain residence rights of an EU citizen's family member after the EU citizen has exercised his free movement rights and then returns to his Member State of origin. It then dealt with the question whether same-sex spouses are included within the personal scope of these rights, which are awarded under the conditions that are set by Directive 2004/38, which applies by analogy. In doing so, it observed that the term 'spouse' within the meaning of Directive 2004/38 is gender-netural and may therefore cover the same-sex spouse of the Union citizen concerned. This reading is furthermore supported by the fact that spouse is a communitarian concept, for the interpretation of which no reference is made to the Member State legislation. Therefore, Member States cannot rely on their national laws to refuse a residence right to the same-sex spouse of an EU citizen that is derived from EU law. It is therefore bound to recognize the marriages concluded in another Member State.[173] This obligation does not impose an obligation for the Member States to provide for the possibility of same-sex marriages in their national family law, which is a competence of each Member State. Nevertheless, the exercise of those competences is limited by the obligations that stem from EU law. Most notably, Member States should ensure freedom of movement for all EU citizens, and acknowledge the rights that are attached to exercising this freedom.[174]

Both cases oblige the Member State to acknowledge a residence right to family members of EU citizens, who they do not recognize as family members in their national law. In Banger, a residence right was awarded to the partner in a durable relationhip with the returning UK national who exercised his free movement rights, even though the UK does not grant this right to its own citizens or to EU citizens residing in the UK, and neither does EU law impose that obligation. Yet, rights that were acquired in another Member State should

172 *Coman*, cit., para. 9–12 and 17. For an analysis on this case see Tryfonidou, A. (2018). Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment, cit.; Kroeze, H.H.C., and Safradin, B. (2019). Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest, cit.; Kochenov, D., and Belavusau, U. (2019). Same-sex spouses in the EU after Coman: More free movement, but what about marriage? *EUI Department of Law Research Paper* 2019.

173 *Coman*, cit., para. 29–36.

174 *Coman*, cit., para 37–40.

be preserved, despite national policy choices that would indicate otherwise.[175] In the light of constitutional EU law this case-law of the Court is not surprising and seems to be connected to the principle of mutual recognition.[176] If a durable relationship is recognized in one Member State as eligible to enjoy a residence right, the other Member States must recognize the rights that are derived thereof, which is an affluent of the principles of effectiveness and loyal cooperation.[177] The same goes for the residence right of the same-sex spouse of an EU citizen who created or strengthened family life with that spouse in another Member State and then returns to his home Member State as in Coman. The case-law is understandable from a European constitutional perspective and fits the internal market logic of mutual recognition, but it does have a serious impact on the family law and private international law competences of the Member States.

Under international law and private international law, states have the competence to decide which family relationships they recognize. *Mutatis mutandis*, if a state does not recognize gay marriage, or it does not attach any legal consequences to a durable relationship between unmarried partners, it is within its discretion to allow or disallow access to its territory and to attach rights to these personal status or not. The discussed case-law reduces this competence by dictating that for the purpose of deriving rights form EU law, certain relationships must be recognized, regardless of the recognition of these relationships in the national law of the Member State. In Coman, Member States opposed this approach, and argued that Member States should be allowed to refuse a residence right to a family member that is not recognized as such under their national law, on the basis of objective public-interest considerations

175 It is asserted here that the obligation for the Member States to recognize rights that were acquired under EU law in another Member State should not only extend to citizens who return to their home Member State, but also to citizens who move between two Member States of which they are not a national. For them the same principle applies. Rights acquired on the basis of EU law through the exercise of free movement rights should be retained, also when they are brought with to another Member State of which the beneficiary is not a national.

176 Court of Justice, judgment of 20 February 1979, case 120/78, *Cassis de Dijon*, para. 14.

177 Article 4(3) TEU. The possiblity to preserve acquired rights is also interesting from the perspective of the international law doctrine of 'acquired rights', which provides that rights obtained on the basis of a Treaty cannot be taken away. See Sik, K. (1977). The Concept of Acquired Rights in International Law: A Survey. *Netherlands International Law Review* 24 (1–2), pp. 120–142; For the application in a Brexit context see Cambien, N. (2018). Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal. *European Papers* 3 (3), pp. 1333–1352. Cambien also explains that the application of the acquired rights doctrine to EU citizenship rights in practice is quite difficult.

or to preserve the national identity of a Member State that is protected by Article 4(2) TEU, but the Court of Justice rejected their arguments. It considered thereto that its decision in Coman does not oblige Member States to provide the institution of marriage between two persons of the same sex in its national law. It only requires the recognition of these marriages for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.[178]

Indeed, the Court's judgment is an affluent of long-standing constitutional principles, but the application thereof seems not only to perpetuate these principles. Through its case-law, the Court may in fact have created a new space in EU law. By defining which relationships should be recognized by the Member State, even if only for the purpose of maintaining rights that were acquired under EU law, a European family law may develop to define which relationships are eligible for rights derived from EU law.

Another argument for this thesis can be found in the case of SM. SM concerned an Algerian child which was placed under kafala with a French couple who resided in the UK. Kafala is an Islamic institution that resembles foster parentship, but it does not create legal descendence. The French couple applied for family reunification with the Algerian child under EU free movement law, but this was refused, because the UK does not recognize children placed under kafala as family member that qualify for family reunification.[179] The Court of Justice did agree that a child placed under kafala cannot be considered a 'direct descendant' within the meaning of Article 2(2c) of Directive 2004/38.[180] It can, however, be qualified as 'other family member' within the meaning of Article 3(2a) of Directive 2004/38, whose entrance into the host Member State of an EU citizen must be facilitated.[181] SM did not concern a return situation, but the approach of the Court is similar to its approach in the two cases that were discussed above. The Court decided whether and under which conditions a family relationship qualifies for family reunification under EU free movement law, regardless of whether national law recognizes that relationship or not. Furthermore, if family reunification with the child who is placed under kafala is granted in the UK, the reading of Banger and Coman

178 *Coman*, cit., para. 42–46.

179 Court of Justice, judgment of 26 March 2019, case C-129/18, *SM*, para. 23–30. For an analysis on this case see Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference. *European Papers* 4(1), pp. 389–393; Den Haese, S., and Kroeze, H.H.C. (2019). The Emergence of a European Family Law? The 'Right' of a Child Placed under *Kafala* Care to Reside within the EU with his Guardian(s). *Tijdschrift Internationaal Privaatrecht*, forthcoming.

180 *SM*, cit., para. 49–56.

181 *SM*, cit., para. 55–59.

implies that when the couple returns to France, France is held to recognize this relationship as well, regardless of their national recognition of children placed under kafala under private international law.

Still, the qualification of family relationships that are eligible for family reunification under EU free movement law is not arbitrary. The aforegoing chapters elaborated upon the criterion of having created or strengthened family life in order to retain a residence right that was obtained in the host Member State upon return to the home Member State of the EU citizen. It was observed that the use of this criterion is coherent with the objectives of free movement law, which provides for family reunification rights to facilitate movement of EU citizens between Member States. It follows from the more recent case-law that the scope of family members who could potentially benefit from family reunification under EU law in a return situation and in general, is also connected to the existence of family life. Whereas in O. and B., Altiner and Ravn, and Banger, the Court mentioned the existence of family life *in abstracto* as a criterion for family members of EU citizens to qualify for a residence right in a return situation, in Coman and SM, the Court made reference to the ECtHR. It reiterated that the free movement provisions should be interpreted in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, which protect family life and the interest of the child. Pursuant to Article 52(3) of the Charter of Fundamental Rights of the European Union, the rights in the Charter that correspond to rights in the European Convention of Human Rights should be interpreted accordingly and minimally offer the same protection. Furthermore, the Court reasons, the protection of Article 8 ECHR also extends to same-sex relationships and children placed under kafala. Thus, if Article 7 Charter should be interpreted accordingly, then same-sex relationships and children placed under kafala should enjoy protection under EU law as well.[182] The only difference between the ECHR and the EU regime, is that the existence of family life under the ECHR does not create an entitlement to family reunification, whereas the recent case-law of the Court of Justice indicates that EU law does create such an entitlement.[183]

182 For same-sex relationships: *Coman*, cit., para. 48–51; European Court of Human Rights, judgment of 7 November 2013, no. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, para. 73; judgment of 14 December 2017, no. 26431/12, 26742/12, 44057/12, and 60088/12, *Orlandi and Others v. Italy*, para. 143. For kafala: *SM*, cit., para. 66; European Court of Human Rights, judgment of 4 October 2012, no. 43631/09, *Harroudj v. France*, para. 40–41; judgment of 16 December 2014, no. 52265/10, *Chbihi Loudoudi and Others v. Belgium*, para. 88–89.

183 European Court of Human Rights, judgment of 28 May 1985, nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* para. 68; judgment of 31

If Coman and SM indeed predict an understanding of EU law in which the existence of family life within the meaning of Article 8 ECHR is sufficient to become eligible for family reunification rights when free movement rights are relied upon, its potential scope is not necessarily limited to blood relationships. It is perceivable that family life exists with a non-family member, for instance when two friends live together and run a household together and support each other in the same way a family would. If the development in Coman and SM is drawn further upon, such a situation may qualify for family reunification under EU law as well, including after the exercise of free movement rights upon return to the home Member State of the EU citizen.[184] This approach 'relies, for these purposes, on a flexible, pragmatic idea of family that leaves potential room to several models of cohabitation and reciprocal responsibility, and to a variety of underlying bonds, from the biological, to the legal, to the factual and affective.'[185] Time will tell if EU law indeed develops in that direction or not.[186]

X Concluding Remarks

The beginning of this contribution problematized the tension between the principle of equality and the division of competences in the EU. Equality is an ideal to strive for that is anchored in the EU Treaties but is contrasted with the preservation of Member States' sovereignty. This tension is particularly prevalent in family reunification. The EU is competent to regulate family reunification for EU citizens who make use of their free movement rights, while those

January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107; Kroeze, H.H.C. (2019). The Substance of Rights, cit., p. 253 et seq.

184 Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference, cit., p. 390–391; Kroeze, H.H.C. (2019). De zin van het gezinsleven: gezinshereniging op grond van een "duurzame relatie" en de implicaties van rechtsmisbruik. *Tijdschrift voor Vreemdelingenrecht* 3, pp. 258–266.

185 Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference, cit., p. 392.

186 If so, it would mirror the development of family reunification rights derived from Article 20 TFEU. Family reunification on the basis of this provision is granted on the basis of dependency between an EU citizen and his family member, but case-law shows that this does not need to be a family member that is bloodrelated. In theory, all relationships of dependency are potentially eligible for family reunification on these grounds. See Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O.S. and L.*; judgment of 8 May 2018, case C-82/16, *K.A.*, para. 65; Kroeze, H.H.C. (2019). The Substance of Rights, cit.

who do not use their free movement rights fall under the competence of the Member States. Member States often impose stricter requirements for family reunification than the EU, whereby they reversely discriminate their own nationals, insofar as they did not use free movement rights. The existence of reverse discrimination is counter intuitive and if the EU and its Member States do not take up the responsibility to remedy this inequality it may seriously undermine the EU's legitimacy. In the meantime, however, this contribution explored another partial remedy to reverse discrimination within the constitutional limits of the EU.

In its case-law, the Court of Justice decided that residence rights for a family member of an EU citizen, who made use of free movement rights, can be retained after return to the home Member State of the EU citizen, provided that the exercise of those rights was effective and genuine. This means that an EU citizen can circumvent national family reunification law by temporarily moving to another Member State and then return with residence rights for his family member. This possibility empowers EU citizens who face reverse discrimination to escape from it. It remains a liability that only EU citizens who are already empowered can benefit from this route which requires financial investment and knowledgeability, but it is a partial solution to reverse discrimination which stays within the constitutional limits of EU law. Member States may want to act against circumvention of their national laws. Therefore, they have the possibility to classify circumvention of national law as an abuse of rights, which legitimizes the refusal or withdrawal of residence rights. The downside thereof is that reliance on abuse of law undermines legal certainty and the certainty for families about whether or not they are able to live with their loved ones. For these reasons, the definition of the scope of abuse of law is very important. A broad scope of abuse of law gives way to frequent intervention by the Member States to protect themselves from circumvention of their national law. A narrow scope of abuse of law limits the scope of application by the Member States and offers more legal certainty and protection of citizens' rights. In the case-law of the Court, a movement can be observed, from a broad essential purpose construction of abuse of law, towards a narrower sole purpose construction of abuse of law. The shift in the general abuse of law doctrine is especially strong in the field of family reunification, where reliance on abuse of law is almost fully rejected and reduced to a merely theoretical legal principle. The crucial criterion for a legitimate use of EU law that was formulated in cases such as Akrich, O. and B., and Coman is that use of EU rights is effective and genuine. More concretely, to retain residence rights upon return to the home Member State of the EU citizen, residence in the host Member State must be such as to have

created or strengthened family life. Following the Court's decision in O. and B. and Altiner and Ravn, a new interpretation of this criterion was suggested. It was proposed to adopt a presumption of having created or strengthened family life when residence in the host Member State had a duration of more than three months in accordance with Art. 7 of Directive 2004/38, rather than making the three months a fixed condition to retain a residence right. Periods of residence less than three months, in accordance with Art. 7 of Directive 2004/38, would then not automatically lead to the refusal of a residence right in the home Member State upon return but require additional evidence of having created or strengthened family life.

The focus on genuine use of EU law and the impact of the movement on family life is quite understandable. Considering the importance the Court attaches to the principle of effectiveness in EU law, it is unsurprising that it does not easily allow for derogation by the Member States through invoking abuse of law. In addition, it is in line with the increasing role of fundamental rights protection, provided by the ECHR and by the Charter, in the EU legal order that protection of the family is prioritized over protecting the enforcement of national migration law. That may also be the reason why the Court, first, shifted towards the sole purpose doctrine in the context of free movement rights, several years before it did so in other fields of EU law.

Although the protection of the family by EU law is commended, constructing the scope of abuse of law too narrowly could also backfire. The decisions of the Court in its most recent case-law could suggest that there is no more place for abuse of law, and noncompliance with the conditions to retain residence rights upon return to the home Member State of the EU citizen simply results in non-applicability of EU law. That interpretation would, however, reduce a return situation in which the requirement of genuine residence is not fulfilled to a purely internal situation, without any protection provided by EU law. In that case, protection by the ECHR might offer solace, but this protection is less extensive than the protection by EU law. Classifying non-compliance with the conditions for reliance on EU law in a return situation as abuse of rights, on the other hand, brings the situation within the scope of EU law and requires that procedural safeguards provided by the directive are observed. Thus, arguably, a narrow construction of abuse of law benefits EU citizens and their family members, because it provides certainty about their rights and future, but when the requirements for a right are not fulfilled they are better off when it is qualified as abuse than when EU law is considered not to be applicable. This is also a better solution in the light of of reconciling the principle of equality and the principle of the division of competences in EU law. To protect the competence of the Member States, more cases could be qualified as abuse, but once people

fall within the scope of EU law the safeguards against deprivation of the rights they obtained are equal for everyone .

The final part of this contribution concerned the definition of family members that are eligible for family reunification under EU free movement law and in return situations. Traditionally these are the family members defined in Article 2(2) of Directive 2004/38, but differentiation in definitions among the Member States still causes uncertainty about which family members of EU citizens may derive a residence right from EU law. It was shown that recent case-law could remedy this uncertainty through the development of a type of European family law, which defines which family members should qualify for family reunification on the basis of Article 2(2) or 3(2) of Directive 2004/38. Although Member States remain competent in principle to define the categories of family members that are mentioned in Article 2(2) of Directive 2004/38, they are also in principle obliged to recognize derived residence rights that are obtained in other Member States in accordance with the law and definition of the family of those Member States. This was the case in Banger and Coman, in which a residence right for the partner with whom the EU citizen maintained a durable relationship, and a residence right for the partner of the same sex as the EU citizen had to be recognized, even though the Member States in those cases did not themselves grant these rights to those categories of family members. The same happened in the case of SM, in which the Court considered that a child placed under kafala should be eligible for family reunification with his legal guardians under Article 3(2) of Directive 2004/38, regardless of the national recognition of kafala guardianship. This development impacts the competence of the Member State in family law and private international law, but it does provide more legal certainty and the Court is wary to limit the impact of its decisions to the EU sphere.

The main purpose of this contribution was to further understand the conditions under which EU law can be legally used for family reunification, even if national immigration law is circumvented. It was demonstrated that the creation, strengthening and continuation of family life is central to this exercise, which is welcomed from a perspective of legal certainty, and from a human rights angle.

CHAPTER 11

The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?

Piet Van Nuffel and Sofia Afanasjeva***

1 Introduction

Free movement is one of the fundamental rights of EU citizens. While constituting the cornerstone of the internal market, free movement often stirs political controversy, in particular in those specific situations where the moving citizen is liable to be perceived as a threat to the welfare system of the host Member State. The obvious example is the situation of economically inactive persons that seek access to a host Member State on the basis of the free movement right of a family member. The case of the posting of workers demonstrates that controversy may also arise when economically active EU citizens rely on free movement rights to take up work in another Member State.

Workers who are "posted" remain employed by their employer in the home Member State and are sent abroad only temporarily. Their situation is therefore covered by the freedom to provide services, not the free movement of workers.[1] Where such posted workers constitute cheaper work force than local workers, local undertakings and workforce may perceive such exercise of the free movement of services as unfair competition, or even as "social dumping". Regulating the increasing use of posted workers, a phenomenon that finds itself at the intersection of internal market and labour protection rules, has turned out to be politically sensitive. It was Jean-Claude Juncker who as candidate for President of the European Commission announced in

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1 See Court of Justice, judgment of 25 October 2001, case C-49/98, *Finalarte*, paras. 22–23.

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July 2014 before the European Parliament a "targeted review" of the Posting of Workers Directive[2] (the "PoW Directive"), indicating that "the same work at the same place should be remunerated in the same manner".[3] In March 2016, with the express support of several Member States and considering that with the enlargement of the Union the existing legal framework for posted workers was not suitable anymore, the European Commission presented its proposal for that review.

Being high on the political agenda of many Member States, it was no surprise that this proposal became the subject of much controversy. Witness to this is the fact that French President Macron turned posting of workers into an important selling point of his campaign for the 2017 presidential elections. Together with other Western European Member States, France has been facing wage competition from workers posted from Eastern European Member States with lower wage levels, leading to the perception of posting of workers as an issue that directly opposes East to West within the EU. It is therefore a success that the Commission's proposal led in spring 2018 to a widely supported political agreement on a revised PoW Directive.[4]

This contribution seeks to explain how this reform builds on the principles developed in the case law of the Court of Justice and eventually managed to upgrade the PoW Directive, which is based on the Treaty provisions on free movement of services, into an extended package of protective labour rules that nevertheless remains within the boundaries of internal market legislation. By prescribing Member States to what extent the exercise of free movement by foreign employers may be regulated, the rules on posting lay down a level playing field in which all workers receive the necessary protection. Given the tensions caused by the increased use of posted workers in certain Member States that considered introducing measures to protect their labour markets, this recent harmonisation of the rules on posting thus also contributed to preserving, and not merely limiting, free movement and the internal market.

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2 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ L 18*, 21.1.1997, p. 1–6.

3 Juncker, J-C (2014). *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission – Opening Statement in the European Parliament*, Strasbourg, p. 8, available at https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf.

4 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, *OJ L 173*, 9.7.2018, p. 16–24.

11 Posting of Workers on European Labour Markets

The term "posted workers" refers to workers who are legally employed by an undertaking established in one Member State (the sending or home Member State) and sent by that undertaking to another (receiving or host) Member State in order to carry out work in the host Member State. Typically, such work is carried out under a contract concluded by the sending undertaking for the provision of services in the host Member State. There may also be "intra-group posting", when an undertaking sends an employee to work in a subsidiary in another Member State. A third category of posted workers covers workers hired out by temporary work agencies established in the home Member State to a user undertaking in the host Member State.[5]

Since posted workers are sent abroad only temporarily, they do not intend to integrate in the labour market of the host Member State and thus remain covered by the social security system of the home Member State. Such workers will be issued a Portable Document A1 in their home Member State, confirming that contributions are paid for them in that Member State.[6] Under the Regulation on the coordination of social security systems, a posted worker continues to be subject to the social security legislation of the home Member State if the duration of the work in the host Member State does not exceed 24 months.[7] This prevents excessive administrative burden for posting undertakings and national authorities, which would otherwise have to change the applicable social security system for every worker performing services in another Member State for a limited time.

Posting of workers is an increasing phenomenon within the EU. Since 2011, the overall number of Portable Documents A1 issued has almost doubled.[8] Posted workers are highly concentrated in specific sectors, in particular the construction sector and, to a lesser extent, in education, health, social work services and business services.[9] Still, only a limited number of Member States

5 See the categories of workers covered by the PoW Directive, Art. 1(3).

6 See the Decision No A1 of 12 June 2009 the Administrative Commission for the Coordination of national social security systems. For that purpose, the Portable Document A1 has replaced since May 2010 the previous E101 document.

7 Art. 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ L 166*, 30.4.2004, p. 1–123.

8 De Wispelaere, F., De Smedt, L. and Pacolet, J – HIVA-KU Leuven (2019). *Posting of workers – Report on A1 Portable Documents issued in 2018*, European Commission, p. 9, available at: https://www.mobilelabour.eu/wp-content/uploads/2020/02/PD-A1-report-Reference-year-2018.pdf.

9 *Ibid*., p. 29.

is affected by the presence of posted workers. In 2018, the pre-2004 Member States constituted the destination of 84 per cent of total postings[10]: among the countries most affected are Germany, France and Belgium as top 3 receiving countries (which altogether received almost 50 per cent of total EU postings) and Germany, Poland and Spain as top sending countries.[11] In particular, France, the Netherlands, Belgium, Sweden and Austria received far more workers posted than they sent.[12] In several sectors, Member States face an increasing number of workers being posted from Central or Eastern Europe Member States with generally lower wage levels. Most postings from low-wage Member States occur in the industry sector, with 40 per cent to be situated in the construction sector. In that sector, Member States such as Luxembourg, Austria and Belgium have been experiencing a particularly large number of posted workers.[13]

Nevertheless, it must be stressed that looking at the general labour market, posting of workers remains a relatively limited phenomenon. It is estimated that around 0.8 per cent of the EU workforce can be considered to have been issued with a Portable Document A1, which is less than three million people.[14] Not more than one third of these postings concern postings from low-wage to high-wage Member States.[15] There are indeed also a large number of postings between high-wage Member States, in particular in the services sector. The average duration of the posting period is less than four months.[16]

III Introducing Workers' Protection through the Posting of Workers Directive

It was the accession of Spain and Portugal in 1986 that started fuelling fears of large groups of workers from low-wage Member States entering the labour market of high-wage Member States after the Court of Justice had confirmed that companies could rely on the free movement of services to temporarily bring in their own workforce.[17] The Court's case law on the balance to be struck

10 *Ibid.*, p. 26.
11 *Ibid.*, p. 15.
12 *Ibid.*, p. 25.
13 *Ibid.*, p. 29.
14 *Ibid.*, p. 10 and 15.
15 *Ibid.*, p. 26.
16 *Ibid.*, p. 11 (average of 91 days in 2018 per A1 document).
17 See Watson, P. (2014). *EU Social and Employment Law*. Oxford: Oxford University Press, pp. 281 and 301.

between free movement and workers' protection inspired the adoption of the PoW Directive in 1996 and also the Commission's 2016 proposal to revise that Directive.

III.1 *The Court of Justice and Workers' Protection in the Context of Cross-Border Services*

In the absence of legislative guidance, the Court of Justice was tasked with a challenging role. On the one hand, the free movement of services as a fundamental freedom had to be preserved against undue regulatory obstacles. On the other hand, the protection of workers and social policy goals had to be recognised as legitimate interests capable of justifying restrictions to that economic freedom. The Court could not escape the finding that measures imposed by a host Member State that put an obstacle to undertakings established in another Member State in their provision of services in the host Member State have to be qualified as "restrictions" to free movement. However, under the Court's established case law on free movement, such finding does not imply that any measures laid down by the host Member State to protect workers becomes subordinated to the objective of market liberalisation underpinning the Treaty provisions on free movement. Restrictions to free movement may indeed be justified provided that they apply without distinction to all undertakings operating in the host Member State and remain proportionate to the pursued objective.[18]

In a number of cases, the Court concluded that social legislation restricting the provision of services from other Member States went beyond what was necessary to safeguard workers' rights, for example, because service providers were required to pay social contributions for social benefits to which the undertakings already contributed in the home Member State.[19] At the same time, however, the Court confirmed that a host Member State may invoke social policy objectives to impose requirements that effectively ensure workers' protection. Thus, the Court considered in *Seco* that the free movement of services does not prevent a host Member State from applying legislation or collective labour agreements setting minimum wages to be paid to any person employed, even temporarily, within its territory, irrespective of the Member

18 See *Finalarte,* cit., paras. 31–32; Court of Justice, judgment of 24 January 2002, case C-164/99, *Portugaia Construções*, para. 19; Court of Justice, judgment of 12 October 2004, case C-60/03, *Wolff & Müller*, para. 34.

19 See Court of Justice, judgment of 3 February 1982, joined cases 62/81 and 63/81, *Seco and Desquenne & Giral*, para. 9; Court of Justice, judgment of 28 March 1996, case C-272/94, *Guiot*, para. 22.

State where the employer is established, and from enforcing such rules by appropriate means.[20] In *Rush Portuguesa* the Court confirmed the host Member State's freedom to apply legislation protecting workers, without limiting it to minimum wages.[21] Those rulings prompted the Commission to come up in 1991 with a proposal for legislation "to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country".[22]

III.2 *The Posting of Workers Directive Laying Down a Nucleus of Protective Rights*

The Commission's proposal of August 1991 acknowledged that a balance needed to be struck between opposing principles: free competition across the borders to realise the full potential of the internal market, even when the main comparative advantage of some Member States is a lower wage cost, and having Member States set minimum pay levels applicable to all workers on their territory to ensure a minimum standard of living.[23] It led to an exhaustive[24] list of rights set out in Article 3(1) of the PoW Directive, which not only aims at protecting the posted workers, but also at guaranteeing that the level of protection ensured by the PoW Directive does not render the cross-border provision of services too burdensome or costly for foreign undertakings. The "nucleus" of rights deals with those issues which are of immediate interest to the worker and the posting undertaking during the posting assignment, such as minimum rates of pay, including overtime pay, paid annual holidays, maximum work periods, and health, safety and hygiene at work. These terms and conditions have to be guaranteed by the posting undertaking based on the legal framework applicable in the host Member State. The list excludes provisions on dismissal and standards relating to the representation of workers, as those are not relevant for the short-term duration of the work provided in the host Member State.

The PoW Directive introduced that nucleus of mandatory rules for all posted workers, leaving the definition of a worker to be determined by the host

20 *Seco and Desquenne & Giral,* cit., para. 14. See also *Guiot*, cit., para. 12; Court of Justice, judgment of 23 November 1999, joined cases C-369/96, *Arblade,* and C-376/96, *Leloup*, para. 43.

21 Court of Justice, judgment of 27 March 1990, case C-113/89, *Rush Portuguesa*, para.18.

22 PoW Directive, recital 13.

23 Proposal of 1 August 1991 for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final. Amended Proposal COM(93) 225 final was submitted in June 1993.

24 Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri*, para. 80–81. See also *infra* section III.3.

Member State's legislation. Since the nucleus of the protective rights is applied in accordance with the host Member State rules, it would indeed not have made sense to regulate situations for which no protection is provided under that Member State's law. The PoW Directive does not set any maximum period for the posting activities falling within its scope. Likewise, it does not define any minimum duration, although it contains an exemption for workers posted less than eight days for assembling or installing goods and also allows Member States to exempt posting activities which do not exceed one month or which concern "not significant work". The Court of Justice however indicated that there may be circumstances, with several and brief crossing of borders, where it could be disproportionate for a host Member State to apply its legislation on minimum wages.[25] In the sector of international road transport, a host Member State can indeed be expected to require minimum wages only for posted workers having established a sufficient link with the territory of that Member State.[26]

The issue that stirred most debate in the adoption process of the PoW Directive, and continued to do so after its transposition, has been the application of the requirement to pay posted workers minimum rates of pay. The PoW Directive specifies that it is for the host Member State's law and practice to define the concept of minimum rates of pay (Article 3(1)), indicating that allowances specific to the posting must be considered part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred by workers, such as expenditure on travel, board and lodging (Article 3(7)). As the PoW Directive does not indicate what exactly falls under the notion of minimum rates of pay, it has been for the national courts to determine that notion on a case-by-case basis. When asked to clarify that notion, the Court of Justice held that it is for the host Member State's law to define the constituent elements of minimum rates of pay, while indicating that national legislation or collective agreements should not have the effect of impeding the freedom to

25 Court of Justice, judgment of 15 March 2001, case C-165/98, *Mazzoleni and ISA*, paras. 30–39.

26 See rec. 10 of the Commission's 2016 Proposal (see infra fn. 63). Accordingly, the specific rules on which the negotiators from the European Parliament and the Council agreed on 12 December 2019 foresee that drivers are not considered 'posted' if they perform bilateral transport operations from the Member State of establishment to another State or are merely transiting through such other State. See Article 1 of the Directive laying down specific rules for the application of Directive 96/71/EC and Directive 2014/67/EU, as adopted by the Council as its position in first reading on 7 April 2020 (ST 5112 2020).

provide services.[27] The notion of minimum wage does not include allowances or supplements, which the law or practice of the host Member State does not define as constituent elements of the minimum wage and which alter the relationship between the service provided by the worker and the consideration received in return.[28]

Further clarification on the notion of minimum wage resulted from the Finish case *Sähköalojen ammattiliitto*[29] concerning a trade union in the electricity sector bringing pay claims assigned to it by workers posted to Finland by a Polish undertaking. Several allowances included in a collective agreement had not been taken into account by the Polish employer. The Court qualified the daily allowances imposed by the agreement as allowances specific to the posting within the meaning of Article 3(7) of the PoW Directive, as they intended to make up for the disadvantages entailed by the worker being removed from his usual working environment.[30] Thus, these allowances had to be considered part of minimum wage and had to be paid to posted workers without discrimination. The same applied to travelling time compensation, applicable whenever a worker had to travel every day for more than one hour from his lodging to the place of work, provided that the posted workers were in such situation.[31] However, other elements, like coverage for accommodation costs and meal vouchers were not considered constituent elements of pay, as they were paid to compensate for living costs actually incurred by workers during the posting assignment.[32]

III.3 *Continued Controversy in the Balance between Free Movement and Social Protection*

At the time of adoption of the PoW Directive, the Commission considered that legal framework fit for the purpose of ensuring a fair balance amongst the interests concerned by removing obstacles to the freedom to provide services

27 Court of Justice, judgment of 12 February 2015, case C-396/13, *Sähköalojen ammattiliitto*, para. 34.

28 Court of Justice, judgment of 14 April 2005, case C-341/02, *Commission v. Germany*, paras. 31–39 (considering regularly paid "13th and 14th months" supplements as elements of minimum rates of pay, but not quality bonuses or bonuses for dangerous and heavy work paid to workers when they are required to carry out additional work or work under certain conditions). See also Court of Justice, judgment of 7 November 2013, case C-522/12, *Tevfik Isbir*, paras. 40–44.

29 *Sähköalojen ammattiliitto*, cit.

30 *Ibid.*, para. 49.

31 *Ibid.*, paras. 53–57.

32 *Ibid.*, paras. 58–63.

and at the same time providing legal clarity on the nucleus of the working conditions applicable to posted workers.[33] However, the subsequent enlargement from 15 to 25 and eventually 28 Member States brought enormous diversity to the Union, bringing together countries with very different wage levels and social security coverage.

At the same time, the Court of Justice had had to rule on several cases involving national legislation protecting workers, and some of these measures were found to be inconsistent with the Treaty provisions on free movement and/or the provisions of the PoW Directive. Most often, the proportionality test proved not to be fulfilled.[34] Various administrative requirements, such as requirements to obtain work permits for posted workers, were considered disproportionate as alternative measures were available that would be less restrictive to free movement, such as obligations to report beforehand on the presence of posted workers, the anticipated duration of their presence and the provision of services justifying the posting.[35] The Court considered other measures justified for the proper enforcement of the posting rules, including requirements for posting undertakings to facilitate controls by retaining on the work site essential documents, such as the employment contract, pay-slips and time-sheets, as well as the obligation to have these documents available in the language of the host Member State.[36]

Importantly, the Court of Justice also recognised that a host Member State may not only invoke the objective of workers' protection, but also the objective to prevent unfair competition on the part of posting undertakings paying their workers at a rate less than the minimum rate of pay.[37] The Court also

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33 Proposal for a Council Directive Concerning the posting of workers in the framework of the provision of services, COM(91) 230 final, p.14. See also Maslauskaite, K. (2014). *Posted Workers in the EU: State of Play and Regulatory Evolution*. Paris: Jacques Delors Institute, Policy Paper 107, available at http://www.institutdelors.eu/wp-content/uploads/2018/01/postedworkers-maslauskaite-ne-jdi-mar14.pdf?pdf=ok; Dhéret, C. and Ghimis, A. (2016). *The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?* Brussels: European Policy Centre, available at http://www.epc.eu/documents/uploads/pub_6475_revision_of_the_posted_workers_directive.pdf?doc_id=1726.

34 See also Syrpis, P. (2016). EU Secondary Legislation and its Impact on Derogations from Free Movement. In: Nic Shuibhne, Koutrakos and Syrpis, eds., *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*. Oxford and Portland: Hart Publishing, pp. 278–296.

35 See, for example, Court of Justice, judgment of 21 October 2004, case C-445/03, *Commission v. Luxembourg,* para. 31; Court of Justice, judgment of 7 October 2010, case C-515/08, *dos Santos Palhota*, paras. 51–60.

36 *Commission v. Germany*, cit., para. 71.

37 *Wolff & Müller,* cit., para. 41. To be noted that the PoW Directive, in recital 5, already referred to the transnational provision of services requiring "a climate of fair competition".

made clear that in so far a host Member State applies measures pursuing an objective of public interest, such as minimum rates of pay, measures intended to facilitate posted workers to usefully assert their rights against their employer should equally be accepted. This is the case, for example, for provisions enabling, in case of contractors making use of a subcontractor, the subcontractor's workers to hold the first undertaking liable for payment of the minimum rate of pay.[38]

Although these rulings confirmed the Court's willingness to preserve workers' protection and fair competition when assessing national measures under the PoW Directive, full trust in the Court's willingness to give adequate weight to workers' rights became undermined by 2007 and 2008 case law on the protection of collective bargaining and collective action in a context of cross-border provision of services. It should be noted that in many Member States matters of pay, including minimum rates of pay, as well as other working conditions are traditionally determined by social partners through collective labour agreements. In its Article 3(1), the PoW Directive already provided that in the construction sector, an undertaking posting workers must not only apply the rights set out in the host Member State's legislation, but also those laid down by collective agreements that have been declared universally applicable.[39] In addition, the increasing presence of workers posted by undertakings from low-wage Member States prompted trade unions to take collective action against such undertakings, amongst which the famous *Laval* case[40] concerning a Latvian undertaking posting workers to Swedish construction sites. Swedish trade unions had initiated negotiations requiring Laval to pay its posted workers the Swedish usual hourly wage. The break-up of these negotiations lead to a blockage of the construction site, following which the dispute was brought to a Swedish court, which referred questions on the compatibility of the collective action with the freedom to provide services to the Court of Justice. Amongst others, the Court had to clarify whether the PoW Directive allows imposing conditions that do not result from universally applicable collective agreements and whether, more generally, other conditions can be imposed than the nucleus of protective rights set out in the PoW Directive.

On the first point, it was indicated above that Article 3(1) of the PoW Directive allows collective agreements that have been declared universally

38 *Wolff & Müller*, cit., paras. 37–40.

39 Under Art. 3(1), this is the case for "the activities referred to in the Annex". The Annex clarifies that this concerns building work relating to the construction, repair, upkeep, alteration or demolition of buildings.

40 *Laval un Partneri*, cit.

applicable to be taken into account when imposing minimum rates of pay in the construction sector. Article 3(8) of the PoW Directive allows Member States to rely also on collective agreements in the absence of a system to declare such agreements universally applicable, provided that these agreements are de facto generally applicable to all undertakings in the industry concerned. The purpose of both provisions is to prevent posted workers from being made subject to collective agreements that local undertakings are not obliged to apply. However, the Swedish situation was rather particular in the sense that no legislation or collective agreements existed containing minimum rates of pay, but only a practice whereby management and labour set the applicable wage rates (not the minimum rates) by way of collective negotiations on a case-by-case basis, at the place of work. In the absence of any public or collectively agreed provision on which foreign service providers could have relied, the Court concluded that there was no question of minimum rates of pay determined in accordance with Article 3(1) and (8) of the PoW Directive.[41] Since the collective action could not be justified by the PoW Directive, it had to be assessed in the light of the Treaty provision on free movement of services. In that context, the Court considered that the negotiations which the collective action sought to impose on Laval were not justified as this employer was already, pursuant to the PoW Directive, required to comply with a nucleus of mandatory rules and faced, in the absence of any transparent regulatory system, excessive difficulties to determine the additional obligations with which it was required to comply as regards pay.[42]

Second, the Court considered in *Laval* that by establishing the minimum protective rights that have to be respected by posting undertaking, Article 3(1) of the PoW Directive does not allow the host Member State to make the provision of services in its territory conditional on the observance of other terms and conditions.[43] Some authors consider that the Court's ruling went against indications in the PoW Directive that the Directive does not prevent conditions which are more favourable to workers,[44] arguing that the Court

41 *Ibid*., paras. 69–71. See also Feenstra, S. (2009). Detachering van werknemers in het kader van het verrichten van diensten – Het arbeidsrechtelijke kader – Richtlijn 96/71/EG. In: Jorens, ed., *Handboek Europese detachering en vrij verkeer van diensten*. Bruges: Die Keure, p. 268.

42 *Laval un Partneri*, cit., paras. 108–110.

43 *Ibid*., paras. 80–81.

44 Art. 3(7) and recital 17 of PoW Directive indicate that the mandatory rules for minimum protection must not prevent the application of terms and conditions of employment, which are more favourable to workers.

transformed into a 'ceiling' what was supposed to be a 'floor'.[45] This alternative interpretation of the PoW Directive is however difficult to square with the PoW Directive's objective to create legal certainty on the rules that a host Member State may impose on foreign service providers. The level of protection which must be ensured to posted workers has indeed been limited to the protective rights set out in Article 3(1) of the PoW Directive, without prejudice to any further-going protection that the posting undertaking would accord them on its own volition or in accordance with the terms and conditions required under the law of the home Member State.[46]

Whereas both conclusions could thus arguably be derived from the PoW Directive's provisions, the *Laval* judgment was badly received in trade unions' circles. For a large part, this can be explained by the fact that the judgment was pronounced only one week after the judgment in the *Viking* case,[47] where the Court equally considered collective action by a trade union to constitute a restriction of free movement that could not be justified by the objective of protecting workers' rights. In two subsequent judgments (*Rüffert*[48] and *Commission v Luxembourg*),[49] the Court also concluded that a host Member State's protective measures were not justified under the PoW Directive.[50] In the light of the increasing posting of workers from low-wage Member States to high-wage Member States, the frustration of trade unions and other advocates of more extensive instruments against "social dumping" can be understood. Still, it can reasonably be argued that the Court did no more than interpret the PoW Directive in accordance with the PoW Directive's double objective to create legal certainty for service providers and ensure workers' protection by laying down a nucleus of protective rights that the host Member State must guarantee to all workers carrying out work on its territory.[51] Interpreting the PoW Directive as allowing

45 See, e.g., Hatzopoulos, V. (2013). Actively talking to each other: the Court and political institutions. In: Dawson, De Witte and Muir, eds., *Judicial Activism at the European Court of Justice*. Cheltenham: Edward Elgar, pp. 121–122.

46 *Laval un Partneri*, cit., para. 81. See also Watson, P. (2014). *EU Social and Employment Law*, cit., p. 299; Feenstra, S. (2009). *Detachering van werknemers in het kader van het verrichten van diensten,* cit., p. 293 *et seq*.

47 Court of Justice, judgment of 11 December 2007, case C-438/05 *Viking*.

48 Court of Justice, judgment of 3 April 2008, case C-346/06, *Rüffert*.

49 Court of Justice, judgment of 19 June 2008, case C-319/06, *Commission v. Luxembourg*.

50 These four judgments are also referred to as the "Laval-Quartet". See Malmberg, J. (2010). *The Impact of the ECJ Judgments on Viking, Laval, Rüffert and Luxembourg on the Practice of Collective Bargaining and the Effectiveness of Social Action.* Brussels: European Parliament.

51 For alternative views on the "Laval-Quartet" rulings, see, for example, Davies, A. C. L. (2008). One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ. *Industrial Law Journal* 37 (2), pp. 126–148; Syrpis, P. and Novitz, T. (2008). Economic

host Member States to impose further-going protective rules would have undermined the effectiveness of the PoW Directive and opened the door to discrimination against service providers exercising their free movement right.[52]

For example, in *Rüffert*[53] the Court had to rule on German legislation, which allowed public tenders for construction projects to be awarded only to undertakings committing to pay their employees the minimum wage prescribed by the collective agreement in the place where the service is provided. In the case at hand, a contract with a German undertaking had been terminated when that undertaking's Polish subcontractor turned out to be paying wages below the level indicated in the collective agreement covering the sector. That agreement had however not been declared universally applicable within the meaning of Article 3(1) of the PoW Directive. Neither could the agreement fall within the scope of Article 3(8) of the PoW Directive, which only applies where – unlike in Germany – there is no system to declare collective agreements universally applicable. Therefore, the Court concluded that the rates of pay fixed by the collective agreement in question could not be considered minimum rates of pay and could under the PoW Directive not be imposed on the posting undertaking.[54] Otherwise, the Court would indeed have allowed the host Member State to impose conditions on posted workers that were not obligatory to local undertakings. In its later *RegioPost* judgment[55] the Court made clear that where minimum wage conditions are effectively fixed by law, even only within a region of the host Member State, it is not against the PoW Directive or free movement to require contractors and their subcontractors to respect those conditions. Unlike in *Rüffert*, the obligation for the employer had in *RegioPost* also been laid down in a transparent and non-discriminatory manner.

IV Clarification of the Rules through the Enforcement Directive

The wage differences that caused posting of workers to increase have unfortunately also led to increased attempts at fraud or circumvention of the rules

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and Social Rights in Conflict: Political and Judicial Approaches to Their Reconciliation. *European Law Review* 33 (3), pp. 411–426, and Barnard, C. (2008). Social Dumping or Dumping Socialism? *Cambridge Law Journal* 67 (2), pp. 262–264.

52 See also Rosas, A. (2010). Finis Europae socialis?. In: Cohen-Jonathan, Constantinesco, Michel, eds., *Chemins d'Europe – Mélanges en honneur de Jean-Paul Jacqué*. Paris: Dalloz, p. 591 *et seq*.

53 *Rüffert*, cit.

54 *Ibid*., para. 31.

55 Court of Justice, judgment of 17 November 2015, case C-115/14, *RegioPost*.

by undertakings seeking to exploit business opportunities with underpaid workers. Circumvention of the posting rules goes from non-compliance with the labour law or social security regulations, which is left undetected due to limited or vague requirements of cooperation and information exchange for national authorities, all the way to the setting up of "letterbox companies" in a Member State with low-wage levels in order to have work carried out in a high-wage Member State by workers posted from the first Member State. To strengthen the enforcement of the PoW Directive, but also to address the developments in the case law on the right to take collective action (read: *Viking* and *Laval*), the Commission started working on two proposals. In March 2012 it proposed a Regulation on the exercise of the right to take collective action (the so-called Monti II proposal)[56] and a Directive on the enforcement of the PoW Directive, which avoided reopening negotiations on the provisions of the PoW Directive itself.[57] The first proposal was withdrawn after huge opposition from trade unions and national parliaments making use of the yellow card procedure foreseen in the Subsidiarity Protocol.[58] The second proposal was adopted in May 2014 by the European Parliament and the Council as Directive 2014/67/EU on the enforcement of Directive 96/71/EC (the "Enforcement Directive").[59]

In order to prevent abuse and circumvention of the posting rules, the Enforcement Directive calls upon national authorities to assess whether workers posted on their territory are genuinely posted, that is have a genuine employment relationship with the posting undertaking established in the home Member State, which in turn should genuinely perform substantial activities in that home Member State.[60] The host Member State must make information on the terms and conditions imposed on posted workers available free of charge in a clear, transparent, comprehensive and easily accessible way, including on an

56 Proposal of 21 March 2012 for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

57 Proposal of 21 March 2012 for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final.

58 See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Art. 7(2).

59 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), *OJ L 159*, 28.5.2014, p. 11–31.

60 *Ibid.*, Art. 4.

official national website.[61] The Enforcement Directive further lays down obligations on mutual assistance, cooperation and monitoring and on the cross-border enforcement of administrative penalties and fines. Importantly, the Enforcement Directive also introduced rules on subcontracting.[62]

V Revision of the Posting of Workers Directive

The Enforcement Directive laid the ground for improved information of service providers and better enforcement of the protective rules set out in the PoW Directive but did not lead to any changes in these rules. Since the PoW Directive requires posted workers to be guaranteed only minimal rates of pay in the host Member State, posted workers do not necessarily benefit from similar protection in terms of wages as local workers. As indicated above, differences in wage levels have been more marked following the accession of Eastern European Member States. Against that background, the Juncker Commission issued in March 2016 a proposal for a "targeted review" of the PoW Directive (the "2016 Proposal").[63] The Commission put forward further clarifications of social security rules in situations of posting in a proposal submitted in December 2016 for a revision of Regulations 883/2004 and 987/2009 on the coordination of social security systems.[64]

V.1 *The Commission's 2016 Proposal*

As already announced by Jean-Claude Juncker in July 2014, the Commission's proposal was presented as a "targeted" revision of the PoW Directive in view of ensuring fair working conditions for all workers. The essence of the proposal has been to replace the host Member State's obligation to impose minimum rates of pay by the requirement to have all legislation and collective agreements on remuneration applicable to posted workers, that is to say to have posted workers receiving wages determined in accordance with the same rules as local workers. For that purpose, relevant provisions of collective agreements

61 *Ibid.*, Art. 5.

62 See fn. 100 and accompanying text.

63 Proposal of 16 December 1996 for a Directive amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

64 Proposal of 13 December 2016 for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016) 815 final.

declared universally applicable should be applied also outside the construction sector.[65] Guaranteeing the principle of "equal pay for equal work at the same place" not only aims at ensuring adequate protection of workers' rights, but also at strengthening the legitimacy of the internal market by ensuring fairness in the market. Since so-called social dumping can lead to the downgrade of existing labour rights and wage levels, the initiative also aimed at preventing distortion of national labour markets and promoting upwards social convergence.

Since it had already been difficult in 1991 to convince the Member States of the need to introduce rules for posted workers, it came as no surprise that in a Union with twice as many Member States, the appetite for another change of the rules applied to posted workers was not universally shared. Applying the Subsidiarity Protocol, fourteen parliamentary chambers from eleven mostly Eastern European Member States[66] issued reasoned opinions alleging that the revision would breach the principle of subsidiarity. Arguing that wage differences constitute a legitimate factor for competition between service providers, they considered the principle of equal pay for equal work at the same place to violate the Treaty provisions on the internal market. Again, the parliaments collected sufficient negative opinions to trigger the "yellow card" procedure, requiring the Commission to review its proposal. In its response,[67] the Commission pointed out that the proposal was not in breach of subsidiarity since posting of workers is by nature a cross-border so that an obligation to apply rules in all the Member States and across sectors could only be established at Union level. In the Commission's view, its proposal also remains in line with the spirit of the internal market as applying the same mandatory rules to all workers performing work at the same place also ensures undertakings to be subject to the same rules across the Union.

Since the Commission did not amend or withdraw its proposal, the legislative discussions on the 2016 Proposal could start, both in the Council, under successive Presidencies, and in the European Parliament, within its Employment Committee. Early 2017, an agreement in the Council seemed within reach until certain Member States hardened their position, including France (following President Macron's election), but also other Member States

65 See also below for the situations under which certain agreements that have not been declared universally applicable may be taken into account.

66 Negative opinions came from Denmark and 10 Central and Eastern European Member States (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and the Slovak Republic).

67 Communication COM(2016) 505 final of 27 July 2016 from the Commission on the posting of workers Directive, with regard to the principle of subsidiarity.

expressing discontent with the proposals on specific rules for posting in the road transport sector that the Commission tabled end May 2017.[68] By October 2017, however, the way had been paved for each of the co-legislators to find agreement on a position on the basis of which interinstitutional negotiations could start: the Council in a general approach adopted late-night after a memorable discussion on 23 October 2017 in the Employment and Social Affairs Council,[69] the Parliament's Employment Committee with the adoption on 16 October 2017 of a report prepared by the two co-rapporteurs.[70] Importantly, these provisional agreements also received support in several Eastern European Member States,[71] attesting to the balance struck between the interests of enhancing workers protection and preserving free movement opportunities.

Under the Estonian and then the Bulgarian Presidency of the Council, the negotiators of the European Parliament, the Council and the Commission met in eight "trilogue" sessions, the Commission being represented by the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, who had initiated the revision in 2016. After a breakthrough on the main political issues in the early hours of 1 March 2018, a provisional agreement was reached on 19 March 2018 on the full text of the Directive revising the PoW Directive (referred to hereinafter as the "Revising Directive"[72]; the amended provisions of the PoW Directive are referred to as the "Revised PoW Directive"). Crucial for reaching that final agreement was the fact that the Revising Directive will only become applicable to the sector of road transport once the proposed specific rules for posting in that sector have been adopted and become applicable.[73] Following the endorsement of that provisional agreement in the

68 Proposal of 31 May 2017 for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, COM(2017) 278 final. At the time of writing, the political agreement reached on this proposal in December 2019 still had to be formally approved by the European Parliament and the Council, see fn. 26 supra.

69 General approach agreed by the Employment, Social Policy, Health and Consumer Affairs Council on 23 October 2017, Council doc. 13612/17 of 24.10.2017.

70 Report of the Committee on Employment and Social Affairs, doc. A8-0319/2017 of 19 October 2017 (Rapporteurs: Elisabeth Morin-Chartier and Agnes Jongerius).

71 Bulgaria, the Czech Republic, Estonia, Romania and the Slovak Republic voted in favour in the October Council, whereas Croatia (together with Ireland and the UK) abstained and only Hungary, Latvia, Lithuania and Poland voted against. Pursuant to Art. 53 TFEU, the ordinary legislative procedure applied, in which the Council votes by qualified majority.

72 Directive 2018/957, cit.

73 See Revising Directive, Art. 3(3). The review that the Commission must undertake within 5 years of the Revising Directive's entry into force will include an assessment of the

European Parliament on 29 May 2018 and in the Council on 21 June 2018 – with even broader geographical support than the negotiation mandates[74] – the PoW Directive was adopted on 28 June 2018. Meanwhile, Hungary and Poland have sought the annulment of the Revised PoW Directive, considering that the protection granted to workers exceeds what is possible under the Treaty provisions on free movement of services.[75] This legal challenge does not suspend the application of the PoW Directive, which will apply as from 30 July 2020.[76] As set out below, this contribution argues that the Revised PoW Directive has duly remained within the boundaries of its legal basis and does not conflict with the Treaty provisions on free movement.

V.2 *Revised Rules for the Posting of Workers*

Besides replacing the requirement to pay posted workers at least "minimum rates of pay" by the requirement of having posted workers' wages completely defined in accordance with the host Member State's laws and (universally applicable) collective agreements, the 2016 Proposal also put forward a higher level of protection for workers posted for a long-term period, defined as any period exceeding the 24 months period during which workers remain covered by the social security legislation of the home Member State. In addition, the Commission proposed allowing Member States to extend the Directive's requirements on wages to workers employed in subcontracting. In the course of the legislative discussions, those issues have been intensively debated while new issues were put on the table, such as the clarification of the status of posting allowances and collective agreements, guarantees of enforcement with respect to certain categories of posted workers, the conditions under which the posting rules would become applicable to the road transport sector and the general conditions for transposition and entry into force of the proposed Directive. Interestingly, the European Parliament initially also requested to have the objective of increased workers protection reflected in the legal basis of the

need for further measures in the light of developments concerning this "lex specialis" (for example, in case the legislative negotiations on that "lex specialis" would not yet have been successful). *Ibid.*, Art. 2(2). For all other sectors, the Revising Directive will be applicable in all Member States at the expiry of the two year transposition period. *Ibid.*, Art. 3(1).

74 Compared to the vote in Council of October 2017 (see fn. 71), at the June 2018 meeting of the Council just Hungary and Poland voted against, with only Croatia, Latvia, Lithuania and the UK abstaining.

75 Case C-620/18 *Hungary* v *European Parliament and Council* (see OJ C 428, 26.11.2018, p. 31) and case C-626/18 *Poland* v *European Parliament and Council* (see OJ C 4, 07.01.2019, p. 12).

76 Revising Directive, Art. 4.

proposed Directive, which, in its view, had to be considered not merely as the implementation of free movement provisions but also as pursuing social policy. However, as explained below, the increase in workers protection resulting from the revision has remained within the internal market legal basis of the initial PoW Directive.

V.3 *Remuneration, Posting Allowances and Collective Agreements*

As indicated above, the essential change of the revision has been to change the notion of "minimum rates of pay" applicable to posted workers under Article 3(1)(c) of the PoW Directive to the notion of "remuneration", defined as "*all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provisions, or by collective agreements or arbitration awards, which, in that Member State, have been declared universally applicable*". With the revised Article 3(1)(c) the nucleus of rights guaranteed to posted workers therefore includes all the elements of remuneration as defined in the host Member State, and not only minimum rates of pay. Whereas this provision eliminates wage competition between posted workers and local workers, it will lead to a wage increase for workers posted to high-wage Member States. By reducing the risk of unfair competition based on low working conditions, the Revised Directive also ensures a "level playing field" for all businesses concerned. All in all, the revision therefore does not change the character of the PoW Directive as an instrument ensuring legal certainty for cross-border service providers, but it increases the level of ambition of that instrument from a social perspective, going from requiring employers to guarantee a minimum level of protection of posted workers to a requirement to make posted workers benefit from the same rules on wages that apply to other workers carrying out the same kind of work.

Clearly, the proposed provision on "remuneration" does not align the levels of wages across the Member States, which is an area that the Treaty expressly excludes from the Union's harmonisation powers in social matters.[77] During the legislative discussions, both the European Parliament and the Council had no difficulty in accepting the notion of "remuneration", not however without emphasizing in the agreed text that setting rules on remuneration and wages remains an exclusive competence of the Member States and social partners.[78] Wages of posted workers will still be set by their employment contract, which is usually concluded under the law of the home Member State, and workers'

77 Art. 153(5) TFEU, according to which the powers set out in this Article do not apply to pay.
78 Revising Directive, recital 17.

salaries may therefore still differ, depending on the rules and practices of the Member States in question and of their employer. Still, once the Revised Directive applies, employers will have to pay their posted workers not only by complying with the rules on remuneration of the law applicable to the employment contract (home Member State legislation) but also by ensuring that the remuneration paid during the posting assignment is at least equivalent to the remuneration that worker would be entitled to under the relevant legislation and collective agreements of the host Member State. Upon the Council's request, the preamble to the Revised Directive clarifies how to assess the compatibility of the salary paid under the home Member State's rules with the elements of remuneration set by the host Member State's rules. In line with the Court's case law on minimum pay,[79] the posted worker's gross salary will need to be matched up to the gross amounts of pay required by the rules on "remuneration" rather than to individual elements of remuneration required by the host Member State.[80] As under the existing rules,[81] allowances specific to the posting should be considered part of the remuneration, unless they compensate for expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.[82] If, for example, the relevant collective agreement in the host Member State requires the posted worker to be paid a monthly salary of 1500 EUR and daily allowances of 300 EUR, whereas that worker is, under home Member State rules, entitled to a salary of 500 EUR but also to a seniority allowance and a flat-rate posting allowance of 100 EUR and 1200 EUR, respectively, it is the gross amount of 1800 EUR paid to the worker under home Member State rules that must be compared with the gross amount of remuneration required under the host Member State rules (also 1800 EUR in the example).

By having posted workers benefit from the elements of "remuneration" applicable to local workers in the host Member State – translated politically as the principle of equal pay for equal work at the same workplace – the Revising Directive is likely to increase salaries for posted workers, especially those posted from lower-wage Member States to higher-wage Member States. During the legislative discussions, both the European Parliament and the Council also insisted on introducing amendments and clarifications on what constitutes remuneration and on the precise status of allowances paid on the top of salaries. The sensitivity of the issue of allowances may be explained, to a certain extent,

79 *Commission v. Germany*, cit., para. 29.
80 Revising Directive, recital 18.
81 PoW Directive, Art. 3(7).
82 Revising Directive, recital 18.

by the phenomenon of posting undertakings seeking to increase their competitive advantage by paying lower social contributions and/or taxes and, for that purpose, preferring to pay their workers relatively low salaries supplemented with high allowances. To the extent that posting allowances do not concern expenditure actually incurred, they do qualify as remuneration for the purpose of the host Member State rules. This does not mean that the host Member State determines whether such allowances must be paid. It is indeed for the law or collective agreements of the home Member State to determine whether such allowances are to be paid at all, together with the amount of such allowances. In order to ensure that posting allowances taken into account for the purposes of remuneration under host Member State rules genuinely constitute part of the workers' remuneration, and not compensation for incurred expenditure, an amendment from the Council has been adopted according to which posting allowances are presumed to be compensation for expenditure actually incurred. Indeed, for an allowance to be considered part of remuneration, this must clearly result from the terms and conditions applicable to the employment relationship.[83] If the parts of the allowance constituting either reimbursement or remuneration are not defined in the applicable legislation, collective agreement or contractual arrangements, the entire allowance will be considered to be paid in reimbursement.[84]

Concerning allowances that constitute reimbursement of expenditure, the co-legislators added two more elements in the Revising Directive. First, upon a request from the Council, the nucleus of protective rights in Article 3(1) of the PoW Directive is complemented with a reference to allowances reimbursing travel, board and lodging expenditure incurred by posted workers that have to travel to and from their regular place of work within the host Member State.[85] In the above-mentioned Finnish case, the Court of Justice had already clarified that where a host Member State requires such posting allowances to be paid, they are part of the minimum wage that under the PoW Directive must be paid to local workers and posted workers alike.[86] This will now also be the case for the application of the notion of "remuneration". It has also been clarified that all this should not lead to posted workers receiving double payment for the same expenses.[87] Second, with respect to all allowances reimbursing expenditure for travel, board or lodging, the Revising Directive confirms the

83 Revised PoW Directive, Art. 3(7), new third subparagraph.
84 See also Revising Directive, recital 19.
85 See Revised PoW Directive, Art. 3(1)(i).
86 See supra fn. 30 and accompanying text.
87 Revising Directive, recital 9 (requested by the European Parliament).

employers' obligation to reimburse the workers for the expenditure incurred, in accordance with the national law applicable to the employment relationship, which is normally the home Member State law.[88] This confirmation has been requested by the European Parliament.[89]

Regarding the nucleus of protective rights, it should also be mentioned that a request of the Council has been accepted to also include in Article 3(1) of the PoW Directive the "conditions of workers' accommodation where provided by the employer to workers away from their regular place of work".[90]

In the Commission's proposal, posted workers' rights were to be increased not only by imposing the host Member State's rules on "remuneration", but also by making wage and working conditions laid down in collective labour agreements applicable. Under the existing PoW Directive, that was already the case in the construction sector, but not in other sectors. The Commission's proposal left the conditions unchanged allowing collective agreements to be applicable, that is to say only those agreements which have been declared universally applicable or, in the absence of a system for declaring agreements universally applicable, those which are generally applicable in the geographical area or in the industry concerned.[91] In order to avoid discrimination between local and posted workers, Article 3(8) of the PoW Directive allows for the application of collective agreements in a Member State where no system of declaring agreements universally applicable exists (read: Sweden) only if equality of treatment is ensured in their application. The European Parliament insisted that also working conditions set out in non-universally applicable collective agreements should be applied to posted workers. This would have allowed for the reversal of the Court's ruling in the above-mentioned *Rüffert* case, where the Court did not allow Germany to impose minimum rates of pay set out in an agreement that was not declared universally applicable.[92] Eventually, the co-legislators agreed to slightly extend the conditions set out in Article 3(8) to collective agreements that have not been declared universally applicable, so that, even in a Member State where that possibility exists, collective agreements that have not been declared universally applicable can be applied to posted workers falling within their sectorial or geographical scope of application, but

88 See Revised PoW Directive, Art. 3(7), second subparagraph.

89 Initially, the European Parliament proposed language that remained unclear as to the basis for the obligation to reimburse, leaving it open whether the host Member State could introduce such obligation (see amendment 32 of the Report, supra fn. 70).

90 See Revised PoW Directive, Art. 3(1)(h).

91 PoW Directive, Art. 3(1) and (8).

92 Supra supra fn. 54 and accompanying text.

still only if the conditions of equal treatment set out in Article 3(8) are fulfilled.[93]

It follows that, although the Commission's proposal already provided for increased protection of workers, the co-legislators accepted further provisions that are even more beneficial for the posted workers, while also introducing more clarity and transparency.

V.4 *Long Term Posting*

Whereas the PoW Directive states that posting of workers is of a temporary nature, it does not clarify the notion "temporary". In Regulation (EC) No 883/2004 on the coordination of social security systems, workers posted from a Member State for a period longer than 24 months are considered no longer having the required link with that Member State to be subject to that Member State's legislation for the purposes of social security coverage. By reference to that rule, the Commission had proposed to consider workers posted for longer than 24 months as falling under the host Member State's legislation for the purposes of determining their working conditions.[94] This alignment would have provided full legal clarity to the workers, the employers and the authorities.

During the legislative discussions, the Council agreed with the principle of having long-term postings made subject to the labour law of the host Member State, with exceptions as regards application of the rules on the conclusion and termination of contracts and on contributions for supplementary pension schemes. That text made it into the final agreement of the co-legislators.[95] However, the actual duration of the period triggering the change in regime has been the source of fierce debates, particularly because that period has been communicated by many governments and stakeholders as a maximum period that would prohibit longer posting assignments instead of being a trigger towards a (slightly) different legal regime.[96] In the 2016 campaign for the French

93 See the changes in Revised PoW Directive, Art. 3(1) and (8).

94 The 2016 Proposal considered that, in case of an anticipated or effective duration of the posting exceeding 24 months, the worker should be deemed to habitually carry out its work in that Member State, which is the default connecting factor to determine the law applicable to an employment relationship. See Art. 8 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177*, 4.7.2008, p. 6–16.

95 See Revised PoW Directive, Art. 3(1a). The co-legislators also changed the Commission proposal so as to take account only of the effective duration of a posting assignment, not its anticipated duration, which probably would have been difficult to monitor.

96 Given the extensive list of areas already covered by the nucleus of protective rights applicable to posted workers pursuant to Art. 3(1) of the PoW Directive, the areas of labour law

presidency, Emmanuel Macron thus defended the need for a maximum period of 12 months. Following long and difficult discussions, the Council eventually agreed on 23 October 2017 to lower the 24 months threshold proposed by the Commission to 12 months, with an extension of 6 months to be granted to service providers submitting a "motivated notification" to the host Member State authorities. At the same time, the European Parliament had agreed to keep the Commission's reference to 24 months, while allowing for an extension of that period, but only upon assessment by the authorities of a reasoned request thereto. That amendment relied on the consideration that although the average duration of posting assignments does not exceed 4 months, high skilled professionals are sometimes seconded for longer periods than two years, so that lowering the threshold would create unreasonable burden for that kind of posting assignments. Eventually, the co-legislators agreed to keep the reference for the long-term posting at 12 months, with a quasi-automatic extension of 6 months upon a "motivated notification" by the service provider. In order to emphasize that Member States cannot prohibit posting assignments longer than 12 (or 18) months, a recital has been inserted which reminds the Member States that any measure restricting such posting assignments must be compatible with the freedom to provide services.[97]

V.5 *Abuse and Strengthened Enforcement of the Posting of Workers Directive*

Given the strengthened framework laid down in the 2014 Enforcement Directive, the 2016 Proposal did not as such tackle issues of enforcement of the posting rules. It however included a provision on subcontracting since posting of workers through subcontracting chains is often used to circumvent posting rules.

The system whereby a principal contractor outsources tasks or activities to other companies or self-employed workers is a common business model across the Union, especially in sectors like construction and road transport, where there is also a high involvement of posted workers. The Commission estimated that in the construction sector, in 2011, payments by undertakings to subcontractors ranged between less than 15 per cent (in Romania, Poland, Portugal, Italy and Denmark) to over 30 per cent (Slovakia, Czech Republic and the UK) of turnover.[98] In a cross-border subcontracting chain, an undertaking providing

for which long-term posted workers would see a shift in applicable law is indeed limited (for example, entitlements to leaves, such as parental leave, not included in Art. 3(1)(b)).

97 Revising Directive, recital 10.

98 See Commission Staff Working Document – Impact Assessment accompanying the 2016 Proposal, SWD(2016) 52 final, point 2.4.1.

services may outsource an activity to another company to which workers are posted from another Member State or directly to a subcontractor established in another Member State. In a context of weak cooperation between national authorities in matters of social security and labour law, subcontracting may be instrumental in organising circumvention of rules and fraud.[99] The PoW Directive does not contain specific rules for subcontracting chains, leaving certain posted workers in sub-contracting chains in a situation of particular vulnerability. The 2014 Enforcement Directive covered the gap in subcontractors' liability by providing a legal framework for posted workers to hold the undertaking that subcontracted with their employer liable for any outstanding payments.[100] Still, it only provided for joint liability in direct subcontracting situations, without ensuring protection of posted workers throughout the entire subcontracting chain. It indicated however that Member States may adopt further going measures if that is done on a non-discriminatory and proportionate basis.[101]

To better protect posted workers in subcontracting situations, the Commission had proposed to broaden the possibility for Member States to regulate subcontracting. The Proposal provided that, whenever a host Member State requires undertakings to subcontract only to companies that guarantee certain terms and conditions of employment covering remuneration, that Member State could extend such obligation also to undertakings subcontracting with companies established in another Member State that post workers to the host Member State. The proposed provision only contained a possibility, not an obligation for Member States to extend workers' protection to subcontracting involving posted workers. However, it did not receive any support in the Council and, even though the Parliament supported it, the widespread opposition amongst the Member States made it impossible for the co-legislators to introduce any obligation for subcontractors to follow the rules on remuneration. As a matter of compromise, the co-legislators agreed that in the context of a future revision of the Directive, the Commission is to assess whether further measures in subcontracting are needed to ensure workers' protection and a level playing field for businesses.[102]

In its Proposal, the Commission also tackled another situation in which posting of workers is prone to abuse, that is posting of workers by temporary

99 See, for example, Court of Justice, judgment of 6 February 2018, case C-359/16, *Altun and Others*.

100 Enforcement Directive, Art. 12.

101 See Enforcement Directive, recital 36, *in fine*.

102 Revising Directive, Art. 2(2).

work or placement agencies, which hire out workers to user undertakings established or operating in another Member State. The PoW Directive also applies to such posted workers, subjecting them to the host Member State's minimum rates of pay and other working conditions set out in Article 3(1). Article 3(9) of the PoW Directive also goes further by allowing Member States to provide that temporary agency workers posted on their territory must be fully subject to the same working conditions as local temporary workers. In the 2016 Proposal, the Commission suggested to make this option obligatory, in line with Article 5 of the Temporary Agency Work Directive,[103] which already establishes the obligation for a user undertaking to grant domestic temporary workers the same basic working and employment conditions as permanent workers in the same job. The co-legislators agreed with this proposal,[104] so that, with respect to the basic working and employment conditions set out in the Temporary Agency Work Directive, posted workers are to be guaranteed equal treatment with local workers. Moreover, the co-legislators added an optional clause according to which Member States may ensure posted temporary workers also equal treatment with respect to the other working and employment conditions.[105] All this does not only improve the situation of the workers concerned, but also ensures a level-playing field for the agencies concerned. Through this equal treatment clause, posted temporary workers may actually benefit from provisions in collective agreements that would otherwise not be applicable to them, for example, collective agreements concluded only at company level or sectorial agreements that have not been declared universally applicable, thereby going beyond the more circumscribed application foreseen for collective agreements under Article 3(8) of the Revised PoW Directive.[106]

The co-legislators added the obligation for the user undertaking to inform the temporary work agencies of the terms and conditions applied by it.[107]

Another issue related to the temporary working agencies, is so called "double" or "chain" posting, which occurs when a worker posted by an agency to a user undertaking in a host Member State, is then asked by that user undertaking to carry out work in a third Member State. This situation often creates legal uncertainty as, first, the agency is not always informed of the "double" posting, and, second, national authorities have difficulties in determining the rights on

103 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, *OJ L 327*, 5.12.2008, p. 9–14.

104 Revised PoW Directive, Art. 3(1b).

105 See Revised PoW Directive, Art. 3(9).

106 See supra fn. 93 and accompanying text.

107 Revised PoW Directive, Art. 3(1b). See also Revising Directive, recital 12.

remuneration and working conditions applicable to such worker. Since Article 1(3) of the PoW Directive requires the existence of an employment relationship between the undertaking making the posting and the posted worker during the whole period of posting, it could be argued that the "second" sending abroad of the worker is not "genuine" and should not be considered to be posting within the meaning of the Directive. The question then arises, however, which working conditions are applicable to that worker in the third Member State. Building upon amendments suggested by the European Parliament, the co-legislators agreed to provide that in such a situation of double posting it must be considered that the worker is posted in the third Member State and that the temporary agency is the posting undertaking responsible for guaranteeing that worker the rights to which he or she is entitled under the PoW Directive and the Enforcement Directive.[108] In order to make that rule enforceable, a provision has been added according to which the user undertaking must inform the temporary agency of posted workers that will be temporarily carrying out work in a Member State other than the one to which they have been posted. These provisions will make a real difference on the ground by clarifying the application of the posting rules in situations currently in a "grey zone". By making the temporary agency as employer responsible for any subsequent posting, the PoW Directive will contribute to preventing circumvention of rules through chain posting of temporary workers.

In addition to these changes regarding temporary agency workers and chain posting, the Revised Directive also contains strengthened rules on access to information and fighting fraud and abuse in situations of non-genuine posting. As indicated above, the Enforcement Directive already establishes an obligation for a host Member State to ensure that information on the applicable terms and conditions of employment is made generally available in a transparent way. The co-legislators agreed that the host Member State's authorities must publish on the official website foreseen in the Enforcement Directive accurate and up to date information on the constituent elements of remuneration.[109] Upon request of the European Parliament, a provision was added to ensure that workers that are not genuinely posted are not left without any protection. The difficulty of such provision is that workers which are found not to be in a situation covered by the PoW Directive may, for example, be permanently employed in a host Member State instead of temporarily posted, or self-employed. Article 4 of the Enforcement

108 Revised PoW Directive, Art. 1(3), new second and third subparagraphs.

109 See Revised PoW Directive, Art. 3(1), new third to fifth subparagraphs.

Directive already provides the Member States with criteria for assessing whether the relationship between an undertaking and a worker is a genuine employment relationship. The co-legislators eventually agreed that in a situation where after such assessment by the host Member State it is established that an undertaking is improperly or fraudulently creating the impression that a worker is posted in accordance with the PoW Directive, that Member State shall ensure that the worker benefits from "relevant law and practice" and not be subject to "less favourable conditions than those applicable to posted workers".[110] Whereas this provision does not clearly indicate which conditions should be applied to a worker who, by definition, falls outside the scope of the PoW Directive, it nonetheless requires Member States to ensure that such workers do not stay in a disadvantaged situation as compared to posted workers.

As posting of workers is by definition a transnational issue, certain cases of circumvention and abuses may remain undetected or not penalised due to lack of cooperation and adequate information exchange between the competent authorities of the Member State concerned. The PoW Directive already created in Article 4(1) an obligation for the Member States to provide for cooperation between public authorities and to share information in fighting unlawful and abusive transnational activities. The Enforcement Directive further developed these cooperation requirements. Also the Commission's proposal on revision of the Regulations on social security coordination provides for a strengthening of the requirements on information exchange and verification of the socials security status of posted workers to prevent unfair practices or abuse.[111] To enhance cooperation and ensure better enforcement of cross-border mobility situations, the Commission submitted on 13 March 2018 a proposal for establishing a European Labour Authority (ELA),[112] which Commissioner Thyssen managed to have adopted by the European Parliament and the Council before the 2019 European elections.[113] Although this agency is meant to facilitate cooperation between the Member States' enforcement authorities in all areas of labour mobility and social security coordination, its expertise and network should certainly ensure enhanced enforcement of the posting rules, more

110 Revised PoW Directive, Art. 5, fourth and fifth subparagraph.

111 See the proposed revision of Arts 5, 14, 16 and 19 of Regulation 987/2009, cit.

112 Proposal of 13 March 2018 for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM(2018) 131 final.

113 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, *OJ L 186*, 11.7.2019, p. 21 – 56.

intense cooperation between the competent national authorities through liaison officers working within the Authority and eventually stronger protection of posted workers against abuses and fraud.[114] Cooperation at Union level between the authorities responsible for labour law and social security issues is essential to guarantee proper enforcement of the existing rules and prevent fraud and abuse.

Given its relevance for the situation of posted workers, it is unfortunate that the co-legislators have not been able to finalise the revision of the social security coordination Regulation before the 2019 elections. In March 2019, the negotiators for the Council and the European Parliament reached a compromise agreement, which was supported in the Council by a coalition of Eastern European and Mediterranean states but eventually did not obtain the required qualified majority to be formally adopted.[115] Likewise, a political agreement on the proposed reform of road transport rules could not be reached before the elections, but only in December 2019 – a file in which the opposition of interests between "sending" and "receiving" Member States has been exacerbated by differences between centrally located and more peripheral Member States.[116] The sensitivity of these two other labour mobility files demonstrates the difficulties that the Juncker Commission surpassed when reaching agreements on the Revised PoW Directive and the European Labour Authority. As regards the ELA – for which the founding Regulation has been adopted within a very short period of time – it is important to note that the Commission deliberately avoided to reduce it to an enforcement tool for 'receiving' Member States focused on combating breaches of EU rules by foreign employers.[117] The

114 See Van Nuffel, P. (2019). De Europese Arbeidsautoriteit: een nieuw agentschap voor eerlijke arbeidsmobiliteit binnen de interne markt. In: Verschueren, ed., *Detachering – Nieuwe ontwikkelingen in het Europees recht vanuit Belgisch en Nederlands perspectief*. Brugge: Die Keure, pp. 227-258.

115 On 21 June 2018, the Council approved a negotiating mandate ("general approach") whereby only Austria, Belgium, Cyprus, Denmark, Germany, Luxembourg, Malta and the Netherlands voted against or abstained. After the European Parliament also approved a negotiating agreement, the negotiators of the Parliament, the Council and the Commission reached a provisional agreement on 19 March 2019, for which however there was no qualified majority among Member States on 29 March 2019 when, in addition to the aforementioned Member States, the Czech Republic, Hungary, Poland and Sweden also indicated that they could not support the agreement. The European Parliament decided at its last plenary session on 18 April 2019 not to vote on the provisional agreement.

116 The Council and the European Parliament had adopted a negotiating position on this file on 4 December 2018 and 4 April 2019 respectively, and found an agreement on 12 December 2019, see fn. 26 supra.

117 See Van Nuffel, P. (2019). De Europese Arbeidsautoriteit, cit.

Commission rather sought to market the ELA as an agency whose first task is to support, guide and inform employers and employees about their rights and obligations in cross-border situations, including by making the ELA responsible for promoting cross-border employment and coordinating the existing European network of employment services (EURES).[118] The ELA should thus support rather than restrict cross-border services and labour mobility in the internal market. The ELA will in addition provide national enforcement authorities with a range of tools to facilitate the application of EU legislation in situations of cross-border labour mobility. As follows from its mandate, those situations includes posting of workers but also free movement of workers and the coordination of social security systems – thereby essentially ensuring the social protection of all mobile citizens across the Union.

VI Conclusion

The PoW Directive remains a delicate piece of legislation as it constitutes a compromise struck between the conflicting interests behind opening up the internal market and safeguarding national protective social standards. It remains therefore a significant achievement that a revision of that Directive has been agreed upon without unduly sharpening the divisions between lower-wage and higher-wage Member States and with express support from many low-wage Member States.

Towards those who advocate that the Revised PoW Directive should have been transformed into a social policy instrument based on the Treaty's social policy legal basis, it must be stressed that the fact that the PoW Directive also promotes the internal market and free movement should not be perceived as making workers' rights subordinate to economic interests. It is true that the Court of Justice, when interpreting the PoW Directive, has found several national measures aimed at protecting workers' rights to be contrary to the PoW Directive. However, the Court has been interpreting the available legal texts in the light of the Treaty provisions, with the principles of non-discrimination and proportionality as guiding values. Moreover, the Court has equally recognised that the social goals pursued by the PoW Directive are not only the protection of posted workers' rights, but also the preservation of fair labour markets and combating social dumping,[119] implying that social rights of local workers and,

118 See Regulation 2019/1149, Art. 2.

119 See supra fn. 37 and accompanying text.

more generally, the preservation of Member States' social protection systems are to be taken into account as well. Together with the Enforcement Directive, the Revised PoW Directive has now stepped up the level of social protection by introducing the principle of equal pay for equal work in the same place, while still attaining the objective of preserving legal certainty for undertakings providing services in the internal market. Time will show how the provisions of the Revised PoW Directive will be interpreted, but the stronger social dimension will not be left unnoticed.

As indicated, the 2016 revision of the PoW Directive must be seen in the larger framework of the Juncker Commission's ambitions for ensuring fairer labour mobility, which also included the proposed reform of the Regulations on social security coordination, the "lex specialis" on the application of the posting rules on the road transport sector and the establishment of the ELA. Compared to the initial hostile reactions that the 2016 Proposal received, there is now broad acceptance, also in many low-wage Member States, that stepping up the social protection of posted workers is not an expression of economic protectionism, but a change necessary for the internal market to preserve its social legitimacy. The conditions imposed by the PoW Directive to cross-border service providers are also in line with changes made by the Lisbon Treaty to certain parameters in the Treaty framework with the recognition of the legally binding nature of the Charter of Fundamental Rights, including its Article 31 on fair and just working conditions, and the introduction of Article 9 TEU, according to which the Union is to take the requirement of adequate social protection into account in defining and implementing its policies and activities. These changes reflect the understanding that economic growth and liberalisation must go hand in hand with adequate social protection. The same understanding led the European Parliament and the Council to accept in November 2017 the Commission's call for a joint proclamation of a European Pillar of Social Rights,[120] which constitutes a political confirmation of the recognition of the need for upward social convergence across the Union. The European Pillar of Social Rights is indeed based on the understanding that economic and social progress go hand-in-hand and that upward social convergence in the Union is not opposed to, but rather dependent on the further development of the internal market, the modernisation of labour markets and the enhanced sustainability of social security

120 For the text, see https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

systems. It is against this background that, as Jean-Claude Juncker indicated when announcing the reform of the Pow Directive,[121] free movement should be seen as an economic opportunity, and not as a threat, and that labour mobility should be promoted, especially where there are persistent vacancies and skills mismatches.

121 See Juncker, J-C (2014). *A New Start for Europe,* cit.

PART 3

EU Citizenship beyond Movement

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CHAPTER 12

The Pernicious Influence of Citizenship Rights on Workers' Rights in the EU – The Case of Student Finance

*Araceli Turmo**

1 Introduction

The need to move beyond an understanding of EU citizenship as a component of freedom of movement within the internal market is emphasized throughout EU Citizenship and Federalism: The Role of Rights. As Dimitry Kochenov writes, EU citizenship cannot be restricted to such a role and must take on a different meaning if it is to fulfil its potential.[1] However, this is not, as it often appears to be, only apparent in the case law related to 'inactive' or static Union citizens. The free movement of workers can also suffer from the current uncertainties through the insidious influence of integration tests initially applicable only outside the scope of Art. 45 TFEU. In that sense, it is not entirely true that the CJEU 'might reasonably now believe that it has done its job'[2] in creating a single physical space in the Union through free movement rules. Such a statement does not take into account the potential for reversal in the rights associated with free movement within the internal market. Indeed, the absence of a true shift towards a new vision of citizenship and solidarity within the European Union can also produce unfortunate regressions in citizens' rights where they used to be most well-established.

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1 Kochenov, D., On Tiles and Pillars: EU Citizenship as a Federal Denominator. In Kochenov, D., ed. (2017). *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, pp. 3–81.

2 To borrow the phrase used in Sarmiento, D., Sharpston, E. (2017), European Citizenship and Its New Union: Time to Move On? In Kochenov, D., ed., *EU Citizenship and Federalism*, cit., pp. 226–242, p. 230.

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Since the early 2000s, a limited, but noticeable trend of European Court of Justice (CJEU) case law has extended the application of the 'sufficient link of integration' test to the social advantages of workers exercising their free movement rights, more specifically frontier workers. The most problematic aspect of this case law concerns an admission of restrictions of the right of students to benefit from funding in the Member State where their parents work, under the same conditions as the children of nationals and migrant workers, in order to study in another Member State.[3] This trend clearly clashes with the traditional approach to the free movement of workers, which under the fifth recital of Regulation 492/2011[4] *'should be enjoyed without discrimination by permanent, seasonal and frontier workers'*. This freedom includes the right to equal treatment concerning enjoyment of social advantages under Article 7(2) of the Regulation. Facing resistance from Member States, the Court of Justice has long confirmed that access to such social advantages should extend without discrimination to frontier workers.[5] The Court had also ruled that the dependent child of a national of a Member State who is employed in another Member State as a frontier worker could rely on this provision in order to obtain study finance under the same conditions as the child of a national of the State of employment.[6]

Frontier workers have doubtless long been a problematic category in EU law. Although Article 45 TFEU and Regulation 492/2011 are, in principle, applicable to both migrant and frontier workers, granting the full benefit of the right to equal treatment to frontier workers had previously been perceived as less necessary or more questionable.[7] Indeed, frontier workers often retain their residence in their State of origin[8] and cannot truly be considered 'migrants', which means it is not as necessary to grant them advantages that

3 Court of Justice, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*; judgment of 20 June 2013, case C-20/12, *Giersch e.a. v. Luxembourg*; judgment of 14 December 2016, case C-238/15, *Bragança Linares Verruga e.a.*; judgment of 15 December 2016, joined cases C-401 to 402/15, *Depesme and Kerrou e.a.*; judgment of 10 July 2019, case C-410/18, *Nicolas Aubriet*.

4 Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

5 Court of Justice, judgment of 27 November 1997, case C-57/96, *Meints v. Minister van Landbouw, Natuurbeheer en Visserij*, paras 49–50.

6 Court of Justice, judgment of 8 June 1999, case C-337/97, *Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, para. 21 ss.

7 Iliopoulou, A. (2013). Le rattachement à l'Etat comme critère de l'intégration sociale. *Revue des affaires européennes* n. 4, pp. 651–666, 655.

8 The ECJ has, however, held that EU citizens who work in their State of origin but reside in another Member State are also frontier workers under Article 45 TFEU.

will allow them to truly integrate in another Member State. The use of the 'sufficient link of integration' test in these cases is nevertheless surprising, since Regulation 492/2011 does not allow for any additional requirements related to a worker's integration in another Member State, instead clearly stating that frontier worker status is in and of itself sufficient to enjoy full equal treatment. This type of test comes from the case law concerning the right of non-economically active citizens to benefit from social programmes: jobseekers,[9] students,[10] civilian war victims[11] and disabled European citizens[12] can be required to prove that they have a real or sufficient link to the society of the Member State in which they applied for benefits. These tests were introduced by Member States and accepted by the European Court of Justice as a form of compensation for the right to equal treatment granted, in principle, to all European citizens lawfully residing in other Member States regardless of their economic activity. As such rights were granted to new categories of European citizens, they were immediately curtailed by new 'entry tests' into the welfare State.[13] However, this was initially always done under the premise that it was justified only insofar as it helped prevent 'social tourism', and did not apply to economically productive members of the employment market.

The extension of such tests to workers' access to social advantages such as student funding constitutes a worrying new encroachment of protectionist views on EU citizens' right to equal treatment. It will be argued that the requirement of 'sufficient links' for the children of frontier workers is not only *contra legem* (I), but also highly questionable regarding both its legitimacy and actual effectiveness (II), and is due to an evolution of the law concerning the rights of Union citizens that requires ambitious legislative reforms (III).

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9 Court of Justice, judgment of 11 July 2002, case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*; judgment of 23 March 2004, case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*; Court of Justice, judgment of 25 october 2012, case C-367/11, *Déborah Prete v. Office national de l'emploi*.

10 Court of Justice, judgment of 15 March 2005, case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*; judgment of 18 November 2008, case C-158/07, *Förster v. Hoofddirectie van de Informatie Beheer Groep*.

11 Court of Justice, judgment of 26 October 2006, case C-192/05, *K. Tas-Hagen and R. A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*.

12 Court of Justice, judgment of 1 October 2009, case C-103/08, *Gottwald v. Bezirkshauptmannschaft Bregenz*.

13 Iliopoulou, A. (2013). Le rattachement à l'État, cit., p. 654.

11 The Perplexing Extension of 'Sufficient Links' Tests to Frontier Workers' Social Advantages

CJEU case law shows a very gradual, and perhaps not entirely intentional, progression towards fully accepting the use of 'sufficient links of integration' tests previously reserved for economically inactive citizens to frontier workers. The initial transfer was made in three questionable rulings in 2007, but its explicit validation appears later, in case law concerning the rights of the children of frontier workers to apply for study finance in the Member State where their parent works. These developments appear to run contrary to secondary law, and to previous case law concerning the rights which workers derive from the Treaties.

11.1 *A Questionable but Minor Initial Development*

Before the rulings concerning student finance, there was one previous line of case law, that was noticed at the time,[14] which seemed to extend 'sufficient links' tests to migrant workers. This line is in fact limited to three rulings made in 2007 concerning provisions excluding non-residents from the German child-raising allowance[15] and the Wajong, a Dutch incapacity benefit for young people.[16] Child-raising allowances typically constitute social advantages within Art. 7(2) of Regulation 1612/68,[17] whereas the Wajong had been found to be a special non-contributory benefit within Art. 10a of Regulation 1408/71.[18] Two of these cases dealt with "reverse frontier workers", nationals of the Member State where they worked who had simply changed their residence to another Member State. This could reasonably have been held to exclude them from migrant worker status, however, it did not seem to have a significant impact on the CJEU's assessment of the applicability of free movement rights as it held

14 See, in particular, the Comment on all three rulings by O'Brien, C. (2008). Comment on Case C-212/05, *Gertraud Hartmann v. Freistaat Bayern*, Judgment of the Grand Chamber of 18 July 2007, nyr; Case C-213/05, *Wendy Geven v. Land Nordrhein-Westfalen*, Judgment of the Grand Chamber of 18 July 2007, nyr; Case C-287/05, *D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, Judgment of the Grand Chamber of 11 September 2007, nyr. *Common Market Law Review* 45 (2), pp. 499–514.

15 Court of Justice, judgment of 18 July 2007, case C-212/05, *Gertraud Hartmann v. Freistaat Bayern*; judgment of 18 July 2007, case C-213/05, *Wendy Geven v. Land Nordrhein-Westfalen*.

16 Court of Justice, judgment of 11 September 2007, case C-287/05, *D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstitut Werknemersverzekeringen*.

17 Now Art. 7(2) of Regulation 492/2011.

18 'Special non-contributory cash benefits' are now covered by Art. 70 and Annex X of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

that both applicants could claim the status of migrant workers.[19] Moreover, in all three cases, reliance upon Regulation 1612/68 and worker status for these frontier workers is combined with the acceptance of 'sufficient links' tests in an effort to mitigate the extension of the scope of such benefits to non-resident citizens. The result is a problematic series of precedents which would later be used as a foundation for an entirely different line of case law, concerning student finance.

The main issue at stake was whether Member States could restrict access to these advantages and benefits to residents, regardless of the claimants' nationalities. The German Government argued that the child-raising allowance was granted in order to benefit persons who, *'by their choice of residence,* [*had*] *established a real link with German society'*.[20] An exception was provided for frontier workers who had more than a "minor occupation" in Germany. This was not rejected by the Court, which held that the fact that this exception meant that frontier workers with more than minor occupations could, as it were, automatically pass the "real links" test. As the Court put it, the rule applicable to frontier workers meant that *'residence was not regarded as the only connecting link* [...] *a substantial contribution to the national labour market also constituted a valid factor of integration'*.[21] The result was that, while Mrs Hartmann must be granted the allowance because her spouse had a full-time job in Germany, Mrs Geven who was only in minor employment could be considered ineligible.[22]

Distinctions among migrant EU citizens based on the number of hours worked or the nature of the employment in a Member State were not new to the CJEU which had already admitted that migrant worker status depended on genuine and effective employment.[23] The test applied here to determine whether someone was in minor employment nevertheless seems stricter than the traditional test defining workers under 45 TFEU. The main issue however is that non-resident EU citizens with "major" and "minor" occupations are both submitted to a test which does not apply to people who reside in Germany. There simply appears to be a presumption that frontier workers with major occupations meet the requirement of a real link with German society. This test was accepted in relation to a stated objective of increasing natality rates in Germany. The Court does not call into question the legitimacy of such an

19 *Hartmann*, cit., para. 18; *Hendrix*, cit., para. 46.

20 *Hartmann*, cit., para. 33.

21 *Ibid.*, para. 36.

22 *Geven*, cit., para. 8.

23 Court of Justice, judgment of 23 March 1982, case 53/81, *Levin v. Secrétaire d'Etat à la justice*; judgment of 31 May 1989, case 344/87, *Bettray v. Staatsecretaris van Justitie*.

objective, nor its link with the number of hours worked in that Member State, which seems tenuous at best.[24] Nor does the Court criticise the fact that this German law establishes a distinction between migrant workers and frontier workers. It seems to accept the idea that frontier workers who only have a minor occupation in Germany are not "sufficiently integrated" in German society.

The discrimination between frontier workers and residents constitutes a break with long-established case law which the Court does not even attempt to justify. The criterion chosen in this German legislation shows how awkward the attempt to apply 'real link' tests to workers can become. Here the CJEU requires the Member State to extend the territorial scope of a social advantage whose objective can only really be understood within the domestic territory. This is necessary for frontier workers because they benefit from equal treatment under Regulation 1612/68. However, proving that a frontier worker has a "sufficient link" with German society to the extent that they will contribute to increasing natality rates in that State is nigh impossible. The Court nevertheless has to accept a link between residence and the stated objective, as well as the unequal treatment between frontier workers and migrants. Yet this issue only arises because the Court accepts the 'sufficient link' test as a valid approach to determine whether frontier workers should benefit from social advantages in the Member State where they work. If one accepts that the child-raising allowance at issue constitutes a social advantage within the meaning of Art. 7(2) of Regulation 1612/68, no difference should be established between migrant and frontier workers. Even if such a difference must be introduced, there is no justification for applying a type of 'sufficient link' test to frontier workers. Moreover, within the framework of the justification + proportionality test, the Member State has the upper hand in suggesting the type of test they deem appropriate. Here, the number of hours worked in Germany is the main criterion and could almost be understood as seeking to determine whether the person is in genuine and effective employment in the host State. However this was not the type of criterion relied upon in the later case law concerning student finance.

In the *Hendrix* Case, although Regulation 1408/71 enabled Member States to establish residence requirements for special non-contributory benefits, the Court held that since the Wajong also constituted a social advantage under Art. 7(2) of Regulation 1612/68 such a requirement, which does not ensure equal

24 *Geven*, cit., paras 21–23. In fact, the Court refuses to engage with the issues of the legitimacy of the objective and the link with a residence criterion, and instead chooses to focus on the fact that the residence criterion is not strictly applied so as to allow certain frontier workers to benefit from the child-raising allowance.

treatment, must be proportionate to the legitimate objective pursued by the Dutch legislation.[25] According to the CJEU, national courts must interpret the national provisions in such a way as to take into account the worker's 'economic and social links' to the State in which they applied for the benefit.[26] The situation was somewhat different in this last case, and called into question the overlap between Regulation 1408/71, which allows Member States to restrict access to certain benefits to residents, and Regulation 1612/68, which relies upon the principle of equal treatment for workers exercising their freedom of movement. At first glance, the priority given to the scope of Art. 7(2) of Regulation 1612/68, thus including frontier workers, appears to grant better protection to EU citizens who do not reside in the State in which they have applied for a specific benefit.[27] However here too the problem lies in the way in which the Court frames the *ratio decidendi*, which grants significant leeway to the Member State in establishing a 'sufficient links' test restricting frontier workers' access to a social advantage.

The ease with which Member States got the CJEU to accept the legitimacy of their aims, the pertinence of 'sufficient link' tests and the criteria introduced to carry them out seems to indicate a lack of awareness on the Court's part of the importance of the break with previous case law concerning frontier workers. The Court certainly insisted upon applying equal treatment under the free movement of workers to borderline cases, and upon a proportionality test under which the citizen's personal circumstances must be examined. This could *prima facie* be considered a positive development for Union citizen's rights[28] but the problem lies in the broader impact of allowing Member States to require frontier workers to prove their integration into the society in which they work. Despite these cases' peculiarities, the three rulings created precedents which the Court relied upon in later cases, a reference made easier by the insufficient care given to the processes by which precedents create norms in EU law.[29] In these rulings, the Court enabled Member States to introduce differences between migrant workers and frontier workers, as well as among frontier workers, based on tests aiming to establish whether their links with the Member State are 'sufficient' to deserve access to social advantages. These rulings

25 *Hendrix*, cit., para. 54.

26 *Ibid.*, para. 57.

27 Dougan, M. (2009). Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States. In Barnard, C., Odudu, O., eds. *The Outer Limits of European Union Law.* Oxford: Hart, pp. 119–166, pp. 127–128.

28 Dougan, M. (2009). Expanding the Frontiers of Union Citizenship, cit., pp. 159–161.

29 On this issue, see *infra*, section III.1.

seemed relatively innocuous until they reappeared in the case law relating to portable student finance.

11.2 *A Problematic Extension to Student Finance*

One unfortunate aspect of the right of students to free movement is that it does not create a uniform status for Union citizens travelling to other Member States to study. Rather, students benefit from very different rights, especially regarding access to certain forms of financial support from their host Member State or their State of origin, depending on whether they themselves or their parents are exercising their free movement rights as economically active Union citizens. Indeed, many forms of financial support for students are considered social advantages for their parents under Art. 7(2) of Regulation 492/2011. A student will therefore benefit from support from the Member State where at least one of his/her parents works, whether they are nationals of that State or not, as long as the worker continues to support the student. In this respect, as with other types of social advantages, frontier workers and migrant workers must in principle benefit from equal treatment under Art. 7(2).

A specific line of case law deals with the right of the children of frontier workers to benefit from a Member State's financial support for university studies abroad. Once again, we find Member States granting social advantages to residents first, thus restricting frontier workers' access to the same advantages. Here, the criterion based on major vs minor work in the host State has disappeared. The Member States, and the Court, seamlessly transition to "duration of work" criteria based on the "duration of residence" criteria applied to economically inactive citizens – another step in the pernicious influence of citizenship case law within the scope of the free movement of workers. The use of criteria based on the duration of the worker's employment in the host State makes it clear in these later cases that the Court is not inviting national authorities to determine whether there is a sufficient economic link, in the sense of genuine employment, justifying the application of Art. 7(2), but whether there is a sufficient link to the society as a whole, an integration within the national community.

The first ruling to apply the 'sufficient link' test to such cases is *Commission v Netherlands*. The Netherlands had made portable student funding conditional on the student having resided in the Netherlands for at least three of the six years preceding his/her enrolment for higher education abroad.[30] This constituted indirect discrimination against frontier workers and migrant workers.

30 *Commission v. Netherlands*, cit., para. 39.

This discrimination could not be justified by budgetary considerations in and of themselves, but the CJEU somewhat surprisingly stated that it had already recognised Member States' power to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages, even when they are economically active – while recalling that in principle, such a requirement for migrant and frontier workers is "inappropriate".[31] In fact, Advocate General Sharpston examined whether evidence of a sufficient degree of integration could be required by a transfer of the Court's reasoning in the *Förster* and *Bidar* rulings, neither of which dealt with the free movement of workers.[32] She refused to transfer the reasoning in these rulings to migrant workers insofar as it was invoked to avert an unreasonable financial burden, insisting that residence could not be the only acceptable evidence of connection with the Member State.[33] She also warned of the dangers of allowing Member States to *'justify less favourable treatment of* (*both economically active and inactive*) *EU citizens in terms of social policy* (*integration*) *by applying access criteria such as length of residence'*.[34]

The Court did not follow its Advocate General and returned to the idea that the "link of integration" is to be presumed, but is an appropriate criterion, in cases involving migrant and frontier workers. The reasoning was similar to that followed in the three 2007 rulings: there is a discrimination, but it may be justified if the Member State uses criteria conducive to identifying the person's integration in its society and based on a legitimate overriding requirement. The CJEU proceeded to reject the Netherlands' justification based on the risk of an unreasonable financial burden, but accept the government's reasoning concerning the second justification, that of increasing student mobility. In a rather counterintuitive line of reasoning, the Court agreed that student mobility was indeed an overriding reason relating to the public interest[35] and that a residence requirement was appropriate to meet that aim because it could ensure that the scheme was aimed first at students who would, in its absence, study in the Netherlands, *and* because Dutch authorities could legitimately expect students who benefit from the scheme to return to the Netherlands to enrich that Member State's job market.[36] Advocate General Sharpston had, indeed,

31 *Ibid.*, paras 63 and 65–66.

32 Opinion of AG Sharpston delivered on 16 February 2012, case C-542/09, *Commission v Netherlands*, para. 74.

33 *Ibid.*, paras 87 and 122.

34 *Ibid.*, para. 85.

35 *Commission v. Netherlands*, cit., para. 72.

36 *Ibid.*, paras 76–77. The Court accepts the appropriateness of the residence requirement for the purposes of attaining the objective of promoting student mobility by simply

stated that requiring a degree of integration from migrant workers was possible if justified by a legitimate social objective but did not support this with any reference to previous case law – in fact, the most explicit occurrence of this statement appears in a footnote.[37]

Despite the rejection of the actual criteria used in the Netherlands this ruling creates another precedent allowing Member States to apply 'sufficient link' tests to frontier workers. Indeed, the rejection of the actual criteria used by Member States in applying a 'real link' test does not constitute a rejection of the test itself, of its pertinence in a given situation, nor of the aims which the Member States rely upon. The force of the precedent lies in the *ratio*, thus the motives given by the Court for rejecting the specific rules at issue (or their later interpretation) are more important than the rejection itself. Once the Court accepts that Member States can look for "sufficient links" between frontier workers and their societies, the issue of legitimacy of such requirements transforms into a search for the appropriately worded overriding requirements and, more importantly, the specific threshold which the Court will deem proportionate.

A good illustration appears in *Caves Krier Frères*,[38] concerning Luxembourgish subsidies for the recruitment of older unemployed persons. In this case, the CJEU seemed to firmly reject discrimination against a Luxembourgish frontier worker who had always worked in that State, but lived in another Member State. However the idea that a frontier worker's integration in the State where they work is not automatic but only to be presumed makes another appearance. The Court cites *Commission v Netherlands* as precedent in order to allow the use of integration tests but holds that, in the case at hand, '*Ms Schmidt-Krier is a frontier worker and a national of that Member State who has spent her entire working life there. Accordingly, she would appear to be integrated into the Luxembourg labour market*'.[39] Although this ruling appears to confirm that frontier

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rephrasing the government's argument based notably on the fact that *'the Kingdom of the Netherlands expects that students who benefit from that scheme will return to the Netherlands after completing their studies, in order to reside and work there'*. No further justification or any explanation is given as to the basis for this expectation, however both the Commission and Advocate General Sharpston seem to have found the aim of targeting students likely to enrich the Dutch employment market legitimate, see Opinion of AG Sharpston, *Commission v. Netherlands*, cit., paras 135–136.

37 Opinion of AG Sharpston, *Commission v. Netherlands*, cit., para. 91, footnote 54: *'This conclusion does not mean that I consider that in all circumstances Member States are precluded from requiring a degree of connection from migrant workers. Indeed, the social objective invoked by the Netherlands Government as justifying a degree of connection from all applicants is a legitimate aim which is justified by overriding reasons in the public interest'.*

38 Court of Justice, judgment of 13 December 2012, case C-379/11, *Caves Krier Frères Sàrl.*

39 *Ibid.*, para. 54.

workers should be treated as migrant workers, it in fact consolidates the case law according to which such an equivalence is only based on a presumption that frontier workers have sufficient links with the State where they work. As later rulings show, this presumption is not absolute and perhaps only citizens whose links with the host Member State are as strong as Ms Schmidt-Krier's can safely assume they will fulfil the criteria. For instance, in its 2019 judgment in *Aubriet*, the Court recalls that '*the fact that migrant and frontier workers have participated in the labour market of a Member State creates, in principle, a sufficient link of integration with the society of that State*', derived in particular from the worker's contribution to the financing of the social policies in question, but goes on to state that '*the Court has already accepted that indirectly discriminatory national legislation* […] *where there is not a sufficient connection to the society* […] *may be objectively justified*'.[40] Exactly why this contradictory status affecting the rights of frontier workers should exist is never explained. In this latest judgment, made without an Opinion, the Court's position seems to be that quoting the previous case law is entirely sufficient and no further explanation or justification is required.

The surprising combination of EU public interest objectives and purely national aims found in *Commission v Netherlands* was seized upon by Luxembourg in the legislation at issue in the infamous *Giersch* case, now confirmed in two 2016 rulings, *Depesme and Kerrou e.a.* and *Bragança Linares Verruga*, and again in 2019 in *Aubriet*. A piece of Luxembourgish legislation introduced in 2010 put an end to the previous system of family allowances for children older than 18 and introduced financial support mechanisms based on scholarships and loans with a residence requirement for nationals of other Member States wishing to benefit from portable student funding. ALEBA,[41] a trade union in the finance sector, supported hundreds of judicial actions by frontier workers who were thus excluded from this financial aid, which led to the four preliminary rulings.[42] Luxembourgish legislation clearly created a discrimination against frontier workers, which the Court held to be incompatible with EU law – but in so doing, the Court reaffirmed that unequal treatment between

40 *Nicolas Aubriet*, paras 32, 33 and 34.

41 Association Luxembourgeoise des Employés de Banque et Assurance (Luxembourg Association of Banking and Insurance Employees). For an overview of the union's involvement in supporting families' efforts to challenge the legislative reform, see its Press release 'L'ALEBA fait le point dans le dossier CEDIES', 29 March 2018, available at: https://www.aleba.lu/laleba-fait-le-point-dans-le-dossier-cedies/.

42 The union's lawyer, Maître Stéphanie Jacquet, was involved in the proceedings before the Court of Justice in *Giersch*, *Depesme and Kerrou e.a.* and *Aubriet.*

resident and frontier workers was possible, provided the criteria were based on a legitimate aim and were proportionate. The reasoning followed in *Commission v Netherlands* seemed coherent insofar as portable funding should reasonably not be used by students residing in other Member States for studies carried out in these States. However, the second stage of that reasoning was much more problematic as it implies that States are entitled to expect students to come back to the State which (partly) funded their studies in order to, as it were, justify the investment made. This seems to run absolutely contrary to the stated objective, since if students are expected to take full advantage of freedom of movement, they should be able to choose which part of the European Union they want to work in. The Luxembourgish justification set out in *Giersch* is slightly different. Instead of encouraging student mobility, the stated objective here is the promotion of the development of the national economy.[43] Having all but abandoned any pretence that these rulings are based on European Union public interest objectives,[44] the Court accepts a straightforwardly protectionist justification to the indirect discrimination caused by a residence requirement for financial aid for higher education studies in another Member State.

In both *Commission v Netherlands* and the *Giersch* line of cases, the Court finds that the national provisions are not proportionate to the objective pursued by the Member State if they set residence requirements which exclude frontier workers, or if they establish criteria which do not enable national authorities to take into account the specific circumstances of each case, e.g. by requiring an uninterrupted five year period of work in the Member State.[45] However, it allows Member States to use the fear of social tourism to establish a potentially damaging distinction between migrant and frontier workers under Art. 45 TFEU.

11.3 *A Clear Break with Established Case Law and Secondary Law*

The case law concerning the access of frontier workers' children to portable study finance clearly appears to be contrary to the traditional understanding of frontier workers' rights. Despite the Court's – unsubstantiated – claim in

43 *Giersch*, cit., para. 48.

44 The Court and Advocate General Mengozzi do tie this objective to the promotion of tertiary education in the Europe 2020 strategy (*Giersch*, cit., paras 53–55; Opinion of AG Mengozzi delivered on 7 February 2013, para. 42 ss).

45 *Bragança*, cit., para. 69 – it must be noted that this Luxembourgish rule was an attempt to conform to the Court's earlier ruling in *Giersch*, whose para. 80 seemed to encourage such a criterion as an alternative to a residency requirement.

Commission v Netherlands, apart from the 2007 rulings which could otherwise have been considered an anomaly, there was no indication in previous case law that 'sufficient links' tests could be applied to frontier workers. Indeed, such tests should in principle be impossible if frontier workers are to benefit from migrant worker status under Regulation 492/2011.[46]

As Advocate General Wathelet put it, 'there is, as it were, a presumption that the migrant or frontier worker is integrated into the Member State in which he works and to which he pays taxes and social contributions which contribute to the financing of the social policies of that State'.[47] But this presumption is not equivalent to automatic equal treatment deriving from migrant worker status under Article 45 TFEU. The Court stated in Commission v Netherlands that the link between migrant workers and frontier workers arises from their contribution to the financing of the State's social policies through taxes.[48] This was the position which justified equal treatment in access to social advantages for all workers exercising their free movement rights, regardless of the duration of their residence or employment in the Member State.

Requiring proof of integration for frontier workers thus amounts to ignoring their contribution to the costs of the social policies they want to benefit from. By considering such criteria as a valid step in the proportionality test of a justification, the Court has therefore introduced a new requirement that is clearly incompatible with Article 7(2) of Regulation 492/2011. In doing so, despite its insistence on the presumption of integration and on a case-by-case examination of individual situations, the Court has created the risk of further differentiation between migrant workers and frontier workers. The difficulties in articulating the territorial and personal scopes of Regulations 492/2011 and 1408/71 emphasize the issues posed by the status of frontier workers. They cannot fully be considered members of the national community of the host Member State in the sense associated with traditional understandings of solidarity within the national community, and do not fulfil the residence criteria often used to extend that solidarity within Union citizenship on the basis of 'real link' tests. However, by including them in the scope of the free movement of workers, EU law requires Member States to find different mechanisms to allow them to benefit from social welfare. The use of "duration of work" criteria

46 *Contra*, Hoogenboom, A. (2012), Export of Study Grants and the Lawfulness of Durational Residency Requirements: Comments on Case C-542/09, *Commission v the Netherlands*. *European Journal of Migration Law* 14 (4), pp. 417–438, 427.

47 Opinion of AG Wathelet delivered on 2 June 2016, case C-238/15, *Bragança Linares Verruga e.a.*, para. 69.

48 *Commission v. Netherlands*, cit., para. 66.

for frontier workers seems to be an ill-conceived attempt to solve this issue by resorting to 'sufficient link' tests that are applied without sufficient care or rigour.[49] Another risk in applying *contra legem* criteria linked to the duration of work to determine whether frontier workers can access social advantages is that it is difficult to see why such requirements should only apply to frontier workers and not to resident migrants. In any case, the Court's reasoning is insufficient to establish a clear motive for different implementations of Regulation 492/2011 based on the worker's place of residence. This line of case law is based on a highly problematic approach whose viability in practice has not been proven.

III A Contentious 'Investor's Approach' to Social Advantages

The case law derived from *Commission v Netherlands* is not only questionable because of its practical implications for the rights of frontier workers and their children. Its social and political consequences are unfortunate but they remain rather limited to this day. More worrying are the facts that this case law does not rely on a convincing line of argument and that the leeway it grants Member States could have unpredictable consequences considering the often insufficiently reasoned use of precedent in CJEU case law.[50] Both the legitimacy of the objectives presented as overriding reasons of public interest and the logical connection between them and the tests used to establish 'sufficient links' are highly contentious.

III.1 *Questionable Legitimacy*

The reasoning followed by the Court in cases *Commission v Netherlands* and *Giersch* seems to be that the difference between cases concerning migrant workers and those concerning economically inactive citizens is not that migrant workers do not need to prove their degree of integration, but that such a requirement cannot be based on purely budgetary preoccupations such as an unreasonable burden on financial assistance programmes and must instead be linked to a social objective.[51] Even if one accepts the introduction of such

49 We are certainly very far from the 'rigorous comparability model' advocated for in Dougan, M., Spaventa, E. (2005). 'Wish You Weren't Here'... New Models of Social Solidarity in the European Union. In Dougan, M., Spaventa, E. (eds). *Social Welfare and EU Law*. Oxford: Hart, pp. 181–218.

50 See *infra*, section III.1.

51 See paras. 49–52 of the Opinion of AG Mengozzi, *Giersch*, cit.

a criterion to restrict frontier workers' access to certain social advantages, the validity of the governments' reasonings is highly doubtful.

First, the objectives put forward by both governments are clearly linked to protectionist concerns that are almost indistinguishable from the financial objectives which the Court purports to reject. This was already clear in *Commission v Netherlands* since, although the objective recognised by the Court of Justice was to increase student mobility, which is indeed a matter of public interest for the European Union as a whole, the Court also seemed to accept the idea that Member States could legitimately expect students who benefit from financial support to return to the country that funded their studies.[52] Funding student mobility thus becomes an investment in the State's *own* economy[53] and *not* a contribution to the general European Union objective of promoting the free movement of persons. The ruling does not appear to take into account the flagrant contradiction between these objectives, only one of which could reasonably be linked to an overriding requirement. To the contrary, the Court almost seems to be encouraging Member States to establish rules which allow them to restrict funding to students who are likely to later enter their job markets.

The leniency towards Member States appears even more clearly in the *Giersch* line of cases, in which the Court accepts as an overriding requirement not the promotion of student mobility, but an increase in the percentage of Luxembourg residents with a higher education degree. A justification of the way in which this national objective is supposed to contribute to European public interest is nowhere to be found, beyond the very loose connection drawn by Advocate General Mengozzi and the Court with the *Europe 2020* strategy promoting a knowledge economy.[54] However, the strategy promotes higher education as an aim for the European Union job market as a whole, not for each Member State individually. Why this European strategy can be more effectively pursued by promoting the return of students having obtained such degrees to Luxembourg rather than allowing them to choose the Member State where they wish to work is never explained. Similarly, the Court never explains why Luxembourg should legitimately expect to meet aims related to the composition of its labour market by promoting the return of students whose parents

52 See *supra*, section 1.2.

53 Skovgaard-Petersen, H. (2013). There and Back Again: Portability of Student Loans, Grants and Fee Support in a Free Movement Perspective. *European Law Review* 38 (6), pp. 783–804, 798.

54 Opinion of AG Mengozzi, *Giersch*, cit., paras 42–45, judgment, cit., paras 53–55.

already have links with its economy rather than by attracting other graduates.[55] Indeed, it seems unlikely that such an explanation can be found. And yet, the Court of Justice keeps insisting that the link exists or rather blindly quoting its own previous rulings as sufficient proof that it does. In *Aubriet*, the Court thus states that it has already "accepted" that a length of employment requirement in the State granting the aid on the part of the frontier worker parent '*is such as to establish such a connection on the part of those workers to the society of that Member State and a reasonable probability that the student will return to that granting Member State after completing his studies*'.[56] Hence, a connection that entered the case law without any logical justification is now being quoted as valid simply *because* it has entered the case law.

Commission v Netherlands thus seems to have opened Pandora's box in allowing Member States to present the funding of portable student finance as an investment on which they can legitimately expect a return. This is not only problematic in that it serves as the basis for the application of 'sufficient links' tests implementing a justification to an indirect discrimination, it goes against the Court's usual position on overriding requirements. In principle, there must be a clear European public interest aim to justify obstacles to free movement, and protectionist or purely national aims are not acceptable – this is the basis for the exclusion of budgetary concerns as an overriding requirement except in certain specific areas of CJEU case law. The admission of the "investor's approach" to student funding raises serious questions. Firstly, the aim of ensuring the return of students who have benefited from financial support seems to run contrary to the aims of Union citizenship and free movement rights, if one accepts that citizens should be encouraged to think of the whole of the single market as a space in which they can freely choose where to study or work. Secondly, it omits the other costs related to higher education, for instance those incurred by the Member State where the worker's child wishes to study. Even in States where higher education is not free, universities depend to a very large extent on government spending and the costs of hosting students from another Member State was the basis for previous rulings relating to student mobility within the EU. Thirdly, it is difficult to determine how far beyond portable student finance this type of reasoning could become acceptable. Since these cases partly rely on precedents concerning child-raising allowances and incapacity benefits, it is conceivable

55 Turmo, A. (2016). Accès des frontaliers aux aides aux études luxembourgeoises – Des précisions insatisfaisantes sur l'arrêt *Giersch*. *Revue des affaires européennes*, n. 4, pp. 701–712, 706.

56 *Nicolas Aubriet*, para. 36, quoting *Bragança*, para. 58.

that Member States will try to use similar criteria to restrict frontier workers' access to all types of social advantages.

III.2 *Questionable Workability*

The aims which the Netherlands and Luxembourg relied upon to justify residence or duration of work requirements do not merely appear to be of questionable legitimacy in and of themselves. The connection established between them and the 'sufficient link'-based proportionality tests, and the appropriateness of the criteria chosen by the Member States in order to establish whether such a link exists, are both highly doubtful. Even if one were to accept that the investor's approach to student finance can form the basis for overriding reasons of public interest, it seems unlikely that Member States can in fact implement this approach while complying with freedom of movement, by establishing objective criteria which Union citizens may rely on.

The two Member States' reasoning appears to be based on the postulate that a student whose parent has a 'sufficient link' with the Member State in which she applies for student funding is extremely likely to join that State's labour force after she has obtained her degree, thus benefiting the national economy. However, not only does this expectation seem contrary to the aims of freedom of movement within the internal market which should prevent Member States from trying to force graduates to enter their own employment markets,[57] but as Advocate General Sharpston wrote in *Commission v Netherlands*, *'it is not self-evident that past residence is a good way of predicting where students will reside and work in the future'.*[58] Indeed, it seems just as likely that the student will seek their first job in the very Member State where they have obtained their degree.

This is made all the more obvious by the fact that, since these cases deal with student finance understood as a social advantage granted to the student's parent, the test seeking to establish integration in the State's society applies not to the student but to their parent.[59] Significantly, the Court itself had rejected the opposite argument that a person residing close to the border with

57 Van der Mei, A. (2005). EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems. In Dougan, M., Spaventa, E. eds, *Social Welfare and EU Law*, cit., pp. 219–240, p. 228.

58 Opinion of AG Sharpston, cit., para. 147, see also para. 43. The Advocate General was *'not convinced that there is an obvious link between where students reside prior to pursuing further education and the likelihood that they will return to that Member State after completing their studies abroad'*.

59 *Ibid.*, para. 43: *'the Kingdom of the Netherlands cannot legitimately assert that the place where the migrant worker or his dependent children will study will be determined, in a quasi-automatic manner, by the place of residence'*.

the State where they completed their studies is more likely to enter that State's labour market, because *'the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market'*.[60] If the place where a person studies cannot be considered a systematic indication of the labour market they will join, the same must be true for the place(s) where their parents live, or where they have worked in recent years as frontier workers. Moreover, even if it were possible to prove that a student whose parents work in a Member State is more likely to seek employment there after obtaining a degree, the very nature of the single market means that there is no way to predict whether they will remain there for a long period of time. The "return on investment" can only be presumed in the short term, if at all. Inversely, the claimant in *Aubriet*, who did not receive any financial aid from Luxembourg for his studies in France and continues to reside in that country like his father, carried out his professional training with a Luxembourgish employer which went on to recruit him.[61]

Systems which make the grant (or the non-reimbursement) of portable funding conditional upon the student's 'return' to join a State's labour market would establish a much clearer logical foundation for the investor's approach. Member States in fact seem to be encouraged to resort to such solutions. While Advocate General Sharpston noted that she was not convinced that past residence was a good way of predicting where students would reside and work in the future, she referred in a footnote to *'ways of encouraging that to happen'* such as making the grant of funding *'conditional upon the student returning to the Netherlands to work there for a minimum period of time'*.[62] Although such rules again appear to clash with the aims of freedom of movement, they at least have the advantage of relying on a demonstrable logical connection between the criterion used and the expected short-term results.

Nowhere in this case law do we find any proof that the Member States gave concrete and precise evidence of the link between the parents' previous residence or work in a State and their children's integration in that State's labour market after pursuing higher education abroad. This is mostly apparent in the Court's examination of the proportionality of the specific requirements that are supposed to establish the 'sufficient link'. The Court's *Commission v Netherlands* and *Giersch* rulings clearly exclude residence requirements which discriminate against frontier workers, but do not exclude the use of criteria based on the duration of the link with a Member State in order to prove integration.

60 Court of Justice, judgment of 25 October 2012, case C-367/11, *Prete*, para. 45.

61 *Nicolas Aubriet*, para. 17.

62 Opinion of AG Sharpston, *Commission v. Netherlands*, cit., footnote 74 (under para. 147).

The question then becomes how many years constitute "sufficient" integration, and whether non-continuous periods of residence and/or work can be taken into account. The fact that in the specific cases at issue the Court found criteria that excluded frontier workers incompatible with the Treaty does not suffice since the later case law shows that certain criteria, which are discriminatory towards frontier workers, can be acceptable.

In *Bragança*, the Court held that the requirement of an uninterrupted five years period of work in the Member State was discriminatory because it did not apply to residents, and disproportionate to the objective already set out in *Giersch*. According to the Court, the five year residence criterion did not permit *'the competent authorities to grant that aid where, as in the main proceedings, the parents, notwithstanding a few short breaks, have worked in Luxembourg for a significant period of time, in this case for almost eight years, in the period preceding that application, involves a restriction that goes beyond what is necessary in order to attain the legitimate objective of increasing the number of residents holding a higher education degree, inasmuch as such breaks are not liable to sever the connection between the applicant for financial aid and the Grand Duchy of Luxembourg'*.[63]

Current Luxembourgish law, introduced before the *Bragança* and *Depesme and Kerrou* rulings, requires the non-resident student's parent to have worked in the Member State for five out of the seven years preceding the application for financial support.[64] Previous case law seemed to indicate that such a rule could be compatible with EU law since, as the Luxembourgish Government argued, it made it possible to take into account cases of quasi-continuous employment in that Member State over the previous years. Although the Government was confident that this was a good way to take into account the Court's case law, the ruling in *Aubriet* forcefully contradicts this view. In a relatively short judgment, without an Opinion and where most of the argument is based on repeating the last three rulings concerning Luxembourg, the Court found that the five out of seven year rule did not meet the requirements of the "necessity" stage of the proportionality test.

One must admit that the five-out-of-seven-years rule seems a very high threshold considering the children of migrant workers are in principle able to benefit from the grant regardless of the duration of their parent's work in Luxembourg. Moreover, the *Bragança* ruling contains no evidence that the Luxembourgish government had showed how such a criterion would be better

63 *Bragança*, cit., para. 69.

64 Loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures (*Mémorial* A 2014, p. 2188).

suited than another to ensure that the students join its labour market after obtaining their degrees abroad. The Court's lax approach to the proof of the appropriateness of national measures discriminating against frontier workers in these rulings clashes with the general trend in the case law.[65] Indeed, the situation of Mr Aubriet's father, who, as the Court remarks, had been working in Luxembourg for more than 17 years out of the previous 23 when his son submitted his application, demonstrates the negative effects of a rigid criterion such as the one set out in 2014 and, more broadly, of allowing Member States to establish such limitations to the rights of frontier workers.

The only explanation for the explicit admission of a protectionist goal as an overriding requirement (after less explicit admission in *Commission v Netherlands*) and the lack of proper examination of the appropriateness of the national provisions must be the specific sociological and economic circumstances visible in Luxembourg today. These factors are only mentioned in passing in Advocate General Mengozzi's Opinion in *Giersch*[66] but they must have played a significant role in the Court's understanding of the Luxembourgish justification for such restrictions to frontier workers' rights. In 2016, Luxembourg's population included 46, 71% foreign residents and, in the second trimester of 2017, 45% frontier workers among its employees.[67] Previous case law has shown that this State's small size and large proportion of migrant and frontier workers leads to specific issues regarding the application of freedom of movement under EU Law.[68] Fears that the stability of a portable student finance programme could be threatened by full access for the children of frontier workers indeed seem more reasonable in the Luxembourgish context than in most Member States. However, precisely because the Court does not consider budgetary concerns acceptable overriding reasons in the public interest, no reference is ever made to the true motives of Luxembourg's restrictive criteria.

If the Luxembourgish context was a deciding factor in these three rulings, this was not made explicit by the Court. The lack of any indication within the

65 O'Leary, S. (2014). The Curious Case of Frontier Workers and Study Finance: *Giersch*. Case C-20/12, *Elodie Giersch v. État du Grand-Duché de Luxembourg*, Judgment of the Court of Justice (Fifth chamber) of 20 June 2013, nyr. *Common Market Law Review* 51 (2), pp. 601–622, 612, quoting Nic Shuibhne, N., Maci, M. (2013). Proving Public Interest: The Growing Impact of Evidence in Free Movement Cases. *Common Market Law Review* 50 (4), pp. 965–1005.

66 Opinion of AG Mengozzi, *Giersch*, cit., para. 46: the Advocate General only refers to Luxembourg's atypical economic history and current situation.

67 According to data collected by Statec, Luxembourg's National Institute of Statistics (www.statistiques.public.lu).

68 O'Leary, S., cit., p. 619–620.

rulings themselves that the admissibility of the overriding reason in the public interest, or any other aspect of the Court's reasoning, is only applicable in the very specific circumstances found in Luxembourg, leaves the rulings open for wider interpretation and creates dangerous precedents. The more or less implicit admission of similar national goals in *Commission v Netherlands* and the lack of circumscription of the Luxembourg rulings to a specific local context could lead to a multiplication of similar provisions restricting access to social advantages such as student finance for frontier workers. Once again the lack of sufficient care in construing and creating precedents is at the root of the problem. A clear indication of the scope the Court wanted to give these rulings would have significantly reduced the potential impact of this ruling and the gravity of the *contra legem* rule being created.

Perhaps even more alarmingly, the case law as constructed by the Court of Justice is impossible to apply in practice. *Aubriet* is a perfect illustration of the impractical nature of the Court of Justice's precedents on this issue. Luxembourg reminded the Court that applications for student financial aid are processed through a "standardised mass procedure".[69] This means that objective and neutral criteria are required because the competent authorities cannot be expected to carry out a literal case-by-case analysis of each application. Requiring an authority, that has to process hundreds of applications within a relatively short time period every year, to carry out a full assessment of the particular circumstances of each case and to look for a "sufficient connection with Luxembourg society", a subjective element, is simply unrealistic. Moreover, as they could have added, such a procedure could, in the absence of objective criteria, significantly affect the rights of EU citizens as it would cause too much uncertainty.

What *Aubriet* proves, therefore, is not only the ill-suited nature of the criterion chosen by Luxembourg (5 out of the previous 7 years) but the serious danger which results from allowing such 'sufficient links' tests to be carried out on frontier workers in the first place. Luxembourg is perfectly justified in insisting that a true case-by-case analysis is ill-suited to the type of application process at issue. National authorities and applicants need clear, objective criteria. The *Aubriet* ruling produces is an insoluble problem: it seems that no objective criterion based on a reasonable duration of employment in the Member State can meet the Court's requirements for a case-by-case analysis, however any other type of assessment leads to excessive uncertainties and workloads at the national level. The Court states that the current criterion '*is not sufficient to make*

69 *Aubriet*, paras 41–43.

full assessment of the significance of that cross-border worker's connections with the Luxembourg labour market',[70] but what would? The Court gives no clues as to what the preferable options would be.

How far in the past should competent national authorities go in assessing the applicant's parents' ties to the national labour market? Five out of the last seven years seemed just as pertinent a criterion as seven out of the last ten, or four out of the last six. A wider time frame also implies a greater burden placed on applicants to prove their parents' ties over a longer time period. Is it truly better to require students wishing to apply for financial support for studies in a neighbouring State to provide evidence that one of their parents was already working in Luxembourg fifteen years ago? Perhaps in this case it seems too harsh to reject an application made by a student whose father had worked in Luxembourg for the greater part of 23 years, but it seems just as harsh to force every non-resident applicant to submit evidence covering a twenty-year period, bearing in mind this is already a *contra legem* exception to the rights of frontier workers.

The real issue is that, while Member States have been allowed to introduce duration of residence criteria to prove 'substantive links' in the field of citizenship, such criteria, once set, are bound to exclude a number of citizens in a somewhat arbitrary fashion even when, as was the case here, they allow for some flexibility. This exclusionary effect seems even more difficult to justify when applied to citizens who should in principle benefit from the rights at issue not by virtue of the duration or solidity of their "links" with a society but simply because they are frontier workers. This is an easily foreseeable consequence of allowing Member States to introduce such criteria to begin with, as true case-by-case analysis of the subjective links between an individual and the society of the Member State is out of the question in the assessment of student applications for financial aid (and, realistically, in most other cases). In *Aubriet* the Court seems to renounce its own case law's actual capacity for implementation as the easiest option to comply with it seems to be to abandon duration of work criteria for frontier workers altogether. The case law remains, however, and its potential full impact is difficult to predict.

IV A Problematic Case Law Caused by the Absence of Ambitious Legislative Reforms

The five rulings concerning student finance could have major consequences for portable student finance in the European Union, encouraging Member

70 *Aubriet*, para. 45.

States to introduce provisions that could make such funding conditional upon the student's return and integration into their own labour markets after having completed their studies. However, more importantly, this case law could have wide-ranging consequences for frontier workers and the status of migrant workers as a whole. The access to social advantages under Regulation 492/2011 is being restricted on the basis of criteria such as the duration of one's residence or work in the host Member State, which were developed in the secondary law and case law applicable to economically inactive Union citizens. This appears to be an involuntary result of Member States' adaptation to the Court's case law. As new rights become available for economically inactive Union citizens, and as the duration of one's stay in a Member State becomes a determining factor to establish one's status under instruments such as Directive 2004/38, worker status is losing the power it once had. As Member States prioritise the rights derived from Union citizen resident status, legislative reform is necessary to establish a new balance between these rights and those derived from migrant worker status.

IV.1 *The Uncertain Development of a Specific Status for Frontier Workers*

The first consequence of this case law, beyond the specific case of student finance, is an explicit admission by the Court of Justice that unequal treatment between frontier and migrant workers may be justified in relation to social advantages. Indeed, the Court has not yet held that 'sufficient links' tests are applicable to migrant workers who reside in the Member State where they work.

This difference cannot be based on Regulation 492/2011 nor on traditional case law on the free movement of workers, but seems to have been introduced by the Court in 2007 Cases *Hartmann* and *Geven*, which are referred to in *Giersch*, and in *Commission v Netherlands* which itself does not refer to any sources on this issue but can only be understood if one takes into account those rulings.[71] In these three rulings, the Court certainly tried to resist Member States' attempts to exclude frontier workers from access to social advantages. However, in doing so by introducing a proportionality test linked to a justification, it enabled States to reason in terms of 'sufficient links' to their labour markets. The Court thus introduced a fundamental shift in the understanding of the status of frontier workers in EU law and of the basis for their access to equal treatment regarding social advantages.

71 Advocate General Sharpston did refer to *Geven*, but only in support of the statement that Art. 7(2) of Regulation 1612/68 expresses the principle of equal treatment set out in Article 45 TFEU. The Court referred to the same ruling in support of the equality of migrant and frontier workers as regards Art. 7(2).

The Court in fact accepts this inequality between migrant and frontier workers as a valid option for Member States. For instance, there is nothing in the case law to suggest that the new Luxembourgish rules on student finance, introduced before the 2016 rulings, are incompatible with either the treaties or secondary law, despite the fact that they explicitly grant different rights to the children of migrant workers (or of Union citizens having acquired permanent residence) and to the children of frontier workers, with only the latter being submitted to a test establishing the duration of employment.[72] The Court states that such a difference can lead to indirect discrimination,[73] but may be justified by an objective in the public interest if the distinction is based on criteria aiming to establish the student's parents' integration in Luxembourgish society. The fact that frontier workers contribute to paying for these social advantages through taxes in the same way as migrant workers no longer seems to shield them from requirements that do not apply to residents. To what extent such distinctions can affect the integrity of frontier worker rights under Art. 45 TFEU is as yet unclear. But there is no reason to suppose that they will remain restricted to the specific cases dealt with in the 2007 rulings and to student finance.

The uncertainty associated with the risk of extending such exceptions beyond the limited scope of the current case law is due to the CJEU's insufficient rigour in developing and applying precedent. There can be no doubt that the Court does rely on precedent, but this line of case law is a good illustration of the deficiencies of the current absence of any clear doctrine of precedent in European Union law.[74] For instance, note the ease with which the 2007 cases are quoted as precedent in para. 64 of *Giersch* as a sufficient basis for the statement according to which *'with regard inter alia to frontier workers, the Court has allowed certain grounds of justification concerning legislation which distinguishes between residents and non-residents carrying out a professional activity in the State concerned, depending on the extent of their integration in the society of that Member State or their attachment to that State'*.[75] The facts that two of these cases concerned 'reverse' frontier workers, that they did not deal with

72 Art. 3 (2) and (5) of the 24 July 2014 Loi concernant l'aide financière de l'État pour études supérieures, Mémorial A n° 139.

73 *Bragança Linares Verruga*, cit., para. 47.

74 On the use of precedent by the Court of Justice, see the brilliant analyses by Komárek, J. (2007). *Precedent in European Union Law: Reasoning with Previous Decisions of the Court of Justice*. Thesis (D.Phil.). University of Oxford; and Jacob, M. (2014). *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business*. Cambridge: Cambridge University Press.

75 *Giersch*, cit., para. 64.

student grants, or that the German legislation at issue in two of them based the criterion applicable to frontier workers on the intensity of the economic activity pursued in the host state are not mentioned. No attempt is made to justify the analogy and a general rule is derived from three peculiar rulings made 6 years earlier, which seem to allow Member States to impose 'real link' tests which discriminate against non-resident workers. In *Giersch*, this seems to be introduced as a wide-ranging exception to the presumption, restated in *Caves Krier Frères*, that frontier workers have established sufficient integration through participation in the employment market.[76]

Similarly, although the Luxembourgish cases clearly seem linked to the specific circumstances in that Member State, the rulings do not make any reference to a specific economic or social context justifying an exception but appear to state a general rule. This means that they could potentially be quoted as precedent by any Member State seeking to restrict frontier workers' access to social advantages. Such transfers from one line of case law (or one area of the law) to another are frequent in CJEU case law, and do not meet the standards of rigour and justification that should be expected in a complex precedent-based system. Citations of *Giersch* appear to have taken on a life of their own, with Advocates General and the Court now referring to it as a precedent for the rule that the free movement of workers prohibits all forms of discrimination, including cases where the national measure does not place all nationals of other Member States at a disadvantage, or also affects some nationals of the State in question.[77] These citations have little to do with the actual precedential value of *Giersch* in the Court's overall case law on freedom of movement. However, they could produce serious consequences by normalising references to a very specific and controversial line of cases. Greater care in formulating new case law and, most importantly, in engaging explicitly with precedent would probably have allowed the Court to restrict the impact of the 2007 rulings, as well as that of *Commission v Netherlands* and *Giersch*. *Aubriet* provides excellent evidence of this, as the Court appears to assume that previous case law is entirely sufficient to answer the preliminary reference, while giving the national judges a new ruling which contradicts previous assumptions as to the type of national rule that would be compatible with EU law, and leaves little room to find a workable alternative.

76 This is quoted in *Giersch*, cit., para. 63.

77 Court of Justice, judgment of 13 March 2019, case C-437/17, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach*, para. 31 (see also the Opinion of AG Saugmandsgaard Øe, delivered on 25 July 2018, paras 8 and 34); Opinion of AG Bobek delivered on 23 May 2019, case C-703/17, *Krah v. Universität Wien*, para. 54.

IV.2 *A Consequence of Member States' Adaptation to Union Citizen Rights*

One interesting aspect of all these rulings is that the Member States were clearly trying to comply with Directive 2004/38. They agreed to grant full equal treatment to migrant workers and to citizens who had acquired permanent residence, as is the case in the legislation passed in Luxembourg following *Giersch*. A test related to the "major" or "minor" nature of the work carried out in the host Member State only appears in the 2007 cases and we see a clear shift towards criteria based on the duration of one's integration in the host state. Even in *Commission v Netherlands*, where national authorities wanted to apply a criterion related to the duration of residence to all migrant workers, such a solution was clearly inspired by previous case law concerning the 'sufficient links' tests applicable to economically inactive citizens and by Article 24(2) of Directive 2004/38.[78]

The link between frontier workers' rights and the rights derived from permanent residence under the Directive was brought up by the Court of Justice itself in *Giersch*, when it suggested that Member States could make financial support conditional on the parent of the student having worked in Luxembourg for a minimum period of time. The Court seemed to add an indication as to what that period could be by referring to the five years' residence condition set in Art. 16(1) of Directive 2004/38,[79] although it then denied this analogy's relevance and rejected such a strict criterion in *Bragança.*[80] Despite this apparent contradiction in the case law, the relevance of analogies between the status of frontier workers and that of all citizens under Directive 2004/38 is made clear by the introduction of a test developed within the case law concerning economically inactive citizens into the interpretation of Article 45 TFEU and of Regulation 492/2011.

These rulings clearly show an influence of the case law and legislation concerning economically inactive citizens over the status of certain workers exercising their free movement rights. Although migrant workers' rights appear to be guaranteed, frontier workers find themselves excluded from the full benefit of equal treatment simply because they do not reside in the Member State. This criterion is contrary to the traditional approach which links rights granted

78 *'By way of derogation from paragraph 1, the host Member State shall not be obliged* [...] *prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.*

79 *Giersch*, cit., para. 80.

80 *Bragança Linares Verruga*, cit., para. 65–70.

under Article 45 TFEU not to residence, but exclusively to worker status. The 'sufficient links' test, which is typically based on the duration of residence, finds itself being implemented through duration of work criteria which bear no relation to the principle that the very status of migrant or frontier worker is sufficient, in and of itself, to justify equal treatment.

The transfer of tests constructed in the context of economically inactive citizens' rights to frontier workers also leads to a clear restriction of the rights associated with migrant worker status, a reversal which gives priority to the rights derived from long-term residence in a Member State. Although migrant workers are not necessarily impacted by this case law in the short-term, there seems to be a shift from the higher protection granted to workers to a distinction between migrant workers and other citizens residing in a Member State, and those workers who do not permanently reside there. This is a fundamental shift in the traditional hierarchy among categories of citizens exercising free movement rights, and it could eventually lead to significant restrictions of frontier workers' rights, as well as those of all citizens exercising their Article 45 TFEU rights if duration of work or residence criteria became the general rule for economically active citizens too. This would not be a major issue if it was part of a more general and well-reasoned shift towards granting priority to Union citizenship rights and applying tests derived from the idea of a 'real link' with sufficient rigour and legal certainty.[81] However, the case law provides no clear indication that this is the case and, instead, gives the impression that the CJEU is almost unwittingly expanding the scope of an exception that was highly questionable in the first place.

IV.3 *The Need for Legislative Reform*

One of the root causes for this case law is clearly the attempt by many Member States to introduce restrictions on Union citizens' access to social benefits while conforming to Directive 2004/38, and the European Court of Justice's attempt to assuage fears of "social tourism" or, more specifically, "study grant forum shopping".[82] By trying to take into account what it felt were legitimate concerns about granting access to social benefits to people who were not truly migrant workers, in the sense that they were "reverse" frontier workers or that they only had a minor professional occupation in the host Member State, the Court of Justice made three very awkward rulings which have served as a precedent for a potentially far-reaching limitation of all frontier workers' rights. As

81 See Dougan, M., Spaventa, E., *'Wish You Weren't Here'*, cit., pp. 217–218.

82 In the words of the Court in *Giersch*, cit., para. 80, and *Bragança Linares Verruga*, cit., para. 57.

in other aspects of free movement law, it has transformed an issue related to the applicability of free movement rights and the appropriateness of national measures to their stated objectives into one of proportionality,[83] using a test which the Court itself considers inapplicable, in principle, to the free movement of workers. This will lead Member States to construct ever more complex legislation establishing criteria designed to prove the (lack of) integration into their societies of Union citizens who are already working there. Unfortunately, the Court's efforts to maintain frontier workers' rights do not fully compensate for the impact of allowing such a distinction with migrant workers to develop in the first place.[84]

In relation to student finance, one cannot help noticing that this is the result of the absence of an EU-wide mechanism to determine which State should be responsible for funding access to higher education for mobile EU citizens. The case law already shows the absurd complexity of a system designed to fund student mobility which depends on one the student's parents being sufficiently "integrated" in a State's economy. *Depesme & Kerrou* shows that proof of what constitutes a parent-child relationship for the purposes of determining access to social advantages is not always easy. The frontier worker may be a step parent but they must actually contribute to the maintenance of the student, whereas student finance is in principle designed specifically so that students whose parents *cannot* support them have access to higher education.[85]

The specific examples which appear in the *Depesme & Kerrou* cases show how problematic the existence of separate categories of mobile students under EU law can become. At the very least, it seems excessively convoluted to have the right to access higher education in another Member State or to benefit from financial support for such studies depend on whether one or one's parents are migrant workers, frontier workers, inactive citizens with permanent residence in another Member State, or "static" Union citizens. Moreover, the Court almost seems to be encouraging Member States to set up systems which restrict access to full financial support to students who return to join their labour markets.

Such schemes indeed answer Member States' concerns but they are contrary to the aims of free movement. These issues clearly derive from the lack

83 Nic Shuibhne, N., Maci, M., *Proving Public Interest*, cit., p. 1005.

84 Regarding the 2007 cases, see *contra* Dougan, M., Expanding the Frontiers of Union Citizenship, cit., p. 158.

85 De Witte, F. (2013). Who Funds the Mobile Student? Shedding some Light on the Normative Assumptions Underlying EU Free Movement Law*: Commission v Netherlands*. *Common Market Law Review* 50 (1), pp. 203–215, 210.

of a sufficient legislative or regulatory framework for student mobility in the EU.[86] The same could be said for the whole of EU citizenship rights, among which the differentiation of separate categories of mobile Union citizens is now rendered even more complex by the apparent pre-eminence of rights derived from residence over those derived from the historical worker status under Art. 45 TFEU. The specific treatment of frontier workers and their children in these rulings defines the 'ideal citizen' in an even more restrictive sense than the one identified by Sara Iglesias Sánchez.[87] If the ideal citizen is generally defined as one who moves to another Member State to pursue an economic activity, the ideal student, from the point of view of a Member State providing funding, is one who moves to another Member State temporarily, in order to return and enrich the first State's employment market. While the general aim of promoting free movement remains, the continuing understanding of free movement and exportable welfare as essentially exchanges between Member States rather than rights associated with EU citizenship across a common territory creates limitations on citizens' right to move across the Union.

V Concluding Remarks

A major overhaul of secondary law concerning the free movement of citizens is long overdue. Unfortunately, the current political climate does not seem to indicate any progress on this issue. In the absence of an ambitious legislative reform, it is nevertheless imperative that the differentiation between migrant and frontier workers is curtailed if we are to avoid unacceptable restrictions on the rights granted to Union citizens under Art. 45 TFEU. Of course, a more desirable reform should not only concern students or frontier workers but the concept of EU citizenship itself. However, as Niamh Nic Shuibhne writes, such a change would in reality require a new federal bargain.[88] In the meantime, she rightly states that *'Union citizenship is overburdened with expectations, both polity-related and rights-related, which it simply cannot deliver'*[89]

86 Skovgaard-Petersen, H., *There and Back Again*, cit., p. 802.

87 Iglesias Sánchez, S. (2017). A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement. In Kochenov, D. ed., *EU Citizenship and Federalism*, cit., pp. 371–393.

88 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?. In Kochenov, D. ed., *EU Citizenship and Federalism*, cit., pp. 147–177, p. 176.

89 *Ibid.*, p. 175.

and this will remain so for as long as such a fundamental political change remains unlikely. However, while the Court tries to strike an appropriate balance between the rights derived from citizenship and Member States' concerns, we must be careful not to weaken those rights which do have a firm footing in the Treaties.

CHAPTER 13

European Higher Education in the Context of Brexit

*Sacha Garben**

1 Introduction

It seems that for a long time, in European higher education at least, the UK *could* have its cake and eat it too. One of the four original architects of the European Higher Education Area (EHEA; which is the culmination of the 1998 intergovernmental Sorbonne Declaration and ensuing Bologna Process), the UK has successfully exported the main features of its higher education model to the other EU Member States and beyond, without having to concede any powers to the EU level in that regard, as the Bologna Process remains formally outside the EU's institutional and legal framework.[1] With the participating countries mainly converging to the UK system, embracing its Bachelor-Master-Doctorate degree structure as well as more implicitly its overall liberal, market-driven approach to higher education, the UK reaped all the benefits of an enlarged higher education "market" on which its higher education institutions could successfully compete, at minimal administrative, political or other cost.

Furthermore, in EU higher education law and policy, the UK has occupied an equally advantageous position. In the specific context of the EU's European Research Area (ERA), the UK's higher education sector has been very successful in obtaining EU research funding. This could potentially be linked to the fact that, as a major net importer of mobile EU students, researchers and academics – who flocked to the UK as a result of a combination of *inter alia* linguistics, the reputation of its universities and international outlook, as well

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1 See for a general discussion Garben, S. (2014). *EU Higher Education Law – The Bologna Process and Harmonization by Stealth*. Alphen aan de Rijn: Kluwer Law International.

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as its open labour market – the UK has profited from a major brain-gain. At the same time, because of the UK's liberal, fee-paying model, this imported wealth and talent has come at a very low cost. This is because the EU's case law on student mobility and diploma recognition has worked mainly to the benefit of the UK model, where it requires equal treatment as regards tuition fees but not maintenance grants. Although the Court developed students' mobility rights already before the introduction of EU citizenship in the Treaty of Maastricht, it has since then relied on this 'fundamental status' of Member State nationals to further strengthen its protective approach.[2] The (ideal-type) mobile student, with its youthful ambition and potential to develop a pan-European career, life and identify, is in many ways the embodiment of both the aspirational and instrumental aspects of EU citizenship.

What will be the impact of Brexit? While we shall leave concrete predictions to futurologists, this paper will reflect on the underlying dynamics in this area, from a legal and political point of view, and will thereby indicate the relevant "stakes" and "pressure points" which are likely to come to the fore in the Brexit negotiations in respect of the area of higher education. It will be argued that while the EHEA is independent from EU membership, and the UK will thus presumably remain party to it post-Brexit, a country's successful performance within the EHEA is deeply connected to (and dependent on) the EU's "hard" free movement rights deriving from EU citizenship and the internal market. In addition, in terms of the ERA, it is clear that UK universities stand a lot to lose if Brexit would bar them from obtaining EU research funding, making this an important bargaining chip for the EU, both within the negotiations and potentially as leverage for the UK's compliance with its obligations under any future relationship. As such, the UK's current strength in higher education is one of its weak spots in the Brexit negotiations.

Part 2 of the paper will set out the general elements of European higher education law and policy, Part 3 will consider the current position of the UK in both this context, while part 4 will explore the possible implications of, and for, Brexit. Part V concludes.

II European Higher Education Law and Policy

Over the past two decades, a remarkable amount of Europeanization has occurred in higher education, an area that has traditionally been closely guarded

2 See Chapter 4 in Garben, S. (2014). *EU Higher Education Law,* cit.

by EU Member States as one of the remaining bastions of national identity and autonomy. This Europeanization has taken place, and continues to develop, in two main forums. The most fundamental European influence on national higher education systems has come from the intergovernmental Bologna Process, which has resulted in the so-called European Higher Education Area (EHEA). The second source of Europeanization is the EU, which since the Maastricht Treaty possesses a direct competence in education in the form of (what is now, since the Lisbon Treaty) Article 165 TFEU.

11.1 *The Bologna Process and the EHEA*

The Bologna Process was initiated in 1998, when at an international forum organized in connection with the celebration of the 800th anniversary of the Sorbonne University, the Ministers of education of France, Germany, Italy and the United Kingdom decided on a "Joint Declaration on harmonisation of the architecture of the European higher education system". It was open for the other Member States of the EU as well as for third countries to join. Belgium, Switzerland, Romania, Bulgaria and Denmark accepted and signed immediately. The Italian minister for education extended an invitation to fellow European ministers to a follow-up conference, taking place in Bologna the following year.[3] On this occasion, in June of 1999, 29 European countries agreed on a declaration that would fundamentally change the future of their higher education systems. From this Bologna Declaration ensued the Bologna Process, which now includes 48 countries and the European Commission as "members".[4]

The Process is an on-going platform for policy-exchange and policy-making in higher education, organized around regular (bi- or triannual) ministerial conferences, which assess the progress made in reference to the various previously established Bologna policy objectives and which add new aims and elements. The original deadline of the Process was the creation of a European Area of Higher Education by 2010, but the Process has continued despite the EHEA's official launch in March 2010 during the Budapest-Vienna Ministerial Conference. While the Process has significantly branched out in terms of scope and objectives over the years, at its heart is still the structural "harmonisation"[5]

3 Hackl, E. (2001). Towards a European Area of Higher Education: Change and Convergence in European Higher Education. *EUI Working Paper*, no. 9, p. 21.

4 All EU Member States, as well as Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Holy See, Iceland, Kazakhstan, Liechtenstein, Moldova, Montenegro, Norway, Russia, Switzerland, Macedonia, Serbia, Turkey and the Ukraine.

5 The Sorbonne Declaration, which is seen as the basis for the Bologna Declaration and Process, carries the term 'harmonisation' in its very title. However, in contrast with the Sorbonne

of Europe's higher education systems, through the introduction of a common higher education system consisting in three (Bachelor-Master-Doctorate) cycles. The Bologna Declaration states that "*access to the second cycle shall require successful completion of first cycle studies, lasting a minimum of three years. The degree awarded after the first cycle shall also be relevant to the European labour market as an appropriate level of qualification. The second cycle should lead to the master and/or doctorate degree as in many European countries*". The main aim of this common system, and of the Bologna Process more generally, is to facilitate mobility in higher education and to improve the employability of graduates. The standardized degrees should be recognized in the participating countries, and to this end the Lisbon Recognition Convention of the Council of Europe[6] is integrated into the Process by making its ratification an explicit Bologna "requirement". As an extension of the common three-tier structure and commitment to diploma recognition, the Process has increasingly focused on quality assurance mechanisms and standards, within which "employability" plays an important role.

It should be stressed that the Sorbonne and Bologna Declarations and the ensuing Process are not legally binding. Both participation in the Process and the 'implementation' of the Declarations and subsequent ministerial communiqués are entirely voluntary; they are "political artefacts"[7] that may be regarded as "public international soft law".[8] It should indeed also be underlined that the Bologna Process is formally separate from the EU and EU law. The European Commission is a "member" of Bologna alongside the participating counties, but the Process takes place outside the EU's institutional and legal framework. As we shall see in Section III, the UK has played an important

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Declaration, the Bologna Declaration carefully avoids the use of the word. In fact, the question whether the envisaged Bologna project constituted 'harmonisation' is reported to have been a highly contentious issue that had to be resolved before the Declaration could be signed. There had already been discussion about the use of the term in the run-up to the conference. Most of the participating countries deemed the type of standardisation entailed by harmonisation to be undesirable in the field of higher education. Although the French minister Claude Allègre tried to convince his colleagues that 'harmonisation' as used in the text of the Declaration was not to mean 'standardisation' in its unwanted sense, the majority of participants preferred to stay on the safe side and leave out the term. See: Kirkwood-Tucker, T. (2004). Toward a European Model of Higher Education Processes, Problems, and Promises. *European Education* 36 (3), pp. 51–69.

6 1997 Convention on the Recognition of Qualifications concerning Higher Education in the European Region.

7 Amaral A., and Magalhaes, A. (2004). Epidemiology and the Bologna Saga. *Higher Education* 48 (1), pp. 79–100, 84.

8 Hackl, E. (2001). *Towards a European area of higher education*, cit, p. 28.

role in ensuring that the Bologna Process would remain an intergovernmental, voluntary project, keeping the EU on the side-lines. But also a number of other EU Member States were (initially) eager to exclude the EU, perhaps as 'retribution' for the EU's growing role in the area despite its initial lack of direct competence.[9]

I have argued elsewhere that the exclusion of the EU and the intergovernmental nature of the Bologna Process have led to a number of legitimacy problems, and that it would in fact have been better to adopt the Declaration as a binding measure within an EU context.[10] In any event, the activities undertaken in the context of Bologna overlap to an important extent with EU policies and initiatives, and its objectives are closely connected to an EU *corpus legis*. The Commission is heavily involved by means of funding and steering, and characterizes its contribution to the Process as part of the Lisbon/Europe 2020 Strategy.[11] The Bologna follow-up relies heavily on the EU presidency and the European Credit Transfer System (ECTS) has been transposed into the Bologna Process' Bachelor-Master system. Furthermore, since 2015, the EU offers a Student Loan Guarantee Facility, which provides partial guarantees to financial intermediaries in respect of loans granted to students undertaking a second-cycle degree, such as a Master's degree, which is neither their country of residence nor the country in which they obtained their qualification granting access to the Master's programme.[12] Once fully implemented,[13] this EU measure is of course an important support for the system and the goals of the Bologna Process. All of this makes the exact status of the Bologna Process obscure and means that in spite of the intentions of the (original) Bologna actors, the EHEA is deeply connected to the EU's institutional and legal framework, even if it remains formally separate from it.

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9 For extensive discussion, see: Garben, S. (2014). *EU Higher Education Law,* cit.

10 Ibid; Garben, S. (2010). The Bologna Process: from a European law perspective. *European Law Journal* 16 (2), pp. 186–210. .

11 European Commission (2003). *Realising the European Higher Education Area,* Contribution of the European Commission to the Berlin Conference of European Higher Education Ministers on 18/19 Sept. 2003.

12 Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing "Erasmus+": The Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC, *OJ L 347,* 20.12.2013, p. 50–73.

13 Currently the scheme is being made available through banks and universities, with only limited coverage. See https://ec.europa.eu/programmes/erasmus-plus/opportunities/individuals/students/erasmus-plus-master-degree-loans_en.

2 *The EU and Its Higher Education Law and Policy*

As was just indicated, the EU features a range of laws and policies in the area of higher education, and this was already the case at the time of the Bologna Declaration's genesis. This may be to the surprise of some, considering that the 1957 Rome Treaty did not confer any specific powers for the development of a common educational policy. This absence however did not deter the European Court of Justice to expand its influence and to help establish a "Community law of education",[14] stating that "although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training".[15] Moreover, there was not a complete lack of explicit competence in educational matters. Article 57 EEC (now Article 53 TFEU) granted legislative powers for the mutual recognition of diplomas. Furthermore, the EEC Treaty also provided for competence in vocational training. It is in fact on this provision that the EU's initial education law was developed. In its consequential *Gravier* judgment, where the Court held that Member states cannot charge higher enrolment fees to non-national EU students, the Court interpreted vocational training to include an element of "general education".[16] Shortly afterwards, the Commission presented the Erasmus programme for student exchange[17] solely under Article 128 EC (now Article 166 TFEU on vocational training),[18] and in a subsequent case, the Court largely upheld the Commission's

14 De Witte, B., ed.(1989). *European Community Law of Education.* Baden-Baden: Nomos.

15 Court of Justice, judgment of 3 July 1974, case 9/74, *Donato Casagrande v. Landeshauptstadt München*.

16 Court of Justice, judgment of 13 February 1985, case 293/83, *Gravier*. Further developed in Court of Justice, judgment of 2 February 1988, case 24/86, *Blaizot v. University of Liege* clarifying that this could also include university education whenever it prepares students for an occupation.

17 European Commission, Proposal for a Council Decision adopting ERASMUS, COM (1985) 756. Erasmus establishes a European University Network, encouraging universities by means of financial incentives to set up student and teacher exchange agreements. It gives out grants to the participating students; covering the cost of linguistic preparation for the studies abroad, travel expenditure and compensation for the higher cost of living in the host state. Erasmus is very much a success story, in terms of numbers, outcomes and perception. See European Commission (2007). *Erasmus: Success Stories: Europe Creates Opportunities*. Luxembourg: Office for Official Publications of the European Communities.

18 Pépin, L. (2007). The history of EU cooperation in the field of education and training: How lifelong learning became a strategic objective. *European Journal of Education* 42 (1), pp. 121–132, 124. Lenaerts, K. (1989). Erasmus: Legal basis and implementation. In: De

wide interpretation of this provision so as to apply to university education.[19] Even if this discussion has been long superseded since the introduction of a specific legal basis for education in the Maastricht Treaty (the most recent incarnation of the programme, ERASMUS+,[20] is based on both Article 165 and 166 TFEU), this story remains interesting as it shows the dynamics behind the evolution of this area.

The Court's case law on student mobility has developed since the seminal *Gravier* judgment, making clear that EU citizens have the right to higher education in other EU Member States on the same terms as nationals, which does not only require equal treatment as regards access conditions and tuition fees, but in principle also as regards maintenance grants. In the *Bidar* case, the Court included student maintenance for the purposes of the application of the prohibition of discrimination as a matter of principle.[21] Remarkably, the Court used the Citizenship Directive 2004/38,[22] which provides in its recital 21 that it should be left to the host Member State to decide whether it will grant maintenance assistance for studies, and in Article 24(2) that the host Member States "shall not be obliged to [...] grant maintenance aid for studies" prior to acquisition of the right of permanent residence, as an argument that the grant of such aid actually falls within the scope of the Treaty.[23] Contrary

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Witte, ed., *European Community Law of Education*, cit, p. 116; Shaw, J. (1992). Education and the law in the European Community. *Journal of Law & Education* 21 (3), pp. 415–442, 420.

19 Court of Justice, judgment of 30 May 1989, case 242/87, *Commission v. Council* (*Erasmus*).

20 Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing "Erasmus+": the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC, *OJ L 347,* 20.12.2013, p. 50–73.

21 Court of Justice, judgment of 15 March 2005, case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*.

22 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

23 The Court stated: "That development of Community law is confirmed by Article 24 of Directive 2004/38, which states in paragraph 1 that all Union citizens residing in the territory of another Member State on the basis of that directive are to enjoy equal treatment 'within the scope of the Treaty'. In that the Community legislature, in paragraph 2 of that article, defined the content of paragraph 1 in more detail, by providing that a Member State may in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families restrict the grant of maintenance aid in the form of grants or loans in respect of students who have not acquired a right of permanent residence, it took the view that the grant of such aid is a matter which, in

to the expectations raised by *Bidar* that students may qualify for maintenance aid before obtaining the right of permanent residence after 5 years of legal residence, in the *Förster* case the Court allowed for an extensive derogation of this principle, so that under the current state of affairs only those students of foreign EU nationality are eligible that have spent 5 years in the host State before applying.[24] As regards the exportability of maintenance grants and loans, the Court held in *Morgan and Bucher* that "where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States".[25]

This distinction between access conditions, comprising tuition fees, on the one hand, for which full equal treatment of mobile students is required, and on the other hand maintenance support for which equal treatment will only apply in exceptional cases, has an asymmetrical effect on Member States' higher education systems. Where a Member States subsidizes and organizes higher education through free or low-tuition access, EU law requires them to extend this to mobile EU students. Where, on the other hand, it subsidizes and organizes higher education through maintenance grants and loans, it does not have to do so. This works to the disadvantage of Member States with a social model of higher education, as "EU law requires Member States which choose to devote significant public resources to maintaining a high quality further education system for the benefit of their own populations to subsidize, through the principle of equal access, in addition potentially large numbers of foreign students"[26] while more Member States with a more 'liberal' model with high tuition fees and support through maintenance grants or loans have to pay significantly less to mobile students in comparison.

In addition to the provision on vocational training discussed above, the Rome Treaty featured another competence related to education: Article 53

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accordance with Article 24(1), now falls within the scope of the Treaty". See paragraph 43 of the judgment.

24 Court of Justice, judgment of 18 November 2008, case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*.

25 Court of Justice, judgment of 23 October 2007, joined cases C-11/06 and C-12/06, *Rhiannon Morgan v. Bezirksregierung Köln* (C-11/06) *and Iris Bucher v. Landrat des Kreises Düren* (C-12/06), para. 28.

26 Dougan, M. (2005). Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?. *Common Market Law Review* 42 (4), pp. 943–986.

TFEU on recognition of diplomas. Professional diploma recognition deals with the rules of Member States that make access to or pursuit of a regulated profession in their territory contingent on possession of professional qualifications.[27] Article 53 TFEU provides an explicit legal basis for legislative action, approaching the issue from an internal market logic. Considering that currently around 800 professions are regulated by one or more Member States, the establishment of a common employment market would be fundamentally impaired if Member States could carve out these professions by applying their different statutory regimes. This has allowed the EU to adopt a range of legal measures. The numerous directives on co-ordination of training and recognition of qualifications have had a direct impact on content of courses.[28] For instance, Directive 78/687 caused the entire dentistry curriculum of Italian universities to be recreated.[29] The most important current measure is umbrella Directive 2005/36/EC.[30] It consolidated almost all the previous legislation, except for the specific directives on the provision of services and establishment of lawyers.[31] The umbrella directive does not substantially impact the higher education systems of the Member States in a direct way. It does not propose the harmonization of new professions, but simply applies a mutual recognition approach to the non-coordinated professions. Still, the mechanism of mutual recognition might have an effect on the national higher education systems, as it could put pressure on the systems that are less 'efficient'.

In contrast to professional recognition, academic recognition is said to be concerned with the academic status of obtained degrees. Academic recognition is often regarded to lie outside the scope of formal EU powers. Although it could be argued that this distinction is unfounded,[32] no EU legislation

27 Schneider, H. (1995). *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*. Antwerp: Maklu.

28 Lonbay, J. (1989). Education and the law: The Community Context. *European Law Review* 14 (6), pp. 363– 387, 368.

29 Zilioli, C. (1989). The Recognition of Diplomas and its Impact on Educational Policies. In; B. de Witte, ed., *European Community Law of Education*, cit., 51.

30 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *OJ L 255*, 30.9.2005, p. 22–142.

31 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, *OJ L 78*, 26.3.1977, p. 17–18 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, *OJ L 77*, 14.3.1998, p. 36–43.

32 Garben, S. (2011). On Recognition of Qualifications for Academic and Professional Purposes. *Tilburg Law Review* 16 (2)2011, pp. 127–156.

concerning the academic recognition of diplomas has been adopted. That is not to say that no European integration has taken place in this area. Firstly, the EU has adopted a number of supporting measures to facilitate academic recognition, such as the European Credit Transfer System for higher education (ECTS)[33] and for vocational training (ECVET),[34] Europass,[35] the European Qualifications Framework[36] and the Diploma Supplement.[37] Moreover, the case law of the Court has played an important role also here, as it has held that the refusal to recognize academic diplomas or titles from other Member States can constitute a restriction of the fundamental freedoms.[38] Beyond the mobility of students and diploma holders, EU law features important mobility rights for other education actors. Teachers qualify as "workers" and can therefore rely on all the rights and benefits connected to Article 45 TFEU.[39] Furthermore, the activities of private education institutions qualify as "services" under Article 56 TFEU.[40] Similarly, private education institutions have the right to free establishment across the EU. Member States may therefore in principle not restrict privately funded higher education institutions from offering education

33 ECTS was developed by the Commission in the context of ERASMUS to enable students to take the credits obtained during their period of study abroad and use them within their home curriculum.

34 Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Credit system for Vocational Education and Training (ECVET), *OJ C 155*, 8.7.2009, p. 11–18.

35 Decision (EU) 2018/646 of the European Parliament and of the Council of 18 April 2018 on a common framework for the provision of better services for skills and qualifications (Europass).

36 Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, *OJ C m*, 6.5.2008, p. 1–7. The EQF constitutes a European reference framework, consisting of 8 levels, based on "learning outcomes".

37 The Diploma Supplement is a European administrative annex to diplomas, which has been elaborated jointly by a working group of the European Commission, Council of Europe and UNESCO.

38 Court of Justice, judgment of 31 March 1993, case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*. The non-recognition on equal terms of secondary school qualifications was considered a restriction of Arts. 18 and 21 TFEU on equal treatment of EU citizens, in Court of Justice, Judgments of 1 July 2004, 7 July 2005 and 13 April 2010 in cases C-65/03, *Commission v. Belgium*, C-147/03, *Commission of the European Communities v. Republic of Austria*, ECLI:EU:C:2005:427 and Case C-73/08, *Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française*.

39 Court of Justice, judgment of 28 November 1989, case 379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*.

40 Court of Justice, judgment of 11 September 2007, case C-76/05, *Herbert Schwarz, Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*.

programmes and degrees in other Member States, and the diplomas they issue should in principle be recognized by that host Member State.[41]

Further relevant EU measures include the Student Residence Directives. Directive 93/96[42] granted students the right of residence in the Member State of study, but under the conditions of sufficient health insurance and sufficient resources to avoid becoming a burden on the host State's social assistance schemes. This Directive was repealed by Directive 2004/38[43] on the right of citizens to move and reside freely within EU territory. The Directive constitutes a consolidation and clarification of all the legislation on the right of entry and residence for Union citizens. As discussed above, it indicates specifically that host Member States are not required, prior to the acquisition of the permanent right of residence, to grant maintenance aid for studies, including for vocational training, in the form of grants or loans. Directive 2004/114 in turn concerns students from third countries. The rationale behind the Directive is to "promote Europe as a whole as a world centre of excellence for studies and vocational training" by promoting the mobility of third-country nationals to the EU for the purpose of studies.[44] The Directive distinguishes four categories of third-country nationals, namely students, school pupils, unpaid trainees and volunteers. The conditions for entry of students and pupils are that they have a valid travel document and, if minors, come with parental authorization, that they have sickness insurance and sufficient resources to cover their stay and that they have been accepted by a higher educational establishment or school.

A final important aspect of EU higher education is the European Research Area (ERA), for which the Lisbon Treaty introduced a legal basis in Article 179(1) TFEU.[45] According to the text of Article 179 FEU, this area is characterized

41 Court of Justice, judgment of 13 November 2003, case C-153/02, *Valentina Neri v. European School of Economics*.

42 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, *OJ L 317*, 18.12.1993.

43 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

44 Preamble (para. 14) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132, 21.5.2016, p. 21–57.

45 The European Research Area was initiated by the Commission in 2000, COM(2000) 6 final of 18.1.2000, and established by a Council Resolution of 15 June 2000 establishing a European Research Area.

by increased mobility of researchers, scientific knowledge and technology, and increased "competitiveness" of the European research sector. This is to be achieved by collaboration among the various actors engaged in research, both private and public; through the use of the internal market freedoms; and through the definition of common standards, for which Article 182(5) TFEU provides a legal basis prescribing the ordinary legislative procedure. In 2010, the European Council indicated its intention to have "the European Research Area completed by 2014 to create a genuine single market for knowledge, research and innovation".[46] That declaration also indicated mobility as a priority, noting that: "[i]n particular, efforts should be made to improve the mobility and career prospects of researchers, the mobility of graduate students and the attractiveness of Europe for foreign researchers".[47] Researchers can, in principle, qualify as "workers" in the sense of Article 45 TFEU when they perform services under direction in return for remuneration,[48] but when they carry out their activities on the basis of a grant rather than a traditional salary, these conditions may not be met.[49] Several further obstacles tend to hamper mobility: many vacancies are not (internationally) openly accessible, many jobs in this sector still require (at least some degree of) knowledge of the national language; and social security provisions for researchers are highly heterogeneous and transferability of entitlements is troublesome.

Facing these challenges, the EU has adopted various policy measures. In 2005, the European Commission adopted a European Charter for Researchers and a Code of Conduct for the Recruitment of Researchers.[50] For the purpose of open, transparent and merit-based recruitment, the EU created the EURAXESS Jobs Portal,[51] the use of which is uneven but growing.[52] In 2014, RESAVER was launched. This is a single European pension arrangement offering a defined contribution plan, tailor-made for research organisations and their employees, to enable mobile and non-mobile employees to remain affiliated to the same pension vehicle when moving countries and changing

46 EUCO 2/1/11 REV of 8 March 2010.

47 Ibid.

48 See Court of Justice, judgment of 17 July 2008, case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*.

49 Ibid.

50 Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers, *OJ L 75*, 22.3.2005, p. 67–77.

51 http://ec.europa.eu/euraxess/.

52 About 47 % of researcher job postings in 2014 with 7.8% compound annual growth rate in the period 2012–2014 in the EU. European Commission (2016). *European Research Area Progress Report 2016*, SWD (2017)21, available at: http://ec.europa.eu/research/era/pdf/era_progress_report2016/era_progress_report_2016_swd.pdf.

jobs.[53] Furthermore, the European Research Council (ERC), which was established in its current form in 2007,[54] has had significant success in 'opening up' research activities to competition at European level. As von Bogdandy notes: "[t]he success rate in obtaining funding from one of its programs is perhaps the most visible instrument for an intra-European comparison regarding the attractiveness and capability of the research institutions of the member states".[55] Indeed, for many the most tangible element of the ERA is the funding for research it provides under Horizon 2020, which amounts to 8 billion EURO.

The ERA and EHEA have very different legal statuses from an EU law perspective. The ERA is firmly based in the Treaties and the EU's institutional setting, while as mentioned the EHEA is a feature of "public international soft law".[56] Still, there is a "substantial degree of resemblance in terms of scope, governance and working methods, actors and activity types".[57] There is also a certain alignment in overall political orientation, as both aim to increase competition and introduce market mechanisms in the higher education sector.[58] The fact that such sensitive decisions are taken through soft law processes, implying a certain accountability deficit, has met with some criticism.[59]

III The UK and European Higher Education Law and Policy

1 *The UK and the Bologna Process*

Whereas at the end of the last century, other European countries were struggling with the faltering influence and standing of their once so glorious

53 See European Commission (2014). New pan-European pension fund to boost researcher mobility, available at http://europa.eu/rapid/press-release_IP-14-1063_en.htm and http://www.resaver.eu.

54 Commission Decision of 17 February 2015 amending Decision C(2013) 8915 establishing the European Research Council, *OJ C 58*, 18.2.2015, p. 3–5.

55 Von Bogdandy, A. (2012). National legal scholarship in the European Legal Area – A Manifesto. *International Journal of Constitutional Law* 10 (3), pp. 614–626.

56 Hackl, E. (2001). *Towards a European Area of Higher Education*, cit, p. 28.

57 Van der Hijden, P. (2012). Mobility Key to the EHEA and ERA. In: Curaj *et al,* eds., *European Higher Education at the Crossroads: Between the Bologna Process and National Reforms*. Dordrecht: Springer, p. 378.

58 See Garben, S. (2010). The Bologna Process and the Lisbon Strategy: Commercialisation of Higher Education through the Back Door?. *Croatian Yearbook of European Law and Policy* 6 (6), pp. 209–230.

59 Ibid. See also Gideon, A. (2015). The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective. *Journal of Common Market Studies* 53 (5), pp. 1045–1060.

universities, and accordingly with the decreasing attractiveness of their higher education systems,[60] the only problem the UK had in attracting foreign students was that there were too many applicants from all over the world eager to study at the UK's universities, because of their world-class reputation and because of the opportunity for students to develop their English-language skills.[61] Accordingly, "the UK's strong position in European higher education raises questions about why it needs to be involved in the Bologna Process, what it has to gain, and why the UK should help other countries in the EHEA to modernise if that is going to risk its competitive advantage".[62] For indeed, the model towards which convergence was directed in the Sorbonne and Bologna Declarations closely resembles the UK Bachelor-Master system, which could have meant that other countries would copy precisely the aspects of the UK's higher-education system that are considered to be responsible for its success. That would risk diminishing the UK's advantageous position, without any additional benefits for the UK itself. Why indeed then, one could ask, is the UK one of the four founding members of the Bologna Process?

The initiative for the Bologna Declaration surely came from the French, Italian and German ministers more than from its fourth signatory, the UK junior minister Baroness Tessa Blackstone. The other three ministers already knew each other and had been discussing some of the issues already well before the Sorbonne event.[63] Hoareau reports that only "once France, Germany and Italy had agreed on the principle of a reform of degrees establishing an undergraduate degree of three years, and two postgraduate levels in two and eight years" they "contacted the British minister".[64] The three initiators were well aware that for the Declaration to have an optimum impact they needed the

60 See for extensive discussion Garben, S. (2014). *EU Higher Education Law*, cit.

61 Furlong, P. (2005). British Higher Education and the Bologna Process: An Interim Assessment. *Politics* 25 (1), pp. 53–61.

62 House of Commons, Education and Skills Committee (2007). *The Bologna Process*, Fourth Report of Session 2006–7, 6.

63 The three ministers from France, Germany and Italy had "come to know and esteem one another in the context of a virtually unknown international organization, sometimes called the "G8 of research", the largely informal grouping of the ministers for research in the key industrialized countries of the world established by the Carnegie Commission on Science, Technology and Government". Tessa Blackstone, as a junior minister, was not in charge of research and had therefore not been a part of these conferences. Schriewer, J. (2009). Rationalized Myths in European Higher Education: The Construction and Diffusion of the Bologna Model. *European Education* 41 (2), pp. 31–51.

64 Hoareau, C. (2009). Consequential Deliberative Governance? Analysing the Impact of Deliberation on Attitudinal and Policy Change in the European Higher Education Area. *London School of Economics Working Paper*.

UK onboard "in light of the political clout the UK has as one of the "larger" EU Member States".[65] Blackstone agreed to participate, probably because of the idea that the Bologna Process only proposed convergence towards the UK model. Indeed, Blackstone stated that signing the Sorbonne Declaration "was a riskier action"[66] for the other three signatories than for her: "They were committing their own systems of higher education to much greater change than I. The Anglo-Saxon model that was proposed that day in May 1998 was essentially the one that prevailed in the United Kingdom as well as North America. We in Britain had to make relatively few adaptations. In France, Germany and Italy more change was required following the Declaration".[67]

Together with this idea that no reforms would be required, it was important for Blackstone that the project would be a strictly intergovernmental one, without any binding agreement, and for that reason she was keen to keep the EU and the European Commission out.

It is reported that when Blackstone returned from the Sorbonne meeting, she did face some "criticism for signing something so "European" as a declaration on a common European Higher Education Area".[68] But contrary to what one might expect, it seems that there was no real controversy or even a heated public debate about the UK's participation in (creating) the EHEA. Blackstone's justification for her signature, stressing that the agreement only implied that Britain's system would be introduced elsewhere,[69] was apparently convincing enough. The government, the higher education sector and the public were all more or less on the same side, because the UK government did not have an agenda to participate in the Bologna Process to push national reforms in the same sense many of the governments of the other participating countries had.[70] In contrast to the governmental rhetoric in those other countries, UK officials were eager to water down the importance of the Declaration, stressing that no reforms would be necessary as the UK was the model country anyway. Indeed, its higher education sector was not subjected to the massive and sometimes painful reorganizations that their colleagues on mainland Europe

65 Schriewer, J. (2009). Rationalized Myths in European Higher Education: The Construction and Diffusion of the Bologna Model, cit, p. 37.

66 Blackstone T., *Education and Training in the Europe of Knowledge*, link no longer available.

67 Ibid.

68 Martens, K. and Wolf, K. (2009) Boomerangs and Trojan Horses: The Unintended Consequences of Internationalizing Education Policy through in the EU and the OECD. In: Amaral *et al,* eds., *European Integration and the Governance of Higher Education and Research*. Dordrecht: Springer, p. 81*et seq*.

69 Ibid.

70 For extensive discussion, see Garben, S. (2014). *EU Higher Education Law,* cit.

faced in the wake of Bologna. This might have contributed to the fact the UK reaction mainly consisted of "complacency, based on the view that much of this amounts to catch-up by other European countries"[71] combined with a sort of indifference to Bologna's ins and outs.

This is not to say that the UK was not actively involved in the Process from the beginning. Seminars and meetings were organized on a relatively frequent basis already a few years after the signing of the Declarations. The national Quality Assurance Agency launched a national framework for higher education qualifications "with careful descriptions of bachelors and master's degree qualifications" in 2000.[72] In 2003, the UK Government ratified the Lisbon Recognition Convention, a key Bologna aim. A survey of UK higher education institutions by the Europe Unit in 2005 indicated considerable awareness and engagement with the Bologna Process among those institutions. However, it can be said that it was only in 2006, when the House of Commons Education and Skills Committee launched an inquiry focusing on Bologna that any kind of substantive debate really materialized. The inquiry was undertaken in the immediate run-up to the Bologna Process' London Ministerial Summit of May 2007 "in order to facilitate broad discussion of the UK position" "with the intention of making a constructive contribution to the negotiations at the 2007 Summit and beyond".[73] The Report thoroughly addressed the question why the UK should participate, because "as a European leader in higher education, the benefits of engagement in the Bologna Process might not be as immediately obvious for the UK as they are for other signatory countries in the EHEA".[74] As a minimum case for membership, it was argued that in the rapidly developing global market for higher education, the UK could simply not afford not to be involved. "The modernization of European higher education would continue to take place regardless of UK involvement and could have implications for the recognition of UK courses and competitive position".[75] It would therefore be better to participate and attempt to influence and steer the Process from the inside.[76] The Report made it clear that a sense of complacency had to be

71 Furlong, P. (2005). British Higher Education and the Bologna Process: An Interim Assessment, cit, p. 60.

72 Cowen, R. (2008). The Bologna Process and Higher Education in England. In: Palomba, ed., *Changing Universities in Europe and the 'Bologna Process'*. Comparative Education Studies, p. 58.

73 House of Commons Education and Skills Committee (2007). *The Bologna Process* cit, p. 3.

74 Ibid, p. 25.

75 Ibid.

76 In the words of a UK Minister: "The problem is that they [mainland Europe] will get on with it, they will continue with this process and, given the competitive pressures that

avoided, and identified the pressure that the convergence process put on the UK's higher education system. The competitive advantage in attracting overseas students, traditionally a particular focus of the UK, could be reduced if "comparability and compatibility would develop apace across the EHEA without efforts from the UK to keep up".

Beyond the minimum case for membership, the Report identified some significant benefits for the UK in active Bologna participation. The Committee found government and the organizations representing higher education to agree about such advantages, supported by student organizations as well as university leaders and academic staff involved in implementing the Bologna principles and action lines in practice. Engagement in the Process could be economically beneficial, through increased employment and productivity. Furthermore, involvement could increase the competitiveness of the UK higher education sector through promoting the attractiveness and international reputation of the EHEA at large. In addition, the Report pointed out that UK students could profit from increased mobility and employment opportunities. With regard to UK universities, active Bologna membership could guarantee an increased market for both EU and international students within the EHEA, increased mobility of staff, sharing of best practice and expertise in a broad range of areas, and increased opportunities for research collaboration across the ERA. All these considerations led the Committee to conclude that there were not only significant dangers for the UK not to be actively involved in the Bologna Process, but that there were also some significant advantages to be gained from membership, with the Bologna action lines increasingly reflecting the policy priorities in the UK. This settled the question of the desirability of the UK's membership of the Bologna Process, almost ten years after it had helped create it.

2 *The UK and EU Higher Education and Policy*

In EU higher education law and policy, the UK equally occupies a privileged position. First and foremost, the UK and its higher education sector has been one of the main beneficiaries of the ERA. UK higher education institutions are highly successful in acquiring EU research funding, with the highest number

exist, over time for some of our institutions, I think that could hit them competitively in that they have ended up in a situation where a system of comparability and compatibility is developed elsewhere in the broader Europe [and] we are not a part of it [...] that is why I think the process is happening, we need to embrace it and we need to influence it in our national interest". See House of Commons Education and Skills Committee (2007). *The Bologna Process,* cit, p. 25.

of Horizon 2020 submissions obtaining the 2nd highest share of all funding, amounting to 15.2% of overall available funding (as well as benefitting indirectly from funding allocated to their project partners from elsewhere in the EU).[77] It has been estimated that EU research funding generates more than 19,000 jobs across the UK, £1.86 billion for the UK economy and contributes more than £1 billion to GDP, according to a report produced for Universities UK.[78]

As regards student mobility, as set out in Part II.B above, EU law requires equal treatment in higher education as regards all access conditions, including tuition fees, but allows a 5-year prior residence requirement to be applied for the purposes of maintenance support. While it is difficult to establish an accurate overall financial picture, it can be expected that EU law as it currently stands thus plays out to the benefit of the UK system, which charges high tuition fees to all students (up to £9,250)[79] and provides its main subsidies to individual students through maintenance grants and loans. Of course, EU law prevents the UK from charging higher tuition fees to foreign EU students than it charges national students and, considering the UK's status as the biggest net-importer of students in the EU, this implies an opportunity cost. On the other hand, if the UK were in fact to charge higher tuition fees, it could be projected that fewer EU students would come. In any event, compared to Member States that do not charge any, or only low, tuition, the UK is required to pay less in regard to foreign students. Furthermore, UK students can, of course, benefit from other Member States' more 'generous' education systems.

It may even be that the UK has a net financial benefit per foreign EU student. EU students will only be entitled to undergraduate tuition fee loans, to cover their ± £9000 yearly fees, which will have to be repaid. Only if they become permanent residents after 5 years of legal stay in the UK, can they apply for undergraduate maintenance support.[80] As the loan is on 'friendly conditions' and not all is always paid back, this of course can still be estimated to come at

77 European Commission (2018). *Horizon 2020 in Full Swing, Key Facts and Figures 2014 – 2016*. Luxembourg : Publications Office of the European Union available at https://ec.europa.eu/programmes/horizon2020/sites/horizon2020/files/h2020_threeyearson_a4_horizontal_2018_web.pdf.

78 Kelly, U. (2016). *Economic Impact on the UK of EU Research Funding to UK Universities*, available at: https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/economic-impact-of-eu-research-funding-in-uk-universities.pdf.

79 The cost of studying at a university in the UK (2017). *Times Higher Education,* December 1, available at: https://www.timeshighereducation.com/student/advice/cost-studying-university-uk.

80 Students with 3 years prior residence, but not for the main purpose of receiving full-time education during any part of this 3-year period, also have access to maintenance loans.

some cost to the UK taxpayer.[81] However, the EU student also spends money in the UK on various living costs such as accommodation, food and general consumption, meaning that on balance this could be projected to break even for the UK economy as a whole. As to the financial position of the universities themselves, while some are claiming that a student costs a university £16.000 a year,[82] there is no transparency concerning the calculations on which these figures are based.[83] It is possible that in the average cost of a student to the institution, universities calculate their various bursary and scholarship schemes which may in fact not always be accessible to EU students. This means that EU students may in certain cases be financing UK students at UK universities. In any event, all these calculations are of course apart from the less calculable but highly valuable knowledge the EU students bring to UK classrooms, the internationalization that adds to the overall competitiveness of the sector and other more intangible benefits to the UK economy and society at large.

If it is indeed considered that importing EU students provides the UK and its universities with significant benefits, it must thank the Court of Justice for its interpretation of EU law that made studying abroad so attractive even before the Bologna Process. Beyond access conditions and fees, it is the 'outcome' of studying that is of major interest to students. The leading case of *Kraus*[84] illustrates this well. The German student Dieter Kraus studied law in Germany and passed the first State examination in law in 1986. In 1988 he obtained the university degree of Master of Laws (LL.M) following postgraduate study at the University of Edinburgh in the UK. In 1989 Mr Kraus sent a copy of his LL.M degree certificate from the University of Edinburgh to the Ministry of Sciences and Arts of the Land Baden-Wuerttemberg, requesting confirmation that, having done so, there was nothing further to prevent him from using his title in the Federal Republic of Germany. The Ministry replied that his request could be allowed only if he made a formal application for the authorization prescribed

81 For the highly complex calculations that could be made in this regard, see: Institute for Fiscal Studies (2014). Estimating the Public Cost of Student Loans, available at: https://www.ifs.org.uk/comms/r94.pdf.

82 Garner, O. (2013). We Need Tuition Fees of Up to £16,000, Says Oxford Vice-Chancellor Professor Andrew Hamilton. *The Independent*, October 9, available at: https://www.independent.co.uk/student/news/we-need-tuition-fees-of-up-to-16000-says-oxford-vice-chancellor-professor-andrew-hamilton-8867323.html.

83 Oxford Teaching and the £16K Question – How Does the University Calculate the Real Cost of Undergraduate Education? *Times Higher Education,* available at: https://www.timeshighereducation.com/news/oxford-teaching-and-the-16k-question/2008179.article.

84 Court of Justice, judgment of 31 March 1993, case C-19/92, *Dieter Kraus v. Land Baden Württemberg*.

for the purpose by German law, using the appropriate form and attaching to it a certified copy of the diploma in question. Mr Kraus subsequently sent a certified copy of his Edinburgh degree, but refused to submit a formal application for authorization on the ground that the requirement for such an authorization prior to the use of an academic title awarded in another Member State constituted an obstacle to the free movement of persons and also discrimination, both prohibited by EU law, since no such authorization was required for the use of a diploma awarded by a German establishment.

The Court of Justice considered that the freedom of movement for workers and freedom of establishment were hampered by a lack of academic diploma recognition, since the possession of an academic title constitutes "an advantage for the purpose both of gaining entry to such a profession and of prospering in it", improving "its holder's chances of appointment" and may lead to "higher remuneration or more rapid advancement or [...] access to certain specific posts reserved to persons with particularly high qualifications", and since "the possibility of using academic titles awarded abroad and supplementing national diplomas required for access to a profession greatly facilitates establishment as an independent practitioner and, in any event, the pursuit of a corresponding professional activity".[85] While Member States are allowed to restrict these freedoms in the interest of preventing abuse of academic titles, any authorization procedure must be intended solely to verify whether the postgraduate academic title obtained in another Member State was properly awarded, following a course of studies which was actually completed, in an establishment of higher education which was competent to award it.[86] The procedure must be easy of access and should not be excessively expensive.[87] Any refusal of authorization must be capable of being subject to judicial proceedings in which its legality under EU law can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken with respect to him.[88] Finally, whilst the national authorities are entitled to prescribe penalties for non-compliance with the authorization procedure, the penalties imposed should not exceed what appears proportionate to the offence committed.[89] As this provides important guarantees to any mobile student, this case law can be considered as instrumental to student mobility as the well-known *Gravier* doctrine.

85 Paragraphs 18 – 23 of the judgment.
86 Paragraph 38 of the judgment.
87 Paragraph 39 of the judgment.
88 Paragraph 40 of the judgment.
89 Paragraph 41 of the judgment.

Another leading diploma recognition case similarly shows how UK higher education institutions benefit from EU mobility rights, in an even more direct sense. Universities themselves can rely on the freedom to provide services and the freedom of establishment to offer for-profit education in other EU Member States. This reportedly comprises 13% of the UK higher education's sector's "transnational education" activities, which are an important profit-yielding part of its higher education model.[90] Ms *Neri*[91] enrolled at Nottingham Trent University ("NTU") with a view to acquiring a BA Honours degree in International Political Studies on completion of a four-year course of studies. Nottingham Trent University is a university subject to UK legislation included in the list of bodies authorised to award BA honours degrees having legal status. While Nottingham Trent University generally administers its courses of study at its establishment in the UK, where final degrees are awarded, it also provides for an 'outsourced' system in accordance with Article 216 of the Education Reform Act 1988. Under Article 216 of the Education Reform Act, the Secretary of State approves a list of bodies who may provide any course which is in preparation for a degree to be granted by a recognised body and is approved by or on behalf of the recognised body, which includes the European School of Economics (ESE). The ESE is thus a Higher Education College authorised according to the UK educational system to organise and provide the university courses of study approved by NTU. It is incorporated as a limited liability company, established in the UK with a number of secondary establishments in other Member States, having 12 branches in Italy. ESE does not award its own degrees but for remuneration organises courses for the students enrolled with NTU in accordance with study plans validated by that university, which then awards a final degree of Bachelor of Arts with Honours. The quality of the courses of study provided by ESE is also subject to audit by the UK Quality Assurance Agency for Higher Education.

In view of the high financial cost attendant on residence in the UK for the entire duration of her studies, Ms Neri decided to attend university courses in Italy at ESE. Having enrolled for the first year of the course of studies held by ESE in Genoa, she learned from authoritative Italian sources that ESE was not authorised to organise university-level courses and that recognition could not be granted to the university's degrees, albeit legally recognised in the United

90 Boe, L., The Scale of UK Higher Education Transnational Education 2015–16. *Universities UK International* available at: https://www.universitiesuk.ac.uk/International/Documents/The%20Scale%20of%20UK%20HE%20TNE%202015–16.pdf.

91 Court of Justice, judgment of 13 November 2003, case C-153/02, *Valentina Neri v. European School of Economics*.

Kingdom, if they had been obtained on the basis of periods of study completed in Italy. On this basis, Ms. Neri brought a case that was referred to the Court of Justice. The Court considered that the organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment and that "for an institution like ESE, which organises courses intended to enable its students to obtain degrees capable of facilitating their access to the employment market, the recognition of those degrees by the authorities of a Member State is of considerable importance".[92] The Court held that it was clear that the Italian administrative practice, under which certain degrees awarded at the end of a university training course given by ESE are not recognised in Italy, is likely to deter students from attending these courses and thus seriously hinder the pursuit by ESE of its economic activity in that Member State. The Italian Government considered that restriction justified by the need to ensure high standards of university education. It maintained that the Italian legal order did not accept agreements such as the one between ESE and Nottingham Trent University since it remains attached to a view of such education as a matter of public interest, expressing as it does the cultural and historical values of the State. According to the Italian Government, such an agreement on university education prevents direct quality control of these private bodies by the competent authorities both in the Member State of origin and the host Member State. The Court however held that "given that the Italian legal order appears to allow, pursuant to Article 8(1) of Law No 341/90, agreements between Italian universities and other Italian establishments of higher education which are comparable to the agreement entered into between NTU and ESE" and since the non-recognition of degrees in question appeared to relate solely to degrees awarded to Italian nationals, the administrative practice did not appear suitable for attaining the objective of ensuring high standards of university education. Furthermore, the administrative practice was disproportionate, since it appeared "to preclude any examination by the national authorities and, consequently, any possibility of recognition of degrees awarded in circumstances like those in the main proceedings".[93] Thus, the upshot of the judgment is that while Member States may under circumstances limit the activities of for-profit higher education institutions on their territory, this is by way of exception to the internal market freedoms and therefore will have to comply with high standards of proportionality. As the facts of this case also clearly show, these provisions of EU law, as

92 Paragraph 42 of the judgment.

93 Paragraph 49 of the judgment.

interpreted by the Court, are of particular benefit to the UK higher education system and its institutions.

IV The Implications of, and on, Brexit

The exact implications of 'Brexit', are of course difficult to predict, especially as everything hinges on the specific conditions of the (various?) agreement(s) that the UK and the EU may conclude, if any, as well as complex and volatile political dynamics. Even in the case of a 'hard Brexit', the future may see subject-specific cooperation agreements, which could very well include the area of higher education, where non-EU Member States regularly participate in various EU policies.[94] Then again, even the 'softest' of Brexits may have profound implications for UK and European higher education, particularly if it were to in any way dilute mobility rights or re-organize research funding. These considerations thus limit the predictive effect of anything we may project or conclude in this chapter. It can nevertheless be insightful, and hopefully somehow useful, to reflect on how the underlying dynamics in the area of higher education, as explored in the previous parts of this chapter may be affected by – and themselves affect – the UK's secession from the Union. The previous analysis has exposed a number of relevant 'stakes' and 'pressure points' when it comes to European higher education and the UK's position in it, which are likely to come to the fore in the Brexit negotiations and afterwards, in post-Brexit Europe, in respect of the area of higher education.

As regards the EHEA, it can firstly be presumed that the UK will remain party to it post-Brexit, as participation to the Bologna Process is entirely independent from EU membership. The Process is voluntary, so there is no reason to fear any loss of sovereignty, and in its post-Brexit isolation, this may *par excellence* be one of the remaining forums within which the UK can still seek to 'lean in' on international affairs. In this respect, it is interesting to recall the comments made by a UK Minister in relation to UK participation in Bologna:

> The problem is that they [mainland Europe] will get on with it, they will continue with this process and, given the competitive pressures that exist, over time for some of our institutions, I think that could hit them competitively in that they have ended up in a situation where a system of comparability and compatibility is developed elsewhere in the broader

94 For instance, the Faroe Islands, Moldova, Tunisia participate in Horizon 2020.

> Europe [and] we are not a part of it [...] that is why I think the process is happening, we need to embrace it and we need to influence it in our national interest.[95]

These remarks have some additional poignancy, as they can be read to be about EU membership in general as much as about Bologna participation. They clearly show the stakes on the side of the UK: how to maintain influence international decision-making and the capacity to pursue the national interest, especially considering economic competitive forces, while being excluded from the most important decision-making forum?

As such, it would not be wholly unexpected for the UK to seek to actually increase the standing and broaden the material scope of the Bologna Process, possibly 'pulling' as much as it can away from the EU in this area, thereby hoping to represent its interests (particularly the interest of its higher education sector, and the public purse) and achieve its policy objectives concerning student mobility, diploma recognition and perhaps even research funding somehow within this purely intergovernmental project in which it can be expected to remain a full and influential member. Such would be a strategic course of action for the UK, considering that as we have seen in the previous sections, much of the Bologna Process depends, in reality, on EU law to give actual effect to it. It is EU law that grants hard and enforceable rights to individual students, teachers and higher education institutions, that make the (proclaimed virtues of the) EHEA from a paper tiger into a tangible reality. It would thus be rational for the UK to try and pry as much of that away from the EU as possible, or in any event to try and reach comparable outcomes in the context of Bologna. Clearly, it remains to be seen whether it will have any success in this regard. As was reported in Part II.1. above, the UK was able to exclude the EU from Bologna, particularly as it found support in this from a number of other (larger) EU Member States. On the other hand, smaller Member States were less keen on this intergovernmentalism, as it exposes them to the more traditional international power-play against which the EU is, in many ways, a bulwark.[96] Especially these countries are not likely to agree to (further) exchange the EU-forum for education law and policy making for the Bologna one. And in the post-Brexit climate, other larger EU Member States may be much less favourable towards the UK, its economic

95 See House of Commons Education and Skills Committee (2007). *The Bologna Process*, cit, p. 25.

96 For extensive discussion, see: Garben, S. (2014). *EU Higher Education Law*, cit.

interests, and thus any of its attempts to assert Bologna over the EU decision-making process.

Whether there will be any such overt clashes of course remains to be seen. Overall, it should be emphasized that the policy-discourse of Bologna and of EU higher education policy have been very much in line. Both have been championing an Anglo-Saxon 'liberal' model of higher education, in which education is conceptualized mainly in economic terms, as self-investment and market-driven, as opposed to the social model of higher education that sees it as a social entitlement for all citizens and a responsibility of the state.[97] Within the former model, one would tend to see more involvement of private and for-profit actors, deregulation, the establishment of quasi-markets and of public-private partnerships, and more generally an instrumental, labour market approach to higher education. The latter model instead tends to make state involvement central, will be focused on widening access to higher education, and may emphasize the citizenship-role of education and the pursuit of knowledge for knowledge's sake. Within the Bologna Process, the preference for the former, 'liberal' model can be seen in its emphasis on 'employability' of graduates, which is operationalized through its requirement that the BA degree has 'labour market value' (whereas before, in most continental European countries, an MA equivalent was usually needed for such labour market recognition), and, even more importantly in practice, through its quality assurance processes. In national accreditation procedures, which higher education institutions often need to follow to be authorized to award degrees under national (but often Bologna-inspired) law, the Bologna-'requirements' on 'employability' are given real teeth, and it is here that much of the influential 'steer' happens: universities are forced to show how their programmes (aim to) guarantee certain economic, labour market-outcomes, for otherwise they may jeopardize their very existence.

Within an EU context, analysis in Part III.2. has shown how EU law tends to play out to the favour of a liberal model such as the UK's, and that it puts a higher burden on more social models that tend to subsidize higher education through open and free (or low-tuition) access. Furthermore, in recent years one of the most important sources of EU involvement in higher education is through its yearly cycle of economic policy coordination: the European Semester, where education is explicitly considered as a factor of economic stability and growth. The Country Specific Recommendations (CSRs) are predominantly concerned with the 'cost-effectiveness' and 'employability' of Member

97 See also Garben, S. (2010). The Bologna Process and the Lisbon Strategy, cit.

States' education systems. For instance, Denmark has been told that "[c]ontinued efforts are […] needed to improve the quality and cost-effectiveness of its education and training systems",[98] Estonia to "[l]ink training and education more effectively to the needs of the labour market"[99] and Malta that it should "focus education outcomes more on labour market needs".[100] The CSRs can be remarkably detailed and specific on the required reforms concerning various aspects of national education systems.[101] For example, the Commission's proposed CSRs in 2017 for Croatia states: "Since 2015, as part of the implementation of the education, science and technology strategy, a reform of the school curricula was launched to improve on content and teaching of transferable skills. After ambivalent stakeholder reactions, the curricular reform was revised, and implementation has been significantly delayed. The process now needs to continue in line with the original objectives".[102] Furthermore, the CSRs reflect a clear policy to increase the involvement of the private sector in higher education and to make the funding of higher education 'competitive'. In this vein, for instance, Bulgaria has been given the recommendation that "frameworks fostering collaboration between universities and the private sector have to be further developed, and funding should be allocated in a competitive, merit-based and transparent way", and to "pursue the reform of higher education, in particular through better aligning outcomes to labour market needs and strengthening cooperation between education, research and business",[103]

98 Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Denmark and delivering a Council opinion on the Convergence Programme of Denmark, 2013–2016, *OJ C 217*, 30.7.2013, p. 18–20, para. 12.

99 Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012–15, *OJ C 219,* 24.7.2012, 25 – 27, para. 14.

100 Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Malta and delivering a Council opinion on the updated Stability Programme of Malta 2011–2014, *OJ C 215*, 21.7.2011, p. 10–12, point 3.

101 This could be said to sit uncomfortably with the national autonomy clause in Article 165(1) TFEU that EU action should fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

102 European Commission, Recommendation for a Council Recommendation on the 2017 National Reform Programme of Croatia and delivering a Council opinion on the 2017 Convergence Programme of Croatia, COM/2017/0510 final.

103 Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria,2012–15, para. 16, *OJ C 219,* 24.7.2012, 9 – 12, and Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2012–2016, *OJ C 217*, 30.7.2013, p. 10–13, point 4.

Estonia to "enhance cooperation between businesses and academia",[104] and Italy to address the "underperformance of the tertiary education system" inter alia by creating "a stronger link between universities' performance and the allocation of public funding".[105]

All this means that the general direction of the discourse in the Europeanisation of higher education, both in the context of the Bologna Process and the EU, is very much in line with the UK's approach, and benefits its model of higher education and its economic stakes in that model. Brexit is unlikely, as such, to bring any fundamental changes in this regard.[106] The extent to which the UK will be able to continue to directly benefit from this development of continental higher education into a market-model like its own, is however likely to change fundamentally with Brexit. As the analysis in Part III.2. showed, UK higher education institutions rely heavily on EU law to be able to offer services in other Member States and to be able to import talented students (the financial picture of which is unclear but which may, under the high tuition fee system, bring direct economic benefits to the universities as well as many indirect beneficial effects), and – through EU research grants – for the overall funding of its higher education and research and development sector(s). In this regard, the UK stands to lose more from Brexit than the other EU Member States: EU students, teachers, researchers and higher education institutions will still have access to 27 higher education systems, and they can continue to create a fully effective internal higher education and research area, as well as an internal market for higher education. In fact, now that following the UK's

104 Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012–15, cit., para. 14.

105 Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Italy and delivering a Council opinion on the Stability Programme of Italy, 2012–2015, *OJ C 219,* 24.7.2012, 46 – 49, para. 16.

106 It has, however, been noted that in the context of allocation of European research funding, there have been "tensions between countries favouring competitive research funding and countries preferring a less competitive and more egalitarian system". Alongside the Netherlands and Denmark, the UK has been the most important supporter of the competitive model. Without the UK at the table, this may change, which is a matter of concern for some stakeholders in the Netherlands and Denmark. See Courtois, A. (2018). Reconfiguring the European higher education sector. *University World News* June 22, available at https://www.universityworldnews.com/post.php?story=20180621101812552 and the full report Courtois A., ed. (2018). *Higher education and Brexit: current European perspectives*. Centre for Global Higher Education, available at: https://www.researchcghe.org/publications/special-report/higher-education-and-brexit-current-european-perspectives/.

lead, EU Member States' higher education systems have become each other's competitors, there is much to gain from the UK's weakening role, and some other Member States are indeed gearing up to take over from the UK as 'EU leader in Higher Education'. Higher education may turn into one of Brexit's major spoils.

These projected consequences of Brexit of course may influence the Brexit-process and negotiations themselves. EU higher education law and policy, with all its current benefits for the UK, is thus an important bargaining chip for the EU, both within the negotiations and potentially as leverage for the UK's compliance with its obligations under any future relationship. As such, the UK's current strength in higher education is one of its weak spots in the Brexit negotiations. The two key issues in this regard are on the one hand research funding under Horizon 2020, of which the UK is one of the main beneficiaries, and on the other hand the internal market freedoms and mobility rights connected to EU citizenship that foster the economic activities of the UK higher education sector. While the former could arguably be negotiated between the EU and the UK on an ad hoc basis, the latter is entirely dependent on the position of the UK in the internal market and will have to be part of any 'big' agreement on the future relationship between the EU and the UK. The UK may seek to use the Bologna Process as a 'back door' to pursue its key interests in this regard, but the potential effectiveness thereof is doubtful. It does, however, seem to be its most rational course of action, as it will need to seek alternative forums to 'win friends and influence people' once it has excluded itself from the most important forum to do so.

v Conclusion

The UK higher education sector is estimated to generate £95 billion for the UK economy each year. It is difficult to calculate the precise direct and indirect negative impact on that lucrative sector in case Brexit would mean that the UK would have to give up EU research funding, student/staff (and knock-on) mobility as well as UK transnational education, but it is likely to be significant. While the overall policy-direction of European higher education is likely to continue, also post-Brexit, to champion the marketization of higher education along the lines of the Anglo-Saxon, liberal model, ironically it can be expected that the UK as a non-member of that growing internal market of higher education and research will be able to benefit less and less from it. At the risk of oversimplification, it could be said that the UK has first been instrumental and influential in creating a lucrative continental market for higher

education, and now it has excluded itself from that market, as well as from its position of influence. While, of course, also EU citizens are disadvantaged by a limitation of their mobility rights vis-à-vis the UK, they are in a better position to shift the focus to any of the other 27 Member States, who remain stronger together.

CHAPTER 14

The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union

*Sébastien Platon**

1 Introduction

The present book is, in part, dedicated to the federal division of competences in citizenship matters and the impact of EU Citizenship rights on the vertical division of powers in the EU. I would like to address here, more particularly, the right to participate in European elections and how the recent case-law on the subject may impact the distribution of competences between the European Union and the Member States.

As F. Fabbrini notes, "The concept of citizenship has been, since its modern reinvention, connected to the idea of political rights". [1] This also applies to the European Union. EU citizenship is far from being a complete transnational status allowing each EU citizen to participate in all the national, regional and local elections in the country where they reside, and therefore "stands in sharp contrast to the situation in the United States, where the Citizenship Clause of the Fourteenth Amendment grants U.S. citizens the citizenship of the state in which they reside".[2] However, when EU citizenship was officially[3] created in 1992, it came, for the first time, with an incipient *status activus*.

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1 Fabbrini, F. (2017). *The Political Side of EU Citizenship in the Context of EU Federalism*. In: Kochenov, D., ed. (2017). *EU Citizenship and Federalism. The Role of Rights*. Cambridge: Cambridge University Press, p. 271.

2 Shaw, J. (2007). E.U. Citizenship and Political Rights in an Evolving European Union. *Fordham Law Review* 75 (5), pp. 2549–2578, 2549.

3 Several authors argue that citizenship already existed in substance, if not in texts, before the Maastricht Treaty. See for example Olsen, E. (2008). The origins of European citizenship in the first two decades of European integration. *Journal of European Public Policy* 15 (1), pp. 40–57, 42; and Closa, C. (1992). The concept of Union citizenship in the Treaty on European Union. *Common Market Law Review* 29 (6), pp. 1137–1169.

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The right to vote and to run for the European elections predates *de facto* the creation of Union Citizenship with the Maastricht Treaty in 1992, since the Members of EU European Parliament have been elected by direct universal suffrage since 1976.[4] However, the 1976 Act does not use the language of rights ("Elections shall be by direct universal suffrage and shall be free and secret"). By contrast, Art. 20(2) and 22 of the Treaty on the Functioning of the European Union (TFEU) provide that citizens of the EU enjoy, among others, the right to vote and to stand as candidates in elections of the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State. Therefore, the Maastricht Treaty constitutionalised the political rights of EU Citizens, which as such was a novelty. In any case, the right for EU Citizens to participate in the municipal elections of the Member State where they reside was undeniably something new in 1992. These new rights therefore constitute major improvements for the rights of Union citizens.[5]

In 2009, when the Charter of fundamental rights of the European Union came into force, these two Citizenship political rights became fundamental rights, enshrined in Art. 39 and 40. There is however a difference between the right to participate in municipal elections and the right to participate in European elections. Interestingly enough, the Court found that Art. 39 of the Charter not only contains a right to national treatment as regards European elections (just like Art. 40 contains a right to national treatment as regards municipal elections) but also an enforceable right to participate in European elections (II). Furthermore, this right has a broad scope of application vis-à-vis Member States, since it is applicable to national electoral legislation, including in purely internal situations (III). All this combined has the potential of blurring the distribution of powers between the European Union and the Member States in the field of election law (IV). Having explored these issues, I will then briefly offer a conclusion (V).

II An Enforceable Right to Participate in European Elections

Art. 39 Charter contains not only, in its first paragraph, the right of EU citizens to vote and to stand as a candidate in elections of the European Parliament in

4 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to the Decision 76/787/ECSC, EEC, Euratom of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage.

5 See Shaw, J. (2007). *The Transformation of Citizenship in the European Union.* Cambridge: Cambridge University Press.

the Member State in which he or she resides, under the same conditions as nationals of that State – which is also enshrined in Art. 20(2), b) and Art. 22(2) TFEU – but also, in its second paragraph, the more general principle according to which members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot, which mirrors Art. 14(3) TEU and Art. 1(3) of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage.

The first paragraph is a "simple" right to national treatment. This is notably apparent from the wording of Art. 20(2), b) and Art. 22(2) TFEU and Art. 39(1) of the EU Charter which all state that every citizen of the Union has the right to vote and to stand as a candidate in elections of the European Parliament in the Member State in which he or she resides, "under the same conditions as nationals of that State". This interpretation is confirmed by the case-law of the Court, which said in *Eman and Sevigner*[6] and *Spain v. UK*[7] that Art. 19(2) of the Treaty on the European Communities (EC), now Art. 22(2) TFEU, was confined to applying the principle of non-discrimination on grounds of nationality to the right to vote and stand for European elections. In this respect, it is similar to the right to participate in municipal elections, enshrined in Art. 20(2), b) and 22(1) TFEU and Art. 40 Charter.

The national treatment aspect of the political rights of EU citizens is consistent with the concept of citizenship and strongly connected with the requirement of equality between citizens.[8] It has a strong normative potential to justify the abolition of all the remaining discriminations, limitations and inconsistencies affecting the political rights of EU citizens residing in other Member States.[9] However, it only means that EU citizens can be treated *as badly* as the nationals of their State of residence as regards the European elections. It does not grant EU citizens, including nationals, an active right to participate in these elections, nor does it guarantee any minimum standard of treatment.

Despite the major breakthrough that was the decision to elect members of the European parliament at universal suffrage in terms of democracy and

6 Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevigner*, para. 53.

7 Court of Justice, judgment of 12 September 2006, case C-145/04, *Spain v. United Kingdom*, para. 66.

8 See for example Lardy, H. (1996). The Political Rights of Union Citizenship. *European Public Law* 2, pp. 611–633, 622.

9 Fabbrini, F. (2017). *The Political Side of EU Citizenship in the Context of EU Federalism*, op. cit., 283.

citizenship, EU legal texts are, surprisingly, rather limited as regards both the existence of a proper individual right of EU citizens to participate in the European elections and the standards applicable thereto. All they say is that the members of the European Parliament shall be elected by direct universal suffrage (since 1976)[10] and that the elections shall be "free and secret" (since 2002).[11] These conditions are now also part of EU primary Law, in Art. 14(3) TFEU and Art. 39(2) of the Charter, which both provide that the members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

It is clear that these provisions create a legal *obligation*, for member States, to organise European elections under the prescribed conditions. However, before the *Delvigne* ruling in 2015,[12] it was not clear whether such vague provisions could be seen as granting a real, enforceable *right* to individuals. In 2006, the Court of Justice still considered, in *Eman and Sevigner*, that the provisions of (then) Part Two of the Treaty on the European Communities relating to citizenship of the EU did not confer on citizens of the EU an unconditional right to vote and to stand as a candidate in elections of the European Parliament.[13] It is true that the circumstances of this case were specific, since it was about the right to participate in European elections in the Dutch island of Aruba. Aruba is one the overseas countries and territories[14] which, according to Art. 198 *et seq.* TFEU are not territorially part of the European Union but are associated with it. Therefore, finding the existence of a right to participate in European elections would not have been very useful for this case since it could not have been assumed that this right was applicable in Aruba. However, the statement of the Court regarding the absence, in general, of an individual right to participate in European elections under EU law contrasts with the opinion of Advocate-General Tizzano in this case and in *Spain v. UK*. In his opinion, AG Tizzano clearly stated that he believed that EU citizens did have a right to vote in European elections under EU Law.[15] By contrast, the existence of an individual right to vote, under EU Law, for citizens of the EU in European elections has

10 Art. 1 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage.

11 Art. 1(2) of the Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom.

12 Court of Justice, judgment of 6 October 2015, case C-650/13, Delvigne.

13 Para. 52.

14 See Annex II to the Treaty on European Union and the Treaty on the Functioning of the European Union.

15 See paras. 67–71.

been explicitly denied by certain national courts, notably the Supreme Court of the United Kingdom.[16]

It was only in *Delvigne* that the Court of Justice explicitly found that such a right existed under EU Law. The case was about a French national who had lost his civic rights due to his conviction for a serious crime with a 12-year prison sentence. Now a free man, Mr Delvigne went to challenge the decision of the competent administrative body to remove him from the electoral roll of the municipality where he resided. The local court referred the matter to the Court of justice. It found that the fact that Mr Delvigne had been deprived of the right to vote under national legislation was a limitation of his right to participate in the European elections implicitly guaranteed by Art. 39(2) of the Charter. However, the Court also found that this limitation 1) was provided for by law, 2) respected the essence of the right to vote referred to in Art. 39(2) of the Charter and 3) was proportionate.

Despite the fact that the Court found, in this case, that there was no violation of EU Law, which has disappointed some commentators,[17] this ruling is noteworthy for the statement that Art. 39(2) of the Charter "constitutes the expression in the Charter of the right of Union citizens to vote in elections of the European Parliament", confirming J. Shaw's analysis that "we have moved from the sole site of contestation of these rights being within and across the European political institutions and the Member States to a situation where courts are likely to be increasingly involved in deliberating about the scope and nature of those rights".[18]

In this finding, the Court was probably inspired by the case-law of the European Court of Human Rights on Art. 3 of the Protocol n° 1 to the European Convention on Human Rights. According to this provision, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". This wording seems not to result in individual rights and freedoms but solely obligations between Parties.[19] In the

16 *R* (*on the application of Chester*) *v Secretary of State for Justice & McGeoch* (*AP*) *v The Lord President of the Council and another* (*Scotland*) [2013] UKSC 63.

17 Van Eijken, H. and Van Rossem, J. W. (2016). Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship? *European Constitutional Law Review* 12 (1), pp. 114–132, 878.

18 Shaw, J. (2008). The Political Representation of Europe's Citizens: Developments. *European Constitutional Law Review* 4 (1), pp. 162–186, 183–184.

19 See Harris, D.J., Bates, E., O'Boyle, M., Warbrick C., and Buckley, C. (2009). *Law of the European Convention on Human* Rights. Oxford: Oxford University Press, p. 712, n 10.

1970s, however, the European Commission of Human Rights began to interpret this provision as creating *"certain individual rights, such as the right to vote and the right to stand for election"*.[20] The Court adopted the same view in *Mathieu-Mohin and Clerfayt v Belgium* (1987),[21] and consistently considers since then that this provision enshrines an individual right to free elections, under the conditions laid down in this provision.

The Court of Justice also used the text called "explanations relating to the Charter". This text was originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. According to the third subparagraph of Art. 6(1) TEU and Art. 52(7) of the Charter, this text must be given due regard for interpreting the Charter. It is however unlikely that this reference was decisive, since the explanations only state, in a very general way, that Art. 39(2) takes over the basic principles of the electoral system in a democratic State.

It has also been considered by commentators of the ruling[22] that this interpretation may have been prompted by a semantic change brought by the Lisbon Treaty. Whereas Art. 189 EC used to state that the European Parliament consisted of representatives of the *peoples of the States* brought together in the Community, Art. 10(2) and 14(2) TEU now both say that the members of the European Parliament represent the *citizens* of the Union. This disintermediation between the citizens and the European Parliament has also been noted by Advocate-General Cruz-Villalon in his opinion on the case,[23] and some authors had already interpreted this change as implying a real right to vote and to run as a candidate for the European elections.[24]

Be that as it may, the (objective) principle according to which the members of the European Parliament must be elected by direct universal suffrage in a free and secret ballot has been turned into a (subjective) right of EU citizens to

20 European Commission of Human Rights, decision of 10 May 1979, no. 8612/79, *Alliance des Belges v. Belgium*.

21 European Court of Human Rights, judgment of 2 March 1987, no. 9267/81, *Mathieu-Mohin and Clerfayt v. Belgium*.

22 Van Eijken, H. and Van Rossem, J. W. (2016). Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship? *European Constitutional Law Review* 12 (1), pp. 114–132, 118; Coutts, S. (2017). Delvigne: A Multi-Levelled Political Citizenship. *European Law Review* 42, pp. 867–881, 877.

23 See para. 100 of his opinion.

24 See House of Lords Select Committee on Constitution Written Evidence, Memorandum by Professor J. Shaw, Salvesen Chair of European Institutions, University of Edinburgh (2008).

vote in European elections. It has also been given a broad scope of application vis-à-vis Member States.

III The Broad Scope of Application of the Right to Participate in European Elections vis-à-vis Member States

The scope of the right to participate in European elections as regards Member States benefits from its dual nature. As a Citizenship right, it applies to Member States even in situations were the link with EU Law is weak (III.1). As a fundamental right, it can apply regardless of any cross-border element (III.2).

III.1 *A Right Applicable to Member States*

According to Art. 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. The Court has broadly interpreted this provision in the past, especially in *Fransson*[25] in which the Court said that "since the fundamental rights guaranteed by the Charter must (…) be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter". However, in the same decision, the Court added that even such a broad interpretation has its limits: "where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction they are applicable every time EU Law is applicable". Later judgments of the Court of Justice, for example *Torralbo Marcos*[26] and *Siragusa*,[27] demonstrate that the Court can be quite strict when defining the limits of the material scope of the Charter as regards the Member States.

However, when it comes to the right to participate in European elections, the Court has proven to be quite bold about the scope of the Charter. In *Delvigne*, the Court found the Charter applicable to the case despite the fact that the relevant French criminal legislation had clearly not been adopted in order to give effect to any specific EU provision. The situation can, *mutatis mutandis*, be

25 Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*.
26 Court of Justice, judgment of 27 March 2014, case C-265/13, *Torralbo Marcos*.
27 Court of Justice, judgment of 6 Match 2014, case C-206/13, *Siragusa*.

compared with the *Siragusa* case.[28] In *Siragusa*, the Court refused to consider that an order requiring Mr Siragusa to dismantle work carried out in breach of a law protecting the cultural heritage and the landscape fell within the scope of EU Law. The Court admitted that there was a connection between such proceedings and EU Environmental Law since protecting the landscape – the aim of the national legislation in question – is an aspect of protecting the environment. Yet, the Court insisted (para 24) that "it should be borne in mind that the concept of 'implementing Union law', as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other". Then the Court stated that

> in order to determine whether national legislation involves the implementation of EU law for the purposes of Art. 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.

It could have therefore been argued in *Delvigne* that French criminal Law only indirectly affected the right to vote and to stand as a candidate in the European elections. Furthermore, as that Court notices in §29 of *Delvigne*, "Art. 8 of the 1976 Act provides that, subject to the provisions of that act, the electoral procedure is to be governed in each Member State by its national provisions", which could have broken the connection with EU Law. Let us also remember that in *Spain v. United Kingdom*,[29] the Court stated that "the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State", allowing them to grant that right to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory. Yet, in *Delvigne*, the Court decided that the case fell within the scope of the Charter and, therefore, under its jurisdiction.

This solution, I believe, reveals the ambiguous nature of EU citizens' rights *as* fundamental rights. The doctrine of fundamental rights in EC Law was developed by the Court of Justice in the 70s, following pressure by several

28 *Siragusa*, cit.

29 *Spain v UK*, cit., para. 78.

national constitutional courts (especially German and Italian), to protect individuals' rights against the institutions of the (then) European Communities. These rights address mainly the institutions. Therefore, in the EU legal system, fundamental rights only apply to the States when they are acting as "agents" of the European Union. The Charter does not *primarily* address the Member States, it only binds them in an *incidental* manner – even though the Court adopted a broad view of the applicability of the Charter to the States in the *Fransson* judgment. As regards the Member States, the EU standards of Human Rights are *functional*, not *federal*.

This is not, and this has never been, the way EU citizens' rights operate. Since the Maastricht Treaty, they have been intentionally designed to be enjoyed by EU citizens in their relations with the Member States. Member States are therefore the *primary* addressees of the EU citizens' rights, whether they are laid down in the Treaties or in the Charter. This is true for all of them, even the right to vote and to stand as a candidate at elections to the European Parliament, since these elections are organised by the Member States. This right, and all the other rights of the EU citizens, have been designed primarily to impose specific obligations on the Member States as regards these EU citizens.

It is worth mentioning that this reasoning does not apply to all the citizens' rights in the EU Charter. The Title V of the EU Charter, "Citizens' rights", is quite misleading – at least in the English language.[30] It gives the impression that it contains only EU citizens' rights (i.e. rights reserved for EU citizens) whereas in fact it contains rights related to citizenship as a broad concept, i.e. rights of action for individuals and legal persons in their relation with the European Union. It does contain EU citizens' rights, reserved for EU citizens and primarily addressed to the Member States. These rights are the right to vote and to stand as a candidate in elections to the European Parliament (Art. 39); the right to vote and to stand as a candidate in municipal elections (Art. 40); the freedom of movement and of residence (Art. 45) and the right to diplomatic and consular protection (Art. 46). However, it also contains rights enjoyed not only by EU citizens but more broadly by every individual or legal person, sometimes on the condition that they reside or have a registered office in a Member State. These rights are the right to good administration (Art. 41); the right of access to documents (Art. 42); the right to refer to the European Ombudsman cases of maladministration (Art. 43) and the right to petition the European

30 In French for example, this Title is called "Citizenship" ("*Citoyenneté*"), which is probably less misleading.

Parliament (Art. 44). Unlike EU citizens' rights, these "non-EU-citizens-only rights" are explicitly addressed either to all the institutions, bodies, offices and agencies of the Union or to one of them (the European Ombudsman – Art. 43; the European Parliament – Art. 44). We could therefore say that in fact, these "non-EU-citizens-only rights" are less likely than any other right in the Charter to apply to Member States. The Court of Justice clearly said for example in *Cicala*[31] and *YS and M. and S.*[32] that the right to good administration protected under Art. 41 could not be used as such against a Member State – even though it also said in *M. M.*[33] (see especially the ambiguous wording of para 84, "that provision is of general application") and more clearly in *H. N.*[34] that this article reflects a general principle of EU Law, which applies to Member States within the scope of EU Law. It is also hard to imagine how the right of access to documents of the Union, the right to refer to the European Ombudsman cases of maladministration or the right to petition the European Parliament could apply to Member States, except if somehow a national authority were to interfere with one of these rights being exercised.

Since it is in their essential nature to be applicable primarily to the Member States, it is not surprising that the fundamental rights of the Citizens are more easily applicable to Member States than the other fundamental rights protected under EU Law. From a technical point of view, this broad applicability is facilitated by the fact that the rights of the Citizens in the Charter mirror provisions contained in other sources of EU Law. For example, in *Delvigne*, the Court demonstrated the link between the situation in question and EU Law by saying that the French legislation must be considered as an implementation of Art. 14(3) of the TEU ("The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot") and Art. 1(3) of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage ("Elections shall be by direct universal suffrage and shall be free and secret"). In short, the Court used the EU provisions which are the material source of the relevant provision of the Charter to declare the Charter applicable, making the limitation of the scope of application of the Charter to the Member States laid down in Art. 51(1) *de facto* almost irrelevant for these specific rights.

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31 Court of Justice, judgment of 21 December 2011, case C-482/10, *Cicala*, para. 28.

32 Court of Justice, judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *YS and M. and S.*, para. 67.

33 Court of Justice, judgment of 22 November 2012, case C--277/11, *M. M.*

34 Court of Justice, judgment of 8 May 2014, case C--604/12, *H. N.*, paras. 49 and 50.

III.2 *A Right Applicable in Purely Internal Situations*

EU citizens' rights (understood *senso strictu* as the rights enjoyed only, under EU Law, by the citizens of the European Union) usually require a "cross-border" situation in order to apply. The freedom of movement and of residence applies only, in principle, to EU citizens who have crossed or want to cross an internal border of the European Union. The diplomatic and consular protection only applies to EU citizens in their relations with Member States other than those of which they are nationals. The right to vote and to stand as a candidate at municipal elections is, in fact, a specific expression of the right to national treatment. Therefore, it only applies to non-national EU citizens.[35] The same applies, in theory, to the right to vote and to stand as a candidate at European elections.

In *Spain v. United Kingdom*,[36] the Court stated at para 66 that Art. 19(2) EC (now Art. 22(2) TFEU), "implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country". However, this seems to be, at best, a mere passing reference. Furthermore, the broader context of this statement gives further indication that the Court may not have meant exactly what it seems to have said. More precisely it said that Art. 19(2) EC, "*like Article 19(1) EC relating to the right of Union citizens to vote and to stand as a candidate at municipal elections*, *implies* that nationals of a Member State have the right to vote and to stand as a candidate in their own country and *requires* the Member States to accord those rights to citizens of the Union residing in their territory".[37] The use of two different verbs ("implies" / "requires") and the reference to the right to participate in municipal elections (a "mere" right to national treatment) seem to indicate that the existence of a right for Member States nationals to vote and to stand as a candidate in their own country is not a *consequence* of EU Law but merely a *precondition* for the exercise of the right to national treatment. Without such a pre-existing right to participate in European elections for nationals *under national Law*, the right to be treated like the nationals would make no sense. It does not necessarily mean that this right is by itself protected *under EU Law*.

In *Eman and Sevinger*, the European Court of Justice considered that a difference of treatment *between nationals* as regards the European elections fell within the scope of EU Law.[38] The national law in question was a Dutch law

35 Court of justice, Order of 26 March 2009, case C-535/08, *Pignataro*, para. 17.
36 *Spain v. United Kingdom*, cit., para. 66.
37 Emphasis added.
38 *Eman and Sevinger*, cit., paras. 57 *et seq*.

disenfranchising Dutch nationals residing in the Dutch overseas territory of Aruba from EU Parliamentary elections, whereas Dutch nationals residing in a non-member country could still vote and stand as a candidate in elections to the European Parliament held in the Netherlands. In this case, the Court found that the Netherlands Government had not sufficiently demonstrated that the difference in treatment observed between Netherlands nationals resident in a non-member country and those resident in the Netherlands Antilles or Aruba was objectively justified as regards the principle of equal treatment. In short, the Court found a breach of equality *between Dutch nationals*, with no consideration of free movement within the European Union. However, in this case, the infringed principle was not the right to vote and to stand as a candidate in European elections itself but the general principle of equality, as a general principle of EC Law.[39] The Court only used the right to vote and to stand as a candidate in European elections in order to "link" the situation with EC Law, making the general principle of equality, as protected under EC Law, applicable to the case. All in all, the right to participate in European elections seemed to be reserved to mobile citizens, or at least citizens who do not enjoy the nationality of the Member State they live in.

It was not therefore before the *Delvigne* ruling in 2015, again, that the Court applied the right to vote and to stand as a candidate in elections itself to a purely internal situation. The main case, as mentioned before, was about a French national complaining that French legislation prevented him from participating in the European elections in France. There was no border-crossing or multinational element whatsoever.

The application of EU citizens' rights in a purely internal situation is not unprecedented. In *Rottmann*,[40] the Court held that a Member State shall observe the principle of proportionality when deciding whether to withdraw its nationality from one of its nationals, especially when such a decision would deprive this citizen of his/her EU citizenship. In *Ruiz Zambrano*,[41] the Court held that a Member State could not deprive an EU citizen – even one of its own nationals – of "the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen". In this case, Belgium could therefore not refuse a non-EU national who had dependent minor children, who were Belgians and therefore EU citizens, a right of residence in Belgium, nor refuse to grant a work permit to that non-EU national. In doing so, Belgium would

39 See at para. 57 et seq.

40 Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*.

41 Court of Justice, judgment of 8 March 2011, case C-135/08, *Ruiz Zambrano*.

have forced this non-EU national to leave the EU territory with his children, depriving them of "the genuine enjoyment of the substance" of the right to stay on the territory of any Member State.

However, these solutions are exceptional and apply only in extreme circumstances. In particular, the Court made it clear in its post-*Ruiz Zambrano* case-law that the *Ruiz Zambrano* solution could only apply exceptionally, in particular when the EU citizen whose third-country national family member is threatened with deportation is not a child.[42] By contrast, it is rather striking that the right to participate in European elections can apply in a purely internal situation even where there is no extreme and particular circumstances "amounting to a de facto loss of one of the rights attaching to that status".[43]

Could this reasoning apply to the other EU citizens' electoral right, the right to vote and to stand as a candidate in municipal elections? It would seem quite unlikely since, as mentioned above, this right is, in fact, a specific and rather limited[44] expression of the right to national treatment with no direct universal suffrage clause, unlike Art. 39 of the Charter. However, the *Ruiz Zambrano* precedent could possibly open a door here. Let us imagine for example that, in a Member State, the restrictions to the right to vote and to stand as a candidate in local elections are excessive but non-discriminatory (i.e. they apply also to national citizens). In such a case, the right to national treatment is irrelevant, because the issue is not about discrimination. However, would it be possible to say, in such a case, using the *Ruiz Zambrano* test, that EU citizens are deprived of "the genuine enjoyment of the substance" of the right to vote and to stand as a candidate for municipal elections? Arguably, this is a far-fetched reasoning, and in any case, it could only apply in extreme circumstances, just like the *Ruiz Zambrano* solution. Moreover, in most cases, restrictions of the right to vote and to stand as a candidate would not only apply to municipal elections but to all elections – including the European elections. The situation could therefore be dealt with using the *Delvigne* precedent, without any need for a *Ruiz Zambrano*-like reasoning. However, in the (rather unlikely) case of

42 Court of Justice, judgment of 8 May 2018, case C-82/16, *K.A. and others v. Belgische Staat*.

43 Lenaerts, K. and Gutiérrez-Fons, J. A. (2017). Epilogue on EU Citizenship: Hopes and Fears. In: Kochenov, ed., *EU Citizenship and Federalism. The Role of Rights.* Cambridge: Cambridge University Press, p. 766.

44 Exceptions to the right of national treatment are laid down in several provisions of the Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, notably Arts. 5(3) and 5(4).

a restriction to local elections that would not apply to European elections, a *Ruiz Zambrano*-like reasoning could give more substance to the political status of the EU citizens, giving them not only a right to political inclusion in other Member States (limited to local and European elections) but also a minimum right to political participation in other Member States.

IV The Right to Participate in European Elections, a Potential Disruptor of the Distribution of Powers between the European Union and Member States

The disruption caused by the right to participate in European elections in the distribution of powers between the European Union and the Member States results from its existence and also from its legal potential, as could be developed by the Court of Justice in future cases.

IV.1 *A New Citizenship Right?*

According to Art. 25(2) TFEU, only the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2) TFEU, subject to the approval by the Member States in accordance with their respective constitutional requirements. Incorporating new citizenship rights by means of judicial interpretation "would be in clear violation of Article 25 TFEU".[45] In doing so, the Court would therefore not only encroach on the horizontal allocation of powers between EU institutions, trespassing the remit of the Council, but also on the vertical allocation of powers between the European Union and the Member States, who are to approve such an addition according to their respective constitutional requirements. Yet, it is clear that, in *Delvigne*, the Court created a new right, and that this right is reserved, under EU Law, to Union citizens.[46]

It could be considered that this right was implicitly protected in Art. 20(2), b) TFEU and, therefore, also in Art. 22(2) TFEU. If it was the case, the right to participate in European elections, *as enshrined in Art. 20(2), b) and 22(2) TFEU*, would therefore have always contained not only a right to national treatment but also an active, enforceable right to participate in European elections, unlike the right to participate in municipal elections, contains. However, this does not

45 Lenaerts K. and Gutiérrez-Fons J. A. (2017). Epilogue on EU Citizenship: Hopes and Fears, op. cit., p. 780.

46 See *Delvigne* para. 44.

sit well with the finding of the Court in *Eman and Sevigner*[47] and *Spain v UK*[48] that Art. 19(2) of the Treaty on the European Communities (EC), currently Art. 22(2) TFEU, was confined to applying the principle of non-discrimination on grounds of nationality to that right to vote and stand for election.

Can we consider *Delvigne* to be an overruling of *Eman and Sevigner* and *Spain v UK*? Such an overruling could be justified by new legal circumstances that occurred since these previous rulings, namely the entry into force of the Charter of Fundamental Rights of the European Union. One could argue that, by linking together, in the same article of the Charter, the right to national treatment and the requirement for direct universal suffrage in a free and secret ballot, the Member States of the European Union, as sovereign Masters of the Treaties, have implicitly amended the content of the former Art. 19(2) of the Treaty on the European Communities (now Art. 22(2) TFEU). In this respect, one must remember that, according to Art. 52(2) Charter, "rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties". If we consider that this provision "links" the substance of the provisions of the Charter which have their source in the treaties with the provisions that they mirror, the incorporation of a new substance in a right laid down in the Charter may also affect the substance of the equivalent right in the treaties. In this interpretation, the Court has not created a new right in 2015. Instead, the Member States have implicitly amended the content of Art. 19(2) EC in 2009.

This is, however, a very far-fetched and acrobatic interpretation. It is difficult to construe Art. 52(2) Charter as a "two-way" interpretation link. Instead, it seems more plausible that the drafters of the Charter meant this provision as a "one-way" interpretation guideline, in order to prevent the substance of the Charter from going beyond the substance of the provisions of the treaties "cloned" in the Charter. One could argue that Art. 52(2) was designed precisely to prevent rulings like *Delvigne*. In any case, it requires a lot of legal imagination to consider that the Court has not tempered with the powers of the Member States by declaring the existence of an active, enforceable right to participate in European elections on the top of the existing right to national treatment as regards European elections.

Another possibility is that the right to participate in European elections already existed *somewhere else* in EU Law other than in Art. 20(2) TFEU. Art.

47 Court of Justice, judgment of 12 September 2016, case C-300/04, *Eman and Sevigner*, para. 53.

48 Court of Justice, judgment of 12 September 2016, case C-145/05, *Spain v. United Kingdom*, para. 66.

20(2) does not list *all* the rights of EU citizens, as evidenced by the terms "inter alia" and also by the fact that one of the rights of EU citizens, the collective right to invite the Commission to submit a proposal for a legal act (the so-called "citizens' initiative"),[49] is not mentioned in Art. 20(2). The right to participate in European elections could therefore be a new right added in Art. 39(2) of the Charter. However, since Art. 39(2) mirrors Art. 14(3) TEU and Art. 1(3) of the 1976 Act, and since the Court explicitly says that Article 39(2) of the Charter "constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament *in accordance with Article 14(3) TEU and Article 1(3) of the 1976 Act*",[50] it could be argued that the EU citizens' right to participate in European elections is and *always was* located in these provisions. This interpretation would mean that the Court has not created a new right and therefore has not encroached upon the powers of the other institutions or of the Member States under Art. 25(2) TFEU. However, even though this interpretation is much less far-fetched than the previous one, it is still quite formalistic. It assumes that the Court has merely discovered a right that was always there, even though it is unlikely that this was the intention of the drafters of the treaties and, before that, of the 1976 Act. Furthermore, it is not perfectly consistent with *Spain v UK* and *Eman and Sevinger*, in which the Court did not interpret the 1976 Act in such a way.

Whichever interpretation we choose, it is therefore hard to construe the finding of the Court as not trespassing on the powers of the Council, the European Parliament and the Member States.

IV.2 *A Potential Minimum EU Standard for National Election Law*

By recognizing a real and enforceable right to vote in the European elections, *Delvigne* may have paved the way for the Court of Justice of the European Union to have a greater control over limitations of civic rights imposed on Union citizens – as long as these limitations also affect their right to participate in the European elections. Furthermore, the Court of Justice will probably, on the basis of the requirement that the elections be "free and secret", be able to fully assess whether the Member States meet fundamental democratic standards, as laid down in the case-law of the European Court on Human rights, when organising the European elections – just as the European Court on Human Rights did itself in *Matthews v United Kingdom*.[51] Since a lot of domestic

49 Art. 11(4) TEU.

50 *Delvigne*, cit., para. 44.

51 European Court of Human Rights, judgment of 18 February 1999, no. 24833/94, *Matthews v. United Kingdom.*

rules which apply to the European elections also apply to the other domestic elections, the Court could therefore assess large portions of the electoral legislation of the Member States. The Court's assessment could include, not only the reasonableness of the restrictions of the right to vote based on criminal conviction (as was the case in *Delvigne*), but also on other grounds, like mental health,[52] and more broadly, the quality of the electoral regime, like the clarity of the electoral legislation,[53] the existence of an effective remedy for those who claim that they have been unlawfully deprived of their vote[54] or the rules governing the access to the media and the neutrality of State-owned media.[55] Even though the Court does not mention it explicitly in *Delvigne*, it would be surprising if its review did not encompass, not only the right to *vote*, but also the right to *run* as a candidate in European elections, even though it must be kept in mind that the European Court of Human Rights "accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility".[56]

It is true that the more recent case-law of the Court of Justice does not really show any willingness from the Court to go further in reviewing national election law. In particular, the order issued by the President of the General Court on the 1st July 2019 is a bit disappointing in this respect.[57] In this case, the Catalan politicians Carles Puigdemont and Antoni Comín got elected in the European Parliamentary elections of 26 May 2019. However, they did not appear in person before the Spanish Central Electoral Commission to swear allegiance to the Spanish Constitution, as required by the Spanish legislation. Because of that, the Commission did not include their names in the list which was notified to the European Parliament on 17 June 2019. According to Article 12 of the 1976 Act, for the purposes of verifying the credentials of its members, the Parliament is to take note of the results declared officially by the Member States. Therefore, the President of the European Parliament sent a letter to the applicants stating that their names were not on the list of elected members

52 European Court of Human Rights, judgment of 20 May 2010, no. 38832/06, *Alajos Kiss v. Hungary*.

53 European Court of Human Rights, judgment of 2 March 2010, no. 78039/01, *Grosaru v. Romania.*

54 *Grosaru v. Romania*, cit.

55 European Court of Human Rights, judgment of 19 June 2012, no. 29400/05, *Communist Party of Russia and others v. Russia.*

56 European Court of Human Rights, judgment of 19 October 2004, no. 17707/02, *Melnitchenko v. Ukraine*, para. 57.

57 General Court, order of the 1st July 2019, case T-388/19 R, *Carles Puigdemont i Casamajó and Antoni Comín i Oliveres v. European Parliament*.

officially communicated to the European Parliament by the Spanish authorities. Consequently, and until further notice by the Spanish authorities, they cannot be treated as future Members of the European Parliament. Carles Puigdemont and Antoni Comín lodged an application before the General Court seeking, in essence, annulment of several decisions of the European Parliament which they claim prevent the applicants from taking their seats in the European Parliament as elected members. They also brought an application for interim measures. It is this second application that was dismissed by the president of the General Court in the order, based on a literal interpretation of the 1976 Act, and not taking into account whether or not the Spanish legal requirement to appear in person before the Commission was compatible with the Union Citizens' right to vote and to be elected at the European Parliament. However disappointing, this order is not the end of the story because a) the General Court still has to rule on the substance of the case in the main proceedings, b) there is a possibility of appeal against the order of the General Court before the Court of Justice and c) a legal action against the requirement to swear allegiance to the Spanish constitution is pending before Spanish courts, which may request for a preliminary ruling from the Court of Justice on the compatibility of Spanish electoral law with EU Law.[58]

If the Court can indeed decide on minimum standards applicable to national election laws (and this evolution has yet to be confirmed by the Court), this would affect the division of competences between the European Union and the Member States as regards electoral rules. So far, the definition of electoral rules and standards falls mostly within the remit of Member States, with the exception of the minimal requirements imposed by EU secondary law regarding European elections. However, if the Court can indeed develop a body of case-law-based standards, this body could constitute the core of an incipient electoral regime common to all the Member States of the European Union.

Another question that could arise is whether the right to participate in European elections is an *exclusive* right of EU citizens. In *Eman and Sevinger*, the Court stated in para 74 that "while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, *enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality*, subject to such exceptions as are expressly provided for (...), that statement does not necessarily mean that the rights recognised

58 Van Elsuwege, P. (2019). Empty Seats in the European Parliament: What About EU Citizenship? *VerfassungsBlog,* available at https://verfassungsblog.de/empty-seats-intheeuropean-parliament-what-about-eu-citizenship/.

by the Treaty are limited to citizens of the Union".[59] This statement seems to explain the non-exclusive nature of citizenship rights by the fact that they are essentially rights to national treatment. The same conclusion can be drawn from para 76, in which the Court says that "while [Article 19(2) EC, now Art. 22(2) TFEU] (...) requires the Member States to accord those rights to citizens of the Union residing in their territory, *it does not follow* that a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election *to certain persons who have a close link with it without however being nationals of that State or another Member State*".[60] The Court then went on to find that a Member State (in this case, the United Kingdom) could legally allow non-EU Citizens (in this case, Commonwealth citizens) to participate in the European elections. It seems that the Court found that since the right to participate in the European elections was a "mere" right to national treatment, it was not *exclusively* reserved for EU citizens as long as it benefitted *at least* to them. However, if there is indeed an *active* right to participate in European elections, can it be inferred that this right is an *exclusive* right, aimed at creating a political European community? It is hard to tell, and it would be a considerable overturn of the previous case-law, but if such was the case, this limitation would encroach the power normally reserved to Member States to determine the limits of their political franchise.

On a positive note, this could, to a certain extent, respond to the criticism that the fragmented electoral rights regime across the EU results in an uneven access to the franchise.[61] It could also create a minimum level playing field applicable to both manifestations of democracy in the European Union multilevel system. According to Art. 10(2) TFEU, "Citizens are directly represented at Union level in the European Parliament" whereas "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens". Setting some minimum standards applicable to both European elections and national elections ensures a common fundamental grammar for these two "branches" of European democracy, under the common supervision of the Court of Justice.

It is also consistent with the fact that being a functional democracy is a condition for being a Member State of the European Union, under the so-called "Copenhagen criteria". It is now well known, in particular as regards the "rule

59 Emphasis added.
60 Emphasis added.
61 Fabbrini, F. The Political Side of EU Citizenship in the Context of EU Federalism, op. cit., p. 279.

of law backsliding"[62] in several Member States,[63] that the European Union is remarkably firm on candidate States complying with the standards of liberal democracy and the rule of law, while lacking the means to enforce these very same standards vis-à-vis Member States. Reviewing whether national legislations meet the basic standards of democracy may contribute to the resorption of this so-called "Copenhagen dilemma",[64] especially when illiberal governments meddle with electoral law in order to remain in power. As an example, the Court could review the various infringements to the 'one person, one vote' principle in Hungary, as well as the differences of treatment between different categories of citizens abroad depending on whether they are more or less likely to vote for the Prime Minister's ruling party Fidesz.[65]

It is however likely that the standards discovered and enforced by the Court, as well as the intensity of its review on Member States' electoral systems, will be limited, due to the obligation of the European Union to respect the national identities of the Member States, under Art. 4(2) TEU. The concept of national identity, coined by the Maastricht Treaty and made more (but far from completely) precise by the Lisbon Treaty, includes each country's fundamental political and constitutional structures, for example the status of the State as a Republic.[66] It may therefore also include the electoral legislation, as it is strongly connected with each country's fundamental constitutional and political choices. Tension is therefore likely to arise between, on the one hand, the necessity to ensure the effectiveness of European representative democracy, which according to Art. 10(1) TFEU founds the functioning of the Union, and

62 Pech, L. and Scheppele K. L. (2017). Illiberalism Within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies* 19, pp. 3–47. See also the concept of "constitutional capture" coined by J.-W. Müller about Hungary: Müller, J.-W. (2015). Should the EU Protect Democracy and the Rule of Law inside Member States? *European Law Journal* 21 (1), pp. 141–160, 142.

63 Poland, in particular, is currently the object of both a political procedure under Art. 7(1) TEU and infringement proceedings before the Court of Justice due to various measures undertook by the current Polish Government with the apparent aim of curtailing the independence of the judiciary. On the 12th September 2018, the European Parliament has also activated the Art. 7(1) procedure against Hungary.

64 As far as we can tell, this expression was coined by then Commissioner V. Reding during a debate at the European Parliament concerning the situation in Romania on the 12th September 2012: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120912+ITEM-011+DOC+XML+V0//EN.

65 Majtényi, B., Nagy, A., and Kállai, P. (2018). "Only Fidesz" – Minority Electoral Law in Hungary. *VerfassungsBlog*, available at https://verfassungsblog.de/onlyfidesz-electoral-law-in-hungary/.

66 Court of Justice, judgment of 22 December 2010, case C--208/09, *Sayn-Wittgenstein*, para. 92.

of Union citizens' participation to the election of the European co-legislature and, on the other hand, the sovereignty of Member States. This could be, for example, an argument against the exclusive nature of the right to participate in European elections (i.e. the thesis according to which this right should be reserved to EU citizens), at least in countries where the extension of suffrage to non-EU citizens is a part of their constitutional identity. This is probably the case with the United Kingdom, since the Court stated in *Spain v UK* that it is "for reasons connected to its constitutional traditions"[67] that the United Kingdom chose to grant the right to vote and to stand for election to Commonwealth citizens.

One must also consider the fact that the Court can only review and decide on standards applicable to national election laws insofar as the laws in question are applicable to European elections. A Member State could perfectly develop electoral rules that are strictly specific to the European elections. These specific rules are likely to be limited, because it is not in the interest of the States to create complications in their electoral regimes. However, a State can for example decide that citizens have to be of a certain age to run as a candidate for European elections, and for European elections only. If the Court was to find this age excessive for example, this finding would not apply to other national elections. Member States could even be tempted to develop a body of law specific to the European elections in order to make sure that the review exercised by the Court, along with the standards it could develop, do not "contaminate" the rest of national electoral law. However, such a strategy would be likely to create major inconsistencies. Can we really imagine that a State would agree, for example, that persons with mental difficulties would be allowed to vote for the European elections but disenfranchised for every other election?

Certain questions in particular are likely to remain either beyond the reach of the Court or subject to self-restraint. This is typically the case of national rules concerning the disenfranchisement of nationals residing in other countries, notwithstanding the position of certain authors who consider these rules incompatible with EU citizens' free movement rights.[68] There are two possibilities here. First, it may be that the nationals of a Member State imposing such disenfranchisement rules reside in another Member State. In this case, the citizens in question might still be able to participate in the European elections in the host State, which means that even if their right to participate in elections

67 Para. 79.

68 See Kochenov, D. (2009). Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link? *Maastricht Journal of European and Comparative Law* 16, pp. 197–223.

in their State of nationality is compromised, their right to participate *in European elections* is not. Alternatively, the citizens in question may reside in a third country. Theoretically, in this case, the Court could review the national rules in question, since in this case the citizens are effectively barred from the possibility to participate in European elections. However, it is likely that the Court would apply self-restraint in this case, for several reasons. First, EU secondary legislation explicitly protects national discretion on this matter.[69] Even though technically the right to participate in European elections prevails on secondary law, being enshrined in primary Law, this might deter the Court from going against the explicit will of the EU legislature. Secondly, even the European Court of Human Rights applies self-restraint on this question, as evidenced by its *Shindler* ruling concerning the 15-year rule in the United Kingdom.[70] Surely, the Court of Justice is not bound by the interpretation of the European Court of Human Rights. It could be argued that the right to participate in European elections must be interpreted in its constitutional context, and notably in the light of the importance of representative democracy in the European Union as expressed in Art. 10(1) TFEU ("The functioning of the Union shall be founded on representative democracy"). However, on this issue, the national identity clause, mentioned above, could play a role in the EU context similar to the national margin of appreciation in the case-law of the European Court of Human Rights. One cannot completely rule out, however, the Court of Justice taking such a bold stance, should the question arise before it.

V Conclusion

Political rights are an essential aspect of citizenship. Yet, when it comes to EU citizenship, the main focus is usually on transnational (horizontal) rights, like free movement and equal treatment, rather than on political (vertical) rights. However, after a period of "expansion" of citizens' transnational rights, during which the Court of Justice seemed to drift away from the "single-market-based"

69 Art. 1(2) of the Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals: "Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory".

70 European Court of Human Rights, judgment of 7 May 2013, no. 19840/09, *Shindler v. United Kingdom*.

citizenship, the Court, in recent cases like *Dano*[71] and *Alimanovic*,[72] seems to have taken a more restrictive stance, in particular as regards the access of EU citizens to social benefits in the host Member State.[73] Could it be that, at the same time, political rights have taken an opposite trajectory and have been reinforced by the Court? The case-law on political rights is too scarce to draw such a definitive conclusion. However, it is striking that the Court has adopted a bold view in *Delvigne* by discovering in the Charter an enforceable right for EU citizens to participate in European elections. The Court did not go as far as some would have hoped since it did not find any violation of EU Law in the case at stake. However, as some commentators have observed, it is a "classical strategy for landmark decisions" to show "restraint with regard to the outcome of the case" while scoring "an important point as a matter of legal principle".[74] Recognising an enforceable right to participate in European elections, applicable to national law regardless of its connection with EU Law and of any cross-border element has a real potential to rock the boat. In particular, I have argued that, merely by its existence, this judicially-recognised right encroaches on the power, reserved by the Treaties to Member States (inter alia), to recognise new citizenship rights. Furthermore, this right could potentially expand into a series of basic democratic standards, applicable to national election rules insofar as they also apply to European elections, with the Court of Justice having the power to review whether national election rules comply with these standards. This potential still needs to be realised, and may be hindered by the Member States' claim to sovereignty. This is however an interesting development, that deserves to be observed closely. Given the strong recognition of the democratic foundation of the European Union in the Lisbon Treaty, and despite the consistently low turnout at the European elections, political rights could develop into another strong pillar for EU Citizenship, alongside transnational / free-movement rights.

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71 Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano*.

72 Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic*.

73 This phenomenon is one of the subjects of Kochenov, D., ed. (2017). *EU Citizenship and Federalism. The Role of Rights*. Cambridge: Cambridge University Press. See also Thym, D., ed. (2017). *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*. Camden: Hart Publishing.

74 Van Eijken, H. and Van Rossem, J. W. (2016). Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship? cit., p. 130.

CHAPTER 15

The European Citizens' Initiative in Times of Brexit

*Natassa Athanasiadou**

1 Introduction

The European citizens' Initiative is an instrument of participatory democracy[1] introduced by the Lisbon Treaty (Art. 11(4) TEU) and aiming to reinforce the influence of citizens over the legislative agenda of the EU.[2] Pursuant to Art. 11(4) TEU, not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal for a legal act of the Union. The right to participate in a European citizens' initiative constitutes one of the specific forms of the general right of every EU citizen to participate in the democratic life of the Union (Art. 10(3) TEU).[3] It enables the involvement of EU citizens in the decision-making process at the EU level, while requiring that they come together with citizens from other Member States and present a proposal not of national, but of European interest. It thus introduces a new dimension of transnational participatory democracy, alongside representative democracy on which the EU is founded,[4] and adds another tool to the political arsenal of EU citizenship.[5]

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1 On participatory democracy and the scope of Art. 11 TEU, see Mendes, J. (2011). Participation and the role of law after Lisbon: a legal view on article 11 TEU. *Common Market Law Review* 48 (6), pp. 1849–1878; Cuesta Lopez, V. (2010). The Lisbon Treaty's provisions on democratic principles: A legal framework for participatory democracy. *European Public Law* 16(1), pp. 123–138.

2 Art. 11(4) TEU echoes Art. I-47(4) of the non-ratified Constitutional Treaty; see Sipala, F. (2007). La vie démocratique de l'Union. In: G. Amato, H. Bribosia and B. de Witte, eds., *Genèse et destinée de la Constitution européenne*, Brussels: Bruylant, p. 367; Dougan, M. (2011). What are we to make of the citizens' initiative? *Common Market Law Review* 48 (6), pp. 1807–1848, 1808.

3 See General Court, judgment of 10 May 2017, case T-754/14, *Efler v. Commission*, paras 24 and 37.

4 Art. 10(1) TEU.

5 See Art. 24 TFEU; General Court, judgment of 23 April 2018, case T-561/14, *One of Us v. Commission*, para. 72 and 93.

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The effective functioning of citizens' initiatives could therefore strengthen the common identity of EU citizens and at the same time enhance the legitimacy of certain Commission proposals being initiated from citizens across the Union.

However, the impact of this instrument so far has been assessed as limited[6] and the European Commission has been criticised for depriving the European citizens' initiative of its effectiveness due to its own institutional practice.[7] On this point, it is important to underline that the Commission's interpretation of the material scope of application of citizens' initiatives has been confirmed in four out of six cases brought before the General Court.[8] The Commission has lost only once in substance, in the "Stop TTIP" case,[9] and once for the procedural reason of lack of justification, in the "Minority SafePack" case.[10] It is the latter case, as it will be shown, that has influenced more the general administrative practice, notably from a procedural point of view. Following this case-law and under pressure by the European Parliament,[11] the European Ombudsman[12] and other stakeholders,[13] the Commission has revisited its

6 See the second Commission report to the European Parliament and Council on the application of Regulation (EU) No 211/2011, COM(2018) 157 final, p. 2.

7 See Salm, C. (2018). *The added value of the ECI and its revision*. European Parliament Research Service, PE 615.666, 13 April 2018, p. 11 et seq.

8 See General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*, which was confirmed by Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Anagnostakis v. Commission*; General Court, judgment of 19 April 2016, case T-44/14, *Constantini and others v. Commission*; judgment of 5 April 2017, case T-361/14, *HB and others v. Commission*, which was confirmed by Court of Justice, judgment of 8 February 2018, case C-336/17 P, *HB and others v. Commission*. In case *Izsak and Dabis v. Commission*, the General Court ruled in favour of the Commission at first instance (judgment of 10 May 2015, case T-529/13, *Izsak and Dabis v. Commission*), but its judgment was set aside following an appeal before the Court of Justice, because the General Court had erroneously placed the burden of proof on the applicants as to whether the subject matter of their initiative was falling within the Commission competences to propose a legal act of the Union (Court of Justice, judgment of 7 March 2019, case C-420/16 P, *Izsak and Dabis v. Commission*, para. 72.) However, the Court of Justice confirmed in essence the Commission's interpretation of the Treaties (*ibid.* paras 70–71.).

9 *Efler v. Commission*, cit.

10 General Court, judgment of 3 February 2017, case T-646/13, *Minority SafePack v. Commission*.

11 European Parliament Resolution P8_TA(2015)0382 of 28 October 2015 on the European Citizens' Initiative.

12 Own initiative report of the European Ombudsman of 4 March 2015, OI/9/2013/TN.

13 See for instance the opinion of the European Citizen Action Service (ECAS), *Revising the ECI: How to make it fit for purpose*, 20 April 2017, <www.euractiv.com/section/politics/opinion/revising-the-eci-how-to-make-it-fit-for-purpose/>.

application practice towards a more flexible approach.[14] In addition, it initiated a new Regulation governing the European citizens' initiative with a view to rendering this instrument more user-friendly and accessible to citizens.[15]

The timing of the Commission's revisited administrative practice and the initiation of the new Regulation coincide with the trigger of a series of Brexit-related citizens' initiatives. EU citizens from different Member States have brought forward initiatives aiming either to reverse Brexit or to secure the rights of EU-citizens whose country withdraws from the EU. EU citizens with the nationality of the United Kingdom (UK) were able to organise and participate in European citizens' initiatives until the withdrawal of the UK from the EU. After the entry into force of the withdrawal agreement, namely on 1 February 2020,[16] UK nationals lost, *inter alia*, this political right, since Art. 11(4) TEU requires that participants of a European citizens' initiative are nationals of a Member State. It is noted that the withdrawal agreement excludes the applicability of the European citizens' initiative during the transition period.[17]

Given the wide public interest that Brexit has generated and the fact that six European citizens' initiatives have been Brexit-related, this group of initiatives ("Brexit-related initiatives") constitutes a suitable case study in order to illustrate the evolution of the Commission's administrative practice and assess it against general principles underpinning the functioning of EU institutions. It will be argued that the changed Commission's approach towards more flexibility takes better account of the primary law right of EU citizens to participate in the democratic life of the EU. However, a closer look at the way the revisited approach works in practice reveals shortcomings which interfere with the right to good administration and the principles of legal certainty and legitimate expectations. These principles will serve as normative benchmarks when assessing the Commission's practice.

Good administration is a general principle of EU law and a right enshrined in Article 41 of the Charter of Fundamental Rights of the EU (Charter), which guarantees that every person has their affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices

14 See the second Commission report COM(2018) 157 final, cit., p. 2 on the non-legislative measures taken by the Commission.

15 Commission Proposal for a Regulation of the European Parliament and of the Council on the European citizens' initiative, COM(2017) 482 final.

16 See https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

17 See Article 127(1) (b) of the Withdrawal Agreement.applicability in the United Kingdom of EU law on the European citizens' initiative during the transition period.

and agencies of the Union.[18] This right also generates an obligation of the administration to inform adequately all involved persons in an ongoing administrative procedure.[19] From a broader perspective, good administration is connected with good governance and requires that the administration conducts a transparent information policy and provides guidance and assistance to the public.[20]

Legal certainty requires that legal rules and acts are clear and precise, and that legal relationships governed by Community law remain foreseeable.[21] While legal certainty refers to the clarity and foreseeability of the legal framework, the principle of the protection of legitimate expectations concerns the ability to rely on the presumed legality of individual measures and on precise assurances provided by the competent administrative organs.[22]

In the following sections, the role of the Commission as institutional mediator of European citizens' initiatives will be assessed against these principles, which form the procedural guarantees for the effective exercise of this participatory right. The cycle of a European citizens' initiative will be divided

18 See Court of Justice, judgment of 4 April 2017, case C-337/15 P, *Ombudsman v. Staelen*, para. 34.

19 See Art. 41, para. 1, let. b), of the Charter on the access to the file which encompasses a more general information obligation; on this obligation see Harlow, C. and Rawlings, R. (2014) *Process and Procedure in EU Administration*. Oxford: Hart Publishing, p. 88.

20 On the elements of good governance see Art. 15 TFEU. On the connection between good administration and good governance see Hofmann, H., Rowe, G. and Türk, A. (2011). *Administrative law and policy of the EU*. Oxford: Oxford University Press, p. 461; Harlow, C. and Rawlings, R. (2014). *Process and Procedure in EU Administration*. cit., p. 209. As example of the obligation of assistance and guidance to the public see Art. 1, para. 2, of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ L 264*, 25.9.2006, p. 13–19.

21 See Court of Justice, judgment of 15 September 2005, case C-199/03, *Ireland v. Commission*, para 69; judgment of 29 October 2009, case C-29/08, *SKF*, para. 77; See also Tridimas, T. (2006). *The General Principles of EU Law*. Oxford: Oxford University Press, p. 242; Hofmann, H., Rowe, G. and Türk, A. (2011). *Administrative law and policy of the EU*, cit., p. 173.

22 See *inter alia* Court of Justice, judgment of 16 June 1966, case 54/65, *Châtillon v. High Authority*; judgment of 19 May 1983, case 289/81, *Mavrides v. Parliament*; judgment of 20 March 1997, case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*. See also Sharpston, E. (1990–1991). European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom. *Northwestern Journal of International Law & Business* 11, pp. 87–103.

in two phases: the registration phase, in which the Commission applies the so-called admissibility test (section II), and the post-registration phase, in which the collection of signatures takes place and the Commission pronounces on an eventually successful initiative (section III). In the last section, the Brexit-related initiatives will be used as a case study illustrating the evolution of the Commission's practice towards more flexibility and the shortcomings which still remain (section IV).

II Revisiting the Admissibility Test

The right to put in place a European citizens' initiative as enshrined in Art. 11(4) TEU was rendered concrete through Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011, which was adopted on the basis of Art. 24(1) TFEU and entered into force on 1 April 2012.[23] Regulation (EU) 211/2011 was replaced by Regulation (EU) 2019/788 ("new Regulation"), which entered into force on 1 January 2020. Regulation (EU) 211/2011 remains in force for ongoing initiatives.[24] Since this chapter discusses initiatives which were put place on the basis of Regulation (EU) 211/2011, reference is primarily made to this Regulation.

The procedure which citizens have to follow contains several steps: as a first step, the organisers of an initiative who must be EU citizens and residents of at least seven different Member States (Art. 3 Regulation (EU) 211/2011) are required to apply for registration in the Commission's online register by submitting information on the subject matter and the objectives of the proposed initiative (Art. 4 Regulation (EU) 211/2011). The Commission has two months to examine the proposed initiative and check whether certain admissibility conditions are fulfilled (Art. 4(2) Regulation (EU) 211/2011). If the initiative is found admissible and is registered by the Commission, the signature collection process begins (Art. 5 Regulation (EU) 211/2011). The organisers must collect within 12 months at least one million signatures from at least one quarter of

23 Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, *OJ L 65*, 11.3.2011, p. 1–22. For critical remarks on Regulation 211/2011, see Dougan, M. (2011). What are we to make of the citizens' initiative?, cit., p. 1807; Kaufmann, B. (2012). Transnational Babystep: The European citizens' initiative. In: T. Schiller and M. Setala, eds., *Citizens' Initiatives in Europe; Procedures and consequences of agenda-setting by citizens*, London: Palgrave Macmillan, p. 229.

24 See Art. 26–27 Regulation (EU) 2019/788 of the European Parliament and the Council of 17 April 2019 on the European citizens' initiative, *OJ L 130*, 17.5.2019, p. 55–81.

Member States (Art. 7 Regulation (EU) 211/2011). Once all the conditions relating to the collection of signatures have been fulfilled and verified (Art. 8), the organisers may submit the initiative to the Commission for its consideration (Art. 9 Regulation (EU) 211/2011). The Commission publishes it and receives the organisers who can now explain their proposal in detail (Art. 10(1), let. a) and b), Regulation (EU) 211/2011). In addition, a public hearing is organised at the European Parliament with the participation of other institutions, the Commission included (Art. 11 Regulation (EU) 211/2011). Finally, within three months following the submission, the Commission sets out in a communication its legal and political conclusions on the initiative, the action it intends to take, if any, and its reasons for taking or not taking that action (Art. 10(1), let. c), Regulation (EU) 211/2011).

From this brief outline of the procedure, it becomes apparent that the role of the Commission is crucial at two stages, at the very beginning, at the stage of the admissibility check, and at the very end, when the Commission decides which action it intends to take in order to give effect to a successful initiative (follow-up stage).

The admissibility test encompasses one positive procedural and three negative substantive conditions. The procedural condition requires that the organisers have formed a citizens' committee of at least seven persons who are residents of at least seven different Member States (Art. 3 and 4(2), let. b), Regulation (EU) 211/2011). The substantive conditions concern the subject matter of the initiative and require that it is not manifestly abusive, frivolous or vexatious (Art. 4(2) let. c), Regulation (EU) 211/2011), it is not manifestly contrary to the values of the Union as set out in Art. 2 TEU (Art. 4(2), let. d), Regulation (EU) 211/2011) and, most importantly, as directly dictated by primary law, it does not manifestly fall outside the framework of the Commission's powers to submit a proposal of a legal act of the Union for the purpose of implementing the Treaties.

This latter condition has proven to be the main hurdle for organisers to achieve formal registration of their initiative and it has generated a series of judgments of the General Court. Twenty eight initiatives[25] have been refused registration so far because, according to the Commission's justification, no legal basis in the Treaties could support a legal act of the Union on their subject matter, three of which were in the end (partially) registered following a Court judgment.[26]

25 Available at <www.ec.europa.eu/citizens-initiative/public/initiatives/non-registered>.

26 The Initiatives "Stop TTIP", "Minority SafePack" and "Cohesion policy for the equality of the regions and sustainability of the regional cultures".

Various stakeholders, including citizens' organisations,[27] academics,[28] the European Parliament[29] and the European Ombudsman[30] had urged the Commission, before the introduction of the new Regulation, to reconsider its practice by offering better guidance to organisers and applying the admissibility test in a less strict way, so as to increase the number of successful registrations.

In the following sub-sections, two landmark judgments, which bear also importance for initiatives in the context of the Brexit negotiations, will be analysed: firstly, the judgment in case "Minority SafePack", which opened the way for partial registration of citizens' initiatives (II.1.); secondly, the judgment in case "STOP TTIP", which enabled the registration of initiatives aiming to influence ongoing negotiations of international agreements (II.2.). These evolutions will be assessed against the right to participation and the general principles of good administration, legal certainty and protection of legitimate expectations.

II.1 *Possibility of Partial Registration*

The main problem in the initial registration practice had been that the Commission perceived an initiative as an inseparable package leading to either acceptance or rejection of the initiative as a whole, without assessing each of its different components.[31] It seemed to apply a centre of gravity test on whether the essence of the initiative lied with the admissible or the non-admissible part and decide accordingly.[32] This approach prevented initiators from understanding which of the elements of their proposal could possibly qualify for resubmission, in order to come back with a new admissible project.[33] The opportunity for the Commission to reconsider this practice was given with the judgment of the General Court in case "Minority SafePack". With this judgment the General Court annulled the Commission's decision refusing the registration of the initiative "Minority SafePack" on the formal ground of lack of justification, because the Commission did not specify which elements of the initiative where admissible and which were not (incomplete statement

27 See for instance the opinion of the European Citizen Action Service (ECAS), cit.

28 Organ, J. (2014). Decommissioning direct democracy? *European Constitutional Law* Review 10 (3), pp. 422–443; Karatzia, A. (2015). The European citizens' initiative in practice: legal admissibility concerns. *European Law Review* 40 (4), pp. 251–270.

29 European Parliament Resolution (2015)0382, cit.

30 Own initiative report of the European Ombudsman of 4 March 2015, OI/9/2013/TN.

31 See for the Commission's interpretation *Minority SafePack v. Commission*, cit., para. 21.

32 See for the Commission's position *Minority SafePack v. Commission*, cit., para. 28.

33 See this argument in Minority SafePack *v.* Commission, cit., para. 29.

of reasons).[34] The General Court left open the legal consequences of partial admissibility.[35] Two different options seemed to be possible, namely that partial admissibility leads to full rejection if the inadmissible content constitutes the essence of the initiative, or to partial registration if the content is indeed separable. As for the possibility of partial registration, it could also be argued that this should not be decided alone by the Commission, but that the latter should confer with the organisers whether they consent to partial registration.

The Commission's practice following the judgment in case "Minority SafePack" shows that, from this point onwards, the Commission identifies the elements of the initiative on which it could make a proposal for an act of the Union and accepts registration for these parts.[36] This evolution is welcome and indeed enables the registration of more initiatives, while respecting the principle of conferral of Union powers (Art. 5 TEU). Partial registration also takes better account of the principle of legitimate expectations, since the registered initiative is cleared from its inadmissible parts and therefore both the organisers and potential signatories have in this way an accurate picture of what they can achieve through their initiative.

However, the problem in the implementation of this practice is that the content of the initiative which is registered in the official Commission register (public website) is not adjusted to the Commission's decision to accept only part of the initiative, but it continues to include the inadmissible parts.[37] The webpage contains a disclaimer that the contents of the page are the sole responsibility of the organisers of the initiatives and they can in no way be taken to reflect the views of the Commission. However, this approach leads to the result that the official register does not provide a clear image of the admissible content of initiatives. This could have the negative effect of creating false expectations for those signatories who sign an initiative on the basis of the

34 *Minority SafePack v. Commission*, cit., para. 29. For a detailed analysis, see Inglese, M. (2018). Recent trends in European Citizens' Initiatives: The General Court case-law and the Commission's practice. *European Public Law* 24 (2), p. 335.

35 See *Minority SafePack v. Commission*, cit., para. 29. This open outcome is in line with Article 266(1) TFEU which provides that the institution draws the consequences of the annulment of its act.

36 See the Commission Decision C(2017) 2200 of 29 March 2017 on the partial registration of the initiative "Minority SafePack", following the judgment in *Minority SafePack v. Commission*, cit.; see also the Commission Decision C(2017) 3382 of 16 May 2017 on the partial registration of the proposed citizens' initiative entitled "Let us reduce the wage and economic differences that tear the EU apart!".

37 See for instance the description of the initiative "Minority SafePack" following its partial registration, available at <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000004>.

content featured on the website without looking concretely into the Commission decision of registration.

This recent practice of partial registration is now crystallised in the new Regulation, which proposes a fully-fledged mechanism of exchange of views between the Commission and the organisers, when upon request of registration of an initiative the Commission considers that the whole or parts of the initiative manifestly fall(s) outside of the Commission's powers, with a view to enabling at least partial registration of the initiative.[38] This proposed mechanism of interaction between the Commission and the organisers is of major importance, because it will allow organisers to know in advance the Commission's position on the admissibility of their initiative, so as to adjust the content accordingly in order to achieve successful registration. Currently, such exchanges of views and clarifications regarding the content of the proposal appear to happen for the first time before the General Court, when the organisers challenge the non-registration of their initiative. This situation is an obstacle to effective democratic participation and is not considered to be in line with the principle of good administration in the broad sense, which as outlined above,[39] requires the provision of assistance and guidance to interested citizens. The importance of this principle in the context of European citizens' initiatives has been already stressed by the Court.[40] It is thus welcome that the new Regulation includes an administrative phase of exchange of views between the Commission and the organisers.

The new Regulation also provides that, when partial registration takes place, the organisers shall ensure that potential signatories are informed of the scope of the registration and of the fact that statements of support are collected only in relation to the scope of the registration of the initiative.[41] This provision is also of major importance towards achieving transparency and clarity about the final admissible content of an initiative, since, as already mentioned, organisers have not been adjusting the information provided in the official Commission register following a partial registration.

11.2 *Possibility of Influencing Ongoing Negotiations*

A second important judgment, which bears significance also for initiatives in the context of Brexit, is the judgment in the case "STOP TTIP". The organisers of the initiative "STOP TTIP" requested the Commission inter alia to withdraw

38 See Art. 6, para. 4, Regulation (EU) 2019/788.

39 See section 1.

40 See *Anagnostakis v. Commission*, case C-589/15 P, cit., para. 47.

41 See recital 19 and Art. 6, para. 5, Regulation (EU) 2019/788.

its recommendation to the Council to authorise the opening of negotiations for the Transatlantic Trade and Investment Partnership (TTIP).[42] The Commission rejected the request for registration on the basis of two arguments.

First, the Commission supported the view that Art. 11(4) TEU refers only to formal Commission proposals leading to the adoption of final acts of the Union producing legal effects vis-à-vis third parties; it thus excludes Commission recommendations which aim at the adoption of preparatory acts by another institution producing effects only among the institutions, such as the Council decision authorising the opening of negotiations.[43] This Council decision adopted on the basis of Art. 218(3) TEU was perceived by the Commission as a preparatory/intermediate act; the final act of the procedure leading to the adoption of an international agreement would be the Council decision authorising the Commission to conclude the agreement.[44]

The second Commission's argument was that "negative acts" may be the object of citizens' initiatives only if they seek to amend or repeal existing acts, because Art. 11(4) TEU provides that initiatives should aim at the adoption of an act *required for implementing the Treaties* (emphasis added). For this reason, according to the Commission, it is not possible for citizens to reunite in order to stop the institutions from acting for the first time.[45]

The General Court, following an action for annulment by the organisers of the "STOP TTIP" initiative, ruled that citizens could also invite the Commission on the basis of Art. 11(4) TEU to submit recommendations for any act of the Union, including acts which deploy legal effects only among institutions, since the provision of the Treaties does not contain any indication to the contrary.[46] This conclusion was reinforced by the argument that the Council decision authorising the opening of negotiations constitutes a decision in the sense of Art. 288 TFEU and thus an "act of the Union" in the meaning of Art. 11(4) TEU.[47] It is important to note that the General Court used the principle of democracy as a guiding principle when interpreting the legal framework, which is specifically pursued by the instrument of the European citizens' initiative. This principle requires, according to the judgment, a broad interpretation of the term "legal act of the Union", so as to enable citizens' participation in all legal acts which

42 See Commission Decision C(2014) 6501 of 10 September 2014 on the registration of the initiative "STOP TTIP", p.1.

43 *Ibid.*, p. 3.

44 *Ibid.*, p. 2.

45 *Ibid.*

46 *Efler v. Commission*, cit., para. 35.

47 *Ibid.*, para. 36.

seek to modify the legal order of the Union, such as the acts preparing the conclusion of an international agreement.[48]

It follows from this judgment that the General Court interpreted the term "proposal" for an act of the Union, as used in Art. 11(4) TEU, in a "non-technical" way and beyond the limits of Art. 17(2) TEU, thus including also Commission recommendations or possibly other acts, with which the Commission gives its opinion to another institution for the adoption of any legal act of the Union. This broad interpretation of the term "proposal" could also be based on the wording of Art. 11(4) TEU which refers to "any appropriate proposal" by the Commission, leaving the specific instrument open. It is interesting to note that the wording of Regulation 211/2011 appears to be more restrictive in this sense referring to "*a* proposal" by the Commission and not "*any appropriate* proposal" as in primary law [emphasis added].

The General Court dismissed also the second argument of the Commission with the justification that the objective of participation in the democratic life of the Union pursued by the mechanism of the European citizens' initiative manifestly includes the power to request the amendment or withdrawal of legal acts, such as the Council decision authorising the opening of negotiations with a view to concluding an international agreement. Acts whose object it is to prevent the signing and conclusion of such an agreement produce, according to the General Court, independent legal effects by preventing, as the case may be, an announced modification of European Union law.[49] The General Court also noted, that, were the Commission's opinion to be followed, the absurdity would be that citizens would have to await the conclusion of an international agreement, so as to be able to invite the institutions to end it.[50]

This judgment bears significant importance, since it clarifies the material scope of the European citizens' initiative. By using the principle of democracy as a normative benchmark, the Court interprets Art. 11(4) TEU in the broadest possible way, with a view to enabling citizen involvement also in the area of ongoing negotiations. The straightforward interpretation of the term "legal act" as encompassing any legal act of the institutions strengthens not only participatory democracy but also legal certainty, because it avoids classifying EU

48 *Ibid.*, para. 37. The principle of democracy was used as interpretation guideline also in previous cases, see *Anagnostakis v. Commission*, case T-450/12, cit., para. 26; *Constantini and others v. Commission*, cit., para. 73; *Minority SafePack v. Commission*, cit., para. 18.

49 *Efler v. Commission*, cit., para. 43. Following this judgment, the Commission registered the initiative "STOP TTIP" with Commission Decision C(2017) 4725 of 4 July 2017 on the proposed citizens' initiative entitled "Stop TTIP".

50 *Efler v. Commission*, cit., para. 44.

legal acts in categories which would be difficult for potential organisers and citizens to follow.

III Managing Expectations at the Post-Registration Stage

The organisers of an initiative, even after they have cleared the hurdle of admissibility and have managed to gather the necessary number of signatures, have still no guarantee that the Commission will take action in line with their proposal. It is clear from the wording of Art. 11(4) TEU ("inviting") that the Commission enjoys discretion on whether to follow the proposal made by the citizens and which exact action to take ("any appropriate proposal").[51] This means that the instrument of citizens' initiatives constitutes an agenda setting tool and not a way to formally initiate the adoption of a legal act.[52] The right of initiative remains with the Commission. This interpretation according to which the Commission has no legal obligation to make a proposal following the invitation of a successful initiative was confirmed by the recent judgments in the case "One of Us", both by the General Court and by the Grand Chamber of the Court of Justice upon appeal of the organisers.[53] The choice made by the Treaty not to confer to an ECI a formal right of initiative can be explained through the Commission's role in the EU institutional balance.[54] Pursuant to Art. 17 TEU, the Commission is in charge – *inter alia* – of safeguarding the general interest of the EU, ensuring respect of the Treaties (Art. 17(1) TEU) and initiating the adoption of Union legal acts (Art. 17(2) TEU). It follows from this last point that the Commission is also responsible for ensuring the coherence

51 Compare the wording of Art. 11(4) TEU with Art. 225 TFEU on the equivalent right of the European Parliament and Art. 241 TFEU on the equivalent right of the Council, which both use the term "requests". *See* the preparatory works of the Constitutional Treaty, during which the initial term "requests" was replaced with the term "invites" in Art. I-46 of the draft Constitutional Treaty on the European citizens' initiatives, 12 June 2003, CONV 811/03, p. 5. On this, *see* also Hieber, T. (2014) *Die Europäische Bürgerinitiative nach dem Vertrag von Lissabon*. Tübingen: Mohr Siebeck, p. 9.

52 On this agenda-setting function, see Organ, J. (2014). Decommissioning direct democracy?, cit., p. 424.

53 *One of Us v. Commission*, cit., paras 111 and 122. The judgment of the General Court was confirmed by the Court of Justice, judgment of 19 December 2019, case C-418/18 P, *Puppinck and Others v. Commission* (*One of Us*).

54 On the "institutional balance" within the EU, *see* Court of Justice, judgment of 13 June 1958, case 9/56, *Meroni v. High Authority*, p. 152; judgment of 14 April 2015, case C-409/13, *Council v. Commission*, para. 64; *Efler v. Commission*, cit., para. 46; *One of Us v. Commission*, cit., paras 110 *et seq*.

of EU policies and actions[55] on the basis of the Union's annual and multiannual programming (Art. 17(1) TEU).[56] Thus, an initiative launched by citizens which contradicts a policy line, especially one based on existing legislation,[57] would provoke a public debate on the issue, but would not necessarily oblige the Commission to change its policy line.

Only five initiatives have so far collected the required one million signatures.[58] The Commission in its communications[59] as a follow-up to these successful initiatives committed itself to further strengthening and improving the existing legal framework in the relevant subject matter, but it has been reproached for not fulfilling (all) the objectives of the organisers and for not initiating any new legislation apart from amendments to existing provisions.[60]

The organisers of the initiative "One of Us" aiming to end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health, have been the first to challenge the Commission's Communication[61] on its intended follow-up (non) action before the General Court. The Commission argued before the Court that its communications on its intended action or non-action do not constitute

55 See *Council v. Commission*, cit., para. 87.

56 On the Union's annual and multiannual programming see Martenczuk, B. (2019). Art. 17 EUV. In: E. Grabitz, M. Hilf and M. Nettesheim, eds., *Das Recht der EU*, Munich: C. H. Beck, para. 51.

57 See the Commission's argument in *One of Us v. Commission*, cit., para. 151.

58 The initiative "Right2Water" on achieving universal access to water and sanitation and on exempting water supply and management from internal market rules; the initiative "Stop Vivisection" with the aim to phase out animal experiments for scientific purposes; the initiative "One of us" aiming to ban and end the financing of activities which presuppose the destruction of human embryos and the initiative "Ban glyphosate" aiming to ban glyphosate-based herbicides and improve the EU regulatory framework for evaluation of pesticides; lastly, the initiative "Minority SafePack", which calls upon the EU to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union. All five initiatives can be found at <www.ec.europa.eu/citizens-initiative/public/initiatives/successful>.

59 The Commission Communications can be found at <www.ec.europa.eu/citizens-initiative/public/initiatives/successful>.

60 See Karatzia, A. (2017). The European citizens' initiative and the EU institutional balance: on realism and the possibilities of affecting EU lawmaking. *Common Market Law Review* 54 (1), pp. 177–208, 198; Bélier, S. (2014). Fulfilling the promise of the ECI, learning from the Right2Water experience. In: C. Berg and J. Thomson, eds., *An ECI that works! Learning from the first two years of the European citizens' initiative*, Germany: Alfter, p. 81. On the follow-up action of the Commission to the so far successful initiatives, *see* the second Commission report COM(2018) 157 final, cit., p. 10 *et seq*.

61 Commission Communication COM(2014) 355 of 28 May 2014 on the European Citizens' Initiative "One of us".

reviewable acts, because they do not produce legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position.[62] Contrary to the Commission's contentions, the Court ruled that such communications are indeed reviewable, because they are the closure act of an administrative procedure, which the Commission is obliged to issue while respecting certain procedural guarantees, such as the obligation to state reasons.[63] The General Court allowed judicial review so as to control the respect of these procedural guarantees, while noting that such review is of a limited nature given the wide margin of appreciation enjoyed by the Commission.[64]

Assessing the Commission's follow-up practice to date against the principles of good administration, legal certainty and legitimate expectations, *two lessons* can be learnt, which might help managing expectations for future successful initiatives and are relevant for Brexit-related initiatives.

III.1 *False Expectations in Case of Partially Inadmissible Initiatives*

In the case of two successful initiatives, the Commission indicated in its Communications to the organisers at the very late stage of follow-up that it could not take any action for part of the aims of the initiatives, since they were Member State rather than EU competencies. More specifically, this concerned one of the aims of the initiative "Right2Water" to exempt water supply and management from privatisation[65] and the part of the initiative "One of us" aiming to ban and end the financing of activities which presuppose the destruction of human embryos for research purposes.[66] The fact that these initiatives were fully registered despite containing certain inadmissible elements created false expectations for the organisers, the signatories as well as the general public that the Commission is competent to propose legislation in line with the initiatives. The Commission has been criticised for not fulfilling (all) the objectives of the organisers and for not initiating any new legislation in this regard,[67]although

62 *One of Us v. Commission*, cit., para. 69.

63 *One of Us v. Commission*, cit., paras 77 et seq.

64 *One of Us v. Commission*, cit., paras 169–170.

65 See Commission Communication COM(2014) 177 of 19 March 2014 on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!".

66 See Commission Communication COM(2014) 355.

67 See the reaction of the "Right2Water" citizens' committee at <http://www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative>. See among the academic commentators Karatzia, A. (2017). The European citizens' initiative and the EU institutional balance, cit., 198; Bélier, S. (2014) Fulfilling the promise of the ECI, cit., p. 81; Vogiatzis, N. (2017). Between

the real problem was the creation of false expectations from the outset. This example illustrates the importance of clearing the admissibility of the main aims of an initiative at the registration phase. Otherwise, the early admissibility check loses its rationale. The recent Commission practice of clearing the inadmissible parts through partial registration, as explained above, is expected to bring more clarity to the organisers and potential signatories of what they can reasonably expect as the outcome of their initiative.

III.2 *Difficulty of Influencing Ongoing Procedures*

Another situation which can create frustration and disappointment for organisers is where they aim to influence ongoing procedures, such as the negotiation or signature of international agreements. In the case of the initiative "STOP TTIP", the organisers invited the Commission to recommend to the Council to repeal the negotiating mandate for the TTIP and not to conclude the Comprehensive Economic and Trade Agreement (CETA). The request for registration was made in July 2014, whereas in August 2014 the negotiations for CETA were already concluded and the negotiating mandate for TTIP had already been approved by the Council one year before the request for registration.[68]

Even assuming that there was the political will to repeal the negotiating mandate for TTIP, it is legally unclear whether the Commission has the power to return to the Council with a new recommendation after the Council has already approved the negotiating mandate. More precisely, Art. 293(2) TFEU provides that the Commission can amend its *proposals* as long as the Council has not acted. The same was held by the Court of Justice as regards the Commission's right to withdraw its proposals under certain conditions.[69] The Commission must respect this requirement also when it amends or withdraws a proposal following the invitation of a citizens' initiative, meaning that the withdrawal or amendment must take place before the Council has acted, since the Treaty provision does not contain any exceptions. Here, the question arises whether the same limitation should apply also when citizens invite the Commission to amend or withdraw its *recommendation* after the Council has already acted. In case this limitation of Art. 293(2) TFEU is to be applied *mutatis mutandis* also in the context of Art. 218(3) TFEU, it is highly doubtful that the

discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process. *European Law Journal* 23 (3–4), pp. 250–271, 261; Inglese, M. (2018). Recent trends in European Citizens' Initiatives, cit., p. 358.

68 On the facts, see *Efler v. Commission*, cit., para. 1.

69 *Council v. Commission*, cit. On this judgment, see Ritleng, D. (2016) Does the European Court of Justice take democracy seriously? *Common Market Law Review* 53 (1), pp. 11–33.

Commission can come back with a new recommendation advising the opposite course of action to that it recommended previously.

The judgment of the General Court does not deal with these aspects at all, stating in a rather minimal way that the citizens' initiative "STOP TTIP" is "far from amounting to an interference in an ongoing legislative procedure".[70] It can be derived from this that the General Court assessed *in abstracto* whether the Commission has a general competence in the subject matter of the initiative without taking into account *in concreto* whether it would be able to submit any appropriate proposal on this matter in terms of timing. The aspect of timing is of particular importance bearing in mind that the organisers also need time for the collection of signatures (a maximum of one year).[71]

The case of "STOP TTIP" shows that the lengthy procedure of a European citizens' initiative does not seem to be best suited for quick reactions from citizens with a view to blocking ongoing procedures. Therefore, it is difficult to imagine that a citizens' initiative could successfully block the ongoing procedure in relation to the conclusion of an international agreement, since the gathering of signatures has no suspensive effect on the actions of the institutions.

In sum, the Commission has in recent years been urged to become more open and flexible when interpreting the admissibility of ECIs. This is a welcome development, but it raises a set of new challenges to protect the legitimate expectations of organisers and signatories as to the real potential of their initiatives. We can therefore observe a tension between a generous admissibility control with a view to enhancing participation and the need to adequately inform the public of what can be actually and pragmatically achieved at the end of the process. The difficulty of solving this tension by striking the right balance is evident also in the case of Brexit-related initiatives. It will be shown that Brexit-related initiatives have benefitted from the Commission's more open approach when applying the admissibility test as it has developed after the aforementioned judgments in cases "Minority SafePack" and "STOP TTIP", but that no measures have been taken in order to manage the expectations of the citizens involved.

IV Brexit-Related Initiatives as a Case Study

Brexit-related initiatives which have requested registration from the European Commission can be divided into two categories: first, initiatives aiming directly

70 *Efler v. Commission*, cit., para. 47.

71 See Art. 5(5) of Regulation 211/2011.

or indirectly at reversing the decision of the UK to withdraw from the EU, and, second, initiatives aiming at securing the rights of citizens whose countries withdraw from the EU. The Commission has applied a strict admissibility test to the first category stressing the sovereign power of the UK regarding the withdrawal decision, while it has shown considerable openness and flexibility *vis-à-vis* the second category.

IV.1 *Towards a More Flexible Admissibility Test*

The category of initiatives aiming directly or indirectly at reversing the decision of the UK to withdraw from the EU consists of the initiatives "STOP Brexit" and "British friends-stay with us in EU". The main aim of the initiative "STOP Brexit" is that the UK stays in the European Union, without any further specification.[72] As regards the second initiative in this category, "British friends-stay with us in EU", its main aim is to "create a platform which would enable all European citizens to take part in this initiative and to reach a majority of British citizens (including those which live in the EU who were effectively disenfranchised in the original referendum) thereby giving to all British citizens an opportunity to voice their opinion".[73]

The Commission rejected registration of both initiatives with the argument that there is no legal basis in the Treaties which would allow for the adoption of a legal act of the Union in order to prevent a Member State from withdrawing from the Union, since the withdrawal decision is a sovereign decision of Member States according to their own constitutional requirements pursuant to Art. 50(1) TEU.[74] This argumentation appears to be self-evident for the initiative "STOP Brexit". However, the answer as regards the admissibility of the initiative "British friends-stay with us in EU" does not seem to be straight-forward. This initiative does not request that the Commission adopts an act in order to prevent the withdrawal of the UK, but merely the creation of a platform which will unite EU citizens against the Brexit outcome. The exact mission of this platform is not entirely clear; however, the initiative seems to request facilitation in order to unify the voices of British citizens against Brexit. It thus seems to invite the Commission not to adopt a legal act, but to proceed to a "material act", the creation of a platform.

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72 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/3511>.

73 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/4061>.

74 Commission Decision C(2017) 2000 of 22 March 2017 on the proposed citizens' initiative entitled "Stop Brexit".

The instrument of the European citizens' initiative should aim, according to Art. 11(4) TEU, at the adoption of legal acts. The Commission's previous practice shows that the Commission does not exclude taking also measures other than the adoption of legal acts, such as the organisation of conferences, in order to fulfil the aims of an initiative.[75] However, such measures seem to be of a supplementary or preparatory nature *vis-à-vis* the adoption of a legal act. Therefore, it can be concluded that an initiative which aims exclusively at a "material" or "simple" act, such as the creation of a platform, and not of a legal act of the Union, falls outside the scope of the Art. 11(4) TEU. Even though the outcome is the same, the Commission's justification of the rejection of the initiative does not seem to be reflecting the real content of the initiative, leaving the organisers without any sufficient explanation. The situation of unclarity as to the material scope of a European citizens' initiative hampers legal certainty. The Commission missed the opportunity to clarify whether Art. 11(4) TEU fully excludes "material acts" or allows them only complementary, in conjunction with legal acts. This question apparently continues to remain perplexing for citizens.

The second category of initiatives, aiming at securing the rights of citizens whose countries withdraw from the EU, comprises four initiatives. All four initiatives managed to pass the hurdle of admissibility. The first initiative, registered as "European Free Movement Instrument" (known also as the "Choose Freedom initiative"), aimed at giving UK nationals EU passports in the form of a unified *laissez-passer* document,[76] similar to the *laissez-passer* document currently issued for EU officials and other staff members of the EU.[77] According to the Commission's press communication, the College of Commissioners decided to register this initiative, concluding that a legal act of the Union with the content of this initiative could indeed be adopted under the current Treaties.[78] The justification of this positive decision is indeed not evident, especially if it is taken into account that the legal basis of issuance of the current *laissez-passer* documents is Protocol No 7 on the privileges and immunities of the European Union, which aims to facilitate the functioning of the EU institutions, by conferring inter alia certain rights to their staff members. It is thus left unanswered under which basis a legal act of the Union conferring EU

75 See C(2015) 3773 of 3 June 2015 on the European Citizens' Initiative "Stop Vivisection".

76 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2017/000001>.

77 See Council Regulation (EU) No 1417/2013 of 17 December 2013 laying down the form of the laissez-passer issued by the European Union, *OJ L 353*, 28.12.2013, p. 26–39.

78 Brussels, 21 December 2016, IP/16/4436.

passports to non-EU citizens who are not employees of the institutions could be adopted.

This decision is diametrically opposed to the previous Commission practice, during which the Commission was examining in a very thorough and detailed way the possible legal bases for an initiative, without taking positive registration decisions in abstract terms, i.e. without having concretely identified at least one legal basis which could support the aim of the initiative.[79] Furthermore, it is the first time that the press communication refers to a decision of the "College of Commissioners"[80] and that the decision is signed on behalf of the College by the first Vice-President F. Timmermans, while all the previous decisions concerning the registration of European citizens' initiatives were signed by the Commission's Secretary General. This new practice of signature by the competent Vice-President has continued for all subsequent registration decisions to date, demonstrating a clear intention of the Commission to retain control of the admissibility practice at the highest level and to show to the public that it highly values the instrument of the European citizens' initiative. This change of practice is explicitly mentioned in the second Commission report to the European Parliament and Council on the application of Regulation 211/2011.[81]

It is not surprising that this both procedural and substantive change of practice began after the hearings in cases "Minority SafePack" and "STOP TTIP" and shortly before the General Court delivered its judgments in these cases, annulling the Commission decisions not to register the initiatives at stake. For all these reasons, the positive decision of the Commission registering the "European Free Movement Instrument" initiative seems to mark a new era as regards the Commission's practice when assessing the admissibility of initiatives.

This new approach, showing considerable openness when assessing whether the Treaties contain a legal basis which could support the object of the initiative, was confirmed also in three subsequent initiatives related to Brexit and citizens' rights. With the initiative "EU-citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis" (informally known as "Flock Brexit"), the organisers aimed at separating EU citizenship and nationality.[82] In a similar vein, the aim of the initiative "Retaining European Citizenship"

79 See also the facts mentioned in *Constantini and others v. Commission*, cit., para. 54, as regards the Commission's detailed assessment of possible legal bases.

80 Brussels, 21 December 2016, IP/16/4436.

81 Second Commission report COM(2018) 157 final, cit., p. 5.

82 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2017/000003>.

was to "retain the rights of EU citizenship for all those who have already exercised their freedom of movement prior to the departure of a Member State leaving the Union, and for those nationals of a departing State who wish to retain their status as citizens of the Union".[83] Similar to both these initiatives, the last initiative "Permanent European Union Citizenship" invites the Commission to assure all EU citizens that, once attained, the fundamental status of EU citizenship is permanent and their rights acquired.[84]

All three initiatives aim(ed) in essence at the adoption of an act of the Union which would enable EU citizens whose countries withdraw from the Union to retain their rights and status of EU citizen. In all three cases, the Commission responded in its registration decisions that it cannot propose an act of the Union aiming at granting the citizenship of the Union to persons who do not hold the nationality of a Member State. However, it accepted registration of the initiatives based on the understanding that they aim at ensuring that following the withdrawal of a Member State its citizens continue to benefit from similar rights compared to EU citizens.[85] This means that although the subject matter of all three initiatives, as initially submitted by the organisers falls outside the powers of the Commission under the current Treaties, the Commission "re-qualified" their subject matter in a way that would allow acceptance for registration and collection of signatures. Requalification seems to go a step further than partial registration, since the Commission does not merely "clear" an initiative from its inadmissible elements, but it adjusts the subject in a way that could fall within its competences.

IV.2 *Shortcomings at the Post-Registration Stage*

This openness and cooperative spirit demonstrates a clear change of the Commission's practice and enables a more effective use of the instrument. However, the Commission has not so far ensured in cases of such "re-qualification" of content or in cases of partial registration that the information on an initiative

83 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2017/000005>.

84 Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2018/000003>.

85 See Commission Decision C(2017) 2001 of 22 March 2017 on the proposed citizens' initiative entitled "EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis"; Commission Decision C(2017) 2002 of 22 March 2017 on the proposed citizens' initiative entitled "Retaining European Citizenship" and Commission Decision C(2018) 4557 of 18 July 2018 on the proposed citizens' initiative entitled "Permanent European Union Citizenship".

made available to potential signatories and the public corresponds to the exact scope of the registration by the Commission.

The Commission made an attempt to guide organisers towards gathering signatures on the basis of the "requalified" content of the initiative. More specifically, in its positive decision to register the initiative "EU Citizenship for Europeans" the Commission indicated that "statements of support may be collected, based on the understanding that it aims at a proposal for a legal act of the Union that would ensure that, following the withdrawal of a Member State from the EU the citizens of that country can continue to benefit from similar rights to those which they enjoyed whilst that country was a Member State".[86] However, the Commission did not use an equivalent caveat when accepting registration of the similar initiatives "Retaining European Citizenship" and "Permanent European Union Citizenship". This means that the registration of these two initiatives was unconditional and only in the recitals of the registration decisions the Commission mentioned this clarification of scope, although the need for a conditional registration is evident for these initiatives as well.

Furthermore, in all cases, the title and main aims of the initiatives, as displayed in the official Commission register and on the webpages where electronic signatures could/can be gathered, have not been adjusted to the Commission's "requalification" and feature(d) the initial inadmissible aim to decouple EU citizenship from nationality. As aforementioned, the webpage of the official register contains a disclaimer that the content of the page of the register dedicated to each initiative is the sole responsibility of the organisers of the initiatives. However, this approach leads to the result that the official register does not provide a clear image of the admissible content of initiatives.

Given this problematic situation, it is welcome, as mentioned above, that the new Regulation provides that, when partial registration takes place, the organisers shall ensure that potential signatories are informed of the scope of the registration and of the fact that statements of support are collected only in relation to the scope of the registration of the initiative.[87] The obligation of organisers to accurately inform potential signatories should also apply, when the Commission "requalifies" an initiative, so as to shape it in a way that falls within its powers.

Apart from the organisers, the Commission should also ensure that all information appearing on its official register corresponds to the exact scope

86 See Commission Decision C(2017) 2001.

87 See recital 16 and Art. 6(5), lit. b), of Proposal for a Regulation COM(2017) 482 final, cit.

of the registered initiative in accordance with the principle of good administration. As outlined above,[88] this principle requires that the Commission provides adequate information and assistance to those involved in an administrative procedure. The different stages of a European citizens' initiative constitute altogether an administrative procedure, which ends with a Communication of the Commission in case of collection of the necessary number of signatures.[89] It is true that the collection of signatures takes place without the Commission's intervention. However, the Commission should ensure that this collection is carried out in a transparent way and on the basis of accurate information. Otherwise, even the mere validity of signatures which were collected on the basis of inaccurate or wrong information can be called into question.

None of the Brexit-related initiatives managed to gather sufficient popular support in any Member State in order to reach the required one million signatures and be able to request from the Commission a possible follow-up action in line with their aims.[90] They gained certain popularity in essence only in the UK and did not manage to create a transnational movement, which constitutes the added value of the ECI.[91] Different reasons can be evoked in order to justify this failure, such as the limited network of the organisers, the fragmentation of signatures among similar initiatives or even the lack of interest of other EU citizens to mobilise for the sake of securing the rights of UK nationals. An important reason, connected with the subject matter of this contribution, could also be the non-adjustment of the titles and main objectives of the registered Brexit-related initiatives so as to be in line with the current Treaties. It is possible that the discrepancy between the current Treaties, which make EU citizenship conditional upon holding the nationality of a Member State, and the initiatives' objectives, which aim at decoupling EU citizenship from the nationality of a Member State, have caused loss of credibility of these initiatives.

In order to restore trust in the instrument and to present to the general public a realistic picture of the potential of an initiative, the need for reinforced mechanisms of cooperation among the Commission and the initiatives' organisers are critical.

88 See section 1.

89 One of Us v. Commission, cit., para. 76.

90 See the archived initiatives with insufficient support at http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/conditions_not_fulfilled.

91 On the strengthening of trans-European society as an added value element of the ECI, see Salm, C. (2018). The added value of the ECI, cit., p. 14.

IV Conclusion

The instrument of the European citizens' initiative, as a tool of participatory democracy and EU citizenship, has the potential to reinforce the legitimacy of the political agenda and strengthen the active participation of EU citizens. The European Commission had been criticised for depriving the European citizens' initiative of its effectiveness due to its own institutional practice, particularly regarding the application of a strict admissibility test and the lack of adequate guidance to organisers. The Commission's practice following the judgment in case "Minority SafePack" shows that, from this point onwards, the Commission identifies the elements of the initiative on the basis of which it could make a proposal for an act of the Union and accepts registration for these parts. This adaptation of the Commission's practice is welcome and indeed enables the registration of more initiatives, while respecting the principle of conferral of Union powers. Partial registration also better takes into account the principle of legitimate expectations, since the registered initiative is cleared from its inadmissible parts and therefore both the organisers and potential signatories have this way an accurate picture of what they can achieve through their initiative.

The effective use of the instrument of citizens' initiatives depends also on a clear understanding of citizens as to its material scope of application. The judgment in case "STOP TTIP" has contributed to enhancing legal clarity in this respect. However, the Commission, through its reasoning when accepting or rejecting initiatives, can further reinforce legal certainty, by explaining clearly to citizens what types of acts may fall within the material scope of an initiative. As the analysis of the admissibility of the initiative "British friends-stay with us in EU", which aimed at creating a discussion platform for Brexit, has shown, it remains unclear whether material acts could be the (principal) object of an initiative.

Brexit-related initiatives aiming at securing the rights of UK citizens have benefitted from the Commission's more open approach when assessing the admissibility of initiatives. When treating these initiatives, the Commission went even a step further than partial registration and showed a more proactive stance: it did not merely "clear" an initiative from its inadmissible elements, but it adjusted, i.e. requalified, the subject in a way that could fall within its competences.

However, the problem in the concrete implementation of this new approach is that the content of the initiative which was registered in the official Commission register (public website) was not adjusted to the Commission's decision, which had only accepted part of the initiative or which "requalified" the object,

but continued to include the inadmissible parts. This could have the negative effect of creating false expectations for the signatories of the initiative, who will sign the initiative on the basis of the content featured on the website without looking concretely into the Commission decision of registration.

The impact of this instrument in the context of the Brexit negotiations can be assessed as limited. None of the Brexit-related initiatives have managed to gather sufficient popular support in order to reach the required one million signatures and be able to request from the Commission a possible follow-up action in line with their aims. A possible reason for this outcome could be the lack of credibility of these initiatives, whose titles and main objectives, as presented throughout the signature collection process, were at odds with the current Treaties as regards the relationship between EU citizenship and nationality of a Member State. The Commission should therefore guide the future organisers of an initiative as to how to adjust its title and content in accordance with the registration decision. Such obligations of assistance and cooperation derive from the principle of good administration understood in a broad sense through the lens of good governance. The evolution of the Commission's role from a mere respondent to a facilitator or even supporter of citizens' initiatives could potentially enhance the institutional role of this instrument. The initiation of six Brexit-related initiatives clearly demonstrates that, in a pressing situation for citizens' rights, the European citizens' initiative constitutes an important tool for EU citizens to raise their voices together. It remains to be seen whether these voices will gain greater force in the future.

PART 4

Supranational Citizenship and the Outside World

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CHAPTER 16

The "Sale" of Conditional Citizenship: the Cyprus Investment Programme under the Lens of EU Law

*Sofya Kudryashova**

1 Introduction

The rise of investment migration has become subject to intense study worldwide. These schemes are characterised as an 'exchange of national membership rights for immigrants' financial and human capital' and have been introduced worldwide with great success, especially in North and Latin America.[1] Despite facing criticism,[2] the increasing popularity of investment migration

* Corporate Administrator at PHC Tsangarides LLC. I would like to express my gratitude to Professor Dimitry Kochenov for his guidance and encouragement throughout the entire process of writing this article. All views expressed herein are personal.

1 Gramlen, A., Kutarna, C. and Monk, A. H. B. (2016). Re-thinking Immigrant Investment Funds. Investment Migration Working Papers No. 2016/1; Antigua and Barbuda Citizenship by Investment (Amendment) Act (2016) published in the Official Gazette, Vol 36; Dominica Economic Citizenship Program, available at http://www.dominicacitizenshipbyinvestment.com; Barzey, U. P. (2015). 4 Caribbean Citizenship By Investment Programs, available on https://www.caribbeanandco.com/4-caribbean-citizenship-by-investment-programs; Valencia, M. (2017). Passports for cash: Citizens of Anywhere, available at https://www.1843magazine.com/features/citizens-of-anywhere; Krakat, M. B. (2018). Genuine Links beyond State and Market Control: The Sale of Citizenship by Investment in International and Supranational Legal Perspective. *Bond Law Review* 30.

2 Schachar, A. (2018). Dangerous Liaisons: Money and Citizenship, in Bauböck, R. (ed), Debating Transformations of National Citizenship. Springer, Cham, pp. 11–12; Barbulescu, R. (2018). Global mobility corridors for the ultra-rich. The neoliberal transformation of citizenship, in Bauböck, R. (ed), Debating Transformations of National Citizenship. Springer, Cham, pp. 29; Scherrer, A. and Thirion, E. (2018). Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU. European Parliamentary Research Service (PE 627.128), pp. 20–25; Cooper, H. (2016). MEPs Slam Cypriot Citizenship-For-Sale Scheme. https://www.politico.eu/article/meps-slam-cypriot-citizenship-for-sale-scheme-schengen-area/; Mavelli, L. (2018). Citizenship for Sale and the Neoliberal Political Economy of Belonging. *International Studies Quarterly*, pp. 1, 4–5; Parker, O. (2016). Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes. *Journal of Common Market Studies* 55, pp. 234–345, 338–340; Klirides, S. (2017). Σχέδια προσέλκυσης επενδυτών μέσω της αγοράς γης οδηγούν σε τεχνητή αύξηση των τιμών των ακινήτων και συνεπώς σε δημιουργία υπεραξίας (Plans to attract investors through the land market lead to artificially rising property prices and the creation of overvaluation), available on http://www.eurokerdos.com/provlima-ta-diavatiria/.

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schemes has reached the EU, with Austria, Malta and the Republic of Cyprus (hereinafter 'Cyprus' or 'Republic') being the leading Member States granting national and therefore EU citizenship to third-country nationals in exchange for financial contribution to their economies.[3] Cyprus, a member of the Union since 2004, introduced its Investment Programme in 2013, which has changed over the years and the newest amendments were imposed as of 15th of May 2019.[4] As the Programme is proving successful in attracting foreign investors,[5] the importance of examining the potential legal issues originating from the criteria imposed on applicants and their aftermath under EU law is indisputable to ensure its legality. The strict territorial link to the institution of citizenship[6] as an attribute of state sovereignty[7] has been loosened through the formation of polities beyond the state, with the emergence of the EU and the institution of Union citizenship[8] as prime examples. The criteria imposed on applicants are to a certain extent similar to those of other investment migration programmes, a topic elaborated in the first section of this article. However, two elements of the Programme are open to question: first, applicants must retain residential property permanently in the Republic to preserve their citizenship status and second, non-compliance with

3 Surak, K. (2016). Global Citizenship 2.0: The Growth of Citizenship by Investment Programmes. IMC-RP 2016/3, pp. 16–17, 21, 24–25; Baaren, L. and Li, H. (2018). Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal. IMC-RP 2018/1, pp. 2–3; Dzankic, J. (2012). The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective. EUI Working Papers RSCAS 2012/14, pp. 11–13; Parker (n 2), pp. 335.

4 Extract from the minutes of the Ministerial Council Meeting Dated 13/2/2019, The Cyprus Investment Programme, Decision Number 86.879, available on http://www.cm.gov.cy/cm/cm.nsf/All/B374F161F3F53A07C22583F300273513/$file/86%20879.pdf?Open Element; Cyprus Investment Programme on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002–2019' available on http://www.moi.gov.cy/moi/moi.nsf/all/A54823EFD5AA75DDC22583FE00224C1F/$file/CYPRUS%20INVESTEMENT%20PROGRAMME_15.5.2019.pdf?openelement.

5 Farolfi, S., Harding, L. and Orphanides, S. (2018). EU Citizenship for sale as Russian oligarch buys Cypriot passport, available on https://www.theguardian.com/world/2018/mar/02/eu-citizenship-for-sale-as-russian- oligarch-oleg-deripaska-buys-cypriot-passport; Leptos, P. (2018). Σχέδιο πολιτογράφησης μέσω επένδυσης: Σημαντικά τα οφέλη για την οικονομία (Scheme for naturalisation through investment: significant benefits for the economy), available on https://inbusinessnews.reporter.com.cy/opinions/article/183434/schedio- politogafisis-meso-ependysis-simantika-ta-ofeli-ga-tin-oikonomia.

6 Brubaker, R. (1992). *Citizenship and Nationhood in France and Germany.* Harvard University Press, pp. 23–26.

7 Kochenov, D. (2009). Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights. *Columbia Journal of European Law* 15, pp. 178.

8 Kochenov (n 7), pp. 181.

the criterion mentioned results in the retroactive revocation of their Cypriot and EU citizenship.

This article analyses the legal implications of the acquisition of EU citizenship through the Cyprus Investment Programme in light of EU law, particularly on the free movement of capital and citizenship. Accordingly, by focusing on the abovementioned aspects, two principal questions will be addressed:

1. Does the requirement to permanently own residential property in Cyprus result in a violation of the free movement of capital under EU law?
2. Does the possibility of revocation of Cypriot nationality for non-compliance with the abovementioned requirement violate the principles established in EU citizenship case law?

To answer the first question, section two will focus on the origins of the freedom of movement of capital and on the constraints imposed on it by the Programme's requirements. Following a close examination of the case law of the Court of Justice of the European Union (the 'CJEU' or 'the Court'), the underlying presumption that economic objectives cannot justify restrictions on capital movements[9] will aid in the assessment of the legality of the Programme. The following section examines the second question; throughout its evolution in the case law of the CJEU and the work of legal scholars, Union citizenship has acquired a unique status which is not a mere extension of the Member States' nationalities.[10] The applicability of Union law in matters of citizenship was established in *Micheletti*,[11] and the material scope of Union citizenship was further expanded in *Rottmann*[12] and *Ruiz Zambrano*.[13] The evaluation of the legality of the Cyprus Investment Programme in light of EU citizenship case law will show that Cyprus cannot take measures which will undermine the rights attached to EU citizenship, nor should it place its citizens under a legal regime, which would not allow the future prospect of exercising the said

9 Court of Justice, judgment of 4 June 2002, case C-367/98, *Commission v Portuguese Republic,* para 52.

10 Szpunar, M. and Blas López, M. E. (2017). Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment, in Kochenov, D. (ed), *EU Citizenship and Federalism: The Role of* Rights. Cambridge University Press, pp. 111–112.

11 Court of Justice, judgment of 7 July1992, case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*.

12 Court of Justice, judgment of 2 March 2010, case C-135/08 *Janko Rottmann v Freistaat Bayern*.

13 Court of Justice, judgment of 8 March 2011, case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (*ONEm*).

rights.[14] In this regard, the status and the rights of the family members of the investor will also be taken into consideration and the *Rottmann* criteria will be applied by analogy to the Cyprus Investment Programme. Its examination in light of the abovementioned will lead to conclusions suggesting an urgent need to amend the Programme in order to comply with Union law.

11 The Unique Case of the Cyprus Investment Programme

Before going through the specific attributes of the Investment Programme introduced in Cyprus, it is important to set out the geopolitical conditions of the island in order to understand its relationship with the Union and the context in which the Programme will be analysed.

Following the Turkish military intervention in 1974 and the unrecognised declaration of independence of the Turkish Republic of Northern Cyprus (hereafter 'the TRNC') in 1983,[15] Cypriot membership of the EU was achieved in 2004, but the application of the *acquis communitaire* is suspended in the northern part of the island's territory.[16] The status of the TRNC is a unique case in the EU, very different to that enjoyed in the outermost regions[17] or overseas territories[18] of its other Member States, as the suspension of the *acquis* there is

14 Kochenov, D. (2011). A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 14, pp. 94, 96.

15 Ker-Lindsay, J. (2011). *The Cyprus Problem: What Everyone Needs to Know*. Oxford University Press, pp. 5–6.

16 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No 10 on Cyprus [2003] *OJ L 236*, 23.9.2003.

17 In Outermost Regions (9) EU law applies according to Article 355 (1) TFEU, under conditions laid down by the Council in Regulations 1447/2001, 1448/2001, 1449/2001, 1450/2001, 1451/2001, [2001] OJ L198/1 and Regulations 1452/2001, 1453/2001, 1454/ 2001, [2001] *OJ L 198*, 21.07.2001. See Skoutaris, N. (2017). Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market? *Cambridge Yearbook of European Legal Studies* 19, pp. 300; For more information on the status of Outermost Regions see Omarjee, I. (2011). Specific Measures for the Outermost Regions after the Entry into Force of the Lisbon Treaty, in Kochenov, D. (ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*. Wolters Kluwer, Leiden, pp. 121–136.

18 These are territories where the applicability of EU law is governed by Part 4 of the TFEU and their corresponding association agreements. See Skoutaris, N. (2017). Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/

a consequence of a military intervention.[19] It has been acknowledged that the area is under the effective control of Turkey[20] and as a consequence, a special regime has been established for the Turkish-Cypriot community residing in the north of the island. Although, the status of Union citizenship of Turkish Cypriots and the rights it entails are uncontested, they remain in 'hibernation'[21] as long as they reside in the TRNC, because the protection of their rights there falls under the jurisdiction of Turkey.[22] To provide certain guarantees for the enjoyment of EU rights for such citizens, the Union adopted the Green Line Regulation on the administration of the rules concerning the crossing of the line dividing the island.[23] It is worth mentioning that the Green Line does not constitute a border in the EU;[24] it authorises Cyprus to impose checks on the crossing of persons, goods and services that originate or have as their destination the TRNC.[25] Due to this state of affairs, the Investment Programme discussed in this article is enforced only in the southern part of the territory of Cyprus, as that is the only area of the island where the Cypriot government exercises effective control and where EU law is applied in its entirety.

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or the Single Market? *Cambridge Yearbook of European Legal Studies* 19, pp. 301–302. For more information on the status of the Overseas Territories see Clegg, P. (2013). European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories. *The Round* Table, pp. 492–494; Tryfonidou, A. (2010). The Free Movement of Goods, the Overseas Countries and Territories, and the EU's Outermost Regions: Some Problematic Aspects. *Legal Issues of Economic Integration* 37, pp. 317–338; Kochenov, D. (2011). *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories* Sui Generis. Wolters Kluwer, Leiden, pp. 47–50.

19 Skoutaris, N. (2011). *The Cyprus Issue: The Four Freedoms in a Member State Under* Siege. Oxford University Press, pp. 52–54.

20 Art. 1, Protocol 10 on Cyprus (n 16); Skoutaris, N. (2005). Differentiation in European Union Citizenship l aw: The Cyprus Problem, in Inglis, K. and Ott, A. (eds), *The Constitution for Europe and an Enlarging Union: Union in Diversity?* Europa Law Publishing, pp. 172–173; European Court of Human Rights, decision of 23 March 1995, no 15318/89, *Titina Loizidou v Turkey*, para 56.

21 Skoutaris (n 19), pp. 65.

22 Skoutaris (n 19), pp. 55–56.

23 Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 Protocol 10 to the Act of Accession, 'Green Line Regulation' [2014] *OJ L* 206; Skoutaris (n 20), pp. 171–172.

24 Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 Protocol 10 to the Act of Accession, 'Green Line Regulation' [2014] *OJ L 206*, 9.6.2004, recital 7; Laulhé-Shaelou, S. (2010) *The EU and Cyprus: Principles and Strategies of Full Integration*. Brill, pp. 270.

25 Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 Protocol 10 to the Act of Accession, 'Green Line Regulation' [2014] *OJ L 206*, 9.6.2004, titles II–IV; Skoutaris (n 19), pp. 111–114.

The Investment Programme has been variously amended since its adoption in 2013 by the Cypriot Council of Ministers, before culminating in its current version in May 2019.[26] According to this Programme, any third-country national can acquire Cypriot and therefore EU citizenship if they meet certain economic criteria such as investment in real estate, land development and infrastructure projects, the purchase or establishment or participation in Cypriot companies or businesses, or investment in alternative investment funds or financial assets in Cypriot companies or organisations. The investment funds must be at least EUR 2 million and must be retained in the Republic for a period of at least 5 years from the date of naturalisation.[27] The latest amendment to the Programme this year introduced an additional economic criterion for applicants: donation of EUR 75.000 to the Research and Innovation Foundation and EUR 75.000 the Cyprus Land Development Corporation for the financing of housing schemes for affordable housing in the Republic.

Further obligations are imposed on the applicants, incorporated in the terms and conditions of the Programme. These include due diligence checks, the possession of a residence permit in Cyprus, a declaration of having no other applications for citizenship rejected in other EU Member States and most importantly with respect to this article, residential property which the applicant must retain ownership of. Residence permits are granted to third-country nationals already living in the Republic in accordance with Regulation 1030/2002,[28] but for the purposes of acquiring Cypriot nationality through investment, an immigration permit is granted to applicants on the basis of Regulation 6(2) of the national Aliens and Immigration Law.[29] The criteria for the acquisition of an immigration permit are included in sections A and B of the Investment Programme, in addition to requirements for a number of financial guarantees such as secure annual income and property title deeds.[30] According to the Programme, if naturalisation is declined or revoked, the immigration permit obtained for the purposes of naturalisation will also be nullified.[31] The due diligence checks have also been recently

26 Cyprus Investment Programme (n 4).

27 Cyprus Investment Programme (n 4).

28 Council Regulation (EC) of 13 June 2002 laying down a uniform format for residence permits for third- country nationals [2002] *OJ L 157*, 15.6.2002.

29 2nd Revision of the Criteria for Granting an Immigration Permit within the Scope of the Expedited Procedure to Applicants who are Third-Country Nationals and Invest in Cyprus [2016], available at http://www.moi.gov.cy/moi/CRMD/crmd.nsf/All/6E845849175A310DC2257F7D0030F4FE?OpenDocument.

30 Ibid, Section 2.

31 Cyprus Investment Programme (n 4), pp. 4.

enhanced, with the creation of an independent governmental body that will examine applicants' admissibility in the future. All applicants must possess a recent clean criminal record, should not hold the status of politically exposed persons and should not be included in the list of persons whose assets have been frozen within the EU as a result of sanctions, in accordance with Directive 2014/42/EU,[32] or had any sanctions imposed by third countries and international organisations, as all of the abovementioned will render their application inadmissible.[33]

As for the purchase of permanent residential property, it should be worth at least EUR 500,000 (plus VAT) and must be retained in the Republic permanently.[34] It is also noted that if the applicant is investing in housing units, which have already been used for the purpose of naturalizing under this Programme, the investment amount rises to EUR 2.5 million, which also includes the EUR 500.000 housing unit. The indefinite ownership of a residence in Cyprus is a crucial requirement for both admissibility and for the retention of citizenship. The Programme clearly states that where periodic checks discover that any criterion or term and condition ceased to be complied with, naturalisation will be revoked. This is in accordance with Article 54(4) of the General Principles of the Administrative Law of Cyprus, which permits the revocation of any administrative decision in situations where the factual circumstances constituting the basis of the decision or which constituted the conditions for the issuance of that decision have changed.[35] In practice, resale of the property is allowed only when it is followed by the purchase of other residential property in the Republic for the applicant's personal use.

This Programme provides the possibility of investing in Cyprus, however obliges applicants to lock part of their investment within its borders, and as a result, obtain Union citizenship, the status of which is enduringly upon the ongoing ownership of one housing unit. These two issues are crucial when examining the Programme in light of the right to the free movement of capital and EU citizenship law respectively, both of which will be analysed in the following sections.

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32 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] *OJ L 127,* 29.4.2014.

33 Council of Ministers Meeting of 25.7.2019, Evaluation of applications for the assignment of Cypriot citizenship to non-Cypriots/Cypriots on the basis of Cyprus Investment Programme by high risk applicants/ applicants, available in Greek at http://www.cm.gov.cy/cm/cm.nsf/index_19/index_19?OpenForm.

34 Cyprus Investment Programme (n 4), pp. 3–4.

35 Art. 54(A), General Principles of Administrative Law 158(I)/1999.

III Restrictions on Free Movement of Capital

III.1 *Capital Movement, Its Restrictions and Justifications*

The internal market of the Union is an area without internal frontiers, which ensures the free movement of goods, persons, services and capital.[36] Article 63 TFEU sets out the prohibition on all restrictions on capital movement between the Member States and between the Union and third countries. The lack of an exact definition of capital movement in the Treaties led to the adoption of Directive 88/361/EEC which provides an explanatory Nomenclature in its first Annex.[37] The list provided for in the annex is not exhaustive, but offers an adequate explanation of the types of capital movement available.[38] Relevant to this article are the definitions of Direct Investment and Investment in Real Estate, the meanings of which are provided in the explanatory notes.[39] Direct investment includes investments by all kinds of natural or commercial undertakings, which enable the establishment of lasting and direct links between the undertaking and the entrepreneur to which the capital is made available, in order to carry on an economic activity. Investment in real estate is the purchase of buildings and land for personal use.[40] These are wide definitions and must be interpreted accordingly.

The CJEU was called upon to provide guidance to the Member States in numerous cases regarding the nature of restrictions prohibited by Article 63 TFEU. The Court insists on a broad interpretation of the freedom and its possible restrictions,[41] since the proper functioning of the internal market relies on free capital movement in combination with the free movement of persons, goods and services.[42] The first identified restriction to the free movement of

36 Art. 26 (2) TFEU.

37 Council Directive 88/361/EEC of 24 July 1988 for the implementation of Article 67 of the Treaty [1988] *OJ L 178*, 8.7.88, art. 1, para. 1, Annex I; Usher, J. A. (2007). The Evolution of Free Movement of Capital. *Fordham International Law Journal* 31, pp. 1537–1538.

38 Ibid, pp. 1537–1538; Baber, G. (2014). *The Free Movement of Capital and Financial Services: An Exposition?* Cambridge Scholars, pp. 26.

39 Council Directive 88/361/EEC of 24 July 1988 for the implementation of Article 67 of the Treaty [1988] *OJ L*178/5, explanatory notes.

40 Ibid.

41 Horsley, T. (2012). The Concept of an Obstacle to Intra-EU Capital Movement in EU Law, in Nic Shuibhne, N. and Gormley, L.W. (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher.* Oxford University Press, pp. 163–164.

42 Hindelang, S. (2009). *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU law*. Oxford Scholarship Online. pp. 128; Andenæs, M., Gütt, T. and Pannier, M. (2005). Free Movement of Capital and National Company Law. *European Business Law Review* 16, pp. 758.

capital was discrimination between domestic and cross-border movement and between two cross-border movements.[43] However, to extend the protective nature of the freedom, the Court has broadened its scope so that it goes beyond the notion of non-discrimination. In *Commission v France*, it ruled that the prohibition of restrictions of capital movement 'goes beyond the mere elimination of unequal treatment'[44] and has reaffirmed the non-hindrance test[45] in *Commission v Portuguese Republic*, where it established that a regulation which restricts the possibility for foreign investors to acquire shares in certain Portuguese undertakings is:

> [...] capable of impeding capital movements and dissuading individuals in other Member States from investing.[46]

Such a regulation may render the free movement of capital illusory and therefore violate Article 63 TFEU. Other examples of the application of the non-hindrance test include a requirement for prior authorisation for the acquisition of a plot of land in order to demonstrate that the planned acquisition will not be used to establish a secondary residence in *Konle*,[47] and a requirement for the security of a mortgage debt, payable in the currency of another Member State, to be registered in the national currency in *Trummer and Mayer*.[48]

Derogations to the free movement of capital are allowed if they fall under the reasons listed in Article 65 TFEU; otherwise, they must be justified on the basis of overriding public interests and objective reasons on grounds of public policy and public security within the meaning of the case law of the CJEU.[49] In principle, it is up to the Member States to 'decide on the degree of protection under which they wish to afford to such legitimate interests', but they must do so within the limits of EU law, particularly by complying with the principle of

43 Hindelang (n 42), pp. 130–131.

44 Court of Justice, judgment of 4 June 2002, case C-483/99 *Commission v France*, paras 40–41.

45 de Luca, A. (2012). New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty, in Sauvant, K. P. (ed), *Yearbook on International Investment Law and Policy.* Oxford University Press, pp. 189–191; Horsley (n 41), pp. 164.

46 Court of Justice, judgement of 4 June 2002, case C-367/98 *Commission v Portuguese Republic*, paras 9–12, 44–45.

47 Court of Justice, judgment of 1 June 1999, case C-302/97 *Klaus Konle v Republik Österreich,* para 39.

48 Court of Justice, judgment of 16 March 1999, case C-222/97 *Manfred Trummer and Peter Mayer*, para 28.

49 C-302/97 *Konle* para 40; Court of Justice, judgment of 21 December 2011, case C-271/09 *Commission v Republic of Poland*, para 55.

proportionality.[50] The Court established in its case law on the free movement of goods[51] and services[52] that economic grounds cannot serve as a justification for derogations from the Member States' obligations.[53] As the scope of the Treaty provisions on the four fundamental freedoms has expanded and the *Gebhard* formula[54] has been applied consistently in case law relating not just to the freedom of establishment,[55] the prohibition of using pure economic justifications extends also to measures restricting the free movement of capital.[56] Accordingly, limitations on capital movements cannot be justified by the financial interests of Member States,[57] such as strengthening the structure of the market[58] or primary budgetary objectives.[59] One issue remains, however, which is the difficulty of obtaining a precise definition of what constitutes strictly economic interests.[60] As a result, the Court sometimes adopts an 'avoidance strategy',[61] where it disregards the possible economic justifications of a measure and is satisfied by argumentation based on the general interest of the Member States.[62]

Understanding the basic principles which govern the freedom of capital movement in the context of this article is paramount to reviewing the legality of the Cyprus Investment Programme adequately. Even though the freedom acquired a wide definition, the Court's methods in assessing measures

50 Court of Justice, judgment of 28 September 2006, Joined Cases C-282/04 and C-283/04 *Commission of the European Communities v Kingdom of the Netherlands*, paras 32–33.

51 C-265/95 *Commission v France*, para 62.

52 Court of Justice, judgment of 5 June 1997, case C-398/95 *SETTG*, para 23.

53 C-367/98 *Commission v Portuguese Republic*, para 52.

54 Court of Justice, judgment of 30 November 1995, case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para 37.

55 Court of Justice, judgment of 11 July 2002, case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v. K Gräbner*, para 39; Court of Justice, judgment of 17 October 2002, case C- 79/01 *Payroll Data Services* (*Italy*) *et al*, para 28; Spaventa, E. (2004). From *Gebhard* to *Carpenter*: Towards a (non-) Economic European Constitution. *Common Market Law Review* 41, pp. 749–750.

56 Spaventa (n 55), pp. 751; Communication of the Commission on Certain Legal Aspects Concerning Intra- EU Investment [1997] C220/15, point 9.

57 Horsley (n 41), pp. 167.

58 C-367/98 *Commission v Portuguese Republic*, para 52.

59 Court of Justice, judgment of 7 February 1984, case 238/82 *Duphar BV and others v The Netherlands State*, para 23.

60 Snell, J. (2016). Economic Justification and the Role of the State, in Koutrakos, P., Nic Shuibhne, N. and Syrpis, P. (eds), *Exceptions from EU Free Movement Law.* Hart Publishing, pp. 16–17.

61 Ibid.

62 Ibid; C-120/95 *Decker*, para 39; C-158/96 *Kohll,* para 41.

breaching Article 63 TFEU have now become uniform and systematic. Member States may not limit the ability or dissuade their citizens from liquidating or reallocating their investments without a legitimate reason. Most importantly, this reasoning should not be purely economic, despite the difficulty which exists in identifying wholly economic justifications.

III.2 *Application of These Principles to the Cypriot Case*

The Cyprus Investment Programme requires applicants to invest in private immovable property, part of which must be retained in the Republic indefinitely. This particular condition amounts to a *de facto* barrier to the right of free movement of capital in the form of real estate investments. Cypriots naturalised under this Programme are prevented from exercising their right to move their investment freely, without any restrictions, limitations or unfair repercussions, such as the threat of revocation of their citizenship status. In this context, one cannot disregard the right to property, included in the European Convention on Human Rights ('ECHR'),[63] the Charter of Fundamental Rights of the European Union[64] as well as the Cyprus Constitution.[65] The right to own and dispose of lawfully acquired possessions is an intrinsic element in all three articles and while limitations may be imposed, they must be made in the name of public interest and be regulated by law. As the focus of this section is the right to free movement of capital, an analysis of the restriction imposed by the duty to retain property permanently and its possible justifications will proceed.

Firstly, I argue that the Programme lacks any guarantee for the equal treatment of domestic and cross-border capital movements. Those naturalised through this Programme are able to move their investment only within the borders of Cyprus (apart from the TRNC where the government does not exercise effective control); relocation of the investment to other Member States or sale of the property without the immediate purchase of a replacement will result in the revocation of citizenship. Such a requirement is not imposed on other Cypriots.[66] Secondly, the obligation to retain ownership of residential property in the Republic forever – regardless the fact that it is part of the investment used for naturalisation – can be argued to constitute a violation of Article 63 TFEU, if it is considered in light of the non-hindrance test applied

63 Art. 1, Protocol 1 ECHR.
64 Art. 17 (1), Charter of Fundamental Rights of the European Union [2000] C364/1.
65 Art. 23, Constitution of the Republic of Cyprus 1960.
66 See Krakat (n 1), pp. 156.

in *Commission v Belgium*[67] and *Commission v Portuguese Republic*,[68] where the Court stated that Article 63 TFEU is breached, if a measure has a deterrent or discouraging effect on individuals seeking to invest abroad. A similar conclusion can be drawn by looking at the judgment in *Verkooijen* where the applicant was restricted from investing in companies outside the Netherlands[69] as a result of a measure that did not grant tax exemptions to individuals who receive dividends on shares in foreign companies.[70] Such a restriction, according to the Court, dissuades individuals from investing their capital in other Member States,[71] a ruling that can be applied by analogy to the duty to retain ownership of residential property used for investment in exchange for citizenship. Allowing Member States to impose restrictions as such, creates the illusion of the freedom of movement of capital and problems with legal certainty and the uniform application of Union law arise.

Furthermore, by providing Union citizenship, the Programme makes it more attractive for third-country nationals to lock their investment in the Republic, which may gradually lead to the obstruction of free movement of capital to other Member States. Liberalisation of cross-border capital movement within the EU is an intrinsic feature of the internal market and it is essential for the attainment of the socioeconomic objectives of the Union.[72] Obstruction of the possibility of making the best use of this freedom affects the individuals whose Union rights are violated, but ultimately, it has detrimental effects on the economic prosperity of other Member States, which the Union aims to guarantee.[73] Despite the fact that the legal requirements for the acquisition

67 The case concerned a Belgian Royal Decree which prohibited Belgian residents from obtaining loans issued by German banks above the fixed rate. In its evaluation of the measure, the Court established that limitations on acquiring loans from other Member States, as well as making investments abroad, constitute violations of Article 63 TFEU; Court of Justice, judgment of 26 September 2000, case C-478/98 *Commission v Kingdom of Belgium*, paras 3, 18.

68 C-367/98 *Commission v Portuguese Republic*, paras 44–45.

69 Court of Justice, judgment of 6 June 2000, case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen*, paras 34–35.

70 C-35/98 *Verkooijen*, paras 6–11; Note that in this case it was established that the receipt of dividends from companies in other Member States is an 'indissociable from a capital movement' (para 29).

71 C-35/98 *Verkooijen*, para 34.

72 Art. 3(1) TEU; Hindelang (n 42), pp. 10–11; European Commission, National Institute of Economic and Social Research, 'Capital Market Liberalisation' (summary) *Single Market Review Series* [1996].

73 For an extensive analysis of the socioeconomic benefits of the free movement of capital see Hindelang (n 41), pp. 19–24.

of EU Citizenship through investment in Cyprus do not take the form of exchange authorization or affect the general possibility of investment abroad, they could constitute an obstacle to the broadest possible liberalisation of the capital movement markets in the EU, as was established in the *Brugnoni* case.[74]

That said, the possible justifications which could validate the implementation of restrictive measures in the Republic and the derogation from its obligations towards the Union must be examined. The Programme was adopted to overcome the economic challenges after the 2012 financial crisis and to attract foreign investment by encouraging natural persons with high incomes to establish themselves in the Republic.[75] These are the only explicit objectives found in the government's website and public statements, which I would argue can be considered purely economic motives. The consequences have been indeed positive: increased tax revenue and increased investment in real estate, tourism and development.[76] Economic prosperity surely resonates with the interest of those individuals who can profit from the clear deficiencies of this Programme, which disadvantages others with respect to Union law. The Cypriot government aims to boost its economy through this Programme and the restriction imposed on applicants would fall under the justification of establishing and maintaining lasting economic links between the investors naturalising and the Republic.

However, justifying such an obvious restriction on capital movement on the basis of achieving economic prosperity would be rather difficult before the Court. As mentioned in the preceding passage, the Court is reluctant to allow justification of a restriction on strictly economic grounds.[77] Another approach would be to consider the principle of the general interest of the state as an overriding justification. In *Decker*[78] and *Kohl*,[79] the justification used to restrict

74 Court of Justice, judgment of 24 June 1986, case C-157/85 *Brugnoni and Ruffinengo v Cassa di Risparmio di Genova e Imperia,* para 22.

75 Cyprus Investment Programme (n 4); Antoniou, G. (2017). Limits on passports to investors, available at http://www.philenews.com/eidiseis/politiki/article/436466/orio-sta-diabatiria-se-ependytes.

76 Maurides, M. (2017). Η πώληση διαβατηρίων είναι εργαλείο ανάπτυξης (Passport selling is a development tool), available at http://www.sigmalive.com/simerini/analiseis/457175/i-polisi-diavatirion-einai-ergaleio-anaptyksis; Polykarpou, A. (2017). Ρώσοι και Άραβες επενδυτές κατέκλυσαν την Κύπρο (Russian and Arab investors flooded Cyprus), available at https://www.offsite.com.cy/articles/eidiseis/oikonomia/217274-rosoi-kai-araves-ependytes-kateklysan-tin-kypro-poia-einai-ta; Hadjioannou, B. (2019). €6.6b from citizenship scheme: breakdown of investments, available at https://in-cyprus.com/e6-6b-from-citizenship-scheme-breakdown-of-investments/.

77 Snell (n 60).

78 C-120/95 *Decker*, para 39.

79 C-158/96 *Kohll,* para 41.

the free movement of goods and services respectively was to secure the financial balance of the social security systems. The Court found that neither restriction had any significant effect on the social security system of the Member States in question and then proceeded in examining alternative justifications, by ruling on the general interest of a state, as opposed to focusing on purely economic justifications.[80] I believe that a similar outcome would result from such an approach during the examination of the conformity of the Cyprus Programme with Article 63 TFEU. Alternatively, the Court would find the justifications used by the Cyprus government as strictly economic. Either way, requiring individuals to retain their investment in Cyprus indefinitely raises serious concerns in view of the right to move capital freely within the Union: such a limitation constitutes a violation of the Republic's obligations under the Treaties and surviving the judicial scrutiny of the Court can be difficult.

IV Citizenship of the EU

IV.1 *Investment Migration Schemes in the EU and the Evolving Nature of Union Citizenship*

Examining investment migration schemes in the framework of the EU legal order can be challenging, considering the unconventional character EU citizenship acquired. It was recognised as the intended future fundamental status of Member States' nationals in 1992[81] and ever since, made the complicated relationship between the supranational EU and national legal orders even more profound. Prima facie, agreeing with Jo Shaw, there is no legal basis for EU-level opposition to investment migration programmes,[82] because of the derivative nature of Union citizenship.[83] Nevertheless, different nationality laws have always raised concerns within the Union, as the result of granting the unifying EU citizenship status to third-country nationals would be the availability of EU rights such as freedom of movement, which ultimately affects all Member States.[84] In 2014 the European Parliament, while underlining its own lack of

80 C-120/95 *Decker*, paras 40–41; C-158/96 *Kohll,* paras 42–43.

81 Art. 8, Treaty on European Union [1992] OJ C191/1; Court of Justice, judgment of 20 September 2001, case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para 31; Court of Justice, judgment of 17 September 2002, case C-413/99 *Baumbast and R*, para 82.

82 Shaw, J. (2018). Citizenship for Sale: Could and Should the EU Intervene? in Bauböck, R. (ed) *Debating Transformations of National Citizenship*. Springer, Cham 2018, pp. 63–64.

83 Art. 20 TFEU.

84 Kochenov (n 7), pp. 182–183.

legal competences over this matter,[85] adopted a Resolution on EU Citizenship for sale in response to the Maltese Individual Investors Programme (hereafter the 'IIP'), where it expressed its concerns at the development of investment migration in the EU and requested the Commission to examine their legality.[86]

Attention must also be paid to the principle of recognition of other Member State nationalities, regardless of their mode of acquisition, developed in *Micheletti*.[87] Accordingly, Member States have to respect the EU citizenship status of nationals from other Member States as well as the nationality of their own citizens.[88] This line of reasoning was previously indicated in *Auer*, where the Court ruled that:

> There is no provision of the Treaty which [...] makes it possible to treat nationals of a Member State differently according to the time at which *or the manner in which they acquired the nationality of that State* [.][89]

This is crucial to the development of investment migration and the concerns raised by Member States that such practices affect the entire Union. According to *Auer* and *Micheletti*, the mode of naturalisation is irrelevant to the validity and recognition of the EU citizenship status of an individual by other Member States and any distinction between groups of nationals of Member States made in this regard shall be deemed unacceptable.[90] The CJEU's approach to the recognition of Member States' nationalities makes investment migration schemes perfectly legitimate: 'investment Cypriots' – just as the 'investment Maltese' – are full-fledged citizens of the EU. In addition, the argument proposed by the AG Poiares Maduro in *Rottmann*,[91] that mass naturalisations of third-country nationals could contradict the principle of sincere cooperation[92]

85 European Parliament resolution of 16 January 2014 on EU citizenship for sale, 2013/2995(RSP), recital 7.

86 European Parliament resolution of 16 January 2014 on EU citizenship for sale, 2013/2995(RSP), recitals 1, 3; Surak (n 3), pp. 25; 'Malta Citizenship by Investment Program' available at http://www.maltaimmigration.com.

87 C-369/90 *Micheletti,* para 10; Kochenov (n 7), pp. 182.

88 Jessurun d'Oliveira, H.-U. (1993). Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, Judgment of 7 July 1992. *Common Market Review* 30, pp. 628.

89 Court of Justice, judgment of 7 February 1979, case C-136/78 *Ministere Public v. Auer*, para 28 (emphasis added).

90 Art. 5(2), European Convention on Nationality (1997) ETS 166; de Groot, D.A.J.G. (2018), Free Movement of Dual EU Citizens, *European Papers* 3, pp. 1105.

91 C-135/08 *Rottmann*.

92 Art. 4(3) TEU.

if not performed in consultation with other Member States,[93] seems inapplicable to the case of investment schemes, given that the number of naturalisations through investment in the EU remain low, especially compared with analogous situations, such as the large numbers of Latin Americans naturalised as Italians.[94] Even if these numbers were to grow in the future, we must consider that third-country nationals naturalising in any Member State through investment migration schemes are individuals of high net worth who would not impose an 'unreasonable burden' on the social welfare systems of Member States if they were to decide to use their free movement rights according to the Citizenship Directive.[95] These individuals contribute to the functioning of the internal market and the objectives of European economic integration, making them valuable citizens in light of EU's unfortunate internal market logic.[96]

The rights attached to the status of EU citizenship were initially manifested in activity within the internal market through the free movement rights,[97] which explains the Court's insistence on the requirement for cross border movement to ascertain the applicability of Union law in citizenship cases.[98]

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93 C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-01449, Opinion of AG Poiares Maduro, para 30.

94 Kochenov, D. (2018). Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price, in Bauböck, R. (ed), Debating Transformations of National Citizenship. Springer, Cham, pp. 54; Tintori, G. (2011). The Transnational Political Practices of "Latin American Italians" *IOM* 49, pp.172–173; Surak (n 3), pp. 6.

95 Art. 7(1)(b), 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 [2004] *OJ L 158* 30.4.2004; Heindlmaier, A. and Blauberger, M. (2017). Enter at your own risk: free movement of EU citizens in practice. *West European Politics* 40, pp. 1200–1201; Thym, D. (2015). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens. *Common Market Law Review* 52, pp. 20.

96 Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as a Federal Denominator, in Kochenov D. (ed) *EU Citizenship and Federalism: the Role of Rights*. Cambridge University Press, pp. 36–39; Kochenov, D. (2019). Interlegality – Citizenship – Intercitizenship, Forthcoming in Palombella, G.and Klabbers J. (eds), *The Challenge of Interlegality*. Cambridge University Press, pp. 70.

97 Kostakopolou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *The Modern Law Review* 68, pp. 238–239; Yanasmayan, Z. (2009). European Citizenship: A Tool for Integration, in Carrera, S., Groenendijk, K. and Guild, E. (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Routledge, pp. 68; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through its Scope, in Kochenov, D. (ed), *EU Citizenship and Federalism: The Role of Rights*. Cambridge University Press, pp. 206–207.

98 Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47(6), pp. 1597, 1612.

The cross-border rationale continues to exist but is now broadened by the inclusion of potential cross-border movement and with added emphasis on individual rights through the expansion of the material and personal scope of Union citizenship through the case law of the CJEU.[99]

Rottmann[100] is of utmost importance in this respect. The Court for the first time provided a clarification of the principle 'due regard to Community law', established in *Micheletti*.[101] Essentially, the ruling resulted in limiting the Member States' discretion in measures revolving around the grant and revocation of nationality by introducing the principle of proportionality to the decisions taken by national authorities:[102] this led to the reassessment of the interdependent relationship between national and EU citizenship.[103] Despite AG Poiares Maduro's suggestion that a cross-border element is a prerequisite to trigger EU law, the Court's approach to this case was different.[104] Accordingly, a situation in which an individual is faced with a decision withdrawing their naturalisation falls 'by reason of its nature and its consequences within the ambit of EU law'.[105] The Court's departure from the traditional requirement of cross-border movement indicates a shift of emphasis to the protection of the individual, who is placed in a situation where they lose the status conferred by

99 Ibid, pp. 1612, 1613–1614; Kochenov (14), pp. 59–60.

100 C-135/08 *Rottmann.*

101 In *Micheletti* the Court mentioned the principle 'due regard to community law' but it was perceived as *obiter dictum* of the ruling; de Groot, G.-R. (2004), Towards a European Nationality Law, *EJCL*, 8; Jessurun d'Oliveira (n 88), pp. 634.

102 C-135/08 *Rottmann*, para 55. For more information on the principle of proportionality see Rochel, J. (2019). Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law, *German L.J.* 20.

103 Mann, D.-J. and Purnhagen, K. P. (2011). The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship – A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision. *Wisconsin International Law Journal* 29, pp. 491–493; Shaw, J. (2018). Deprivation of Citizenship: Is There an Issue of EU Law? in Bauböck, R. (ed) *Debating Transformations of National Citizenship*. Springer, Cham, pp. 236–238.

104 C-135/08 *Rottmann v Freistaat Bayern*, Opinion of AG Poiares Maduro, paras 10, 14, 23; Kochenov, D. (2010). Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported. *Common Market Law Review* 47, pp. 1832–1833; Kostakopoulou, D. (2012). The European Court of Justice, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions, in Micklitz, H.-W. and de Witte, B. (eds), *The European Court of Justice and the Autonomy of the Member States*. Intersentia, pp. 198–199.

105 C-135/08 *Rottmann*, para 42; van Eijken, H. (2010). European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals. *Utrecht Journal of International and European Law* 27, pp. 68–69.

Article 20 TFEU and the rights attached thereof.[106] By bringing Dr Rottmann's case within the scope of EU law, the Court effectively expanded the *ratione materiae* of EU citizenship.[107] As a result, the need to exercise free movement rights is no longer the paramount requirement for the ECJ to intervene; based on *Rottmann*, the status of being a Union citizen and the rights associated with it became sufficient foundation to engage and determine any violations of EU law, which reaffirms its fundamental status, established in *Grzelczyk*.[108]

Another critical case which builds on the *Rottmann* line of reasoning is *Ruiz Zambrano*.[109] This case dealt with the decision of the Belgian authorities to deprive the residency and working rights of Mr Ruiz Zambrano, a Colombian national and parent of two children born in Belgium.[110] The ECJ insisted on the applicability of the case under EU law, despite the absence of cross-border movement, because Mr Zambrano's children were Union citizens and would be deprived of 'the genuine enjoyment of the substance of [their] rights'[111] if forced to move outside the territory of the Union.[112] Unfortunately, in following cases the Court adopted a more restrictive approach to situations which potentially deprive individuals of the substance of their Union citizenship rights,[113] by qualifying the ruling in *Ruiz Zambrano* as an exceptional

106 Kochenov (n 14), pp. 58–61; C-135/08 *Rottmann*, para 42; Garner, O. (2018). The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status. *Cambridge Yearbook of European Legal Studies 20*, pp. 126.

107 Kochenov (n 14), pp. 64 and 67–69.

108 Cambien, N. (2011). Case C-135/08 Janko Rottmann v. Freistaat Bayern. *Columbia Journal of European Law* 17, pp. 383–384; Bauböck, R. and Paskalev, V. (2014). Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation, Geo. Immigr. L.J. 30 (47), pp. 99 and 102; Jessurun d'Oliveira, H.-U. (2018). Once again: Plural nationality. *Maastricht Journal of European and Comparative Law* 25, pp. 37; Jessurun d'Oliveira in this volume.

109 C-34/09 *Ruiz Zambrano*.

110 C-34/09 *Ruiz Zambrano*, paras 14–16, 43–44.

111 C-34/09 *Ruiz Zambrano*, paras 40–44; Lansbergen, A. and Miller, N. (2011). Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM). *European Constitutional Law Review* 7, pp. 291.

112 Nic Shuibhne, N. (2012). (Some of) The Kids Are All Right. *Common Market Law Review* 49, pp. 350–352; Hailbronner K. and Thym, D. (2011). Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported. *Common Market Law Review* 48, 1255–1257.

113 C-434/09 *McCarthy*, paras 46–47; Court of Justice, judgment of 29 September 2011, case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres*, paras 40, 74; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through its Scope, in Kochenov, D. (ed), *EU Citizenship and Federalism: The Role of Rights*. Cambridge University Press, pp. 212–213.

case.[114] In the recent case of *Tjebbes,*[115]despite the effort to follow the principles established in previous case law on EU citizenship, the Court ruled that a measure revoking Dutch and EU citizenship of Dutch nationals, who possess another nationality and who resided outside the Union for more than ten consecutive years, without renewing their passport within that period, is compatible with EU law as long as the proportionality test is performed by the national authorities and courts.[116] The vagueness and the passing manner by which the principles of EU citizenship have been applied by the Court, resulted in a missed opportunity to clarify and strengthen the already established principles on EU citizenship.[117] Notwithstanding that, the formula of 'substance of rights' established in *Ruiz Zambrano*, though uncertain, remains promising[118] and is regarded as a stepping stone on the way to shaping the material scope of Union law by defending the future ability of individuals to enjoy their EU rights.[119]

The judgments in *Micheletti*, *Rottmann* and *Ruiz Zambrano* pave the way towards a better understanding of the relationship between national and Union citizenship.[120] With the expansion of the scope of EU citizenship *ratione materiae*, the requirement of cross-border movement is proven illogical[121] in a 'Union without borders' and contrary to the spirit of European integration.[122] In the current context, three conclusions can be drawn which will provide guidance in the assessment of the Cyprus Programme. Firstly, Member State nationality must be recognised and respected by all Member States (including the Member State issuing the nationality),[123] regardless the mode of

114 C-256/11 *Dereci,* para 55; Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Challenging Legal Shape of Union Citizenship. *Common Market Review* 52, 901–902; Skrbic, A. (2019) Mobile Individualism: The Subjectivity of EU Citizenship, *Neth. J. Legal. Phil*. 48, pp. 25–26.

115 Court of Justice, judgment of 12 March 2019, case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*.

116 C-221/17 *Tjebbes*, paras 39–40.

117 Kochenov, D. (2019), The Tjebbes Fail, *European Papers* 4, 326.

118 Sánchez, S. I. (2014). Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison? *European Law Journal* 20, pp. 474.

119 Kochenov, D. (2013). The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon? *International and Comparative Law Quarterly* 63, pp. 101.

120 Kochenov (n 14), pp. 86; Krūma, K. (2015). *EU Citizenship, Nationality and Migrant Status: An ongoing Challenge*. Brill Nijhoff, pp. 124.

121 Kochenov (n 14) pp. 92–93.

122 Kochenov, D. (2010). Citizenship without Respect: The EU's Troubled Equality Ideal. *Jean Monnet Working Paper 08/10*, pp. 43–44.

123 Ibid.

naturalisation. Secondly, even though the derivative nature of EU citizenship is uncontested, the need to preserve its unique status and protect the individuals' rights requires limitations on Member State competences in matters of citizenship, particularly when EU rights are undermined by a measure adopted at the national level. Thirdly, Member States should not impose restrictive conditions on their own citizens, the effects of which would be to render the future prospect of exercising their Union rights impossible.

IV.2 *The Cyprus Investment Programme: Revocation of Union Citizenship, Discrimination, Family Members and the Right to Leave*

The adoption of investment migration schemes in Member States is not uncommon and, as has been established in the previous passage, does not necessarily violate Union law. However, the Cyprus Investment Programme is significantly different due to the requirement imposed on investors to retain ownership of residential property in the Republic for an unlimited period. This condition can cause future complications, as it places individuals who decide to sell their invested property or to relocate beyond the island's territory in a situation where their Cypriot nationality and EU citizenship will be revoked.[124] The conditional nature of the citizenship acquired through investment[125] prompts several issues when viewed in the light of EU citizenship law: the ability of Cyprus to revoke citizenship upon the exercise of rights granted by EU law and the consequences such measures would have on the investor's family.

The revocation of citizenship based on non-compliance with the conditions of the Cyprus Programme must be closely analysed, mainly in light of

124 Cyprus Investment Programme (n 4) 1.

125 'Conditional Citizenship' is not merely a Cypriot invention; the UK adopted a similar approach and according to the 2006 Immigration, Asylum and Nationality Act, deprivation of citizenship constitutes a valid measure that can be taken by the Secretary of State of the Home Department in an attempt to "fight terrorists 'disguised' as UK citizens". The difference between the UK and Cyprus is that firstly, the conditionality of the British citizenship applies to all citizens, regardless whether they acquired their nationality by birth or through registration and naturalisation and secondly, this conditionality is activated when a citizen engages in terrorist activity; thus the deprivation is seen as a form of a punitive measure to protect national security. In Cyprus on the contrary, the conditional nature applies only to investor Cypriots who exercise their right to the free movement of capital by re-investing outside the Republic's territory. See Mantu, S. (2010). 'Terrorist' citizens and the human right to nationality. *Journal of Contemporary European Studies* 26, pp. 32–33; Lavi, S. (2010). Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel. *New Criminal Law Review: An International and Interdisciplinary Journal* 13, pp. 409–411; Joppke, J. (2015). Terror and the Loss of Citizenship. *Citizenship Studies* 20, 733––734.

Rottmann and *Ruiz Zambrano.* In *Rottmann* the Court concluded that Member States must take decisions on the revocation of nationality having due regard to Community law, and proceeded to delegate the proportionality test to the German court.[126] On the one hand, empowering national courts with the application of the principle of proportionality could undermine the principle of legal certainty for individuals and threaten the uniform application of Union law.[127] On the other hand, it can be considered as an efficient method of allowing cooperation between the national courts of the Member States and the CJEU, once the latter establishes its jurisdiction and the potential breach of the substance of EU citizenship rights.[128] In *Rottmann* the national courts found that the revocation of Dr Rottmann's citizenship was proportionate because of his criminal history and the fact that it did not breach any international or EU law requirements.[129]

Notwithstanding the discretion Member States enjoy in nationality matters, measures regarding the withdrawal of nationality must be legitimate in light of EU law.[130] When comparing the argumentation and the outcome of *Rottmann* to the Cyprus case, fundamental differences must be pointed out. To begin with, the decision of an individual to exercise their Union rights and relocate their investment outside the territory of a Member State cannot be compared to the situation in *Rottmann*, where the applicant was found guilty of obtaining German nationality by deception.[131] Consequently, the revocation of nationality was considered legitimate in the name of protecting the solidarity between all the citizens of Germany. In the Cyprus case nationality is withdrawn as a consequence of the decision from Cypriots naturalised through investment to move their capital away from the territory of Cyprus, relying on Articles 26 and 36 TFEU. The revocation of Cypriot nationality for non-compliance with the condition to permanently

126 C-135/08 *Rottmann*, paras 58–59.

127 In *Rottmann*, before delegating the competence to the German court, the ECJ included some suggestions on how to assess proportionality which made the outcome of the German ruling more predictable, see C-135/08 *Rottmann* [2010], para 56; van Eijken, H. (2010). European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals. *Utrecht Journal of International and European Law* 27, pp. 69; van der Mei, A. P. (2018). EU Citizenship and Loss of Member State Nationality. *European Papers* 3, pp. 1323.

128 Kochenov, D. and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text. *European Law Review* 37, pp. 386 and 392–393.

129 Kochenov (n 14), pp. 78.

130 C-135/08 *Rottmann*, para 51; Shaw (n 103), p. 235.

131 C-135/08 *Rottmann*, para 28.

own property in Cyprus is a restriction of the EU right to free movement of capital and the possibility of this measure being justified is very unlikely, as was established in the previous section on capital movement. The measure also restricts the applicants' right leave the territory of Cyprus and establish themselves in other Member States. Łazowski argues that the right to exit is a *condition sine qua non* to the right to move and reside freely within the Union,[132] as it is implied in Article 21 TFEU. The right to exit is also established in Article 4 of the Citizenship Directive[133] and was affirmed by the Court in *Jipa* and subsequent cases, in which individuals were prevented from leaving their Member State of nationality.[134] This right is compromised by the Investment Programme as it practically ties the applicants to the Republic, making the exercise of the right to move freely to other Member States unappealing. Even if this does not amount to a direct restriction to the right to leave, it is nonetheless incompatible with the objective to eliminate any obstacles to free movement within the EU, a prerequisite to the functioning of the internal market.[135]

Adopting a naturalisation programme on the basis of limiting the exercise of rights accorded by EU law is contrary to the spirit of the Treaties as it interferes with the goal of gradual integration even if, paradoxically, the Cyprus Investment Programme presents it under a pretext of enhancing economic integration. Based on the judgment in *Lounes*[136] it is 'contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU

132 Łazowski, A. (2015). Darling you are Not Going Anywhere: The Right to Exit and Restriction in EU Law. *European Law Review* 47, pp. 888.

133 Art. 4, 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 [2004] *OJ L 158* 30.4.2004.

134 Court of Justice, judgment of 10 July 2008, case C-33/07 *Ministerul Administratiei si Internelor – Directia Generala de Pasapoarte Bucuresti v Jipa*, para 18; This line of reasoning continued in subsequent judgments, see Court of Justice, judgment of 17 November 2011, case C-430/10 *Gaydarov v Direktor na Glavna Direktsia Ohranitelna Politsia pri Ministerstvo na Vatreshnite Raboti* and Court of Justice, judgment of 17 November 2011, case C-434/10 *Aladzhov v Zamestnik Direktor na Stolichna Direktsia na Vatreshnite Raboti kam Ministerstvo na Vatreshnite Raboti.*

135 Court of Justice, judgment of 25 July 2008, case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, para 68; de Groot, G.-R. and Steling, A. (2011). The Consequences of the *Rottmann* Judgment on Member States Autonomy – The Court's Avant-Gardism in Nationality Matters, in Shaw, J. (ed), *Has the European Court of Justice Challenged Member State Sovereignty in National Law?* EUI RSCAS 2011/62.

136 Court of Justice, judgment of 14 November 2017, case C-165/16 *Toufik Lounes v Secretary of State for the Home Department,* paras 56–58; Kochenov (n 7), pp. 191–192.

to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights'.[137]

Through the case law on citizenship, the Court established itself as the final arbitrator and protector of EU citizens through the activation of EU law when national measures result to the loss of the rights attached to the status of Union citizenship[138] and as a result, decision-making and the adoption of policies such as the Cyprus Investment Programme no longer fall under the sovereignty umbrella. Potential violations of the substance of Union citizenship can be manifested through restrictions to the exercise of one of the fundamental rights of the Treaties[139] and are amplified when a Member State's naturalisation process leads to the granting of Union citizenship status which is absurdly conditioned by a limitation of the rights it is associated with. The priority to enact measures which would result in relative economic prosperity should not overshadow the arbitrary effects of such measures on individuals' rights. The interests of other Member States must also not be ignored: using a measure such as the withdrawal of nationality if individuals decide to exercise their right to the free movement of capital is burdensome to say the least and contrary to the aim of achieving a functioning internal market within the EU.[140] Based on these findings, one must conclude that a measure withdrawing the naturalisation of an EU citizen on the basis of exercising their right to the free movement of capital alongside their right to exit, cannot be considered legitimate.

In addition to the effects on the main investor, family members are also greatly affected by this Investment Programme. Citizenship is granted initially to the main investor and subsequently can be acquired by their parents, spouse or partner and by their financially dependent adult children,[141] while their minor children naturalise in accordance with Article 110(3) Civil Registry

137 C-165/16 *Lounes*, para 58; de Groot (n 135), pp. 1104; Shaw, J. (2018). EU citizenship: still a fundamental status? *European University Institute* (RSCAS 2018/14), pp. 7.

138 Lenaerts, K. (2012). Civis Europaeus Sum: From the Cross-border Link to the Status of Citizen of the Union, in Rosas, A., Wahl, N., Lindh, L. and Cardonnel, P. (eds) *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*. Oxford Hart Publishing, pp. 141–142.

139 de Groot, G.-R. (2004). Towards a European Nationality Law. *EJCL* 8.

140 Art. 26 TFEU; Hindelang (n 42), pp. 10–11.

141 'Cyprus Investment Programme (n 4) 1. For clarification, adult dependent children of the applicants are considered students under the age of 28 and children with severe physical or mental disability (see page 2).

Law.[142] However, there is no mention of the circumstances under which the family members lose their nationality. The extent of their dependency on the investor's citizenship is unclear and their legal status is questionable if the citizenship of the former is revoked because of future non-compliance with the conditions of the Programme. Relying on the Citizenship Directive[143] would only be possible if the family moves to another Member State and satisfied the criteria of Articles 7(1) and 14(2).[144] The predicament here is that, if the family wished to exercise the right to relocate within the Union by relying on the Directive, it is very likely that the residential property forming part of their investment would be sold in Cyprus and at most, be reinvested in another Member State. This case, based on the wording of the Programme, would lead to the revocation of at least the main investor's citizenship, and most likely that of all family Members except for minor children naturalised under the ordinary national naturalisation procedures noted above. Therefore, the possibility to acquire or retain residency rights and invoke the right to family reunification becomes ambiguous, as the beneficiaries of the Directive remain Union citizens and their family members.[145]

The Programme also fails to detail the effects of the loss of the Union citizenship of the main investor and their family on future generations. If the nationality of both parents is revoked in accordance with the Programme, their children, born in Cyprus and therefore Cypriot citizens *iure soli*, would be forced to leave the territory of the Union and thus be deprived of the substance of their Union rights analogously to the situation in *Ruiz Zambrano*.[146] One of the questions submitted to the Court in *Tjebbes*,[147] was whether it is in conformity of EU law to have minors lose their citizenship status as a

142 Art. 110(3) Civil Registry Law 114(I)/2002 provides that minor children of a citizen of the Republic may acquire Cypriot nationality upon a request made to the Ministry of Internal Affairs.

143 Article 6 and 7, 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 [2004] *OJ L 158* 30.4.2004.

144 Court of Justice, judgment of 21 December 2011, Joined Cases C-424/10 and C-425/10 *Tomasz Ziolkowski and Barbara Szeja and Others* v *Land Berlin*, paras 40–41; Jesse, M. (2012). Joined Cases C-424/10, Tomasz Ziolkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgment of the Court of Justice (Grand Chamber) of 21 December 201. *Common Market Law Review* 49, pp. 2008.

145 Art. 3, 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 [2004] *OJ L 158* 30.4.2004; de Groot (n 90), pp. 1092–1093; C-165/16 *Lounes*, para 35.

146 C-34/09 *Ruiz Zambrano*, paras 40–44.

147 C-221/17 *Tjebbes*.

consequence of the deprivation of the nationality of their parent. In his opinion, AG Mengozzi considered that the principle of uniform nationality within the same family should not be burdensome on the substantive rights and interests of minors, which must be recognised as being independent from those of their parents.[148] On the other side, the Court ruled that as long as the decision withdrawing the nationality of a minor is seen in light of Article 24 of the Charter, such a decision can be legitimate.[149] Having regard that a minor loses their citizenship as a consequence of the deprivation of their parent's citizenship, the only logical assumption to an illegitimate decision to revoke the nationality of the parent is that the child is losing their nationality illegitimately as well.[150] Depriving the status of Union citizenship of minors born in a Member State on the basis of an unjustified revocation of the nationality of their parents seems highly inappropriate and any justification based on economic grounds or the discretion accorded to Member States to govern their nationality laws would contradict the approach taken and the aims pursued by the Court in *Ruiz Zambrano*.

Non-compliance with the requirement of retaining the invested residential property in the Republic will result in the withdrawal of the investor's Cypriot and EU citizenship and have a knock-on effect on their family members. The ambiguity of the Programme permits the strict interpretation of its provisions, which leads to the following conclusions: the investor and their family members acquire a very peculiar Union citizenship, the validity of which depends on limiting the rights accorded to all EU citizens and the revocation of which exposes the entire family to a regime with which fails to provide for legal remedies.

We must consider whether alternative, more appropriate measures could be taken to integrate newly naturalised investors and at the same time achieve the goal of economic prosperity and development. The main difference between the Cyprus Investment Programme and other investment migration schemes is the conditional character of the citizenship granted to investors, since the requirement of withholding the residential property has no time limitation[151] and non-compliance results in the revocation of their nationality.[152] Imposing a reasonable time limit on the ownership of the residential property would

148 C-221/17 *Tjebbes*, Opinion of Advocate General Mengozzi paras 122–125.
149 C-221/17 *Tjebbes*, para 47.
150 Bauböck and Paskalev (n 108), pp. 83–85.
151 Cyprus Investment Programme (n 4), pp. 3–4.
152 Cyprus Investment Programme (n 4), pp. 1–2.

not raise concerns in the domain of the free movement of capital.[153] The absolute prohibition from selling the residential property used as an investment for the purposes of naturalisation in the Republic contradicts the very essence of investment, which is conditioned on the prospect of future liquidity.[154] Moreover, the programme needs to become more specific on the manner in which citizenship is revoked and provide for a possibility of reviewing such a decision in a procedure that aims to protect the fundamental rights of those affected, having due regard to Union law.

It might be a tough task to balance the economic benefits of a measure, which has indeed succeeded in generating EUR 4.8 billion in investment as of March 2018,[155] with its adverse effects on individuals, while taking into account the established case law focusing on the deprivation of EU citizenship. It is my view, that the nature of the citizenship granted to investors and the limitations imposed on them demonstrates an unreasonable violation of the substance of Union citizenship, as established by the CJEU's jurisprudence.[156] With the evolution of a 'new logic of citizenship',[157] the importance of Union law and principles shall not be underestimated by national authorities when exercising their competences in matters of naturalisation.

V Conclusions

The legal analysis of the Cyprus Investment Programme in light of EU law on the free movement of capital and citizenship has proven that there is an immediate need for amendments and improvements, which will not only guarantee compliance with Union rules but also advance the benefits for the economy of Cyprus and possibly secure its continuation in the future.

With regards to the question whether the Programme imposes restrictions to the free movement of capital, the case law of the ECJ demonstrates that, inasmuch as economic objectives cannot justify derogations from the obligation

153 Limitations to the free movement of capital are allowed for a certain periods of time, according to art. 3(4) and 6 of Council Directive 88/361/EEC of 24 July 1988 for the implementation of Article 67 of the Treaty [1988] *OJ L* 178/5.

154 UBS. (2017). The Liquidity of Real Estate Investments: Investor Challenges During the Real Estate Cycle. *White Paper*, pp. 5.

155 Farolfi, S., Harding, L. and Orphanides, S. (2018). EU Citizenship for sale as Russian oligarch buys Cypriot passport, available at https://www.theguardian.com/world/2018/mar/02/eu-citizenship-for-sale-as-russian-oligarch-oleg-deripaska-buys-cypriot-passport.

156 C-34/09 *Ruiz Zambrano*, paras 40–44.

157 Kochenov, Plender (n 128), pp. 387.

to prohibit measures that would result in a restriction to the freedom guaranteed in Article 26 TFEU, advancing the national economy through a stream of foreign investment, part of which must be kept indefinitely in Cyprus, violates Article 63 TFEU. Therefore, the Programme must be reformed and the requirement to maintain residential property in the Republic indefinitely must be altered with the introduction of time limitations. The overall wording of the Programme should also be more precise, offering individuals all the legal remedies needed in case their citizenship is revoked.

As for the question of the possible violations of EU citizenship law, this article finds that the requirements of the Cyprus Investment Programme are dubious to say the least. The liberalisation of Union citizenship from its traditional establishment in the Treaties through the case law of the CJEU has played a detrimental role in the decisions Member States can take in matters regarding the grant and revocation of nationality. The judgments of *Rottmann, Ruiz Zambrano* and *Lounes* guided the process of the evaluation of the Cyprus Programme and accordingly, the revocation of Cypriot nationality and EU citizenship as a result of non-compliance with the condition to retain part of the investment in the Republic forever is illegitimate and unjustifiable, as it leads to the revocation of Union citizenship based on the exercise of the rights it grants access to and leaves the investor's entire family unprotected and with no other alternative but to leave the territory of the Union.

Naturalisation should be a transparent and just process, regardless of the financial status of individuals. As a Member of the EU, Cyprus is under an obligation to follow Union principles such as sincere cooperation and loyalty and is required to eliminate any unjustified obstacles to the free movement of capital. Current and future legislators and other public authorities adopting measures on matters of naturalisation and citizenship in general should remember that serving national economic interests should not restrict fundamental EU rights. The increasing significance of the supranational character of Union citizenship proves that compliance is not a mere formalistic obligation imposed on the Member States: the objectives of the Union[158] must be internalised and prioritised in every national policy of the Member States. Effective cooperation between national and EU authorities is the best way to adequately shape and preserve the essence of EU citizenship and define the extent to which EU institutions can intervene in the sovereign powers of the Member States. The Cyprus Investment Programme is just one example of the discrepancies that emanate from the uncertainty and disparity in the ECJ's case law. Be that as

158 Art 3 TEU.

it may, the Court is not solely to blame for the troubled development of EU citizenship; national authorities which continue to disregard the supranational character of the Union are also accountable for the current state of affairs. Instead of contemplating methods to profit from systemic inadequacies, both legal orders must work together to prioritise individual rights, the protection of which both are pledged to guarantee.

CHAPTER 17

Member State Nationality, EU Citizenship and Associate European Citizenship

*A.P. van der Mei**

Introduction

According to Article 20 TFEU, "[E]very person holding the nationality of a Member State shall be a citizen of the Union".[1] The wording of the provision thus suggests a notably simple relationship between EU citizenship and Member State nationality: to be an EU citizen one must be a Member State national. Third country nationals cannot acquire EU citizenship. Loss of nationality implies automatic loss of this privileged status. When a Member State withdraws from the EU its nationals become third country nationals.[2]

From the case law of the Court of Justice of the European Union (CJEU), however, it follows that the relationship between EU and national citizenship is not as clear and straightforward as the Treaty text suggests. To be sure, the CJEU has never recognised, and not even suggested, any exceptions to the rule that EU citizenship is reserved for Member State nationals. Rather, in the well-known *Rottmann* ruling,[3] it confirmed the exclusive link between EU citizenship and national citizenship. What the CJEU did say in this ruling – and this is what complicates the relationship between the two citizenships – is that Member States must, before taking a decision withdrawing "their" nationality, consider the consequences of such a decision for the person concerned as regards the loss of the rights he/she enjoys as an EU citizen. Loss of EU citizenship or the rights attached to it may preclude the lawful application of national rules on deprivation of national citizenship.

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1 See also the almost identically worded Article 9 TEU.

2 The same holds true when a region or comparable entity secedes from a Member State and becomes a new independent State. See further Marrero González, G. (2017). Civis Europaeus Sum? *Consequences with Regard to Nationality law and EU Citizenship Status of the Independence of a Devolved Part of an EU Member State*. Oisterwijk: Wolf Legal Publishers.

3 Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann,* para. 39.

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This is not just a theoretical matter. In recent years, questions concerning the loss of Member State nationality and the implications for EU citizenship have emerged, and increasingly so, in various contexts.[4] A first one concerns the fight against terrorism. Various Member States have adopted laws making it possible or easier to deprive convicted or suspected terrorists of their nationality. As commentators have observed,[5] not only international law and ECHR law but also EU law, including the norms on EU citizenship, may restrict Member States law and policies on nationality deprivation. Further, in response to increased migration and the proliferation of multiple citizenship, various States have enacted laws aimed at singular citizenship. Acquisition of the nationality of a third State may result in loss of a Member State nationality and, thus, EU citizenship. In *Tjebbes*[6] the CJEU was given the opportunity to specify its holdings in *Rottmann* and to determine its significance for situations involving national fights against multiple citizenship.

And finally, there is of course Brexit. The UK's decision to withdraw from the EU has triggered numerous questions concerning the rights and interests of UK nationals. Early 2018, an Amsterdam court, in the '*Brexpats*' case,[7] announced its intention to ask the CJEU whether a hard Brexit indeed implies that UK nationals will become 'ordinary' third country nationals. In the end the preliminary question was not referred to Luxembourg, but Brexit and the *Brexpats* case do trigger interesting questions on the status and rights of nationals of former EU Member States and, more generally, the link between EU and national citizenship.

1 Deprivation of Member State Nationality

For a proper understanding of *Tjebbes* and the questions that arose in the case, let us first recall the lessons from *Rottmann.*

4 For a comprehensive overview of Member States' rules and policies on loss of nationality and its implications for EU citizenship see Carrera Nunez, S. and de Groot, G-R. (2015). *European Citizenship at the Crossroads – The Role of the European Union on Loss and Acquisition of Nationality*. Oisterwijk: Wolf Legal Publishers. For theoretical reflections on loss of nationality and its significance for EU citizenship see Bauböck, R. and Peskalev, V. (2015). Citizenship Deprivation – A Normative Analysis. *CEPS Paper in Liberty and Security in Europe*, No.82, available at www.ceps.eu.

5 See e.g. Cloots, E. (2017). The Legal Limits of Citizenship Deprivation as a Counterterror Strategy. *European Public Law* 23 (1), pp. 57–92.

6 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes and Others.*

7 Rechtbank Amsterdam, C/13/640244 / KG ZA 17–1327, ECLI:NL:RBAMS:2018:605.

First, while Member States are competent in nationality matters, they must exercise their powers with due regard for EU law.[8]

Second, decisions depriving a person of his or her nationality are subject to review under EU law whenever loss of EU citizenship or the rights attached to it are at stake. It is not necessary that the person concerned has exercised free movement rights.[9]

Third, Member States are entitled to protect the special relationship of solidarity and good faith, as well as the reciprocity of rights and duties, which form the bedrock of the bond of nationality.[10]

Fourth, when deciding on possibly withdrawing a nationality, Member States must observe principles of EU law, including the principles of proportionality,[11] legitimate expectations and equality.[12]

Fifth, as regards proportionality, the CJEU demands from Member States to balance national interests, such as combatting the acquisition of their nationality by deception or fraud, against the implications of a possible withdrawal of nationality for the person concerned.[13]

Sixth, if proportionality is respected, Member States are entitled to withdraw nationality, which, if the person concerned does not hold the nationality of any other Member State, in turn implies the loss of EU citizenship.

In *Tjebbes* the Court was asked to clarify *Rottmann* in a case which concerned Dutch nationality law. The relevant rules stipulated that Dutch nationality is lost, by operation of law, if the person concerned also possesses a 'foreign' nationality, and has lived outside the EU for an uninterrupted period of ten years. In addition, according to the Dutch nationality rules, where a parent loses Dutch nationality on grounds of having lived in a third country for ten years, his or her minor children are deprived of Dutch nationality too, unless they would become stateless. Are these rules, so the Court was asked in *Tjebbes*, compatible with the Treaty provisions on EU citizenship?

Adults

Unlike the German rule at stake in *Rottmann,* the Dutch rule under consideration did not seek to combat wrong or fraudulent acquisition of nationality.

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8 *Rottmann,* cit., paras. 39–41 and 45.

9 Ibid., para. 42.

10 Ibid., para. 51.

11 Ibid., para. 55.

12 de Groot, G-R. and Wautelet, P. (2014). Reflections on Quasi-Loss of Nationality in Comparative, International and European Perspective. *CEPS Paper in Liberty and Security in Europe*, No. 66, pp. 27 *et seq*.

13 *Rottmann,* cit., para. 56.

Rather, the goal was to fight multi-citizenship and to ensure that nationals have and retain a genuine link with the Netherlands. Following its Advocate General,[14] the Court accepted the aim of the Dutch legislature as a legally sound one:

> it is legitimate for a Member State to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality.[15]

In that regard, a criterion such as laid down in Dutch legislation of residence outside national territory for a given period may be regarded as an indication that there is no such link.[16] The legitimacy of this, so the Court observed, is supported by international law. For example, the European Convention on permits State parties to withdraw nationality in case of a lack of a genuine link between the State Party and a national habitually residing abroad, provided it concerns persons with double or multiple nationality, who do not run the risk of becoming stateless.[17]

A Member State, in principle, thus may prescribe for reasons of public interest that its nationality is lost in case of long-term residence abroad, even if this were to imply of loss of EU citizenship. The more difficult question, however, concerned proportionality. *Tjebbes* involved a national provision that withdraws nationality by operation of law. It should be noted that it is plain that the Dutch legislature did not blindly pursue the above-stated 'genuine link-aim'. It also had an eye on the interests of the persons concerned. The Dutch

14 Opinion of 12 July 2018, *Tjebbes,* cit., paras. 51–59.

15 *Tjebbes and Others,* cit., para. 35.

16 Ibid., para. 36.

17 Art.7(1), sub e of the Convention. Even though the Court did not stress the point, it is worth highlighting out that the Dutch provision under consideration withdraws Dutch nationality in the event of ten years habitual residence outside not only the Netherlands but also outside the EU. The latter would seem to be crucial. If long-term habitual residence in another EU Member State could be regarded as evidence of a lack of a genuine link with the Netherlands, Dutch nationals (who also possess the nationality of a third country) could lose EU citizenship for having exercised the right to freedom of movement that they enjoy in that capacity. Exercising EU citizenship rights could therefore lead to a loss of EU citizenship. This, of course, does not and cannot hold true. De Groot, G-R. (2004). Towards a European Nationality Law. *Electronic Journal of Comparative Law* 8 (3), 8. Member States may impose long-term residence requirements as key elements for establishing a genuine link between them and their nationals, but, in principle, EU law and EU citizenship demand that they recognize periods of residence in another Member State as periods of residence on their own territory.

legislature chose a quite long period of absence from the EU of ten years. It also showed flexibility: the ten-year absence rule does not apply to persons who, during this period, have lived in the Netherlands for a year or who have been issued a passport or identity card. Moreover, the rule only applies to persons who hold another nationality; the rule does not and cannot lead to statelessness. Further, and as already highlighted, the Dutch legislature showed due respect for EU law, and EU citizenship in particular, by not considering residence in another Member State as residence abroad for purposes of the ten-year rule. Finally, loss of Dutch nationality was not final and irreversible; Dutch nationals could retain it under preferential conditions.

So, the Dutch legislature did apply a proportionality test. The question that arose, however, was whether this suffices for compatibility with EU law or whether proportionality demands that all relevant factors and circumstances are taken into account in each individual case where nationality may be withdrawn. *Rottmann* concerned a decision in an individual case. Did the ruling in this case imply that the balancing act that proportionality entails must be performed by national authorities and/or courts in each individual case or is there room for regulatory balancing?

In the view of AG Mengozzi, a national provision may comply with the proportionality requirement, even if it is general or regulatory in nature. In support of this opinion the AG referred to the ruling in *Delvigne,*[18] in which the Court accepted that a national provision according to which persons convicted of a crime were deprived of their right to vote, also in European Parliament elections, could pass the proportionality test. In the view of the AG, one cannot deduce from the ruling in *Rottmann* a requirement that proportionality must be considered in each and every case by any administrative authority or court. This would even be at odds with the division of competences between the European Union and the Member States. It is for the Member States to govern the conditions for acquisition and loss of their nationality, and national legislatures are in principle free to establish which criteria are determinative for the genuine link between them and their nationals. If the EU principle of proportionality would require each national court in each case to consider all factors and circumstances, including those that the legislature has deliberately not chosen, determining the genuine link, it would intervene too deeply in the national domain of nationality law.

The Court did not follow its Advocate General on this point. It held that:

> the loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant

18 Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne*.

> national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law.[19]

It follows that

> the competent national authorities and courts must be in a position to examine the consequences of the loss of nationality and, where appropriate, to have the person concerned recover his or her nationality *ex tunc*'.[20]

That examination, so the Court explained,

> requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing the nationality of the Member State concerned, when it entails the loss of his or her citizenship of the Union, might (..),disproportionately affect the normal development of his or her family and professional life from the point of view of EU law.[21]

As part of that examination national authorities and courts must ensure that the loss of nationality is consistent with the fundamental rights as guaranteed by the EU Charter of Fundamental Rights, and the right to respect for family life in particular.[22] Circumstances that might be relevant in applying the proportionality test include difficulties in travelling Member States in order to retain genuine and regular links with members of his or her family, or to pursue professional activities, and the fact that the person concerned might not have been able to renounce the nationality of a third country.[23]

The Court's conclusion is notable yet understandable. Case law on the Citizenship Directive[24] or the European Arrest Warrant[25] demonstrate that a proportionality assessment may very well be carried out by the (European)

19 *Tjebbes and Others,* cit., para. 41.
20 Ibid., para. 42.
21 Ibid., para. 44.
22 Ibid., para. 45.
23 Ibid.
24 E.g. Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic.*
25 Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni.*

legislature without there being a need for an additional proportionality assessment by executive authorities in each individual case.[26] Further, one may agree with AG Mengozzi that an obligation under EU law for national authorities and courts to check in every single case whether the legislature has sufficiently considered and balanced all factors relevant for the required genuine link is perhaps hard to compare with the duty imposed by Article 4(2) TEU on the EU to respect national identities, of which "the composition of the national body politic is clearly an essential element".[27] At the same time, one certainly may have sympathy for the Court's requirement of an individual proportionality test. The application of a rule according to which a Member State nationality is lost may have very diverse implications for the right to enter or return to the European Union, a factor to which the Court appears to attach specific importance. For example, for a person who after loss of the nationality of a given Member State still holds US nationality it will be much easier than for someone who only possesses Iranian nationality.[28]

11.2 Minor Children

When it comes to the rules applicable to minor children, even greater doubts existed as regards the compatibility with EU law. Under these rules, Dutch children lose their nationality if the father or the mother loses Dutch nationality on the ground of having lived outside the EU for ten years or more. This holds true even if the child has lived during that period in the Netherlands or the EU. Dutch nationality is not lost if this would result in the minor child becoming stateless.

The Dutch legislature had justified this rule by emphasizing the unity of nationality within the family. The Court accepted this by holding that it is legitimate for "a Member State to wish to protect the unity of nationality within the same family".[29] The Court added that the lack of a genuine link between parents (who have lived abroad for more than 10 years) and a Member State like the Netherlands can be understood, in principle, as a lack of a genuine link between the child and that same Member State.[30]

26 Compare the contribution by Elise Muir in this Volume.

27 Opinion in *Tjebbes.* cit., para. 107, referring to Opinion of AG Poiares Maduro in *Rottmann*, cit., para. 25.

28 See e.g. de Groot, G-R. (2019). Beschouwingen over Tjebbes. *Tijdschrift voor Asiel- & Migrantenrecht* 10 (5), pp. 196–203, 200–201.

29 *Tjebbes and Others,* cit., para. 35.

30 Ibid.

However, also as regards children an individual assessment is needed of the consequences of the loss of nationality. In carrying out such an assessment, national authorities and courts must consider the development of a child's family and (future) professional life and, as Article 24(2) of the EU Charter on Fundamental Rights requires, the child's best interest must be the primary consideration.[31]

The Court's ruling is, in as far as children is concerned, a bit puzzling. As such it may not truly surprise that the Court accepts promoting the unity of nationality within one and the same family as a ground for justification as this indeed is an internationally recognized as a permissible tool for combating multiple nationality.[32] However, it is not apparent why or how this principle of unity of nationality serves the interests of a child in cases on loss of nationality. How can depriving children of their nationality can actually promote their interests? Leaving aside issues concerning military service, one would rather think that only rights to retain or acquire nationality can serve children's interests. It is hard to see how the fact that a child possesses an additional nationality to the one that he/she shares with the parent disadvantages him/her.[33] Arguably, the interests of the child call for the promotion rather than the reduction of multiple citizenship.

Further, the Court accepted the argument of the Dutch Government that in case a parent loses his/her nationality because he/she no longer has an effective link with the Netherlands, it is reasonable to presume that also the minor children no longer have such a link. As such this presumption may make sense but not in all situations, for example in situations in which children do not live with their parent(s). Fortunately, the individual assessment and consideration of proportionality that the Court requires, may help to ensure here 'fair' outcomes in the sense that national authorities or courts may have to reach the

31 Ibid., para. 47. Compare also UN Convention on the Rights of the Child, Art. 3 (1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

32 See e.g. Second Protocol to the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, European Treaties Series No.149.

33 The "only conceivable disadvantage is if at a latter point in life she is suspected of terrorism – in such cases the availability of a second citizenship may expose her to deprivation, while potential statelessness may protect her from losing her preferred citizenship. However, the probability that same person is exposed to potential derivative loss as a child and threatened with deprivation on security grounds as an adult seems extremely low." Bauböck, R. and Peskalev, V., Citizenship Deprivation, cit., p. 24.

conclusion that, unlike their parents, children cannot lose their nationality as this would affect their rights as EU citizens.

In his Opinion, the AG also criticized the Dutch rules concerned because they would disregard to the autonomous nature of EU citizenship. EU citizenship is not reserved for adults, and minors are not second-class EU citizens. Children's EU citizenship cannot be regarded as being derived from their parents' possession of that same status but must be regarded as an autonomous status. Therefore, so the AG argued, children ought to have the same procedural and substantive rights in relation to the possible loss of nationality and, thus, EU citizenship. In the case at hand, this was not the case *inter alia* because, under the Dutch nationality rules, only adults could break the uninterrupted period of ten years of living abroad by applying for e.g. a passport, and, by doing so, thereby retain both their nationality and EU citizenship. On this point, one does not necessarily have to agree with the AG. It may very well be true that that EU citizenship has evolved to become an autonomous status which in itself may be a source of rights, and of course, these rights can be enjoyed by all EU citizens regardless of their age. Yet, from the fact that EU law itself may determine the scope and meaning of EU citizenship rights it does not necessarily follow that it is also exclusively up to EU law to decide on who possesses EU citizenship. We will return to the issue in the following sections, but the fact is that Article 20 TFEU makes the possession of EU citizenship directly and exclusively conditional upon Member State nationality. It is not for the EU but for the Member States to determine who possesses 'their' nationality. If children's nationality derives under national law from their parents' nationality, the same holds true for EU citizenship. Both for parents and children, EU citizenship is derivative in nature. Therefore, from the autonomous nature of EU citizenship it arguably does not (necessarily) follow that children ought to have the same procedural and substantive rights as adults under national law to obtain or retain Member State nationality and, by extension, EU citizenship.

2 Member State Withdrawal from the Union

The *Rottmann* case law concerned national decisions withdrawing a Member State nationality and its implications for EU citizenship and the rights linked to that status. That case law thus is not directly applicable to situations in which a Member State nationality is lost because the Member State concerned decides to withdraw from the Union. Yet, can the logic underpinning the case law be extended to withdrawal situations?

Early 2018 an Amsterdam district court answered this question in the affirmative.[34] The court was faced with a case initiated by UK nationals living in the Netherlands, who claimed that the Dutch State and/or the city of Amsterdam had to take measures so as to ensure that they could continue to enjoy EU citizenship rights after Brexit. Referring to AG Poiares Maduro's opinion in *Rottmann,*[35] the Amsterdam court observed that EU citizenship now constitutes an own autonomous source of rights and that decisions implying loss of Member State nationality must be proportional. The court opined that it can reasonably be doubted that loss of national citizenship implies loss of EU citizenship and stated its intention to refer the following preliminary questions to the Court of Justice:

First, does the withdrawal of the UK from the EU automatically lead to the loss of EU citizenship of [UK] nationals and, thus, to the elimination of rights and freedoms deriving from EU citizenship, if and in so far as the EU and the UK do not agree otherwise in the exit-negotiations?

Second, if Brexit does imply loss of EU citizenship, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship? In the end, however, the questions were not referred to Luxembourg.[36]

It is not clear on what grounds the Amsterdam court based its suggestion that UK nationals might keep EU citizenship after Brexit. It may very well be that EU citizenship has evolved to become a fundamental status that may constitute an autonomous source of EU rights, and that Article 20 TFEU "precludes

34 Rechtbank Amsterdam, C/13/640244 / KG ZA 17–1327, ECLI:NL:RBAMS:2018:605. See also Garner, O. (2018). Does Member State Withdrawal from the European Union Extinguish EU Citizenship? *European Law Blog*, available at: http://europeanlawblog.eu/2018/02/19/does-member-state-withdrawal-from-the-european-union-extinguish-eu-citizenship-c13640244-kg-za-17-1327-rechtbank-amsterdam-the-amsterdam-case.

35 Ibid., para. 5.20.

36 The Amsterdam court had not yet taken the decision to refer the question to the Court of Justice. It had invited the parties in the proceedings to appeal its interlocutory decision before the Court of Appeals. The Court of Appeals recognized that a decision to refer preliminary questions cannot be made subject to an appeal (Court of Justice, judgment of 16 December 2008, case C-210/06, *Cartesio*), but held that it nonetheless had jurisdiction because parties could appeal the interlocutory decision also on grounds other than the decision to refer preliminary questions. The Court of Appeals shared the view that doubts indeed exist as regards the view that Brexit implies loss of EU citizenship, but it concluded that the British applicants' claims were too vague. Regardless of the possible answers of the Court of Justice to the suggested preliminary question, applicants had not adequately indicated what concrete measures they demanded to be taken by the State and city. Gerechtshof Amsterdam, 2000.235.073/01 SKG, ECLI:NL:GHAMS:2018:2009.

national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance"[37] of EU citizenship rights. From that, however, no conclusion can be drawn about a possible retention of EU citizenship itself after a Member State has left the EU. One could perhaps seek to interpret Article 20 TFEU to imply that Member States – via their nationality laws – can only decide on the grant but not on the withdrawal of EU citizenship, but there is not much, if anything, in the text or drafting history to support this reading.[38] Further, it is hard to understand why or how the Court's line of reasoning in *Rottmann* can be extended to situations in which a Member State national loses his/her nationality as a result of the decision of his/her Member State to step out of the Union. Should, because of *Rottmann,* a Member State observe proportionality when taking a decision under Article 50 TEU? A decision to withdraw nationality in individual cases and a decision to withdraw as an entire State from the European Union are not in any serious manner comparable. The entire reasoning of the Court was clearly geared towards the specific individual situation in which Mr. Rottmann found himself. It simply does not make much sense to draw conclusions from this reasoning for the entirely different situation of Brexit, in which millions of citizens could lose EU citizenship as a result of a collective decision adopted in accordance with their own democratic rules.

Article 20 TFEU makes it patently clear that EU citizenship is derivative in nature. Neither in *Rottmann* nor in any other ruling did the Court cut through EU citizenship's exclusive and absolute link with Member State nationality. From existing case law one arguably can only draw one logical conclusion: for UK nationals, Brexit implies loss of EU citizenship.

Of course, (some) UK nationals might have hoped for an activist Court that would be willing to change its position.[39] There are no sound reasons, however, why the Court would or should have done so. The contrary rather holds true. If the Court would have accept that nationals of former Member States could retain EU citizenship, it would have acted contrary to the wishes of the drafters of the Treaty.

First, in Maastricht the drafters made it patently clear that it is not the Union but the Member States who, through their nationality laws, decide on

37 Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano,* para. 43.

38 Compare Dawson, M. and Augenstein, D. (2016). After Brexit: Time for a Further Decoupling of European and National Citizenship. *Verfassungsblog*, available at https://verfassungsblog.de/brexit-decoupling-european-national-citizenship.

39 Compare Shaw, J. (2018). EU Citizenship: Still a Fundamental Status? *EUI Working Paper RSCAS 2018/14*, pp. 10–11.

who holds EU citizenship. Second, in Lisbon, by including Article 50 in the TEU and by thus ordering the EU to negotiate and conclude an agreement governing the arrangements for withdrawal with the exiting Member State, the drafters of the Treaty made it clear that a possible retention of EU citizenship and of the rights linked to it falls within the tasks of the political EU institutions, not of the Court. The entire structure of Article 50 TEU implies that it is up to Member States to withdraw from the Union in whichever manner they wish; EU law does not impose any limitations as to the reasons for the withdrawal, the manner in which this decision is taken, or the extent to which that Member State takes into consideration the interests of its own nationals. If a Member State decides to withdraw from the EU, and thus to deprive their nationals of EU citizenship, it is perfectly entitled to do this. The EU, including its highest court, cannot alter this.

3 Associate EU Citizenship

Thus, under the Treaties, it essentially falls to the EU political institutions rather than the Court to prevent a situation in which UK nationals would lose EU citizenship status and/or rights as a consequence of Brexit. As regards the possibilities and options available, politicians,[40] non-governmental organisations[41] as well as academics have expressed their views.[42] The most interesting ones among the suggested proposals were those calling for the introduction of an associate EU citizenship. The original idea, if I am correct, stemmed from the mind of the European Parliament's Brexit coordinator, Guy Verhofstadt. In December 2016, Verhofstadt suggested a form of EU 'associate citizenship' status that would allow individuals to "keep free movement to live and work across the EU, as well as a vote in European Parliament elections". MEP colleague Goerens supported the idea and added that "[f]ollowing the reciprocal

40 These include MEPs Goerens and Verhofstadt. See further Miller, V. (2018) Brexit and European Citizenship, *House of Commons – Briefing paper 8365*, and Austin-Greenall, A. and Lipinska, S. (2017). *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, Citizen Brexit Observatory.

41 See e.g. the various European citizens' initiatives *Permanent European Union Citizenship*, *Retaining European Citizenship* and *EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis*, available on http://ec.europa.eu/citizens-initiative/public/welcome. See further the contribution by Natassa Athanasiadou in this Special Issue.

42 See Kostakopoulou, D. (2018). Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens. *Journal of Common Market Studies* 56(4), pp. 854–869.

principle of 'no taxation without representation', these associate citizens should pay an annual membership fee directly into the EU budget."[43] The EP itself was also sympathetic to the idea and proposed that the EU-27 would examine how to mitigate the loss of EU rights by UK nationals by introducing such status, provided that full respect is given to the principles of reciprocity, equity, symmetry and non-discrimination.[44]

The idea of an associate EU citizenship has proven to be controversial, with some indeed advocating it[45] and others (strongly) opposing it.[46] Discussions on this status are not always easy to understand, partly because it is not truly clear what associate European citizenship would actually entail. To be sure, associate European citizenship would differ from EU citizenship itself. Those who favour it do not seem to call for a retention of the status established by Article 20 TFEU but rather for the creation of a new status. Further, it would be a status to be granted or offered to nationals of former Member States and not, for example, to third country nationals who have acquired long-term residence status. Third, in terms of substance, the new status would encompass the most important EU citizenship rights: free movement rights (presumably including equal treatment) and active voting rights in European Parliament elections.

Numerous aspects, however, still remain unclear. For example, will/would paying a fee into the EU budget be a requirement, as MEP Goerens suggested? The issue certainly is relevant for the legitimacy of Associate citizenship and reminds us of the 'citizenship-by-investment' of Malta, and a few other Member States.[47] The Maltese programme has proven quite controversial *inter alia* because of a free rider problem. By buying Maltese citizenship, a country with which they may have no genuine link, third country nationals could acquire EU citizenship and, subsequently, move to other Member States, which otherwise would never have admitted them. This free rider problem would not exist

43 Goerens, C. (2016). European Citizenship, *Blog,* available at https://www.charlesgoerens.eu/blog-charles/eu-citizenship.

44 European Parliament, Draft Motion for a Resolution to to wind up the debate on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, 29 March 2017, B8-0000/2017.

45 For an overview see Austin-Greenall, A. and Lipinska, S. (2017). *Brexit and Loss of EU Citizenship*, cit.

46 Kochenov, D. (2018). Misguided 'Associate EU Citizenship' – Talk as a Denial of EU Values. *Verfassungsblog*, available at https://verfassungsblog.de/misguided-associate-eu-citizenship-talk-as-a-denial-of-eu-values/, and Van den Brink, M. and Kochenov, D. (2019). Against Associate EU Citizenship. *Journal of Common Market Studies* 57 (6), pp. 1366–1382.

47 Carrera, S. (2014). The Price of EU Citizenship – The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters. *Maastricht Journal of European and Comparative Law* 21 (3), pp. 406–427.

if one were to introduce associate citizenship at EU level. Yet, is it desirable to ask a price for a citizenship-like status, to commercialise it? Will it be a new status based on a genuine link that its holders have with the EU or one of its Member States, or will associate EU citizenship be a tradable good?

A next question that then arises is who would be the beneficiaries of this new associated citizenship? Concretely in the case of Brexit: would only the Brits who have moved to another Member State and have lived there for a given period of time be given the right or option to become associate EU citizens, or also those who have never done so and find themselves in 'purely internal British situation'? The answer to this question is relevant because it triggers the subsequent question of what the actual aim of associate citizenship would be: is it just a means to ensure the continuation of rights for nationals of exiting Member States living in other EU Member States, or does it have an own intrinsic or more deeply motivated aim? If the former is the case, why would UK nationals who have never settled across the Channel still need to have a right to vote for the EP? Those who wish to include EP election rights for this category of UK nationals must have something else or more in mind. Yet, what exactly? Even though the term 'associate citizenship' is used, is it not that this is meant as a covert way to make sure that Brits, and potential other future ex-Member State nationals, can nonetheless retain EU citizenship?

It is of course perfectly possible that advocates of associate European citizenship themselves do not exactly know what they are proposing or what the implications of their proposal might be. As noble as their motives may be, if these advocates have more in mind than merely freezing the legal status of UK nationals living in 'Europe', one must be cautious. Critical questions must be addressed. If this envisaged status is meant as a status separate from EU citizenship, yet encompassing the same or very similar rights as the latter, does it not undermine EU citizenship? Even if it were established that the EU can formally confer all rights that it offers to its own citizens to third country nationals, does the very existence of EU citizenship not command restrictions? Further, and recalling what has previously been said about Article 50 TEU, why is there at all a need for the EU to consider introducing a new status to the benefit of people who have collectively, and fully in accordance with their own internal constitutional norms and procedures, decided to step out of the Union and decided to give up their EU citizenship? Apparently, the majority who voted in favour of Brexit did not consider EU citizenship important enough. And whatever others may think of this choice, the choice to leave the EU made was entirely legally. Those who voted to remain simply have to accept that they, as a result of UK constitutional rules, lost the battle and, with that, EU citizenship and all rights flowing from this status. In fact, by offering one-sidedly associate

citizenship to those UK nationals who wish to remain part of the European integration project, the EU is meddling in the internal affairs of a former Member State in which it arguably should not meddle.

Finally, and perhaps most importantly, why would the EU at all consider unilaterally offering a new status to British (or other former EU) citizens without there being any reciprocal status or legal protection for EU citizens living in the UK (or any other exiting Member State)? The number of EU citizens in the UK far exceeds the number of UK nationals living in 'Europe'. As noble as it may be to show legal and political compassion with UK nationals in EU-27 Member States, the EU's main commitment does not, or at least should not, lie with them but rather with EU citizens living in the UK. The EU should not give in to the pressure of all those who – often quite annoyingly – place so much emphasis on the negative implications of Brexit for UK nationals living in the EU without giving equal (if any at all) attention to the rights and interests of EU citizens residing in the UK. Reciprocity is a must. Without it, introducing associate European citizenship is an idea that is doomed to be rejected by EU citizens.

4 Final Remarks

There is no denying that the drafters of the European Treaties have decided to reserve EU citizenship for nationals of EU Member States. The Court of Justice has never cut through the exclusive link between Member State nationality and EU citizenship. As the legal situation stand at present, the Court is well advised not to alter its position just because of 'Brexit'. If it were to do so, it would likely be faced with accusations of undue judicial activism that may not be easy to dismiss.

Of course, one fully understands the frustrations of all those UK nationals who live in 'Europe' and may lose the rights attached to EU citizenship, or all those British citizens who voted for 'Bremain'. And, yes, one understands the calls made by them, or on their behalf, for cutting through the umbilical cord between EU and national citizenship. Yet, this is not a task for the Court, but rather a task for 'politics' and, more concretely, for the parties that have to negotiate the exit agreement under Article 50 TEU. One may dislike the idea that individuals are subject to political negotiations and thus deals,[48] but that is essentially what the Treaty prescribes. Given their political, day-to-day nature

48 Kostakopoulou, D. (2018). Scala Civium, cit.

one can only be satisfied that the Brexit-negotiators have limited themselves to a freezing of the rights of mobile EU citizens and have not burned their fingers on more fundamental questions concerning the scope and nature of EU citizenship. For an answer on those questions we, as European citizens, need to take more time to reflect.

CHAPTER 18

From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union

*Gillian More**

Introduction

Brexit, including over three years of uncertainty leading up to Brexit on 31 January 2019, has had a profound effect on the lives of the approximately 3 million EU citizens living in the UK and 1.2 million UK nationals[1] living in the EU Member States. For both groups of citizens, the UK's withdrawal from the EU means their rights under EU law are withdrawn while they are exercising them. This is an unprecedented situation and a major development in the history of Union citizenship ("EU citizenship").

Brexit for UK nationals means they become third-country nationals and collectively lose their EU citizenship. This chapter focusses on the specific position of UK nationals (referred to interchangeably as either UK nationals or Britons) who live and/or work in the EU(and who do not have the nationality of another Member State and thereby lose EU citizenship). What happens in legal terms to these former EU citizens still living in the EU?

The transformation of Britons into non-EU citizens in fact takes place in two stages: in a first stage, from 1 February 2020 when the UK ceases to be a Member State, all UK nationals lose the political rights of EU citizenship (see further below).[2] The Withdrawal Agreement allows however other rights of EU citizenship to be retained during the transition period: all UK nationals

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1 For a discussion of the size of the UK population in the EU, see, Benton, M. (2017). Safe or Sorry: Prospects for Britons in the EU after Brexit. *Migration Policy Institute* 2017, 6–11.

2 These rights are excepted from the effect of the transition period by Article 127(1)(b) of the Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and

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continue to enjoy the rights of free movement and residence in other Member States during this time. In the second stage, at the end of the transition (in principle 31 December 2020), these rights will end.[3] The provisions of Part Two of the Withdrawal Agreement then kick in fully to protect only those citizens and their family members within its scope.[4] As this contribution will set out, only certain rights are however protected by the Agreement.

The chapter is divided into four parts. First, it reminds the reader of the concept of EU citizenship and its associated rights: what exactly do UK nationals lose? Second, it considers the Withdrawal Agreement: what has the process been; what is its scope; what rights does it protect for UK nationals living and/or working in the EU? Third, the preparations made by the EUunder the No-Deal scenario for the sudden default of UK citizens to third-country national status are put under the lens. The fourth section reflects more broadly on the withdrawal of EU citizenship: who has the duty to protect the citizens whose EU citizenship is being withdrawn; what rights must be protected; and what should the process look like?

The specific rights that may eventually be given to UK nationals residing and/or working in the EU under a new UK-EU relationship are, at the time of writing, unknown.[5] This issue is not therefore discussed. The position of non-mobile UK nationals, who remain in the UK, is out of scope of this contribution too.

1 EU Citizenship – the Concept – the Rights – Its Evolution

The Maastricht Treaty established both the European Union and the concept of EU citizenship. EU citizenship was part of the creation of a "People's Europe":- showing to citizens that the nascent Union offered more than merely the possibility to participate in the (single) market.[6] In addition, a new label, "Union citizen" or "EU citizen" was invented that went beyond the "privileged

Northern Ireland from the European Union and the European Atomic Energy Community, *OJ C 384I*, 12.11.2019, p. 1–184 (hereinafter, "the Withdrawal Agreement").

3 Article 132(1) provides that the transition period may before 1 July 2020 be extended for up to 1 or 2 years.

4 Article 126 of the Withdrawal Agreement.

5 An outline of what is foreseen as regards movement of citizens can be found in Part IX "Mobility" of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ C 384*, 12.11.19, p. 178.

6 A People's Europe: Reports from the ad hoc Committee (Adonnino Report), Bull-EC Supp 7/85.

foreigner" status that nationals from Member States had hitherto enjoyed in a host Member State.[7] The Union citizen was defined as every person holding the nationality of a Member State and a set of citizenship rights was laid down by the new Treaty.

The core element of EU citizenship, when introduced, was in fact an already known set of rights: the right to move and reside within the territory of all Member States. What was new was that such rights were conferred by primary law on all Union citizens (although subject to limitations and conditions), regardless of economic activity. There were also political rights, which in part restated what already existed pre-Maastricht: the right for EU citizens to vote and stand in European Parliament elections, including while residing in another Member State; a new right to vote and stand in local elections in the Member State of residence; and the right to petition the European Parliament, another already-existing right. To this group of political rights, the Lisbon Treaty later added the right to launch a European Citizen's initiative – a right intended to promote EU citizens' participation in the democratic life of the Union.[8] EU citizens were also (by the Maastricht Treaty) conferred with the right to consular protection by any Member State when unrepresented in a third country outside of the EU. In addition, institutional rights, aimed at reinforcing relations with EU institutions, were listed: the right to apply to the European Ombudsman; to which the Amsterdam Treaty added the right to correspond with the EU institutions in one's own language.

While not formally part of the list of EU citizenship rights, the guarantee of non-discrimination on grounds of Member State nationality is a fundamental, constitutional aspect of EU citizenship.[9]

At the time of introduction of EU citizenship, many writers demonstrated scepticism towards the concept. Everson underlined the difficulty of creating a bond of citizenship and allegiance between an individual and a transnational group of states. While EU citizenship was a "progressive concept" and could be a "dynamic notion", Everson doubted whether what was essentially still a market or consumer status could do this.[10] Jessurun d'Oliveira considered the concept as largely symbolic, lacking coherence and with little new

7 Jessurun d'Oliveira, H.U. (1994). Citizenship: Its meaning, Its Potential. In: Dehousse, ed., *European After Maastricht: An Ever Closer Union?* Munich: CH Beck, p. 127.

8 Recital 1 of Regulation (EU) 2019/788 on the European Citizens' Initiative, *OJ L 130*, 17.5.2019, p. 55.

9 Muir, E. (2018). *EU equality law: the first fundamental rights policy of the EU*. Oxford: Oxford University Press, p. 36.

10 Everson, M. (1995). The Legacy of the Market Citizen. In: Shaw and More, eds., *New Legal Dynamics of European Union*. Oxford: Clarendon Press, pp. 89–90.

content. Moreover, due to its link to the nationality of a Member State, EU citizenship created a demarcation line between those who "belonged" and those who did not. In his view it would have been both more cohesive and more rational in policy terms to forge EU citizenship for resident aliens as well.[11]

Since its introduction, EU citizenship has evolved considerably. Its definition was amended by the Amsterdam Treaty to underline that it complements and does not replace national citizenship. It is reinforced by a section on "Citizens' rights" in the Charter of Fundamental Rights of the EU. It is supported by a body of secondary legislation,[12] which in various ways shapes its content and direction. The Court of Justice has contributed to the development of EU citizenship through its judgments: in its heyday the Court established that EU citizenship was "destined to be the fundamental status of nationals of the Member States";[13] more recently, reacting to a political environment hostile to mobile EU citizens accessing social welfare, the Court reined in the equal treatment rights of EU citizenship.[14] Public opinion surveys show that EU citizenship is a concept that the European public embraces.[15] Through the ECI and other civil society initiatives, EU citizenship provides a framework for European action not just from the top down but also from the bottom up.[16] It has become a product not only of a process of polity-building beyond the state, but also of a move away from a predominantly state-centred conception of citizenship.[17]

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11 Jessurun d'Oliveira, H.U. (1994), cit., p. 147.

12 Most notably, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State, *OJ L 158*, 30.4.2004, p. 77; Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections, *OJ L 368*, 31.12.1994, p. 38; Directive 93/109 on the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals European Parliament elections *OJ L 329*, 30.12.1993, p. 34; Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, *OJ L* 106, 24.4.2015, p. 1.

13 Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

14 Martinsen, D.S. and others. (2018). ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence. *Journal of European Public Policy* 25 (10), pp. 1422–1441.

15 Standard Eurobarometer 91 (published in August 2019) showed that in all 28 Member States, more than half of respondents felt that they were citizens of the EU. Across the EU, 73% felt this way.

16 Venables, T. (2016). *The UK Referendum on Membership of the EU: One Choice Hides Another – to Keep or Give up European Citizenship*. ECIT Foundation.

17 Shaw, J. (2018). EU Citizenship: Still a Fundamental Status? *EUI Working Papers* RSCAS 2018/14, p. 3.

The personal scope of EU citizenship remains however firmly linked to nationality of a Member State.[18] Concern about the loss of rights Brexit entails has triggered a massive wave of applications from UK citizens for other Member State nationalities in order to conserve their EU citizenship.[19] UK nationals in the Netherlands initiated litigation – judged premature by the national appeal court – to challenge the loss of EU citizenship.[20] The MEP, Charles Goerens, put forward the possibility of creating associate EU citizenship for nationals of a former Member State;[21] a European Citizens' Initiative ("ECI") was launched to ask for the creation of "Permanent EU Citizenship";[22] and a citizens' lobby group suggested a "Green Card" as a way to maintain free movement rights after Brexit for both EU citizens and UK nationals with permanent residence rights.[23] In April 2020 a direct action challenging the removal of EU citizenship rights upon the UK's departure from the EU was lodged before the General Court of the EU.[24] Brexit has paradoxically brought the concept of EU citizenship alive![25]

Yet, despite the attempts by UK nationals to find a way to retain EU citizenship, the Brexit negotiations between the EU and the UK made clear there was no panacea for the loss of EU citizenship pursuant to Brexit. Article 50(3) TEU is the mechanism by which EU citizenship is removed. It provides that the Treaties shall cease to apply to the State, which has notified its withdrawal from the EU under the terms of Article 50 TEU. Thus, when the Withdrawal Agreement takes effect, the UK ceases to be a Member State and persons with UK nationality thereby no longer fulfill the condition in Article 20 TFEU to have EU citizenship – "nationality of a Member State". In this way the rights of

18 Kostakopoulou, D. (2014). European Union citizenship and Member State nationality: rethinking the link? In: Konopacki, ed., *Europe in the time of crisis*. Łódź/Kraków: Wydawnictwo Uniwersytetu Łódzkiego, p. 71.

19 House of Commons Library Briefing, *Brexit and European Citizenship*, 6 July 2018, p. 35.

20 De Staat der Nederlanden & de Gemeente Amsterdam v Brexpats Hear Our Voice, Gerechtshof Amsterdam, 20 June 2018, ECLI:NL:GHAMS:2018:2009.

21 European Parliament Committee on Constitutional Affairs (2016). *Amendments to draft report on "Possible evolutions of and adjustments to the current institutional set-up of the European Union"*. 9 November 2016.

22 Available at https://www.eucitizen2017.org.

23 "European Green Card proposed as solution", available at https://neweuropeans.net/article/2628/european-green-card-proposed-solution.

24 Available at https://www.thelondoneconomic.com/politics/exclusive-uk-campaigners-file-case-to-prove-withdrawal-agreement-cannot-remove-eu-citizenship/27/04/

25 Jessurun d'Oliveira, H.U. (2018). Brexit, Nationality and Union Citizenship: bottom up. *EUI Working Papers* RSCAS 2018/49.

EU citizenship listed in Article 20(2) TFEU previously enjoyed by UK nationals simply fall away. Other key rights for individuals in the EU Treaties, which depend on having nationality of a Member State, such as the rights of work and establishment in another Member State and the right to provide cross-border services, are also lost by virtue of the effect of Article 50 TEU.

2 Loss of EU Citizenship and the Withdrawal Agreement

From the outset of the discussions concerning Brexit, the EU and the UK government stated their commitment to protecting the rights of citizens affected by Brexit – both EU citizens in the UK and UK nationals in the EU. The protection of citizens' rights was one of the central planks of the Withdrawal Agreement. A position paper published by the European Commission's Taskforce 50 on 12 June 2017 set out its objective as follows:

> ..to protect the rights of EU27 citizens, UK nationals and their family members who … have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date[for example pensions rights].[26]

The paper set out essential principles for the start of the withdrawal negotiations with the UK, stating that, among others, the following principle should apply:

> the same level of protection as set out in Union law at the date of withdrawal of EU27 citizens in the UK and of UK nationals in EU27 including the right to acquire permanent residence after a continuous period of 5 years of legal residence …

As the negotiations commenced and a joint EU-UK position was agreed in the December 2017 Joint Report,[27] the commitment of the earlier position paper

26 European Commission (2017). TaskForce50 Position Paper on "*Essential Principles on Citizens' Rights*", 12 June 2017.

27 Joint Report of the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27. 8 December 2017, available at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

narrowed: the aim became "protecting the effective exercise of rights derived from EU law and based on past life choices". As the discussion below will show, the new focus on "past life choices", in the case of UK nationals in the EU, became a limitation.

Laffan describes the key strengths of the Union in the withdrawal negotiations as the way it framed the Brexit negotiations and the method it developed: a so-called "Brexit toolkit".[28] In the context of citizens' rights, "protection of past life choices" and reciprocal protection were central framing principles. Important elements of the citizens' rights toolkit were transparency (publication of key draft texts), regular meetings with the Member States and consultation with the key interest groups on both sides. The interest group, the3million, was consulted on the position of EU citizens in the UK.[29] The umbrella organisation, British in Europe, was consulted on the interests of UK nationals living in the EU.[30] Both interest groups were formed in the context of Brexit, precisely for these reasons.[31] This process of consultation was conveyed on social media with photos of the Chief Negotiator, Michel Barnier, meeting with both the3million and with British in Europe.

3 Key Elements of the Withdrawal Agreement as Regards Citizens' Rights

This process of draft texts, discussions and consultations led to Part Two of the Withdrawal Agreement – concerning citizens' rights. Compared to the list of EU citizenship rights above, the Agreement focusses on a limited number of rights: residence; the exercise of an economic activity as a worker or

28 Laffan, B. (2019). How the EU27 came to be. *Journal of Common Market Studies* 57 (S1), pp. 13–27, 16–18.

29 The3million is the largest campaign organisation for EU citizens in the UK, formed after the 2016 EU referendum. It is not party affiliated and does not take a position on whether the UK should leave or remain in the EU. It works with MPs and organisations across the political spectrum on the specific issue of protecting EU citizens' rights. Available at https://www.the3million.org.uk/about-us.

30 The coalition group, British in Europe, was created in early 2017 to allow for better coordination between British citizenship groups across Europe in the Brexit negotiations. It is made up of 10 groups, representing a membership of around 35 000 Brits, working together to stand up for the rights of UK citizens in the EU and EU citizens in the UK. Available at https://britishineurope.org/who-we-are/.

31 Both organisations are entered in the EU Transparency Register, where further details can be found.

self-employed person (including frontier workers); social security coordination; and certain acquired rights, including recognition of professional qualifications (including qualifications in the process of being recognised). The expectation of acquiring permanent residence in the host country after legal residence for a continuous period of 5 years is also protected.[32] The Agreement makes clear that persons within its scope will enjoy life-long protection, for as long as they continue to meet the necessary conditions.[33]

4 Personal Scope and Lawful Residence

The defining feature of Part Two of the Agreement is its personal scope. This is what decides if you are protected by the Agreement or not. For Britons in the EU, personal scope is defined (except as regards social security where a different scope is necessary) by Article 10, as applying to,

– "*UK nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafte*r"; and
– "*UK nationals who exercised their right as frontier workers*[34] *in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter*".

The same approach to scope applies also to EU citizens in the UK. The scope is generous to the extent that it catches citizens who move to live in either the UK or in an EU state during the transition period. However, for both groups of citizens, only in the circumstances where a person can demonstrate a right of residence as defined by Union law (or meets the definition of frontier worker in the Agreement), are they protected.[35]

The EU legal acquis on having a "right of residence" is a dense and complicated patchwork of legislation and Court of Justice case-law. Most Member States no longer require EU citizens to have residence documents (known as registration certificates) and many citizens may not know if they have a legal right of residence. The existence of the right is assessed based on compliance with certain conditions. As citizens' and their family members' factual situations evolve (e.g. in work or not, length of time unemployed, divorced, in

32 Article 15 of the Agreement.
33 Article 39 of the Agreement.
34 The term, "frontier worker" covers both employed and self-employed persons: see Article 9(b) of the Agreement.
35 Other than in relation to social security coordination, where a different scope applies.

partnership or married, claiming benefits or not), they may cease, sometimes temporarily, to meet those conditions. Member State administrators find the law complex and are generally encouraged to take a strict approach to the determination of such rights.[36] Member State authorities regularly challenge the right to reside of workers by asking the question whether the work was genuine and effective[37]; for the self-employed,[38] Member State authorities apply a range of national criteria to recognise this status; and for non-active persons (for example, the retired), the lack of guidance on the meaning of "comprehensive sickness insurance"[39] and the requirement for sufficient resources[40] give Member State authorities various possibilities to find that residence was not "in accordance with Union law". Indeed, research on Britons in France mapped the case of Britons who, concerned about their status after the Brexit vote, applied for registration documents to confirm their right of residence, but ended up being served with papers asking them to leave France.[41]

The Joint Report from the negotiators in December 2017 already made clear there would be a pre-condition of legal residence in the Agreement. The3million, British in Europe and academic commentators expressed considerable concern on this matter.[42] The draft Withdrawal Agreement published in February 2018 maintained the condition, but softened its application with procedural provisions, requiring, for example: the application form to be

36 O'Brien, C. (2017). *Unity in Diversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*. Oxford: Hart Publishing, pp. 201–241.

37 O'Brien, C. (2016). Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights. *Common Market Law Review* 53 (4), pp. 937–978, 953–964; FEANTSA (2019). *The working poor and EU free movement: the notion of "worker" in the context of low-wage and low-hour employment,* available at *https://www.feantsa.org/en/report/2019/05/22/the-working-poor-and-eu-free-movement-the-notion-of-worker-in-the-context-of-low-wage-and-low-hour-employment*.

38 Guidance in EU law on who is self-employed is provided by Court of Justice, judgment of 27 June 1996, case C-107/94, *Asscher*, para. 26; and judgment of 30 November 1995, case C-55/94, *Gebhard*, paras. 24–25.

39 Although see Case C-535/19, pending before the Court of Justice.

40 Recent case-law from the Court of Justice gives Member States a basis to find persons, who claim "social benefits", do not comply with the requirement for sufficient resources and hence have no right to reside: Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*; judgment of 11 November 2014, case C-333/13, *Dano*.

41 Benson, M. (2019). "Focus: Brexit and Rethinking the British in Europe". *Discover Society* 65 Focus. See also, European Citizen Action Service (ECAS). UK and EU citizens still struggle to obtain residence documents in France, available at https://ecas.org/uk-and-eu-citizens-still-struggle-to-obtain-residence-documents-in-france.

42 British in Europe and the3million (2018a). *Securing citizens' rights: Considerations for Phase 2 of the Brexit negotiations*, January 2018, avaible at https://docs.wixstatic.com/ugd/0d3854_3e2adeb0770a4e71b7d460957afbe926.pdf.

"user-friendly"; that the competent authorities should "help the applicant to prove their eligibility";[43] and underlining that the host state cannot require documents that "go beyond what is strictly necessary and proportionate to provide evidence".[44]

Less restrictive approaches to scope and to residence were indeed possible.[45] Smismans suggests part of the reason behind the requirement for a right of residence may have been the fear of undermining the method of Directive 2004/38/EC ("the Free Movement Directive"), the central plank of EU law on the right of residence.[46] Laffan, in her discussion of the overall EU approach, provides the rationale for this: one of the key strategies in the negotiations was to ensure adherence to, and preserve, the fundamental principles of the Union.[47] Smismans argues, nonetheless, that simply copying the criteria for legal residence from the Free Movement Directive underestimates the challenges of applying these criteria in a very different context.[48]

5 The Requirement to Apply for Residence Status under the Agreement

During the Brexit negotiations, the United Kingdom made clear its intention to require EU citizens residing in the UK to apply for a status referred to as "settled status" in order to have rights in the UK under the Withdrawal Agreement. Following the framing principle of reciprocity, this meant that the EU Member States would have to require Britons in the EU to apply also for a new residence status. Adoption of this approach was controversial as it ran contrary to the usual "declaratory" approach in EU law, under which residence rights flow directly from EU law, regardless of whether the holder is in possession of a valid

43 Article 18(1)(o) of the Agreement.

44 Article 18(1)(n) of the Agreement.

45 See for example the concept of habitual residence in Article 11 of Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ L 284*, 30.10.2009, p. 1, or the concept of normal residence in Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, *OJ L 105*, 23.4.1983, p. 59.

46 Directive 2004/38/EC, cit.; Smismans, S. (2018). Brexit and EU27 citizens' rights: a proposal for a Protocol. *EUlawanalysis Blog*, available at https://eulawanalysis.blogspot.com/2018/06/brexit-and-eu27-citizens-rights.html.

47 Laffan, B. (2019), cit., p. 17.

48 Smismans, cit.

residence document.[49] Moreover, it implied a potential administrative burden for EU Member States with large numbers of British residents.

In the end, the UK's requirement that EU citizens apply for "settled status" was accepted. Article 18(1) of the Agreement reflects this and allows the UK and the EU Member States *to choose* whether they will require EU citizens, UK nationals and their family members to apply for a new residence status or not. The principles of reciprocity, uniformity and indeed the declaratory nature of EU rights were therefore compromised on this point.

The UK started to implement its system of "settled status" in March 2019, well in advance of Brexit taking place. For Britons in the EU, Article 18(1) of the Withdrawal Agreement means there is no uniform EU approach to confirming their status in their country of residence under the Withdrawal Agreement. Each EU Member State decides whether to institute a "constitutive" registration system (similar to UK "settled status"), or whether to adopt the "declaratory" approach that legal residence on its territory is sufficient to be protected by the Agreement.[50] At the time of writing this (April 2020), little information and no official published list is available:[51] Italy has indicated it intends to apply the "declaratory approach", under which UK nationals and their family members must simply register their status. Austria, France and Greece, on the other hand, have indicated the adoption of a "constitutive" approach, requiring Britons to re-apply for a new residence status.[52]

The inclusion of an application procedure in the Agreement continues to cause controversy, particularly in the UK where this is the confirmed approach.[53] The overall implication is that, if a person does not make an application within the required deadline, she loses her right to reside legally in the host state.[54] Particular groups have been identified as at risk: elderly

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49 Court of Justice, judgment of 8 April 1976, case C-48/75, *Royer*; judgment of 21 July 2011, case C-325/09, *Dias*, paras. 48–49.

50 In the latter case, Article 18(4) of the Agreement provides for UK nationals to receive a residence document, which may be in a digital form, that evidences their status under the Agreement.

51 See Benton, M. & Ahad, A. (2019), A. *On the Brink: Prospects for UK Nationals in the EU-27 after a No-Deal Brexit.* MPI Europe Policy Brief No.14, pp. 4–6.

52 British in Europe (2020). *Newsletter*, 15 April 2020.

53 The Commission's Chief Negotiator, Michel Barnier, wrote in December 2019 to the UK government to express concern about the deadline imposed for applications to be received. Brussels Uneasy over EU Citizens' rights after Brexit. *Financial Times*, January 8, 2020.

54 Smismans, S (2019). This is how to stop Brexit causing a new Windrush Scandal for EU citizens. *Free Movement Blog*, available at https://www.freemovement.org.uk/this-is-how-to-stop-brexit-causing-a-new-windrush-scandal-for-eu-citizens.

people; people without digital literacy; and children, who need their parents or guardians to apply on their behalf.[55] Taken together with the need to prove compliance with the conditions for a right of residence under EU law, there is effectively a double burden on the applicant. Decades of residence, of work and real links to the country[56] are potentially at risk.[57] In response to these concerns, the negotiators inserted a provision in the Agreement that requires both the UK and the EU Member State authorities to assess all the circumstances in the case of applicants who do not apply within the deadline. The authorities are required to allow the application, if there are reasonable grounds for the failure to meet the deadline.[58] There is also a requirement for the UK and the EU to carry out awareness-raising campaigns through national and local media.[59] The UK government announced in summer 2019 funding for organisations to help UK nationals with the application process.[60]

In addition, for applicants who already hold a permanent residence document issued either under EU or under national law, the procedure is lighter: they have a right to exchange this for the new residence document, although must still confirm their "ongoing residence" and undergo checks to verify their identity and criminality and security checks.[61] Citizens who have a permanent residence document, may however not know that a second application under the Withdrawal Agreement is necessary and information to this group of Britons in the EU – where some Member States will require applications and others not – will be particularly important.[62]

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55 Sumption, M. and Kone, Z. (2018). *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* Oxford: Migration Observatory.

56 See for example the case of a Portuguese woman, who had worked in a range of jobs (building, looking after the elderly, caring for children) and lived in the UK for 20 years, but whose application status under the Withdrawal Agreement (settled status) was refused, "Tearful woman pleads to stay in UK on live TV", *The Guardian*, Friday 30 August 2019.

57 O'Brien, C. (2019) Settled Status scheme for EU citizens risks being next Windrush. *The Times*, April 4, 2019.

58 Article 18(1)(d) of the Agreement.

59 Article 37 of the Agreement; For example, in autumn 2019 the UK Government advertised on social media to invite UK nationals living abroad to "citizens outreach" meetings in their member state of residence.

60 Available at https://www.gov.uk/government/news/3-million-grant-to-help-uk-nationals-in-eu-for-brexit.

61 Article 18(1)(h) of the Agreement.

62 Seeking Settled Status and Permanent Residency. *The UK in a Changing Europe,* available at https://ukandeu.ac.uk/seeking-settled-status-and-permanent-residency.

6 Family Members

Part Two of the Agreement protects also the residence and rights to work of family members of UK nationals in the EU and EU citizens in the UK.[63] As in the case of primary right-holders, family members must show they resided in the host state in accordance with Union law. Both "direct" family members within the meaning of Article 2(2) of the Free Movement Directive and "extended" family members, including partners in a durable relationship, whose entry and residence have been facilitated under Article 3(2) of the Free Movement Directive, are protected. Provision is also made for a right of residence for children born, or legally adopted, after the end of the transition period.

No protection is, however, provided for the right of UK nationals to return to the UK accompanied by their non-UK family members, referred to in shorthand as the Surinder Singh right.[64] The extensive case-law on which the right is based involves EU citizens enforcing EU law – Article 45, Article 49 or Article 21 TFEU – against their home state on the basis that they are returning after having exercised Treaty free movement rights.[65] This means that the UK will – post-Brexit – be entitled to apply its domestic immigration rules to the family members of Britons returning from the EU, potentially causing difficulties for the family to return to the UK. The UK Government however announced that Britons returning to the UK from the EU would, based on UK law, be permitted to bring their family members – where the relation began before Brexit – until 29 March 2022.[66]

7 Loss of Market Citizenship

The principal rights not protected by the Agreement for Britons in the UK are their EU rights to earn a living through employment or self-employment in another Member State, provide cross-border services ("market citizenship rights") and move freely across EU borders.[67] An early draft of the Withdrawal

63 Article 10(1)(e) of the Agreement.

64 Court of Justice, judgment of 7 July 1992, case C-370/90, *R v. Immigration Appeal Tribunal and Surinder Singh*.

65 C-370/90 *Singh*, cit.; Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*, paras. 35–38; judgment of 12 March 2014, case C-456/12, *O. and B.*, paras. 50–51; judgment of 12 July 2018, case C-89/17, *Banger*, paras. 32–34.

66 Available at https://www.gov.uk/guidance/advice-for-british-nationals-travelling-and-living-in-europe.

67 Although UK nationals resident in the Schengen Area will benefit, as do other third-country nationals, from free movement in the Schengen Area. This is limited to 90 days

Agreement contained an Article 32 – "scope of rights" – which set this out explicitly, but it was deleted in the final published agreement.[68]

Instead the Agreement is limited to protecting "past life choices". This framing principle is legally translated via Articles 9(c) and (d), which define the "host state" and "state of work". The result is that a Briton's right to work in the EU either as an employed person or self-employed person is protected, *where this right is being exercised in the host state at the end of the transition period* or, if the person is a frontier worker (either employed or self-employed) and *pursues an economic activity as a frontier worker in a Member State before the end of the transition period and continues to do so thereafter*.[69] So, for example, a frontier worker with UK nationality, living in Belgium and working in France, will have her residence in Belgium and right to work in France protected. However, the option under EU law to take on a new job in another Member State is not protected.[70] Similarly, for example, self-employed UK nationals established in Austria at the end of the transition will be protected as regards their work in Austria, but will not under the Withdrawal Agreement have the possibility to change their operations and establish in Italy.

The provision of cross-border services is, moreover, not covered in any way. UK nationals, who before or at the point of Brexit earn their living by providing their services in various Member States – IT engineers or freelance interpreters for example – are not protected. In today's labour market and gig economy, this is a striking restriction. The removal of such rights and the possibility under EU law to change country of work or establishment has been little publicised to Britons who are potentially affected.[71] Pending any agreement on the UK-EU

within any 180-day period: Article 6(1) Schengen Borders Code (Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, *OJ L 77*, 23.3.2016, p. 1).

68 Article 32 of the Draft Withdrawal Agreement, 28 February 2018 provided: "In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States", TF50 (2018) 33 – Commission to EU27.

69 See Articles 24 and 25, read in conjunction with Article 9(c) and (d), of the Agreement.

70 In contrast, the right to change to work in Belgium would seem to exist as, based on Article 17 of the Agreement, both EU citizens and UK nationals are entitled to "change status" in the host state: therefore in the example given, the UK national who resides (as a non-active person) in Belgium could change her status to a worker. Article 17 would appear to permit her to enter the Belgian labour market at a later stage.

71 One exception is "The beautiful dream destroyed: Britons in EU on no-deal Brexit", *The Guardian*, 7 September 2019, available at https://www.theguardian.com/politics/2019/sep/07/britons-in-eu-no-deal-brexit. The UK Government in autumn 2019 started advertising on social media to alert UK service providers to the need to protect their rights.

future relationship, Britons who regularly cross borders providing services as the way of making their living will, where they can, establish as a legal person under the legislation of a Member State or find other solutions based on national law. .

8 Loss of Political and Institutional Rights of EU Citizenship

As already mentioned above, the political rights of EU citizenship are lost by UK nationals immediately after the UK leaves the EU. These are the rights to vote and stand in European Parliament elections, to vote and stand in local elections and to launch and participate in a European Citizens' Initiative. These rights are explicitly exempted from the transition and there are no provisions under the Withdrawal Agreement, for example, to protect the position of a British councillor sitting on a local council in Spain. These matters are left to national law to deal with.

In this regard, Spain and the UK signed a bilateral agreement enabling Spaniards in the UK and UK nationals resident in Spain to maintain their rights to vote and stand in local elections once the UK leaves the EU.[72] The bilateral agreement also allows UK citizens residing in Spain to vote in European Parliament elections – this reflects the fact that it is for Member States to decide the electoral franchise for the European Parliament.[73] Bilateral agreements on voting rights have also been made by the UK with Luxembourg[74] and Portugal.[75] In addition, the UK agreed a Memorandum of Understanding with Ireland that affirms a range of existing reciprocal rights between the two countries, including the right for their citizens to vote in both local and general elections.[76]

Other rights of EU citizenship listed in Article 20(2)(c) and (d) TFEU (consular protection, right to petition the European Parliament and to apply to the European Ombudsman), while protected during the transition, are not covered by the Withdrawal Agreement. UK nationals resident in the EU nonetheless retain post-Brexit rights to petition the European Parliament and to apply to

72 Spain and UK guarantee citizens' voting rights after Brexit, *Financial Times*, January 21, 2019.

73 Case C-145/04 Spain v United Kingdom, ECLI: EU:C:2006:543 at paras. 77–78.

74 Available at https://www.gov.uk/government/news/treaty-on-voting-rights-signed-with-luxembourg.

75 Available at https://www.gov.uk/government/news/voting-rights-treaty-secured-with-portugal.

76 Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges, 8 May 2019, para. 13.

the Ombudsman based on Articles 227 and 228 TFEU, which extend the remit of these procedures to "any natural or legal person residing or having its registered office in a Member State". The right to petition the European Parliament could indeed be an important means for Britons in the EU to obtain assistance with enforcing their rights under the Withdrawal Agreement. Unlike in the UK, where an independent authority will (from the end of the transition period) monitor the implementation and application of the rights of EU citizens under the Agreement,[77] there is no specific mechanism foreseen by the Withdrawal Agreement to assist UK nationals enforce their rights in the EU.[78]

9 Equal Treatment

The right to be protected from discrimination on grounds of nationality will be an important right all-round post-Brexit. For persons within the scope of the Withdrawal Agreement the right to equal treatment regardless of Member State nationality is conserved in a number of ways. There is a general provision of non-discrimination in Article 12 of the Agreement, which mirrors the wording of Article 18 TFEU. Its scope is limited to the citizens' rights part of the Agreement. Since, however, the coverage of citizens' rights is limited, so the scope of this equal treatment right seems also limited.

There is also in Chapter 1 of Title II a guarantee of equal treatment which mirrors Article 24 of the Free Movement Directive. This gives persons with permanent residence status full equal treatment rights in matters such as social assistance or student study grants. However, persons with lesser residence rights are subject to the standard exceptions of the Directive (no entitlement to social assistance, maintenance aid etc). For workers, the equal treatment provisions of Regulation 492/2011 on the free movement of workers are reproduced.[79] As regards establishment, the Chapter on professional qualifications sets out that the recognition of professional qualifications (based on specified EU instruments and where this has taken place or been initiated before the end of the transition period) shall maintain its effects, including the right to

77 Article 159 of the Agreement.

78 Rights protected by the Withdrawal Agreement should be enforceable in national courts in the Member States, with the possibility to make preliminary reference to the Court of Justice. A specialised committee on citizens' rights is also foreseen in Article 165(1)(a) of the Agreement, but its role as regards implementation and application of UK nationals' rights in the Member States is not specified.

79 Article 24 of the Agreement.

pursue a profession under the same conditions as nationals of the state concerned.[80]

10 Social Security Coordination

Space does not permit a detailed consideration of the social security coordination provisions in Title III of Part Two of the Withdrawal Agreement. The personal scope of this Title is much wider than the residence title. It covers persons who have been subject to the social security legislation of either the UK or the EU. This scope is aimed at protecting past contributions, as well as persons still in cross-border situations.

One of the key concerns for many Britons in the EU related to continuing access to healthcare in their state of residence. The Withdrawal Agreement provides that the EU social security coordination rules will continue to apply to persons within its scope.[81] Among other things, this means that the principle of equal treatment, which includes equal conditions of access to healthcare with nationals, will still apply.[82] In addition, the S1 Portable Document system will continue, subject to the proviso that the citizens "continue without interruption" to be in a UK-EU cross-border situation.[83] In the course of 2020 the European Commission is expected to agree with the Member States a "Guidance Document" on the citizens' rights provisions in the Withdrawal Agreement. Such guidance could, among other issues, clarify how the term, "continue without interruption", should be implemented.

11 Loss of EU Citizenship and Preparations for No-Deal by the EU

For a significant time leading up to Brexit, there was uncertainty as to whether the UK would leave the EU on the basis of the Withdrawal Agreement or not. The

80 Articles 27–29 of the Agreement.

81 Article 30 of the Agreement.

82 Article 4 of Regulation (EC) No 883/2004 concerning the coordination of social security systems, *OJ L 200*, 7.6.2004, p. 1.; see also Article 24(1)€ of the Agreement which gives the same social advantages to workers and their families.

83 Article 30(2) of the Withdrawal Agreement. The S1 allows persons, (for example) insured in the UK (pensioners, frontier workers, posted workers and some other categories of persons who work in more than one Member State) to register with the healthcare authority in their host state and receive treatment as if they were insured in that country – see Articles 17, 24, 25 and 26 of Regulation (EC) No 883/2004.

European Commission therefore embarked on a process of No-Deal planning, the so-called "Brexit Preparedness" work. Just as the withdrawal negotiations underlined the capacity of the EU "to disaggregate complex problems and forge shared understandings across the member states",[84] so too did this contingency planning.

The protection of citizens' rights was a plank of the Brexit Preparedness process and the citizens' lobby groups, the3million and British in Europe, were consulted additionally as part of this. However, despite repeated requests by the3million and British in Europe for special protection of citizens' rights in the case of No-Deal (for example, by concluding a limited agreement based on Part Two of the Withdrawal Agreement or part thereof),[85] the EU maintained there could be no "mini-deal" on citizens' rights. A regulation to put in place limited contingency arrangements for the EU social security coordination rules was however adopted as part of the Brexit Preparedness process.[86]

Had the UK left the EU without an agreement, then UK nationals would have transformed overnight from EU citizens who enjoyed entry rights, residence rights, market freedoms and free movement rights into third-country immigrants needing residence and work permits and, in the worst-case scenario, entry visas. The "Brexit Preparedness" planning by the Commission therefore encouraged Member States to formulate in advance of the first Brexit deadline of 29 March 2019 their contingency plans for dealing with this loss of EU citizenship by UK nationals.

The EU, as part of its common immigration policy, has of course legal migration rules for third-country nationals entering and living in the EU. These EU norms sit however alongside national rules. If the EU has not acted, then it is national law that applies. Moreover, there is variable geometry in this area: Denmark does not participate in the EU's common immigration policy; and Ireland only sometimes (if it chooses to opt in). Without a Withdrawal Agreement or other specific EU rules on how to deal with this unique situation of collective loss of EU citizenship on their territory, it would therefore be national competence that would apply. A key feature of the Brexit Preparedness planning was therefore to coordinate the 27 different legal regimes to which UK nationals would be subject.

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84 Laffan, B. (2019), cit., p. 16.

85 British in Europe and the3million (2018). *The last mile on citizens'* rights, available at https://britishineurope.org/wp-content/uploads/2018/09/Joint-position-paper-the3million-and-British-in-Europe.pdf.

86 Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union, *OJ L 85I*, 27.3.2019, p. 35.

12 Application of the Long-Term Residence Directive

One aspect of this planning was the provision of guidance to the Member States on the application of the Long-Term Residence Directive ("the LTR Directive"), a core instrument within the EU common immigration policy aimed at giving security of residence and a set of uniform rights to third-country nationals residing in EU Member States.[87] In early discussions on No-Deal and residence, it had been widely assumed that Britons with EU permanent residence rights (for which 5 years of legal residence are required)[88] could simply fall back on the rights given (again after 5 years of legal residence) by the LTR Directive. However, when examined in detail, the LTR Directive allows Member States to define legal residence under their national law (albeit within the limits of EU law).[89] Thus, residence in accordance with the Free Movement Directive could not automatically equate with legal residence for third-country nationals under national law. In addition, the LTR directive allows Member States to attach additional conditions to long term resident status, for example, compliance with integration conditions.[90]

The European Commission acknowledged the difficulties on this question in its Communication of 13 November 2018 on Contingency Planning and urged Member States to take "a generous approach to the rights of UK citizens who are already resident in their territory" and to treat periods of legal residence of UK citizens in an EU Member State before the withdrawal of the UK as periods of legal residence in a Member State in accordance with the LTR Directive.[91]

13 Publication of Member State No-Deal Planning for Loss of EU Citizenship

Beyond this guidance, the Commission coordinated meetings with the Member States and encouraged them to adopt No-deal legislation and publish information on UK citizens' rights. The Commission itself published an evolving

87 *OJ L 16*, 23.1.2004, p. 44.

88 Article 16 of the Free Movement Directive.

89 European Commission (2011). *Report from the Commission to the European Parliament and to the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*. COM (2011) 585 final, p. 2.

90 Article 5(2) of the long-term residents' Directive.

91 European Commission (2018). *Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan*. COM (2018) 880 final.

overview of Member States' national No-Deal preparations on citizens' rights on its Brexit-preparedness website.[92] The website underlined that national authorities of the Member States remained the first point of contact for UK nationals as regards No-Deal and links to relevant national websites were also provided. Nonetheless, the information presented by most Member States was clearly based on a standard text, although a variation of approaches among them was still noticeable.

The last published overview of these contingency arrangements (17 October 2019) showed that most Member States proposed a "transitional" or "grace period" in case of No-Deal, varying between 6 months to 3 years, to allow UK nationals time to adjust to their new status and apply for a residence status under national law. During this period, some countries proposed a specific temporary permit. Most countries proposed that UK nationals could keep during this period "most of their rights as EU citizens" in their host country, including the right to reside, work, look for a job or study. Family members, provided the relationship predated the withdrawal of the UK from the EU, also retained their rights.

After the end of the national transitional or grace period, the 27 Member States' approaches varied however:

(1) Some Member States took the approach that UK nationals were no different from any other third-country nationals and were required to apply for a residence permit under the general immigration regime for third-country nationals (eg. Czech Republic, France, Germany);
(2) Others were less clear and either said nothing or referred to the need to apply for a new residence permit, according to the law that would be applicable at that time (eg. Belgium, Spain; Sweden);
(3) Some referred to UK nationals keeping their residence rights and "most of their rights" indefinitely (eg. Italy, Malta);
(4) Some Member States referred to laws that made specific provision for UK citizens to keep their residence rights on more favourable terms (eg. Lithuania), or to UK nationals and their family members preserving their status (Estonia);
(5) Most Member States set out that UK nationals with documents certifying permanent residence would qualify for long-term resident status without any further conditions (but not Ireland or Denmark);
(6) Others referred to conditions for granting permanent residence under national law (Slovakia; Finland).

92 Available at https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en.

Many countries made clear that the arrangements offered for UK nationals were contingent on reciprocal treatment granted in a No-Deal situation to their own citizens living in the UK.[93]

In sum, the approach taken to the loss of EU citizenship pursuant to No-deal covered a wide spectrum, with some Member States apparently prepared to recognise for UK nationals living in the EU a special status as former EU citizens and others not.

14 Reflections on the Collective Loss of EU Citizenship

14.1 *What Rights to Protect?*

A key question not addressed so far is what rights and interests should be protected when a Member State withdraws from the Union? What guidance is there in either EU law or in international law on protection of citizens' rights in this situation?

The Treaty itself – beyond the bare bones of Article 50 TEU – does not address what should happen to citizens' rights when a Member State withdraws.[94] It is therefore a matter of interpretation how EU law should apply in such circumstances. Kostakopoulou, writing following the outcome of the historic UK vote to leave the EU, draws from the essence of EU citizenship a duty on the Union to protect its citizens in the situation where a Member State decides to withdraw. She proposes the idea of an "EU protected citizen status", which could apply both to EU citizens in the UK and to UK nationals in the EU. This would allow all EU citizens affected by Brexit to continue to be subject to the same conditions relating to their residence, employment and family reunification as previously.[95] Garner underscores the need for reciprocal protection of rights and suggests an "ex-EU citizenship" regime for UK nationals living in the EU: "a Member State could operate as a legal guardian of an ex-EU citizen", complying with the Member State's obligation under Article 47 of the Charter

93 British in Europe (2019). Written evidence submitted by British in Europe to the House of Commons Committee for Exiting the European Union, NEG0038.

94 Eeckhout and Frantziou point out that, at the Constitutional Convention that led to the Lisbon Treaty and the drafting of Article 50 TEU, some delegates proposed amendments that safeguarded existing rights, but these were not adopted: Eeckhout, P. and Frantziou, E.(2017). Brexit and Article 50: A Constitutionalist Reading. *Common Market Law Review* 54 (3), pp. 695–733, 718. I am grateful to Nathan Cambien for this point.

95 Kostakopoulou, D. (2018). *Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens. *Journal of Common Market Studies* 56 (4), pp. 854–869, 863–866.

of Fundamental Rights to provide individuals with effective judicial protection. He also emphasises the possible role of the principle of "protection of legitimate expectations".[96] Cambien refers to the "effet utile" of the EU right: by suddenly taking the right away, it could be argued that this compromises the *effet utile* of the right which happened in *tempore non suspecto*.[97]

There has also been debate on the impact of international law on the withdrawal of EU citizenship. Authors of a study for the European Parliament's Constitutional Affairs Committee took the view that residence rights and rights linked to the exercise of single market freedoms could not be considered "acquired rights", that is, rights protected against changes in law, under international law.[98] The authors underlined at the same time the application of the European Convention on Human Rights: Article 8 concerning the right to respect for private and family life and one's home; and Article 1 of Protocol 1 concerning the right to property. They recommended therefore the conclusion of an agreement founded on reciprocity and non-discrimination that achieved for affected citizens "as close as possible enjoyment … of the rights that European citizens have possessed until now", including "freedom of movement and residence, the so-called four freedoms, and equal access to public services and social protection, as well as the right to vote in municipal elections in the country of permanent residence".[99] A study undertaken for Jill Evans MEP took a different view on the application of international law but made similar recommendations. The authors argued that the objectives of legal certainty and non-retroactivity of Article 70(1)(b) of the Vienna Convention on the Law of Treaties required that individual rights created in the execution of a treaty continue past its end.[100] They concluded therefore that the rights of EU citizenship, where they were being exercised, could not be taken away and proposed that the Withdrawal Agreement should protect a form of "Continuity

96 Garner, Oliver. (2016). After Brexit: Protecting European citizens and citizenship from fragmentation. *EUI Working Papers Law* 2016/22, pp. 16–18; Note the principle of protection of legitimate expectations is a general principle of EU law: see for example, Court of Justice, judgment of 28 April 1988, case 120/86, *Mulder*.

97 See Cambien, N. (2020). Residence Rights for EU Citizens and their Family Members: Navigating the New Normal, in this volume, section IV.2.

98 Fernandez Tomas A., and Lopez Garrido D. (2017). Study for the AFCO Committee: *The Impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27*.

99 Ibid, p. 60.

100 Roeben, V., Snell, J., Minnerop P., Telles, P., and Bush K. (2017). *The Feasibility of Associate EU Citizenship for UK citizens post-Brexit: A study for Jill Evans MEP*. DOI: 10.2139/ssrn.3178055, pp. 18–21.

Union Citizenship", or indeed go further and create a new status of "Associate Union citizenship".

The idea of associate citizenship was also put forward by Charles Goerens MEP, who proposed, with a view to the future UK-EU relationship, associate EU citizenship for nationals of former Member States, "who feel and wish to be part of the European Project".[101] The idea provoked however a counter-reaction. Van der Mei suggested that such a new status, existing in parallel to full EU citizenship, could undermine EU citizenship.[102] Van den Brink and Kochenov also objected to offering a form of EU citizenship to people who no longer had nationality of a Member State. The starting position for the negotiations, they argued, must be to accept that EU citizenship is terminated for nationals of a withdrawing state.[103]

In this author's view, the debate about associate or continuing EU citizenship is a distraction. It's not the label that matters. Rather, the core issue is protecting people whose rights are withdrawn while they are exercising them or who are discriminated against on grounds of their nationality as a result of the withdrawal process. In this regard, it seems the key rights – both for Britons in the EU and for EU citizens in the UK – necessitating protection are: residence; residence of family members; family reunification; legitimate expectations; property; the right to earn a living; equality and non-discrimination on grounds of nationality; and legal redress in respect of all these rights.

15 The Process of Loss of EU Citizenship

The process of loss of EU citizenship also merits discussion. For those citizens affected, Brexit has been and remains a drawn-out process of uncertainty: will rights be withdrawn; if they are, what new rights (if any) will be given in their place; where is information available; is an application for a new residence status necessary; what procedure should be followed; what documents are needed to prove legal entitlement to continue residing in their home: will the

101 European Citizens' Action Service (ECAS). Interview – *Charles Goerens: We should never say no to Associate Citizenship.* December 21, 2017, available at https://ecas.org/charles-goerens-brexit-interview.

102 Van der Mei, A. (2018). Brexit and Citizenship II: Associate EU Citizenship, *Maastricht University Law Blog*, available at https://www.maastrichtuniversity.nl/blog/2018/10/brexit-and-citizenship-ii-associate-eu-citizenship.

103 Van den Brink, M., and Kochenov, D. (2019). Against Associate EU Citizenship. *Journal of Common Market Studies* 57 (6), pp. 1366–1382.

application be accepted?[104] All these questions arise for both EU citizens in the UK and Britons in the EU. In addition, the split process between withdrawal, on the one hand, and the negotiation of the new UK-EU relationship, on the other, means an extended period for citizens affected by Brexit of not knowing what its impact on their lives will be.[105]

There is also the question of who exercises the duty of care for EU citizens affected by the departure of a Member State. In the Brexit negotiations the EU was clear throughout that securing the interests of EU citizens in the UK was its priority. Clearly it never took responsibility for the interests of the UK,[106] nor for Britons in the EU. The UK government, focussing on the rights of EU-citizens in the UK, took however decisions, the reciprocal effect of which were not in the interests of Britons in the EU. The involvement of a neutral arbiter in the exit negotiations may arguably have obtained better results all round for the over 5 million citizens concerned.

What role did the European Parliament play? Via its Brexit Steering Group, it followed and gave input into the negotiations on citizens' rights. In its resolution of January 2020, the Parliament flagged a range of concerns on the implementation and monitoring of the citizens' rights part of the Agreement. The resolution called on the 27 Member StatesEU to provide legal certainty for UK nationals and included a commitment that the Parliament would monitor closely how they implement the possibility to require UK nationals living on their territory to apply for a new residence status.[107]

16 Conclusions

Brexit has underlined that EU citizenship remains a highly contingent status, reliant on nationality of a Member State. The nationals of a departing state

104 A survey of 3,044 people by Europe Street News underlined the anxiety and information gap felt by mobile EU citizens as a result of Brexit, European Street News (2019). *Brexit, the EU and You*, available at https://europestreet.news/brexit-the-eu-and-you-lack-of-information-protection-and-political-representation-revealed-in-europe-street-news-survey.

105 Examples of the effects of this uncertainty are set out in the following article: https://www.theguardian.com/politics/2019/nov/15/job-hunting-britons-in-eu-say-brexit-is-taking-its-toll.

106 Laffan, B. (2019), cit., pp. 21–22.

107 Resolution on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement adopted 15 January 2020, P9_TA-PROV(2020)0006: see points 14–16; see also the response of the European Parliament on Citizens' Rights and the Withdrawal Agreement in: European Parliament (2018). Resolution of 14 March 2018 on the framework of the future EU-UK relationship P8_TA-PROV(2018)0069.

living on the territory of the EU become once more "resident aliens" albeit, thanks to the Withdrawal Agreement, resident aliens with a special status. The hard default to third-country national status, which some Member States favoured in the context of No-deal preparations, is avoided. The Union has, to use Kostakopoulou's terminology,[108] exercised its duty to protect.

Whether the protection given by the Agreement is optimal is a different question. For both EU citizens in the UK and UK nationals in the EU, obtaining the protection of the Agreement will be difficult due to the highly conditional nature of the right of legal residence in EU law and the generally restrictive approach national adminstrations take to recognising it. Moreover, the option given to both the UK and the EU Member States to require an application for protected status compounds the difficulties in obtaining the protection of the Agreement. Excellent information campaigns combined with dedicated advice and problem-solving services for affected citizens will all be vital for ensuring correct application and maximising the protection of the Agreement.

The Agreement does not protect all rights. The refusal by the EU in particular to protect the right of Britons living in the EU to free movement to other Member States and associated market citizenship rights in the Withdrawal Agreement was a key strategic move. It is a bitter blow for Britons living in the EU to lose these rights. While the creation of EU citizenship was intended to move beyond market citizenship, Brexit underlines that market citizenship – the right of individuals to move within the single market to earn a living through employment, self-employment and providing cross-border services – remains indeed a fundamental aspect of EU citizenship.

Finally, process is important. The uncertainty of over three years about loss of rights and status has been harrowing for those affected. While there may be reluctance to plan for the possibility that another Member State could leave the Union, it might make sense to strengthen the "unfinished institution"[109] of EU citizenship for the future. As the planning for a Conference on the Future of Europe with involvement of citizens commences,[110] perhaps one of the topics to be addressed at this Conference should be the process of collective loss of EU citizenship?

108 Kostakopolou, D. (2018), cit.

109 Kostakopoulou, D. (2014), cit., p. 71.

110 European Commission (2020). *Shaping the Conference on the Future of Europe COM(2020) 27 final.*

CHAPTER 19

Free Movement of Persons in the EU v. in the EEA: of Effect-Related Homogeneity and a Reversed *Polydor* Principle

*Christa Tobler**

1 Introduction

When the European Economic Area (EEA) Agreement[1] was concluded in the early 1990s, it reflected, in the fields covered, the state of the law of the then Community law. This also applied in the field of the free movement of persons. Since then, both EEA and EU law in this field have developed further, though with certain marked differences. Most notably, in the Union the Treaty revision of Maastricht led to the introduction of Union citizenship on the Treaty level. Subsequently, Directive 2004/38[2] was adopted as a further development of the law on former free movement, on the one hand, and as a Union citizenship instrument, on the other hand. This double nature of the Directive and the fact that there is no concept corresponding to Union citizenship in the EEA Agreement led to certain challenges within the EEA, when faced with the demand of the EU that the Directive should be incorporated into EEA law. In fact, it was difficult to convince some of the EEA/European Free Trade Association (EFTA) States to agree to such incorporation. When eventually it was incorporated, this was done with certain reservations.

Today, it can be stated that the EEA and the EU rules are identical with respect to the market access rights of economic agents (e.g. the right of migrant workers to be employed in another contracting State without

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1 European Economic Area Agreement of 2 May 1992. For a consolidated version of the Agreement that incorporates subsequent changes, see http://www.efta.int/Legal-Text/EEA-Agreement-1327.

2 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158/77, *OJ L 158*, 30.4.2004, p. 77–123.

discrimination on grounds of nationality and without restrictions). In contrast, it is debated whether and to what extent the incorporation of Directive 2004/38 into the EEA legal system is limited for those purposes. Doubts have arisen notably in the context of recent case law of the EFTA Court (which deals with EEA law matters arising in the three EEA/EFTA States Iceland, Liechtenstein and Norway) in the context of travel and residence rights and of family reunification.

This issue forms the subject matter of the present contribution, which explores the differences in the legal regime on the free movement of persons in the EU as compared to the EEA. The contribution begins with a brief description of the legal framework of the incorporation of Directive 2004/38 into EEA law (section II.). In its main part, it then turns to the EFTA Court's case law on the possible limits of that incorporation (section III.) and, more generally, on the meaning of the Directive in the EEA context (section IV.). A final part will summarise the findings and ask what they mean in other contexts, including notably that of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU ("Brexit") (section V.).

II The Incorporation of Directive 2004/38 into EEA Law: Legal Framework

Through the EEA Agreement, the participating EFTA States[3] associate themselves to EU law in a number of important areas, the core of which is the Union's internal market law. With respect to persons, this included from the beginning not only the (then Community) rules on the free movement of persons and services, but also the movement and residence rights for the

3 This includes all EFTA States except Switzerland. Whilst the Swiss Government wanted the country to join and participated very actively in the negotiation of the EEA Agreement, a popular vote held in 1991 yielded a negative result with respect to membership; see Nell, P.G. (2012). *Suisse-Communauté Européenne. Au coeur des négotiations sur l'Espace économique européen*. Paris: Economica. Following the vote, Switzerland continued on its previous path of concluding sectoral agreements with the Communities and the Union; for a brief introduction in the English language, see Oesch, M. (2018). *Switzerland and the European Union. General Framework. Bilateral Agreements. Autonomous Adaptation.* Zurich/St.Gallen and Baden-Baden: Dike/Nomos. For more details, e.g. Oesch M. (2015). *Europarecht. Band I Grundlagen, Institutionen, Verhältnis Schweiz-EU*, Berne: Stämpfli; Cottier T., Diebold, N., Kölliker, I., Liechti-McKee, R., Oesch, M., Paysova, T. and Wüger, D. (2014). *Die Rechtsbeziehungen der Schweiz und der Europäischen Union*. Berne: Stämpfli, and Tobler, C. and Beglinger, J. (2013). *Grundzüge des bilateralen (Wirtschafts-)Rechts. Systematische Darstellung in Text und Tafeln* (2 vols.).Zurich/St.Gallen: Dike.

economically non-active under what was then Directives 90/364,[4] 90/365[5] and 93/96.[6] In this as in other fields, Community law developed further following the signing of the EEA Agreement. For this situation, the EEA Agreement envisages a dynamic system of updating the EEA *acquis*: if new EU law falls within a field covered by the EEA Agreement, the EEA Joint Committee will decide on its incorporation into EEA law. Should this decision not be taken, the consequence may be that the relevant part of the EEA Agreement is suspended (Article 102 EEA).[7]

This mechanism also came into play with regard to Directive 2004/38,[8] which was incorporated into Annex V to the EEA Agreement, concerning the free movement for workers, and into Annex VIII, concerning freedom of establishment, by Decision of the EEA Joint Committee 158/2007 ("Joint Committee Decision" or "JCD").[9] For these purposes, the Directive's geographic scope had to be broadened (namely to include the EEA/EFTA States) and its wording had to be adapted (e.g. to be read as referring, for the purposes of EEA law, not to "Union citizens" but rather to "national(s) of [EU] Member States and EFTA States", Article 1(1)(c) JCD). In addition, there was the problem that the concept of EU citizenship does not apply in the EEA/EFTA States. For that reason, the EEA/EFTA States were not enthusiastic about incorporation. However, the EU refused an approach whereby the provisions of the Directive that are linked to EU citizenship would have been excluded from incorporation into EEA law. Instead, the parties agreed to a compromise under which the full text of the Directive was incorporated, though with certain limits regarding their interpretation and application.

4 Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L* 180, 13.7.1990, p. 26–27 (no longer in force).

5 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, *OJ L 180*, 13.7.1990, p. 28–29 (no longer in force).

6 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, *OJ L 317*, 18.12.1993, p. 59–60 (no longer in force).

7 For the incorporation procedure, see e.g. Baur G. (2015). *Decision-Making Procedure and Implementing of New Law*, as well as *Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures*. Both in: Baudenbacher C., ed., *The Handbook of EEA Law*. Cham: Springer, pp. 45–67 and pp. 69–83, respectively.

8 See already Tobler, C. (2013). Bikers Are(n't) Welcome. (Jan Anfinn Wahl ./. The Icelandic State, EFTA Court, judgment of 22 July 2013, E-15/12). *European Law Reporter*, pp. 246–255, 250 *et seq*.

9 EEA Joint Committee, Decision No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.

First, the JDC circumscribes the fields where the incorporation takes effect. According to Articles 1 and 2 JCD, the Directive "shall apply, as appropriate, in the fields covered by this Annex", i.e. the free movement for workers under Annex V and that of freedom of establishment under Annex VIII. However, it should be noted that these Annexes concern not only the legal position of migrant workers and the self-employed, respectively, with the nationality of an EEA State, but also that of their family members as defined in the Directive. Further, Annex VIII also touches upon services and includes rules on the movement and residence of non-economic agents. Overall, this means that not only in the framework of EU law but also in that of EEA law, Directive 2004/38 applies to the movement of natural persons in a rather broad sense (workers, the self-employed, service providers and recipients, and non-economically active persons under certain conditions), though according to the JCD only "as appropriate". As will be seen infra (section IV.), the EFTA Court appears to have given a surprising meaning to this latter term.

Second, the Contracting Parties noted in the preamble to the JCD that the concept of Union citizenship is not included in, and immigration policy is not part of, the EEA Agreement. This is elaborated on in a Joint Declaration. With reference to EU citizenship, it states:

> The concept of Union Citizenship as introduced by the Treaty of Maastricht [...] has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

Burke et al.[10] note that, as a result of its incorporation into EEA law, the Directive 2004/38 now applies in two divergent legal contexts (namely EU law and EEA law). For practical purposes, the challenge lies in the fact that when the EEA Joint Committee limited the application of the Directive to the (broad) scope of the two annexes as just described and at the same time stated that EU citizenship and immigration policy are not part of EEA law, it consciously left

10 Burke, C., Ísberg Hannesson, Ó. and Bangsund, K. (2017). Chapter 12: Schrödinger's Cake? Territorial Truths for Post-Brexit Britain. In: M. Kuijer and W. Werner, eds., *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law*, The Hague: T.M.C. Asser Press, pp. 287–312, p. 309.

it to the courts to decide through interpretation what this means in concrete terms. In other words, the letter of EEA law is not clear on this matter.

The following part deals with case law on Directive 2004/38 in the EEA context and on the meaning of the reservation in the JCD with respect to Union citizenship, in the latter context more specifically on the meaning of the second sentence in the above quote from the Joint Declaration ("The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship."). At the time of writing, there is no case law yet of the Court of Justice of the European Union (CJEU) on either the incorporation of Directive 2004/38 into the EEA legal acquis or on the meaning of the Directive in this specific context.[11] In contrast, there are a number of EFTA Court judgments on Directive 2004/38 in the EEA context. Of these, only one addresses the substantive meaning of the reservation with respect to Union citizenship, namely *Wahl*,[12] and then only in an *obiter dictum*.

III The Meaning of the Reservation according to the EFTA Court's *Obiter Dictum* in *Wahl*

The *Wahl* case concerned the limitations to the right of entry and residence of persons with the nationality of an EEA State under Article 27 of Directive 2004/38. The EFTA Court held that the above-mentioned reservation cannot be relevant in this context. In the present writer's opinion, that is correct, as the case concerned a provision on limitations to free movement that simply codified CJEU case law on the previous derogation rules, both of which had already been part of EEA law before the incorporation of Directive 2004/38 and neither of which relates specifically to Union citizenship. In fact, *Wahl* is

11 In the EU law context, this could notably be an action for annulment under Art. 263 TFEU of the decision of the EU to agree to the incorporation of the JCD (compare, in a different context, CJEU, judgment of 27 February 2014, Case C-656/11 *UK v Council*) or a preliminary ruling under Art. 267 TFEU on an EEA matter arising in the territory of an EU Member State. In the latter context, an example of a matter falling within the jurisdiction of the CJEU would be an Icelandic national who faces problems when wishing to exercise EEA free movement rights in Spain (or in any other EU Member State). Conversely, where an EEA matter arises on the territory of an EEA/EFTA State, it falls within the jurisdiction of the national courts of that state and of the EFTA Court.

12 EFTA Court, judgment of 9 December 2013, Case E-15/12 *Jan Anfinn Wahl v The Icelandic State,* [2013] EFTA Court Reports 534.

simply a successor to the European Economic Community (EEC) free movement for workers case of *Van Duyn*.[13]

Even so, the EFTA Court addressed the incorporation of the Directive into EEA law and the meaning of the reservation as follows (*Wahl*, para. 74 et seq.):

> The Directive was incorporated into the EEA Agreement by the adoption of Joint Committee Decision No 158/2007 ("the Decision"). According to the Decision, the concept of 'Union Citizenship' and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties ("the Declaration"). However, these exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly. In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals [...]. To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA. The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence. [...].

In the present writer's analysis of the *Wahl* judgment, the EFTA Court's statements with regard to Article 24 in the EEA context might be the point where the Polydor principle enters EEA law.[14] According to this principle, provisions of agreements concluded by the EU with non-Member States are not automatically to be interpreted in the same manner, even if they are very similar or even identical; rather, relevant differences in the context may lead to a different interpretation. Weiss & Kaupa[15] observe more generally that free movement rights under EEA law may have to be interpreted differently from EU law if the legal or factual situation differs. In the present context, this might mean that certain provisions of Directive 2004/38, including in particular Article 24, though

13 CJEU, judgment of 4 December 1974, Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133. See on this point Tobler, C. (2013). Bikers Are(n't) Welcome, cit., 249 *et seq*.

14 Tobler, C. (2013). Bikers Are(n't) Welcome, cit., p. 252.

15 Weiss, F. and Kaupa, C. (2014). *European Union Internal Market Law*. Cambridge: Cambridge University Press, p. 24.

formally part of both EU law and EEA law, might not have the same relevance or meaning in the two legal orders. Indeed, it could even mean that the incorporation of Directive 2004/38 into EEA law implies certain substantive carve-outs, an approach that could be useful also in other contexts of the EU's external relations, including notably the EU-Swiss Agreement on the free movement of persons.[16] This has, however, not been confirmed through case law so far.

Other commentators on the EFTA Court's *Wahl* decision were more critical. Fredriksen & Franklin[17] thought that the EFTA Court's reference to "in particular, Art. 24 of the Directive", to the exclusion of other aspects, meant that the wind was already seemingly snatched out of the Joint Declaration's sails. In this context, it is interesting to note the Norwegian Government's argument before the EFTA Court that Directive 2004/38 has a more limited scope under EEA law than under EU law, due to the fact that Union citizenship is not part of the former. However, the following parts of this contribution will show that that is not the gist of subsequent case law of the EFTA Court. Whilst the expectation that identical provisions might not have the same meaning under EU and EEA law has been confirmed, this is in a rather different manner than expected by the present writer in her annotation of the *Wahl* judgment. Indeed, the result of more recent EFTA Court case law appears to be, not that of *limiting* the meaning of Directive 2004/38 under EEA law but, on the contrary, of *broadening* it beyond that applicable under EU law, based on a rather particular understanding of homogeneity.

IV Other EFTA Court Case Law on Directive 2004/38 in the EEA Context

None of these other decisions applies the reservation, and none elaborates on its meaning. On the contrary: several commentators are of the opinion that, in

16 Tobler, C. (2013). Bikers Are(n't) Welcome, cit., p. 253. More specifically, this would mean that certain matters, in the context of EU law, are clearly linked to Union citizenship, though formally part of the Directive also in the EEA context, would in fact not be part of EEA law, e.g. the right to equal treatment of the economically non-active with respect to social assistance (see also infra, footnote 25). Similarly, Fredriksen and Franklin thought that where the CJEU bases its decisions on these Union citizenship provisions or gives a "citizenship reading" of worker's rights under EU law, the same direct methods will not be possible under EEA law. As an example, they mention job-seekers' rights to equal treatment under Art. 45 TFEU; Fredriksen, H.H. and Franklin, C.N.K. (2015). Of pragmatism and principles: The EEA Agreement 20 years on. *Common Market Law Review* 52(3), pp. 629–684, 640.

17 Idem, p. 643.

terms of their substantive finding, certain of these decisions are, in fact, based on elements of Union citizenship, thereby going beyond the limits of EEA law. It is submitted that at least one of these decisions is unproblematic, whilst two further decisions indeed raise a number of questions.[18]

IV.1 *Unproblematic in the Present Writer's Opinion:* Clauder

Clauder[19] was the first EFTA Court decision on Directive 2004/38 in the EEA context, handed down shortly before *Wahl*, without elaborating on the reservation in the Joint Declaration with respect to Union citizenship. The case concerns the right of permanent residence of family members of EEA nationals under Article 16 of the Directive. Mr Clauder, a German national living as a pensioner in Liechtenstein, drew old age pensions from Germany and Liechtenstein and supplementary social welfare benefits in Liechtenstein. Mr Clauder's wife, a German national, lived in Germany at the time of their marriage. The Liechtenstein authorities based their refusal of family reunification on the argument that Mr Clauder could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. The case led to a request for an advisory opinion to the EFTA Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement).[20]

It should be noted that even though Article 16 of the Directive mentions the right to permanent residence for family members in para. 2 (a fact that is sometimes overlooked in comments on the *Clauder* decision), this relates specifically and exclusively to "family members who are not nationals of a Member State". These are given a right to permanent residence if they have legally resided with the Union citizen in the host Member State for a continuous period of five years. In contrast, no mention is made of family members whose nationality is of a Member State, as was the case with Ms Clauder. It is therefore not clear from the wording of the Directive whether such persons, too, must fulfill the residence condition (which Ms Clauder did not), possibly

18 One of the more recent decisions of the EFTA Court is not discussed below because, although it refers to Directive 2004/38, the facts of the case appear not to be covered by that Directive; EFTA Court, judgment of 13 November 2019, Case E-2/19 *D and E*, https://eftacourt.int/download/2-19-judgment/?wpdmdl=6340.

19 EFTA Court, judgment of 8 April 2013, Case E-4/11 *Arnulf Clauder,* [2011] EFTA Court Reports, 216.

20 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ 1994 L 344/1, available at www.efta.int.

combined with the condition of sufficient means and comprehensive health insurance.

According to the EFTA Court, there are no such conditions for EU nationals and there is a right to immediate permanent residence, even where the family member will be claiming social welfare benefits. As Franklin[21] notes, the EFTA Court made no direct reference to CJEU citizenship case law. The respective reservation is not mentioned in the judgment, and the JCD appears only in the part where the EFTA Court describes the EEA legal context (*Clauder*, para. 5). According to Wennerås,[22] the Court "dodged the issue", relying instead on elements such as the right to protection of family life and the strengthening of free movement rights (*Clauder*, para. 33 et seq.).

Opinions with respect to the acceptability of the EFTA Court's approach differ. According to Fløistad,[23] the EFTA Court in *Clauder* took an innovative step towards free movement rights for economically inactive citizens in the EEA Agreement, in fact comparable to the CJEU citizenship case law in the EU legal order. Similarly, Jay[24] writes about an active, pro-integrationist stance of the EFTA Court and suggests that in *Clauder* the Court has essentially assimilated nationality of an EEA/EFTA State with EU citizenship for the purposes of free movement and residence. In Jay's view, no other conclusion is tenable if the homogeneity of the internal market is to be maintained in a manner which secures fair and effective legal rights, though this can be seen to come at the cost of legal certainty. Still in the same vein, Einarsson[25] considers the Court's (implicit) view that the EEA adaptations (i.e. with respect to the scope and the interpretation of the law) have no impact on the interpretation of the Directive well founded, as otherwise there would be very major deviations from the very wording of these adaptations.

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21 Franklin, C.N.K. (2017). Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law. *Cambridge Yearbook of European Legal Studies* 19, pp. 165–186, p. 177.

22 Wennerås, P. (2018). Article 6 Homogeneity. In: F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, and C. Vedder, eds., *Agreement on the European Economic Area: EEA Agreement. A commentary*. C.H. Beck, Munich, pp. 209–248, para. 15.

23 Fløistad, F. (2018). Article 28 Free movement of workers. In: F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit., pp. 369–385, para.15.

24 Jay, M.A. (2012). Homogeneity, the free movement of persons and integration without membership: mission impossible?. *Croatian Yearbook of European Law and Policy* 8, pp. 77–116, 87 *et seq*.

25 Einarsson, Ó.J. (2018). Article 31 Freedom of establishment, in Wennerås, P. (2018). Article 6 Homogeneity. In: F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit., pp. 400–420, para. 38.

In contrast, the authors writing for the law firm Simonsen Vogt Wiig AS[26] opine that, according to the wording of the Directive, family members who do not fulfil the requirements for permanent residence pursuant to Article 16, para. 2, of the directive may only be granted a right of residence pursuant to Article 7, para. 1, letter c, in conjunction with Article 7, para. 1, letter b, of the Directive. In effect, this means that according to this view Article 16, para. 2, is relevant also for family members with the nationality of an EU Member State.

In the present writer's view, the legal situation in *Clauder* is special in that the EFTA Court was faced with the gap in Article 16 of Directive 2004/38 with respect to family members with an EU nationality. It was, moreover, a gap that had not yet been filled by the CJEU in its case law. There was, therefore, no previous CJEU case law which the EFTA Court could or should have taken in account. Rather, the situation was one of "first go" for the EFTA Court, which gave it the chance to shape the interpretation of EEA law, at least for the time being (i.e. awaiting what the CJEU would make of it once it would have the issue before it).

Did the EFTA Court fill the gap by using Union citizenship elements derived from CJEU case law on Union citizenship dating from after 7 December 2007, contrary to the reservation in the Joint Declaration? It is submitted that is not the case: Where the EFTA Court, in the relevant parts of the judgment, relies on CJEU case law, it does so with respect to the basic right to family unification. Did the Court otherwise rely on Union citizenship, outside the limits of the reservation? It is true that under EU law, entitlement to social assistance for the economically non-active as such is historically linked to Union citizenship (i.e. it has developed through CJEU Union citizenship case law).[27] Insofar, one may argue that the fact that Directive 2004/38 does not maintain these conditions, for the economically non-active, in the context of the newly created status of permanent residence is a consequence of Union citizenship, rather than a "mere" further development of the free movement aspects of previous law. However, that cannot be relevant under the Union citizenship reservation, which only relates to the evaluation of the EEA relevance of *future*

26 Advokatfirmaet Simonsen Vogt Wiig AS (2016). Legal study on Norway's obligations under the EU Citizenship Directive 2004/38/EC, available at https://www.udi.no/globalassets/global/forskning-fou_i/annet/norways-obligations-eu-citizenship-directive.pdf, p. 123.

27 On this issue e.g. Tobler, C. (2015). Auswirkungen einer Übernahme der Unionsbürgerrichtlinie für die Schweiz – Sozialhilfe nach bilateralem Recht als Anwendungsfall des Polydor-Prinzips. In: A. Epiney, and T. Gordzielik, eds., *Personenfreizügigkeit und Zugang zu staatlichen Leistungen / Libre circulation des personnes et accès aux prestations étatiques*. Zurich/Basel/Geneva: Schulthess, 55–82.

EU legislation as well as *future* CJEU case law based on the concept of Union Citizenship.

More generally, it should be noted that Mr Clauder's personal right to reside in Liechtenstein, in spite of the fact that he was in receipt of social welfare assistance, was not in dispute. Rather, the case exclusively concerned the right to family reunification and in this vein Ms Clauder's residence rights.

Overall, the present writer's conclusion is that *Clauder* is in no way problematic, but rather represents a sensible approach to filling the gap in Article 16 of the Directive 2004/38. After all, in a situation where the Directive clearly states certain conditions for third country family members only, it is quite legitimate to assume that the legislator did not wish the same conditions to apply to EU nationals, and it would be unreasonable to assume that EU family members would not enjoy permanent residence at all.

IV.2 *From* Clauder *to* Gunarsson *and* Jabbi*: a Very Particular Understanding of Homogeneity*

Compared to *Clauder*, the situation in the subsequent cases of *Gunnarsson*[28] and *Jabbi*[29] was different, as the EFTA Court in its judgment ruled on the meaning of the provisions of Directive 2004/38 in contexts that had already been addressed by the CJEU in its case law. Accordingly, the EFTA Court was bound by the homogeneity principle under Article 6 EEA.

According to this principle, the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of EU law shall be interpreted in conformity with the relevant rulings of the CJEU given prior to the date of signature of the EEA Agreement. However, the EFTA Court has held generally that it does not consider this limitation in terms of time – i.e. relevance only of CJEU judgments given prior to the date of signature of the EEA Agreement – useful. Rather, in the interest of the effectiveness of EEA law, the EFTA Court goes beyond this date and also takes into account subsequent case law.[30]

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28 EFTA Court, judgment of 27 June 2014, Case E-26/13 *The Icelandic State and Atli Gunnarsson,* [2014] EFTA Court Reports 254.

29 EFTA Court, judgment of 26 July 2017, Case E-28/15 *Yankuba Jabbi v The Norwegian Government,* [2016] EFTA Court Reports 573.

30 For example, EFTA Court, judgment of 5 April 2013, Case E-2/06 *EFTA Surveillance Authority v Norway.* In this case, commonly referred to as the *Norwegian Waterfalls* case, [2007] EFTA Court Reports 164, the EFTA Court stated (para. 59): "The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way."

In academic writing, it has been noted that homogeneity does not have to be slavish but can be creative.[31] As was already indicated, both *Gunnarsson* and *Jabbi* reflect a very particular type of creative homogeneity, where the EFTA Court consciously interprets EEA law differently from EU law, in order to achieve the same level of protection for EEA citizens as for EU citizens. Before these decisions were handed down, a hint of this approach could, perhaps, be found in an article by the former President of the EFTA Court, Carl Baudenbacher, entitled "The goal of homogeneous interpretation of the law in the European Economic Area. Two courts and two separate legal orders, but law that is essentially identical in substance".[32]

In the following sections, the facts and issues of the *Gunnarsson* and *Jabbi* cases are described and the EFTA Court's judgments in these cases are discussed, again, in view of the reservation with respect to Union citizenship.

IV.3 Gunnarsson *and* Jabbi*: Facts and Issues*

According to Fredriksen & Franklin,[33] the *Gunnarsson* case represented the litmus test of the EFTA Court's approach with respect to the reservation in the above-mentioned Joint Declaration (more specifically: of the second sentence of the above quote). The case involved an Icelandic couple who had lived in Denmark for a certain time. Their income, which was taxed in Iceland, consisted of various pensions and benefits, including, among others, an employment-related pension of Mr Gunnarsson. He claimed that, for the purposes of taxation in Iceland, he should be allowed to use his wife's unused personal tax credit in respect of his income for the time during which he resided in Denmark. This was denied to him because, under the law in force at the time (which was subsequently amended), the transfer of a personal tax credit was only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension. None of this applied in the case at hand. Mr Gunnarsson demanded repayment of the income tax that he considered to have paid in excess. When refused, he brought an action to the relevant District Court. Both he and the Icelandic State appealed against this court's decision, whereupon the Icelandic

31 E.g. Timmermans, C. (2006). Creative Homogeneity. In: M. Johansson, N. Wahl, and U. Bernitz, eds., *Liber amicorum in Honour of Sven Norberg: A European for all Seasons*, Brussels: Bruylant, 471–484.

32 Baudenbacher, C. (2008). The goal of homogeneous interpretation of the law in the European Economic Area. Two courts and two separate legal orders, but law that is essentially identical in substance. *The European Legal Forum* 1-2008, I-22–31.

33 Fredriksen, H.H. and Franklin, C.N.K. (2015). Of pragmatism and principles, cit., p. 643.

Supreme Court turned to the EFTA Court for an advisory opinion. The Supreme Court's questions related to the applicability of Article 28 EEA and/or Article 7 of Directive 2004/38 in circumstances as that at hand. In addition, the national court asked whether it is of any significance that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU, on the free right to movement of Union citizens.

Before the EFTA Court, Iceland, Norway and *EFTA Surveillance Authority* (ESA) argued that Article 7 of Directive 2004/38 does not impose obligations on the home State and therefore cannot be applicable in case like *Gunnarsson*. Rather, in EU law – and only there – such obligations follow from Article 21 TFEU. Alternatively, Norway argued that if Article 7 of the Directive should entail rights in relation to the home State, it follows from the JCD that only economically active persons are included. In contrast, the European Commission was of the opinion that Mr Gunnarsson could rely on Article 7 of the Directive in order to claim equal treatment with residents of Iceland in relation to the pooling of personal tax credits with his spouse, based on the argument that the rights of free movement and residence envisaged by this provision would be set at nought if the home State could obstruct persons wishing to avail themselves of them.

The *Jabbi* case concerned the question of whether "Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen" (*Jabbi,* para. 26). Mr Jabbi had married his Norwegian wife when she lived in Spain as an economically inactive person. From there they later returned to Norway. When Mr Jabbi's application for residence in that country was refused, he went to court which turned to the EFTA Court for help with the interpretation of Directive 2004/38.

Before the EFTA Court, the ESA argued that the scope of free movement rights granted to EFTA nationals should be the same as for EU nationals; further, that the lack of a citizenship concept in the EEA Agreement means that the Directive should be accorded a more important role in the EEA context and that its scope must therefore be broadened on the basis of the principle of effectiveness. The European Commission, interestingly, criticised previous CJEU case law (mentioned further below) and argued that it should not apply in the present context.

IV.4 *The EFTA Court's Decision in* Gunnarsson

In *Gunnarsson*, the Court mentions both the JCD and the accompanying Joint Declaration, acknowledging that "the incorporation of Directive 2004/

38 cannot introduce rights in to the EEA Agreement based on the concept of Union Citizenship". However, it then adds that "individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU" (*Gunnarsson*, para. 80). This has to be seen against the background of the secondary law on movement and residence that applied before the incorporation of Directive 2004/38 into EEA law. In fact, the EFTA Court found that due to temporal aspects of the *Gunnarsson* case, both the former Directive 90/365 and the subsequent Directive 2004/38 were applicable. Noting that Directive 90/365 – in contrast to Directive 2004/38 – does not explicitly mention a right of exit, the EFTA Court points out that taking up residence in another state presupposes a move from the EEA State of origin. From this, it concludes that Article 1 of Directive 90/365 on the right of residence must be understood as also prohibiting the home State from hindering the person concerned from moving to another EEA State (*Gunnarsson*, para. 77).

In the present writer's opinion, so far, the judgment is easy to follow and logical, if understood literally as relating to the right of exit by crossing the national border. What follows is perhaps more surprising. Pointing out that the substance of Article 1 of Directive 90/365 has been maintained in Article 7, para. 1, letter b, of Directive 2004/38, the Court finds that there is nothing to suggest that the latter provision must be interpreted more narrowly than the former with regard to a right to move within the EEA from the home State. On the contrary, according to recital 3 of its preamble, Directive 2004/38 aims in particular to strengthen the right of free movement and residence. Against this background, the EFTA Court concludes that "Article 1(1) of Directive 90/365 and Article 7, para. 1, letter b, of Directive 2004/38 must be interpreted such that they confer on a pensioner who receives a pension due to a former employment relationship, but who has not carried out any economic activity in another EEA State during his working life, not only a right of residence in relation to the host EEA State, but also a right to move freely from the home EEA State. The latter right prohibits the home State from hindering such a person from moving to another EEA State. A less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance. Furthermore, a spouse of such a pensioner has similar derived rights, cf. Article 1(2) of Directive 90/365 and Article 7(1)(d) of Directive 2004/38, respectively." (*Gunnarsson*, para. 82).

The Court then elaborates on the meaning of the principle of equal treatment with respect to EEA direct tax law, thereby relying on CJEU case law on EU direct tax law (*Gunnarsson*, para. 84 et seq.). With respect to justification, the Court states that less favourable treatment of a pensioner and his wife who

have exercised the right to move freely within the EEA is not compatible with Article 1(1) and (2) of Directive 90/365 and Article 7(1)(b) and (d) of Directive 2004/38, where the pension received by the pensioner constitutes all or nearly all of that person's income, unless objectively justified. However, the EFTA Court refuses to consider the arguments by Iceland based on the grounds of fiscal cohesion and the effectiveness of fiscal supervision (both arguments that often appear in tax cases), pointing out that such grounds are permitted neither under Directive 90/365 nor under Directive 2004/38.

In the analysis of Wennerås,[34] the Court swept everything aside that it had said in *Wahl* in relation to the reservation in the Joint Declaration in relation to Union citizenship, resulting in an interpretation of EEA law that, on the level of secondary law, covers a field of law falling outside the Main Part of the EEA Agreement itself. Conversely, in the present writer's analysis, the reservation played no real role in the EFTA Court's decision. It is, however, true that the Court's approach is very particular in other respects.

With respect to the reservation, the decisive question is, again, whether the EFTA Court relied on Union citizenship case law of the CJEU that dates from after 7 December 2007. That is not the case. Whilst several authors comment generally on the influence of Union citizenship on the outcome of the EFTA Court's judgment, they do not address the time issue. Thus, Burke & Hannesson[35] note that without the CJEU case law on citizenship in EU, "it is doubtful that the EFTA Court would have required this level of protection". Similarly, Arnesen et al.[36] argue that in *Gunnarsson* (as well as in the subsequent case of *Jabbi*) the EFTA Court opted for an interpretation of provisions of Directive 2004/38 at odds with CJEU case law in order to "remedy" the lack of EEA Treaty provisions mirroring Articles 20 et seq. TFEU. The present writer joins these commentators in arguing that even though formally not in contradiction with the Joint Declaration, the EFTA Court's approach is problematic in a context where the Court uses this approach in order to interpret EEA secondary law differently from the relevant secondary EU law, thereby manifestly going beyond both the wording of this law and the relevant CJEU case law.

34 Wennerås, P. (2018). Article 6 Homogeneity, cit., para. 15.

35 Burke, C., and Hannesson, Ó.Í. (2015). Citizenship by the backdoor? Gunnarsson. *Common Market Law Review* 52(4), pp. 1111–1133, 1127.

36 The editors (2018). Introduction. The EFTA States, the EEA and the different views on the legal integration of Europe. In: F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit., pp. 1–12, para. 17.

As was already indicated above, the present writer considers the EFTA Court's statements about an implied right of exit as such under Directive 90/365 convincing. At that time, the secondary law relating to movement and residence of economically active persons contained explicit provisions on the right of exit (of the Member State of origin) and of entry (into the host Member State; e.g. Arts. 2 and 3 of Directive 68/360).[37] In contrast, the Directives on persons who were not economically active only mentioned the right of residence. It is logical that this implies both a right of exit and a right of entry. However, the EFTA Court disregards the fact that under the Directives that were explicit on this matter, these rights concerned specifically and exclusively the right to cross the border and its technicalities ("simply on production of a valid identity card or passport"). The same is true for Directive 2004/38. In the relevant provisions, there was, and is, no link to equal treatment and freedom of restrictions in other respects.

Moreover, when the CJEU began to develop its case law on measures that could deter Union citizens from making use of their free movement rights, this was in the context of market access rights for the economically active under the Treaty (e.g. *Singh*,[38] *Bosmann*,[39] *Kranemann*).[40] Similarly, when the Court subsequently extended this approach to Union citizenship by introducing a prohibition of restriction, it again linked it to the substance of the right to free movement as stated in the Treaty (e.g. *De Cuyper*,[41] *Rüffler*).[42] It should also be noted that Article 24 of Directive 2004/38 adds to this a right to equal treatment only in respect to further matters, excluding those already covered under other Union law.[43]

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37 Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ English Special Edition Series I Chapter 1968(II), p. 485.

38 Court of Justice, judgment of 7 July 1992, Case C-370/90, *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department*.

39 Court of Justice, judgment of 15 December 1995, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*.

40 Court of Justice, judgment of 17 March 2005, Case C-109/04, *Karl Robert Kranemann v Land Nordrhein-Westfalen*.

41 Court of Justice, judgment of 18 July 2006, Case C-406/04, *Gérald De Cuyper v Office national de l'emploi*.

42 Court of Justice, judgment of 23 April 2009, Case C-544/07, *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*.

43 Art. 24(1) of the Directive states: "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence." Section 2 then provides for certain derogations.

There is, therefore, a difference between the right to cross the border as a purely technical issue, on the one hand, and the right not be discouraged from making use of a free movement right in a more general sense. Importantly, these different rights are regulated on different levels, and this is where EU law and EEA differ, since the latter in respect to persons who are not economically active includes only one of the two levels, namely that of secondary law.

The EFTA Court is aware of this gap but considers it irrelevant (*Gunnarsson*, para. 81):

> Nor can it be decisive that, in the EU pillar, the [CJEU] has based the right of an economically inactive person to move from his home State directly on the Treaty provision on Union Citizenship, now Article 21 TFEU, instead of on Article 1 of Directive 90/365 or Article 7 of Directive 2004/38. As the [CJEU] was called upon to rule on the matter only after a right to move and reside freely was expressly introduced in primary law, there was no need to interpret secondary law in that regard [...].

As is stated by some commentators, this is not convincing, not least because of the different nature of the regulation on the two levels. In their careful and extensive annotation of the *Gunnarsson* judgment, Burke & Hannesson[44] note that, up to the point of justification, the EFTA Court interprets the Directives in conformity with a component of the EEA Agreement's free movement provisions, namely the prohibition of discriminations and restrictions in the context of market access (it should be added: rather than movement and residence in a technical sense). The authors consider it rather artificial to do so in the context of a situation falling outside the material scope of these very same free movement provisions (namely because under EU law, it falls under Union citizenship provisions which do not exist under EEA law). The authors also argue – again, convincingly in the present writer's opinion – that it is difficult to reconcile the EFTA Court's use of the exhaustive list of derogations under the Directives with the CJEU and EFTA Court case law on restrictions, where the category of objective justification is open. Against that background, Burke & Hannesson criticise the EFTA Court's "complete absence of a convincing and explicit methodology", including also the fact that this Court relied on selected CJEU case law only, to the exclusion of other, more recent case law.[45] This

44 Burke, C., and Hannesson, Ó.Í. (2015). Citizenship by the backdoor? Gunnarsson, cit., p. 1125 *et seq*.

45 Similarly Franklin, C.N.K. (2017). Square Pegs and Round Holes, cit., p. 180.

latter point relates notably to *O. and B.*,[46] which had been handed down before *Gunnarsson* (and which the European Commission criticised before the EFTA Court). In *O. and B.*, the CJEU held that it follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not cover situations of a Union citizen returning to the Member State of nationality, or their family members. Instead, the Court found Article 21 TFEU to be applicable (in which context Directive 2004/38 applies by analogy).[47]

Overall, Burke & Hannesson[48] note that as a result of the EFTA Court's decision in *Gunnarsson,* there is now a significant cleavage between the EU and the EEA regime in relation to the interpretation of an identical norm. At the same time, the authors note that had the EFTA Court transposed CJEU case law, EFTA nationals would not have been afforded equal protection in their home states on the basis of EEA law when compared to their counterparts in EU Member States relying on EU law. From that perspective, the authors consider that the conclusion in *Gunnarsson* would seem justified, even though based on "a rather stretched teleology".

It is submitted that here lies the key to the EFTA Court's approach: rather than opting for a homogeneous interpretation of Article 7 of Directive 2004/38 in the sense of following the interpretation in the relevant CJEU case law, the EFTA Court consciously deviates from that interpretation in order to arrive, not at the same interpretation, but rather, *through different interpretation, at the same overall level of protection under EU law and under EEA*. The fact that this is the Court's guiding star in interpreting Directive 2004/38 becomes evident in the next judgment, in the case of *Jabbi,* through explicit statements to that effect.

IV.5 *The EFTA Court's Decision in* Jabbi

Having been criticised for disregarding the *O. and B.* decision of the CJEU in *Gunnarsson*, the EFTA Court in *Jabbi* sets out to explain why that judgment could not affect its approach. The EFTA Court begins by acknowledging that under EU law, the right to return of economically non-active citizens together with their family members is based on Article 21 TFEU, and that the CJEU had

46 Court of Justice, judgment of 12 March 2014, Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*

47 More recently, see also Court of Justice, judgment of 5 June 2018, Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*.

48 Burke, C., and Hannesson, Ó.Í. (2015). Citizenship by the backdoor? Gunnarsson, cit., p. 1132.

explicitly rejected the application of Directive 2004/38. The EFTA Court continues in the following manner (*Jabbi*, para. 66 and 68):

> Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue. However, if the Court ensures the same level of protection in the EEA, it must explain why the [CJEU's] statement in *O. and B.* regarding the Directive cannot decide the matter. [...] The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.

Having set out its path in this manner and having, further, drawn attention to the preamble of the EEA Agreement, according to which a uniform interpretation and application of the EEA Agreement shall be achieved in full deference to the independence of the courts (*Jabbi,* para. 70), the EFTA Court recalls its finding in *Gunnarsson*, namely that Article 7, para. 1, letter b, of Directive 2004/38 confers on an EEA national the right to move freely from the home EEA State and to take up residence in another EEA State, that an EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law, including in relation to family members covered by the Directive (*Jabbi,* para. 75).

Referring to *Singh* and *Eind*,[49] the EFTA Court further recalls that the right to return is protected under EU law. In the latter, in particular, the CJEU recognises that an EU migrant worker may rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he previously exercised his EU rights. According to the EFTA Court, this reasoning is equally relevant when the person returning is not a former migrant worker, but rather an economically inactive person who has exercised the right to free movement under Article 7, para. 1, letter b, of the Directive. The EFTA Court therefore concludes that, "[w]hen a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself

49 Court of Justice, judgment of 11 December 2007, Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind.*

of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State" (*Jabbi*, para. 77).

From the perspective of the reservation in the Joint Declaration, again, the question should be asked whether the EFTA Court relied on CJEU case law on Union citizenship dating from after 7 December 2007. First, it may be noted that, contrary to the suggestion of the European Commission, the EFTA Court did not refer to *McCarthy II*,[50] handed down in 2014 and recommended by the European Commission as a benchmark. However, this is perhaps understandable in view of the fact that that case concerned an entirely different provision of the Directive, namely Article 35, on measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. The Court did, however, rely on *Eind,* a decision that dates from 10 December 2007. But is it a citizenship case? As stated above, the case involved a former migrant worker who wanted to return home without being economically active there. The CJEU notes that "the right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by Community law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68", adding that "that interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States" (*Eind*, para. 10). In other words, it may be argued that the real basis of the Court's reasoning in that case remains the free movement for workers, which is a particular aspect of the economic side of Union citizenship. If so, it must be concluded that the Court respected the limits of the reservation.

Again, academic comments on *Jabbi* do not focus on the temporal aspect of (alleged) Union citizenship case law of the CJEU that the EFTA Court relies on in *Jabbi*. They rather tend to discuss the EFTA Court's particular approach to the homogeneity principle under EEA law. They note that in interpreting Article 7 of Directive 2004/38, the EFTA Court chose a different approach than the CJEU did in the case of *O. and B.,* formally distinguishing the case before it from that precedent but in fact openly departing from it. Thus, according to Wennerås,[51] the EFTA Court held that Directive 2004/38 "could be applied by analogy and gave the applicant the same rights as the [CJEU] had said could

50 Court of Justice, judgment of 18 December 2014, Case C-202/13 *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department*.

51 Wennerås, P. (2018). Article 6 Homogeneity, cit., para. 66.

only be derived from the concept of Union citizenship in Article 21 TFEU. The judgment speaks volumes about how the EFTA Court perceives the principle of homogeneity and the objectives of the EEA Agreement." Following Falch,[52] *Jabbi* suggests that the EFTA Court will do much to preserve homogeneity with EU law in its interpretation and application of EEA law, even in situations where the parallel in EU law has been interpreted and applied in light of provisions not made part of the Agreement (i.e. Union citizenship provisions). Franklin[53] notes that "[t]he EFTA Court's point seems to be that if one of the aims of the Citizenship Directive was to strengthen pre-existing rights of free movement, then one cannot rely on the introduction of Citizenship to do away with such pre-existing rights in an EEA context. Even if the concept of Citizenship cannot be used to enhance the pre-existing rights which applied under EEA law, it should certainly not be used as an argument to limit rights which were intended to survive. The creative technique opted for by the EFTA Court will therefore presumably be capable of ensuring homogeneity between EEA and EU law in most cases, notwithstanding the contrary impression one might otherwise get from (and perhaps the intention behind) the Joint Declaration."

A final example, Arnesen & Fredriksen[54] argue that "[t]he controversial aspect of *Jabbi* lies in the fact that the EFTA Court found its break with the case law of the [CJEU] to be *supported* by the homogeneity principle (as opposed to representing a deviation from it) and, as a result, advocated a more extensive reading of the Citizenship Directive in the EEA law context than in the EU law context."

In this context, again, much depends on the meaning of the homogeneity principle. If homogeneity is understood as requiring, in principle, the same interpretation of a given provision under EEA law as under EU law, then the EFTA Court clearly strayed from it. However, quite clearly, the EFTA Court in the present context does not aim at this type of homogeneity, but rather at homogeneity in view of the same result or the same level of protection. Wennerås[55] argues that, "[u]nderneath it all lays, it would seem, a conviction that

52 Falch, I. (2018). Article 4 Non-discrimination on grounds of nationality. In: F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit., pp. 196–208, para. 20.

53 Franklin, C.N.K. (2017). Square Pegs and Round Holes, cit., p. 183.

54 Arnesen, F. and Fredriksen, H.H. (2018). Preamble. In F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit., pp. 150–179, footnote 100.

55 Wennerås, P. (2018). Article 6 Homogeneity, cit., para. 66.

the Contracting Parties wants EEA law to provide the same *results* as EU law and that it is for the EFTA Court to carry out this task." Following the terminology of Baudenbacher and Fredriksen, Burke & Hannesson[56] in the context of *Gunnarsson* refer to "effect-related homogeneity", stating that this decision represents the first occasion on which the EFTA Court interpreted EEA law to entail more extensive rights than what follows from a settled interpretation of an identical norm of EU law by the CJEU.

Franklin[57] opines that, "as a result of the EFTA Court's Opinions in both *Gunnarsson* and *Jabbi*, it seems as though all rights – both autonomous and derived – contained in EEA rules pre-dating yet furthered in the Citizenship Directive will continue to enjoy the same protection under EEA law today and will continue to be interpreted in conformity with EU developments. It would seem as though almost any case in which the Court of Justice bases its findings on the Citizenship rules of the Treaty, and where aspects of the rights in question find at least some resonance in the provisions of the Directive, might therefore be capable of being followed – by way of analogy."

The present writer would submit that the EFTA Court's approach could be seen to reflect a new, reversed version of the Polydor principle: different contexts of the same provision must lead to different interpretations, where that is necessary in order to achieve the same overall result in terms of the level of peoples' protection. It remains to be seen whether this approach will be confirmed in future decisions such as *Campbell*[58] and *Norway v L*.[59]

V Findings with Respect to the Reservation and Relevance in Other Contexts, Including Notably Brexit

To return to the reservation in the Joint Declaration with respect to Union citizenship, Pirker[60] quite rightly called it "in practice hardly ever relevant".

56 Burke, C., and Hannesson, Ó.Í. (2015). Citizenship by the backdoor? Gunnarsson, cit., p. 1117 *et seq*.

57 Franklin, C.N.K. (2017). Square Pegs and Round Holes, cit., p. 183.

58 EFTA Court, Case E-4/19 *Melissa Colleen Campbell v The Norwegian Government*, pending at the the time of review of the proofs for the present text.

59 EFTA Court, Case E-2/20 *The Norwegian Government v L*, pending at the the time of review of the proofs for the present text.

60 Pirker, P. (2018). Switzerland and the EEA. In: F. Arnesen, F., H.H. Fredriksen, H.H., H.P. Graver, H.P., O. Mestad, O. and C. Vedder C., eds., *Agreement on the European Economic Area*, cit, pp. 80–100, para. 32.

According to Jay,[61] this raises the question of how accurate it is to say that citizenship rights do not form part of the EEA Agreement, given that the EFTA Court has essentially assimilated nationality of an EEA/EFTA State with EU citizenship for the purposes of free movement and residence.

However, it remains to be seen whether the reservation would have any meaning in the context of Article 24 of Directive 2004/38, as indicated by the EFTA Court in *Clauder*. It also remains to be seen what the CJEU will make of the EFTA Court's approach should it be faced with an EEA case on Directive 2004/38 in similar circumstances as those of *Clauder*, *Gunnarsson* and *Jabbi*. Will it follow the EFTA Court's interpretation, or will it go in a different direction, adhering to its own, previous EU case law, also in the overall different context of the EEA? Or will it follow a middle path, opting for an EEA-specific interpretation that is different from that by the EFTA Court? In this context, it will be remembered that the European Commission had urged the EFTA Court to depart from *O. and B.*, apparently aiming at the judicial dialogue between the two Courts and possibly hoping that an interpretation by the EFTA Court along the lines suggested by it would, subsequently, lead the CJEU to take the same approach when dealing with Directive 2004/38 in the EEA context. As Baudenbacher[62] notes, the CJEU has shown itself willing to enter into a dialogue with the EFTA Court and in some instance even to reconsider and to adjust its case law in the light of the EFTA Court's jurisprudence.

Finally, there is the question of what all of this could mean in other contexts, i.e. in the legal relations of the EU with other non-Member States.[63] In this respect, different legal regimes must be distinguished. For example, under the Ankara Agreement between the EU and Turkey,[64] Directive 2004/38 is not part of the common legal acquis. At the same time, it is established CJEU case law that "the principles enshrined in the Treaty articles relating to freedom of movement for workers must be extended, as far as possible, to Turkish nationals who enjoy rights under the EEC-Turkey Association", and that the law

61 Jay, M.A. (2012). Homogeneity, the free movement of persons and integration without membership: mission impossible?, cit., p. 88.

62 Baudenbacher, C. (2008). The goal of homogeneous interpretation of the law in the European Economic Area, cit., p. I-24 *et seq.*

63 See Tobler, C. (2016). One of Many Challenges After ‚Brexit'. The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere? *Maastricht Journal of European and Comparative Law*, 575–594.

64 Agreement of 1963 establishing an Association between the European Community and its Member States, of the one part, and the Republic of Turkey, of the other part, OJ 1973 C 113/1 (as amended).

of the Ankara Agreement must be interpreted by analogy with EU Treaty and secondary law (e.g. *Ziebell,*[65] para. 58). Against that background, the applicant in the case of *Ziebell* argued that Article 28 of Directive 2004/38, which establishes a system of protection against expulsion measures which is based on the degree of integration of the person in question in the host Member State, should apply also in the context of the agreement. The CJEU disagreed, stating that it is "the very concept of citizenship [which] justifies the recognition, for Union citizens alone, of guarantees which are considerably strengthened in respect of expulsion, such as those provided for in Article 28(3)(a) of Directive 2004/38" (*Ziebell*, para. 73).

Another example relates to the EU-Swiss agreement on the free movement of persons (FMP).[66] In terms of movement, residence and family reunification, this agreement is based on secondary EU law that predates Directive 2004/38. Whilst the EU desired the incorporation of that Directive into the acquis of the agreement, the Swiss Government resisted. So far, this has been possible because the agreement does not provide for a system of dynamic updating in line with the evolving EU law on which the agreement is based. However, the FMP is part of a package of market access agreements for which the EU has demanded the introduction of a new institutional system, including, among others, a dynamic system of updating. Whilst Switzerland agreed to enter into negotiations on a renewed institutional system for the relevant agreements as well as for any future market access agreements, the Federal Government has aimed at leaving the incorporation of Directive 2004/38 out of the scope of the negotiations. In this respect, it has not been successful so far: The draft text for an Institutional Agreement resulting from the negotiations as they stood at the end of November 2018[67] does not contain any limiting provisions with regard to Directive 2004/38. In fact, the draft text does not mention the Directive at all, with the consequence that it falls in principle under the new dynamic updating mechanism. It would then be up

65 Court of Justice, judgment of 8 December 2011, Case C-371/08, *Nural Ziebell v. Land Baden-Württemberg*.

66 Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ 2002 L 114/6 (as amended).

67 Accord facilitant les relations bilaterales entre l'Union européenne et la Confédération Suisse dans les parties du marché intérieur auxquelles la Suisse participle, original French draft text of 23 November 2018, available at https://www.eda.admin.ch/dam/dea/fr/documents/abkommen/Acccord-inst-Projet-de-texte_fr.pdf. See generally e.g. Epiney, A. (2018). Der Entwurf des Institutionellen Abkommens Schweiz – EU. *Jusletter* 17

to the contracting parties to agree within the framework of the updating procedure whether Directive 2004/38 should be incorporated into bilateral law as a whole or only in part.[68]

Much earlier, after the EFTA Court's decision in the case of *Wahl* had been handed down, the present writer suggested that, given the Court's statements about the limits of the incorporation of the Directive into the EEA Agreement, a limited incorporation of the Directive could also be useful for Switzerland, namely incorporation of the Directive minus its Union citizenship elements.[69] However, the EFTA Court's subsequent case law, as discussed in this contribution, has shown that for such a carve-out to be effective, it would be wise to frame it in much more explicit terms.

This, then, would also be the lesson in the context of Brexit in the – though at present admittedly unlikely – event that the UK and the EU, following the former's withdrawal from the Union, should agree on a future legal relationship including some form of free movement of persons based on EU rules. Again, should the UK wish for a carve-out of specific Union citizenship elements, it would have to insist on a specific and unambiguous regulation of the matter.

Alternatively, should the UK decide to (re-)join the EEA – though also unlikely at the time of writing – then it would find that free movement of persons under EEA is to a very large extent the same as under EU law, in spite of the absence of Union citizenship under EEA law. Indeed, the only clearly established difference is the presence, in the EEA Agreement only, of a permanent safeguard clause. Article 112 EEA provides:

> 1. If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.

December 2018, Ambühl, M. and Scherer, D.S. (2019). Zum Entwurf des Institutionellen Abkommens. *Jusletter* 4 February 2019, and Tobler, C. and Beglinger, J. (2020). *Tobler/Beglinger-Brevier zum Institutionellen Abkommen Schweiz-EU*. Online publication, available via www.brevier.eur-charts.eu.

68 On this issue, see in particular Epiney, A. and Affolter, S. (2019). Das Institutionelle Abkommen und die Unionsbürgerrichtlinie. *Jusletter* 11 March 2019; also Tobler and Beglinger. *Tobler/Beglinger-Brevier*, cit., as of question 44.

69 Tobler, C. (2013). Bikers Are(n't) Welcome, cit., p. 254; subsequently also Tobler, C. (2015). Auswirkungen einer Übernahme der Unionsbürgerrichtlinie für die Schweiz – Sozialhilfe nach bilateralem Recht als Anwendungsfall des Polydor-Prinzips. In: A. Epiney, A. and T. Gordzielik, T., eds., *Personenfreizügigkeit und Zugang zu staatlichen Leistungen / Libre circulation des personnes et accès aux prestations éta-tiques*, cit., pp. 55–82.

2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.
3. The safeguard measures shall apply with regard to all Contracting Parties.

This EEA law clause – which has been used only once it its history, namely by Liechtenstein before it secured a special deal under the EEA that limits its obligation to let other EEA nationals settle on its territory –[70] gives a certain leeway to the contracting States which is not available under EU law, if only in special circumstances. It is obvious that this is far from letting the States control the movement of persons based on their own, unilateral decision, as has been the aim of the recent UK governments for the time post-Brexit. In fact, to be completely "free" of EU law-related ramifications to the movement of persons, both on the substantive and on the institutional level, requires a common regime that makes no use whatsoever of substantive EU law concepts. Only in that case, will no issues of parallel interpretation arise.

70 See Tobler, C. (2015). Schutzklauseln in der Personenfreizügigkeit mit der EU. *Jusletter* 16 February 2015.

CHAPTER 20

The Free Movement of Persons in the Eurasian Economic Union – between *Civis Eurasiaticus* and *Homo Oeconomicus*

*Benedikt Pirker and Kirill Entin**

I Introduction

Few commentators would suggest that the Eurasian Economic Union (EAEU) is in any way a European Union (EU) "in the making". Nonetheless, as a regional integration project, the EAEU faces many challenges similar to those faced by the EU, and much can be learned from an informed comparison of the two organisations. The present chapter examines the state of the right to free movement of persons in the Eurasian Economic Union. No formal EAEU citizenship exists which would be comparable to EU citizenship, and an examination of the existing legal framework reveals a rather limited conception of the "*Civis Eurasiaticus*".[1] Yet the case law of the Eurasian Economic Union Court (EAEU Court) and the interpretative leeway of certain provisions of EAEU law leave space to reflect on potential future developments. Additionally, some inspiration may come from the citizenship provisions of the Russia-Belarus Union state legal framework.

II The EAEU and the Free Movement of Persons

Before we outline the context of free movement in detail it is useful to give a brief overview of the EAEU. The EAEU, active since 2015, was founded by Belarus, the

* University of Fribourg (Switzerland) and Legal Research and Analysis Department, Court of the Eurasian Economic Union (Belarus), respectively. Dr Entin contributed to this article in his personal capacity. The views expressed are his own and do not necessarily reflect the official position of the Court of the Eurasian Economic Union. The authors wish to thank Ekaterina Diyachenko, Dimitry Kochenov and Giovanni Piccirilli for their very useful comments and suggestions, as well as Sabine Cotting for editorial assistance.

1 Opinion of Advocate General Jacobs delivered on 9 December 1992, case C-168/91, *Konstantinidis v Stadt Altensteig and Landratsamt Calw*, para 46. See also Lenaerts, K. (2012). "*Civis Europaeus sum*": from the cross-border link to the status of citizen of the Union. In: Cardonnel *et al*, eds., *Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh*. Oxford: Hart Publishing.

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Russian Federation and Kazakhstan and joined by Armenia and Kyrgyzstan.[2] In terms of institutions, it is far less supranational than the EU. There is a strict hierarchy of institutions from top to bottom: the Supreme Council formed by the heads of EAEU Member States, the Intergovernmental Council formed by the heads of national governments and the Eurasian Economic Commission (EECOMM). The latter consists of a Council formed by the deputy prime ministers and the EECOMM Board composed of ten members nominated as ministers by the Member States, who, however, act independently from the latter as non-political quasi-commissioners. While the EECOMM board can indeed be considered a supranational regulatory body, its decisions are all subject to being cancelled or amended by the Council.[3] There is no parliamentary assembly at EAEU level.

The EAEU Court, in turn, has a rather limited set of judicial remedies at its disposal compared to the Court of Justice of the European Union (CJEU).[4] Even though the EAEU Court has given as much effect as possible to the relevant provisions, we cannot overlook the fact that the legal framework offers no real preliminary reference procedure for national courts and, moreover, there is no possibility for the EECOMM to bring Member States in front of the EAEU Court if they are not in compliance with EAEU law.[5] The EECOMM and Member States can, however, ask the Court for a "clarification" of any provision of EAEU law. Although the advisory opinions of the Court are not formally binding, the EECOMM and Member States tend to comply with them and this instrument has been repeatedly used by both the EECOMM and Member States as a soft substitute for a real sanction in case of a failure to fulfil obligations.

2 On EAEU Law development, see, e.g., Dragneva, R., and De Kort, J. (2007). The Legal Regime for Free Trade in the Commonwealth of Independent States. *International & Comparative Law Quarterly* 56 (2), pp. 233–266, 266; Cooper, J. (2013). The development of Eurasian economic integration. In: Dragneva and Wolczuk, eds., *Eurasian Economic Integration – Law, Policy and Politics*. Cheltenham: Edward Elgar; Kembayev, Z. (2016). Regional Integration in Eurasia: The Legal and Political Framework. *Review of Central and East European Law* 41 (2), pp. 157–194.

3 See for a concise overview Yeliseyeu, A. (2019). The Eurasian Economic Union: Expectations, Challenges and Achievements. *German Marshall Fund Policy Paper* (10), pp. 1–22, 3–4.

4 For an overview of the competence of the Court see Diyachenko, E. and Entin, K. (2017) The Court of the Eurasian Economic Union: Challenges and Perspectives. *Russian Law Journal* 5 (2), pp. 53–74. For a detailed analysis of the Statute of the Court provisions see Дьяченко, Е., Энтин, К. (2017) Компетенция Суда ЕАЭС: мифы и реальность. *Международное правосудие* 3 (23), pp. 76–95.

5 See in detail Entin, K. and Pirker, B. (2018). The early case law of the Eurasian Economic Union Court: On the road to Luxembourg? *Maastricht Journal of European and Comparative Law* 25 (3), pp. 266–287; Kembayev, Z. (2016). The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration? *Review of Central and East European Law* 41 (3–4), pp. 342–367; Исполинов, А. (2016). Статут Суда ЕАЭС как отражение опасений и сомнений государств-членов Евразийского экономического союза. *Право. Журнал Высшей школы экономики* 4, pp. 152–166.

The *Professional Athletes case*[6] is a perfect example here as it originated from a complaint to the EECOMM by the Ministry for International Economic Integration and Reform of Armenia over a perceived violation of the rights of Armenian basketball players as workers in sports clubs of the Russian Federation. In its inquiry, the EECOMM discovered that the Russian Federation had indeed put in place quantitative limits on participation in sports competitions based on players' nationality, differentiating between Russian nationals and nationals of other Member States. The EECOMM adopted a decision[7] prompting Member States to comply with their obligations under Article 97(2) EAEU Treaty by ensuring equal possibilities for athletes from other Member States to work in sports organisations. The Russian Federation, however, made no move to comply with the EECOMM's decision. It argued that the case did not fall under Article 97(2) as the measures were not protectionist (this would be prevented under the Treaty) but rather were part of a policy to promote better conditions for the training of athletes. In response, the EECOMM sought a clarification of the relevant Treaty provision from the Court. On 7 December 2018, the EAEU Court handed down a remarkable advisory opinion that not only qualified measures taken by the Russian Federation as restrictions falling under Article 97(2) EAEU Treaty, but also tackled a number of important issues, such as the horizontal effect of a fundamental freedom, the direct effect and primacy of EAEU Treaty norms, as well as the powers of the EECOMM.

Substantive law includes numerous provisions on free movement covering the free movement of goods[8] and services, the freedom of establishment as well as the activities of the self-employed.[9] This chapter focuses on the aspect, which has thus far received most attention, namely freedom of movement for workers. Our aim is to determine to what extent there is an EAEU citizen, and if the latter is a "mere" market citizen[10] or more.

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6 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.2. Cf. Pirker, B. and Entin, K. (2019). Bosman's Second Life? The Eurasian Economic Union Court and the Free Movement of Professional Athletes. *Legal Issues of Economic Integration* 46 (2), pp. 129–148, 148; Энтин К. и Дьяченко Е. (2019) Обзор практики Суда Евразийского экономического союза в 2018 году. *Международное правосудие* 1 (29), pp. 3–22.

7 Decision n° 47 of 11 May 2017.

8 Art. 28, 29 EAEU Treaty.

9 Art. 65–69 EAEU Treaty and Protocol No. 16.

10 On the notion see e.g. Everson, M. (1995). The Legacy of the Market Citizen. In: Shaw and More, eds., *New Legal Dynamics of European Union*. Oxford: Clarendon Press; Wollenschläger, F. (2007). Grundfreiheit ohne Markt: Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime. Tübingen: Mohr Siebeck; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (6), pp. 1597–1628; Van Cleynenbreugel, P. (2015). Citizens beyond the market?

III The Notion of Workers and Their Rights in EAEU Law – Come in, Let's Get to Work …

A number of factors influence the effectiveness of free movement provisions. For the present purpose, we will take into account first the goals of EAEU integration and the effects of EAEU law in the context where it most matters, namely in Member States' legal orders. We then turn to the status of workers and the rights connected to this status, as well as the effects of, and exceptions to, the relevant fundamental freedom of EAEU law. In the first part of this article we focus deliberately on the aspects of the law most favourable to free movement.

1 *The Goals of EAEU Integration and the EAEU Citizen*

At first glance, the objectives of the EAEU Treaty seem to aim mostly at establishing a single market and inter-state cooperation. Article 4 of the EAEU Treaty sets down a number of main objectives for the Union. The provision outlines as its goals the creation of a common market for goods, services, capital and labour within the Union (point 2) as well as the comprehensive modernisation, cooperation and competitiveness of national economies within the global economy (point 3). As the first point, in contrast, the document lists the creation of conditions to encourage sustainable economic development in Member States in order to improve the living standards of their populations. In theory at least, there is no obstacle to adopting a broad reading of the living standards of Member States' populations, and also fostering more opportunities in life for individuals, which could stretch to more extensive rights to free movement. Nonetheless, the improvement of living standards is framed as a goal to be achieved through the tool of sustainable *economic* development, which emphasizes the need for (sustainable) economic components of the project.

Still, even if some elements of the preamble to the EAEU Treaty also point at a strong role for Member States[11] and for economic cooperation,[12] there are also parts that focus on the position of individuals and how the EAEU can further this position. Recital 2 requires "unconditional" respect for the supremacy of constitutional rights and freedoms of "man and national", while recital 3 aims to strengthen solidarity and cooperation between the "peoples" of Member States'.

EU citizenship in the context of European economic and social integration. In: Oliveira Pais, ed., *EU Citizenship – Challenges and Opportunities*. Porto: Universidade Catolica Editora.

11 See recital 2 on the sovereign equality of states or recital 4 on Eurasian economic integration serving the national interests of the parties.

12 See recital 5 on strengthening the Member States' economies.

There is thus a justification for developing a reading of provisions of EAEU law in light of these objectives, giving weight to the protection of the legal position of individuals not only for economic purposes, but also for their own sake as "man and national", as phrased in the Treaty. The EAEU Court has been initially reticent towards this idea, using Article 4 of the EAEU Treaty only to advance the idea of the common market through teleological interpretation.[13] However, in a recent advisory opinion regarding pensions for EAEU civil servant,[14] the Court showed its willingness to assume some of the functions of a constitutional court. Referring to the provisions stated in the preamble on the "unconditional respect" for the constitutional rights and freedoms of a "man and national", the court interpreted that provision as follows: "the level of such rights and freedoms guaranteed by the Union shall not be lower than that ensured in the Member States". This is reminiscent of the early case law of the ECJ in *Stauder*[15] and *Internationale Handelsgesellschaft*[16] and could thus have a significant effect on the free movement of workers. The position of the Court here illustrates its willingness to draw inspiration from the national constitutions in the absence of an EAEU catalogue of fundamental rights, thus creating a sort of a general principle of EAEU law. The phrasing used by the Court also suggests that instead of a minimal standard or common denominator, the Court will be willing to adopt the highest standard of protection that exists among Member States.

2 *The Effects of EAEU Law*

Although the Treaty itself provides no such clear indication, through its case law the EAEU Court has established far-reaching effects of EAEU law in the domestic legal orders of Member States.[17] First, the EAEU Court has determined

13 See, e.g. in the context of competition law, Court of the Eurasian Economic Union, advisory opinion of 4 April 2017, case CE-2-1/1-17-BK, *Ministry of Justice of Belarus* (*Vertical Agreements case*), part IV para. 2(5).

14 Court of the Eurasian Economic Union, advisory opinion of 20 December 2018, case CE-2-2/7-18-BK, *Eurasian Economic Commission* (*Pensions case*), section III, para. 3.1. Summary in English available at http://courteurasian.org/page-26491.

15 Court of Justice, judgment of 12 November 1969, case 29/69, *Stauder v. Stadt Ulm*. Cf. Douglas-Scott, S. (2018). The European Union and Fundamental Rights. In: Schütze and Tridimas, eds., *Oxford Principles of European Union Law*. Oxford: Oxford University Press, 409–410.

16 Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*.

17 For an overview of the main characteristics of EAEU law see Дьяченко Е. и Энтин К. (2018) Свойства права Евразийского экономического союза сквозь призму практики Суда ЕАЭС. *Журнал российского права* 10 (262), pp. 123–133.

that EAEU law can have direct effect. It did so by simply stating in the *Vertical Agreements Case*[18] that the provisions of Article 76 containing general rules of competition "had direct effect and shall be applied directly" before setting up the criteria for direct effect in its *Opinion on Professional Athletes* stating that, where a norm conferred rights on individuals, was sufficiently precise and unconditional and did not require implementation, it possessed direct "effect and applicability".[19] It thereby overruled sceptical voices in the doctrine. These commentators had argued that the Court was not strong enough as an institution to develop the principle of direct effect and "introduce it to regular practice"[20] or that the lack of a preliminary reference procedure – and the corresponding lack of cooperation between the EAEU Court and national courts – would hamper any effective implementation of a direct effect doctrine.[21]

Second, after some early reticence[22] the EAEU Court embraced primacy in its *Advisory Opinion on Downsizing*, holding that national legislation could only apply to labour relations within the limits of EAEU law within the latter's scope, and that the point of departure was the primacy of Treaty rules.[23] However, the exact reasons for these statements on primacy were not clear. In the *Opinion on Professional Athletes*, the Court cited a question asked by the EECOMM to directly address national courts and emphasized that in cases of conflict with national law, it was their duty to be guided by the provisions of EAEU law.[24] Consequently, and based on the experience of EU law, one can probably legitimately assume that such primacy implies certain obligations for national courts regarding EAEU law, e.g. that courts have to interpret national

18 Court of the Eurasian Economic Union, advisory opinion of 4 April 2017, case CE-2-1/1-17-BK, *Ministry of Justice of Belarus* (*Vertical Agreements case*), part IV para. 2(1).

19 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.2.

20 Kalinichenko, P. (2017). A Principle of Direct Effect: The Eurasian Economic Union's Court Pushes for More Integration. *Verfassungsblog*, available at https://verfassungsblog.de.

21 Rosano, A. (2018). Wrong Way to Direct Effect?: Case Note on the Advisory Opinion of the Court of the Eurasian Economic Union Delivered on 4 April 2017 at the Request of the Republic of Belarus. *Legal Issues of Economic Integration* 45 (2), pp. 211–220, 218.

22 See the avoidance of an answer in Court of the Eurasian Economic Union, judgments of 28 December 2015, 3 March 2016, cases CE-1–2/2-15-KC and CE-1–2/2–15/AP, *Tarasik K.P. v. Eurasian Economic Commission* and a rather implicit formula used in Court of the Eurasian Economic Union, judgment of 21 February 2015, case CE-1-1/1-16-BK, *Russian Federation v. Republic of Belarus*, para. 7(4).

23 Court of the Eurasian Economic Union, advisory opinion of 12 September 2017, case CE-2-2/1-17-BK, *Eurasian Economic Commission*, para. 4(7).

24 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission*, para. III.7.

law as much as possible in conformity with EAEU law but where this is not possible, they have to set its rules aside.[25] These elements are necessary if we wish to understand that, independent of the scope of a worker's status and rights under EAEU law, EAEU law holds powerful legal effects which can render these norms effective also within the national legal orders of the Member States.[26]

3 *The Definition of a Worker*

One key difference which stands out when comparing the provisions of the EAEU Treaty with those of TFEU is an abundance of definitions. It should be noted here that the authors of the EU Treaties deliberately refrained from giving definitions of notions such as "quantitative restrictions and measures having equivalent effect" or "workers", thus leaving it to the CJEU to fill the gaps. In contrast, the drafters of the EAEU Treaty preferred to avoid surprises and agreed on a set of definitions. In addition to a main list in Article 2 EAEU, each of the chapters and even each of the protocols have its own list of definitions. This approach can be partly explained by the legislative tradition of the EAEU Member States.[27] Even more importantly, however, the EAEU Treaty can be seen as a codification of a number of existing treaties in the framework of the customs union and the single economic area.

According to Article 96(5) EAEU, to qualify as a worker under EAEU law a person must be "a national of a Member State lawfully residing and lawfully engaged in labour activities in the state of employment, of which he or she is not a national and where he or she does not permanently reside".[28] Thus, under EAEU law, to be a worker means exercising a labour activity, i.e. an activity

25 Pirker, B. and Entin, K. (2019). Bosman's Second Life, cit., 141.

26 See on the direct effect of the free movement of workers provisions in EU law e.g. Court of Justice, judgment of 15 October 1969, case 15/69, *Ugliola*. In recent literature see generally e.g. Nihoul, P. (2018). Effet direct et protection des citoyens. In: Paschalidis and Wildemeersch, eds., *L'Europe au présent!: liber amicorum Melchior Wathelet*. Brussels: Bruylant.

27 See on the role of definitions in Russian law: Таева, Н. (2016). Дефиниции в конституционном законодательстве. *Lex Russica* 3 (112), pp. 153–163; Вопленко Н., Давыдова М. (2001). Правовые дефиниции в современном российском законодательстве. *Вестник Нижегородского государственного университета им. Н.И. Лобачевского* 1, pp. 64–71.

28 See on the need for this cross-border element in EU law e.g. Court of Justice, judgment of 16 December 2004, case C-293/03, *My*, para. 40; in recent literature e.g. Wollenschläger, F. (2015). Binnenmarktrelevanz statt grenzüberschreitender Aktivität – die Rs. Belgacom als Neujustierung in der Dogmatik der Grundfreiheiten. In: Stumpf *et al*, eds., *Privatrecht, Wirtschaftsrecht, Verfassungsrecht – Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration*. Baden-Baden: Nomos.

performed under an employment contract, or to perform works (services) under a civil law contract "in accordance with the legislation" of the relevant Member State.

Compared to CJEU case law such an approach appears to be much more formalistic. The CJEU has recognised that the main feature of an employment relationship 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".[29] Thus for the CJEU, a person may be considered a worker even without a work contract[30] provided that they can demonstrate that their activity is "effective and genuine".[31] The EAEU Court, by contrast, is bound by the definition contained in Article 96(5). Thus, when confronted with the question of whether professional sports are to be considered employment, the Court examined the relevant national laws of the Member States and ascertained that in all Member States, relations between players and professional sport clubs are governed by working contracts.[32] This, however, should not be misunderstood as a sign that the autonomy of notions of EAEU law was being abandoned which would mean that such notions could be defined by national law in whichever way a Member State sees fit. In EU law, the CJEU similarly partly defers to national definitions, partly imposes limits of EU law on such definitions.[33] In EAEU law it is currently unclear to what extent in the future the EAEU Court will defer to national definitions or impose limits of EAEU law in certain extreme cases.[34]

The main advantage of the EAEU approach to legal definitions is that it simplifies the work of national courts and limits the discretion of national authorities which do not have the possibility to oppose the validity of a person's rights on the grounds that their work is not genuine or effective. On the other hand,

29 See Court of Justice, judgment of 3 July 198, case 66/85, *Lawrie-Blum*. Reiterated in judgment of 17 July 2008, case C-94/07, *Raccanelli*, para. 33. On the notion(s) of workers in EU law see e.g. Ziegler, K. (2011). *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht*. Baden-Baden: Nomos.

30 See, for instance, Court of Justice, judgment of 12 February 1974, case 152/73, *Sotgiu v. Deutsche Bundespost*.

31 See Court of Justice, judgment of 23 March 1982, case 53/81, *Levin v Staatssecretaris van Justitie*, paras. 17, 18.

32 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.3.

33 See e.g. Court of Justice, judgment of 5 October 2010, case C-400/10 PPU, *McB*, para. 52; Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj*, para. 80. See generally Pirker B., Entin K. (2019). *Legal Issues of Economic Integration*, cit, p. 144–145.

34 In the sense of an EAEU law based margin of discretion granted to the Member States in how they define such terms.

one could argue that this places a heavy emphasis on the legal character of the relevant activities, meaning that those working without the necessary documents are not able to invoke the Treaty provisions.

Another obvious problem with the definition of a "worker" given in the Treaty is that it seems to limit the scope of this term to those who are temporarily residing in the Member State where they are working. Does this mean that once a person obtains the right of permanent residence in a Member State he or she is automatically excluded from the scope of the Treaty? Such a narrow reading seems to clash with the Treaty objectives. Furthermore, the definition of the "state of permanent residence" in Article 96(5) defines that state as the one of the nationality of the relevant worker, effectively equating permanent residence and nationality. Thus, it does not appear that the authors of Treaty intended to exclude a category of people, namely permanent residents, from the scope of the Treaty. Rather, it can be assumed that the emphasis put on the temporary character of residence is meant to underline that the Treaty does not create a right to permanent residence and that Member States are to outline the conditions for obtaining this right in their national legislation. In the EU, by contrast, the right to remain in a Member State after having been employed in that state was introduced as early as 1970 with regard to workers and their family members.[35] The preamble of the relevant regulation stated that this right represents a corollary to the right of residence acquired by workers in active employment.

Finally, what can be said about cross-border workers? The ECJ had no difficulty in extending the social advantages and the principle of non-discrimination to cross-border workers, including in the field of taxation.[36] However, a similar step would require considerably more effort from the EAEU Court in order to overcome the inherent limitation of the Treaty definitions.

4 *Rights Granted to the Worker*

Once a person is considered a worker under EAEU law, what rights does this confer? Residence and entry rights under the EAEU Treaty are rather limited. The right to residence based on the provisions of EAEU law is bound to

35 See Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State. OJ L 142, 30.6.1970, p. 24–26.

36 See, for instance, Court of Justice, judgment of 14 February 1995, case C-279/93, *Schumacker*, where the Court interpreted the Treaty provision on the free movement of workers as precluding a provision of national legislation making annual adjustment of deductions at source available only to residents, thereby excluding natural persons who have no permanent residence or usually abode on its territory but receive income there from employment.

the duration of the employment contract at hand.[37] There is – somewhat implicitly – a right of entry and the right not to register for the first 30 days in the territory of the state of employment, inasmuch as there is such a requirement to register under national law.[38] Although the objective of these provisions is not expressly mentioned, it seems that the period of 30 days is meant to allow job seekers to look for work without undertaking additional formalities. One could note that even before the introduction of EU citizenship the right for jobseekers to arrive and stay in a Member State existed in EU law, although the precise duration was not laid down expressly.[39] In EAEU law, terms of the treaty suggest that entry can only occur "for employment", seemingly precluding them being applied to other purposes of stay. There are, in addition, certain alleviations for Member State nationals entering other Member States for purposes "provided for by the legislation" of that state.[40]

The right to stay in a Member State of employment is prolonged by 15 days if 90 days have expired since the date of entry of the worker and if an employment contract is terminated early. In that case, the worker can stay only if they enter into a new employment contract within 15 days.[41] Implicitly, these provisions seem to suggest that the right of residence is otherwise limited to the duration of the employment contract and this impression is further reinforced by the definition of a worker as discussed above.

Access to employment is also facilitated. Based on Article 98(1) EAEU Treaty a worker has the right to engage in professional activities in accordance with his/her specialisation and qualifications, including the right to have relevant degrees and certificates recognised in accordance with the treaty and the

37 Art. 97(5) EAEU Treaty.

38 Art. 97(6) EAEU Treaty. See on such (permissible) requirements Art. 8 Directive 68/360/EEC, OJ 1968 L 257, 13 ff., as the predecessor norm before the right of stay for three months was granted without any such requirement by Article 6(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158, 77 ff.

39 See on the permissibility of a six-months period Court of Justice, judgment of 26 February 1991, case C-292/89, *Antonissen*, para. 21.On the end of the status of a worker under EU law generally see e.g. Pirker, B. (2014). Zum Verlust der Arbeitnehmereigenschaft im Freizügigkeitsabkommen. *Aktuelle Juristische Praxis* 23 (9), pp. 1217–1225.

40 In essence, when a Member State national enters another Member State, normally they have to use a migration card; but if their stay does not exceed 30 days and they use a suitable document for affixing marks of border control authorities, they do not have to use such a card, Art. 97(7) and (8) EAEU Treaty.

41 Art. 97(9) EAEU Treaty.

legislation of the employment state.[42] Employers may hire workers from other Member States without considering restrictions for the protection of the national labour market; workers must not be required to obtain employment permits.[43]

Workers also have protections once employed. With regard to social security, workers have a right to non-discrimination vis-à-vis nationals of the state where they are employed although pensions are excluded and are instead governed by the legislation of the state of permanent residence and by a separate international treaty between the Member States.[44] Such a treaty, the Agreement on the provision of pensions for workers, has been signed during a meeting of the Supreme Council in St Petersburg in December 2019 but has not entered into force yet. The agreement grants workers the same status as nationals with regard to the conditions for fixing and paying pensions and the possibility to export some of their pension rights. This will allow workers to have their work experience abroad counted and grant them the possibility to receive their pension in another state.

Workers' rights to emergency medical care and other types of medical treatment are also regulated partly in the Treaty, partly by the legislation of the country where they are employed and partly by applicable international treaties.[45]

Workers are entitled to receive information on the conditions of their stay and employment and their rights and obligations as provided by the legislation of the country where they are employed, both from the state and the employer as the addressee.[46] Upon request, workers are also entitled to a certificate from the employer indicating their profession and position(s), the period of employment and wages as determined by the legislation of the state of employment.[47]

Which measures fall within the scope of the legal protections that workers enjoy under EAEU law? The EAEU Court had the opportunity to interpret the law in the *Professional Athletes case*. Based on its earlier definition of a

42 See also Art. 97(3) EAEU Treaty. See in EU law Directive 2005/36/EC, OJ 2005 L 255, 22 ff., and in the case law: Court of Justice, judgment of 7 May 1991, case C-340/89, *Vlassopoulou*, para 14. In the literature, see e.g. Claessens, S. and Schneider, H. (2005). The Recognition of Diplomas and the Free Movement of Professionals in the European Union. In: Schneider, ed., *Migration, Integration and Citizenship*. Maastricht: Forum; Gammenthaler, N. (2010). Diplomanerkennung und Freizügigkeit. Zurich/Basel/Genf: Schulthess.

43 Art. 97(1) EAEU Treaty.

44 Art. 98(3) EAEU Treaty.

45 Art. 98(4) EAEU Treaty.

46 Art. 98(6) EAEU Treaty.

47 Art. 98(7) EAEU Treaty.

worker, the Court held that restrictions would fall within the scope of the Treaty if they affected the employment activity of the people in question.[48] In the context of sports, this meant that restrictions concerning sporting matters exclusively seemed not to fall within the Treaty.[49] A classic example would be rules on the composition of national teams that should not be affected by EAEU law.[50]

When asked what kind of measures fell within this scope, the EAEU Court decided based on the indicative wording of the Treaty, but also based on inspiration from the CJEU's case law,[51] that restrictions as well as discriminatory measures could be scrutinised under the Treaty. For the Court, restrictions were defined as measures which preclude or deter the nationals of EAEU Member States from exercising their right to work in another Member State, including working conditions,[52] but also e.g. access restrictions influencing employment prospects or residence-based restrictions.[53]

5 *Horizontal Effect, Mutual Recognition and Mutual Trust*

To some extent at least, the fundamental freedom of movement of workers also has a horizontal effect. In the *Professional Athletes case*, the EAEU Court found that Articles 97(1) and (2) EAEU Treaty were not only applicable to State authorities, but also to sports organizations as the employers of professional athletes. Restrictions could thus be laws, acts below the level of a law or local acts of

48 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.3. Whereas the text of Article 45 TFEU points in the direction of a prohibition of discrimination, the CJEU has clarified through its case law that both restrictions and discriminatory measures are covered by the provision, see e.g. Court of Justice, judgment of 17 March 2005, case C-109/04, *Kranemann*, paras. 25–26.

49 See for such a restrictive approach also the earlier case law of the CJEU, e.g. Court of Justice, judgment of 12 December 1974, case 36/74, *Walrave and Koch*, para. 4. In its later case law, the Court narrowed down this exception and seems to perceive most restrictions concerning sporting matters as also falling within the scope of the Treaty, although they can be justified on legitimate reasons if they are proportionate, see e.g. Court of Justice, judgment of 11 April 2000, case C-51/96, *Deliège*, para. 43. See also Muresan, R. (2010). Ausnahmen von den EU-Grundfreiheiten im Bereich des Sports nach der "Deliège"-Konzeption. Basel: Helbing Lichtenhahn.

50 Pirker, B. and Entin, K. (2019). Bosman's Second Life, cit., 138.

51 Court of Justice, judgment of 15 December 1995, case C-415/93, *Bosman*, para. 96.

52 See in EU law Art. 7(1) and (2) Regulation 492/11 on "conditions of employment and work" and "social and tax advantages".

53 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.4. Compare this to EU law's rules in Regulation 492/2011, OJ 2011 L 141, p. 1 ff.

responsible organizations.[54] If we compare this to the situation in EU law, at least for now the EAEU Court has not gone as far as the CJEU in relation to the free movement of workers, as the latter has established far-reaching horizontal effect for private employers in relation to discriminatory measures.[55] The approach of the EAEU Court is, however, comparable to the CJEU's in relation to other fundamental freedoms, where the latter court similarly focused on private actors with a certain collective regulatory power.[56] There also does not seem to be any obvious reason why the EAEU Court could not follow a similar reasoning to that of the CJEU, namely deciding that without such an effect, private obstacles could be re-established where Member State measures have been struck down.[57]

Traces of mutual recognition and mutual trust can also be detected in the EAEU Court's case law on other fundamental freedoms, for example in a case where customs authorities were required under EAEU law to refrain from taking unilateral decisions on documents issued by the authorities of another Member State.[58]

6 *Exceptions to the Free Movement of Persons in EAEU Law*

Art. 97(2) EAEU Treaty prescribes strict limits regarding the exceptions to free movement provisions. Member State measures must be aimed at ensuring national security including in economic sectors of strategic importance and public order. In its relevant case law, the Court remained rather succinct.[59] Note, nonetheless, that the list of possible restrictions in the Treaty is shorter and unlike EU law does not mention public health.[60] Nothing seems to preclude the EAEU Court from engaging in an exercise similar to that of the CJEU and the

54 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.5.

55 Court of Justice, judgment of 6 June 2000, case C-281/98, *Angonese*.

56 Court of Justice, judgment of 12 December 1974, case 36/74, *Walrave*; judgment of 12 July 2012, case C-171/11, *Fra.bo*; judgment of 11 December 2007, case C-438/05, *Viking*; judgment of 18 December 2007, case C-341/05, *Laval*. On the debate over the horizontal effect of fundamental freedoms and its variations in the case law in EU law see e.g. Müller-Graff, P.-C. (2014). Die horizontale Direktwirkung der Grundfreiheiten. *Europarecht* 16 (1), pp. 3–29; Kainer, F. (2015). Die Gewährleistung von Privatautonomie im Spannungsfeld horizontaler Wirkung von Grundfreiheiten und Grundrechten in der Europäischen Union: Eine Skizze. In: Stumpf *et al*, eds., *Privatrecht, Wirtschaftsrecht, Verfassungsrecht – Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration*. Baden-Baden: Nomos.

57 Court of Justice, judgment of 16 March 2010, case C-325/08, *Olympique Lyonnais*, para. 31.

58 Court of the Eurasian Economic Union, judgment of 21 February 2015, case CE-1-1/1-16-BK, *Russian Federation v. Republic of Belarus*, para. 3(5).

59 Court of the Eurasian Economic Union, advisory Opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para. III.5.

60 Se e.g. in EU law Court of Justice, judgment of 13 April 2010, case C-73/08, *Bressol*, para. 55.

EU legislature in precisely outlining the possible grounds for (and elements to be taken into account in) expulsion decisions, for example.[61] The inclusion of "economic sectors of strategic importance" in the concept of public security, however, is rather puzzling. While the EU has settled case law stating that Member States are allowed to restrict the admission of foreign nationals to certain activities in public services,[62] the term 'economic sectors of strategic importance' is extremely broad and seems to leave a wide margin of discretion for the EAEU Member States when determining such spheres. In this situation it will be up to the EECOMM and the Court to prevent possible abuses by requiring Member States to demonstrate a genuine link between the chosen economic sector and national security. One possible example could be the energy field where a direct link between energy and security has been established in CJEU case law on the free movement of goods.[63] Safeguarding a secure energy supply in case of a crisis has also been recognized as a ground of public security by the ECJ in the well-known "golden shares" cases.[64]

More extensive reasoning on exceptions to fundamental freedoms enshrined in the EAEU Treaty can be borrowed from the context of the free movement of goods. Faced with a case on Article 29(1) and (3) of the Treaty, the EAEU Court

61 See in EU law with regard to EU citizens Articles 27 to 29 Directive 2004/38; in the (comprehensive) jurisprudence see Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn*; judgment of 28 October 1975, case 36/75, *Rutili*; judgment of 27 October 1977, case 30/77, *Bouchereau*; judgment of 19 January 1999, case C-348/96, *Calfa*; judgment of 29 April 2004, cases C-482/01 and C-493/01, *Orfanopoulos*; judgment of 23 November 2010, case C-145/09, *Tsakouridis*; judgment of 22 May 201, case C-348/09, *P.I. v. Oberbürgermeisterin der Stadt Remscheid*. See also e.g. Kochenov, D. and Pirker, B. (2013). Deporting the Citizens within the Union? A Counter-Intuitive Trend in Case C-348/09, P.I. v. Oberbürgermeisterin der Stadt Remscheid. *Columbia Journal of European Law* pp. 369–390; Meduna, M. (2017). "*Scelestus europeus sum*": what protection against expulsion does EU citizenship offer to European offenders? In: Kochenov, ed., *EU Citizenship and Federalism*. Cambridge: Cambridge University Press.

62 See, for instance, Court of Justice, judgment of 12 February 1974, case 152/73, *Sotgiu*.

63 See Court of Justice, judgment of 10 July 1984, case 72/83, *Campus Oil*. For a broader reflection in this context see Leal-Arcas, R. and Filis, A. (2013). Conceptualizing EU energy security through an EU constitutional law perspective. *Fordham International Law Journal* 36 (5), pp. 1225–1301.

64 See Court of Justice, judgment of 10 November 2011, case C-212/09, *Commission v. Portugal*; judgment of 4 June 2002, case C-503/99, *Commission v. Belgium*. In the literature, see Gallo, D. (2018). On the content and scope of national and European solidarity under free movement rules: The case of golden shares and sovereign investments. In: Biondi *et al*, eds., *Solidarity in EU Law – Legal Principle in the Making*. Cheltenham: Edward Elgar; Apel, M. (2017). *Golden Shares: Eine rechtsdogmatische Untersuchung der primärrechtlichen Zulässigkeit regulatorischer sowie privater Sonderrechte an Unternehmen unter Berücksichtigung der Rechtsökonomik*. Baden-Baden: Nomos.

developed its reasoning in that context. Article 29 of the EAEU Treaty is similar to Article 36 of the TFEU and allows Member States to impose restrictions on mutual trade for the protection of fundamental interests such as human life and health, public morals and public order or the environment, provided that such restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. The EAEU Court took inspiration from CJEU case law[65] and held that Member States could indeed impose such restrictions, but that their discretion was limited. First, the measures they adopted had to pursue one of the interests laid down in Article 29(1) and these interests had to be narrowly interpreted as exceptions to the principle of free movement. Second, the EAEU Court repeated that restrictions could not constitute arbitrary discrimination or a disguised restriction on trade and held that they had to be proportionate.[66] Proportionality has also made its appearance in other situations,[67] which might lead one to wonder whether we are witnessing the emergence of a general principle of the EAEU legal order.[68]

Moreover, some clues can also be taken from case law on the free movement of workers. The EAEU Court reaffirmed that government measures need to be proportionate, i.e. they should facilitate the achievement of the objectives provided in Article 97(2) EAEU and should be limited to actions which are necessary for the achievement of such objectives.[69] While the Court did not expressly address the possibility of using justifications not explicitly laid down in the Treaty, the jurisprudence of the CJEU which it cited[70] seems to indicate that the EAEU Court would be willing to accept justifications based on the social function of sports[71] – though probably not in the case of discriminatory measures.[72] Such an approach would be preferable to simply excluding different

65 Court of Justice, judgment of 25 January 1977, case 46/76, *Bauhuis*; Judgment of 20 May 1976, case 104/75, *de Peijper*.

66 Court of the Eurasian Economic Union, advisory opinion of 30 October 2017, case CE-2-2/2-17-BK, *Eurasian Economic Commission* (*Free Movement of Goods Restrictions*).

67 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Ministry of national economy of Kazakhstan* (*Movement of Currency across the EAEU Customs Border*), para. IV.7.

68 Pirker B., Entin K. (2019). *Legal Issues of Economic Integration*, cit, p. 147.

69 Court of the Eurasian Economic Union, advisory opinion of 7 December 2018, case CE-2-2/5-18-BK, *Eurasian Economic Commission* (*Professional Athletes case*), para III.5.

70 Court of Justice, judgment of 15 December 1995, case C-415/93, *Bosman*; judgment of 16 March 2010, case C-325/08, *Olympique Lyonnais*.

71 For instance, the objective of recruiting and training young players.

72 See for this approach in EU law e.g. Court of Justice, judgment of 26 May 2016, case C-300/15, *Kohll and Kohll-Schlesser*, para. 49.

rules from the scope of the Treaty since it would allow the Court to have more room for manoeuvre through the application of the proportionality test.

All in all, we can see that, despite obvious similarities between EU and EAEU law many questions remain, notably regarding the concept of "economic sectors of strategic importance" and the possibility of using grounds of justification other than those laid down in the Treaties.

7 *Interim Conclusion*

So far, so good? At first glance, EAEU law does not seem very different from the EU legal regime, at least in the case of workers. EAEU law has broad goals that could accommodate interpretations furthering the position of a "*Civis Eurasiaticus*" under EAEU law; it has potential direct effect and is vested with primacy towards national law. Although the definition of a worker contains some inherent limitations, nothing prevents the EAEU Court from interpreting the concept broadly in order to establish an ultimately autonomous definition in EAEU law and fend off national attempts to undermine EAEU law's effectiveness with competing, narrow definitions. The bundle of rights granted to those who hold the status of a worker will sound familiar to an EU lawyer's ear. Even though rights of entry and residence are very closely linked to employment contracts, a worker will be protected through non-discrimination obligations while only measures justified by important public interests in a proportionate manner may restrict access to employment and employment conditions. We can thus ask whether the "*Eurasiaticus*" status is thus simply the reduced "*Homo Oeconomicus*" version of the status of the "*Civis Europaeus*". Or, in other words, is this the pre-citizenship market citizen without any of the political ambitions surrounding the EU citizenship project?

IV The Status of Family Members of a Worker – ... You May Bring Your Family, Get Comfortable ...

Now if we accept that the status of EAEU workers somewhat resembles that of workers in EU law before the advent of EU citizenship, the provisions for the family members of workers are also somewhat logical given the story told so far. Namely, there are a number of protections that ensure that at least some relatives of a worker can come with him or her.

Regarding the definition, family members are defined as the spouse of a worker, their dependent children and other members of their families. To define these other family members, EAEU law refers to such persons being recognised as members of the family according to the legislation of the country

of employment.[73] One may wonder how broad or narrow the designation of the circle of beneficiaries could be made by Member States following this delegation rule. Merely based on the wording, national legislation appears to be free to not define any additional family members who would then enjoy rights under EAEU law. Nonetheless, if we take into account the individual rights-friendly preamble of the Treaty, there is also good reason to favour an obligation of Member States to define family members under EAEU law based on the required "unconditional" respect for constitutional rights and freedoms, which could be read as including e.g. a right to family life.

There is also no indication as to the nationality of family members, meaning that third country nationals can also enjoy the protections of EAEU law as family members.[74] When they fall within the definition, family members have the same rights of entry and residence as the worker in question.[75] The express requirement to register after 30 days if so provided by national law is also applicable to family members. Family members of a worker also have the same status as a worker with regard to the right to property and to free transfer of funds, social security and emergency medical care mentioned above.[76] Children of a worker residing with that worker have the right to attend pre-school institutions and receive education.[77] The question is left open as to whether they can also rely on the protection of the worker from discrimination with regard to working conditions such as social advantages.[78] Notably, there is also

73 Art. 96(5) EAEU Treaty.

74 This silence leaves open, however, also certain questions that have come up in EU law. E.g., the CJEU had to decide (and reverse earlier case law) that a third country national does not have to reside legally in an EU Member State before relying on his or her rights of entry and residence under EU law, Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock*, para. 54. In EU law, see also generally Berneri, C. (2017). Family reunification in the EU: the movement and residence rights of third country national family members of EU citizens. Oxford: Hart Publishing.

75 Art. 97(6) EAEU Treaty.

76 Art. 98(2), (3) and (4) EAEU Treaty.

77 Art. 98(8) EAEU Treaty. If we take EU law as guidance, this includes professional education, see Article 10 Regulation 492/2011. According to the CJEU, this access to education must not be restricted merely to those under 21 years of age or to children for whom a worker provides, Court of Justice, judgment of 4 May 1995, case C-7/94, *Gaal*, para. 25. In EU law, see also Gori, G. (2017). Mademoiselle Gravier and equal access to education: success and boundaries of European integration. In: Fernanda and Davies, eds., *EU Law Stories*. Cambridge: Cambridge University Press.

78 In EU law at least, the CJEU moved from an earlier negative stance (Court of Justice, judgment of 11 April 1973, case 76/72, *Michel S.*, paras. 6 and 10) towards a positive stance (Court of Justice, judgment of16 December 1976, case 63/76, *Inzirillo*, paras. 18 and 21), arguing that to not grant this possibility would hinder the free movement of the worker if the host

no specific worker status under EAEU law for persons as family members in the Treaty.[79]

In sum, EAEU law takes a broadly similar approach to EU law. It defines a core group of family members and provides them with somewhat parallel protections to the worker whose family they are a part of. In numerous respects, it does not go as far as EU law. Overall, it seems to pursue, however, an idea similar to EU law that the right to family is part of a worker's legal protections in the context of free movement. The fact that EAEU law contains these explicit provisions can be read as a further indication that a broad, rights-based reading of the legal regime as a whole is both possible and plausible.[80]

V The Limitations of the EAEU Worker Status – … but Not Too Comfortable!

Of course, in any story as linear as the present one there must come a twist. So far we have noted quite a remarkable convergence between EAEU law and the early stages of EU law concerning the free movement of workers before the advent of EU citizenship, but we now need to take into account certain differences.

1 *The Obligation to Respect the "Culture and Tradition" of the Member State*

The first element of difference is that under EAEU law, the position of a worker is not only defined by its rights. Article 98 is named "rights and obligations of a worker". An express provision of the Treaty requires workers and their family members to comply with the legislation of their country of employment, respect the "culture and tradition" of that state and be liable for offences under the latter's legislation.[81] The first and the last point seem somewhat

Member State could thereby deny family members the social advantages it grants to its own citizens (Court of Justice, judgment of 20 June 1985, case 94/84 *ONEM*, para. 23).

79 Like in EU law, this is mostly relevant for third country family members, as EAEU citizens can themselves rely on the Treaty protections as workers if they fulfil the necessary conditions, see in EU law Article 23 Directive 2004/38.

80 On the complex relationship between citizenship and (fundamental) rights in the EU context see in recent literature e.g. van den Brink, M. (2019). EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems. *European Law Journal* 25 (1), pp. 21–36; Yong, A. (2019). The Rise and Decline of Fundamental Rights in EU Citizenship. Oxford: Hart Publishing.

81 Art. 98(9) EAEU Treaty.

superfluous, as the EAEU Treaty does not exempt EAEU workers and their family members from compliance with national law nor national criminal law jurisdiction, unless there is a conflict with EAEU law in which case the primacy of the latter applies.

With regard to the second point of Article 98, it remains questionable to what extent binding legal obligations can be distilled from this vague phrase in daily legal practice. However, such obligations do not appear unthinkable. In particular, one could ask whether this clause can be read as a restriction of rights granted by EAEU law. We have only to think of cases where workers are to be expelled, for example because of criminal offences that they have committed.[82] Crimes seen as violations of particularly important values of the culture and tradition of a Member State could thus be treated as particularly virulent threats to public order and security, and facilitate a path to expelling EAEU workers. The vagueness of the provision is thus disconcerting in light of such potentially far-reaching effects. How could an individual predict what crimes would be covered, and thus fully appreciate the possible consequences of wrongdoing? Moreover, even beyond the scope of EAEU law Member States may feel encouraged by the "culture and tradition" clause to restrict EAEU citizens' legal position in areas where they are free to regulate as they see fit.

2 *The Non-Integration Rationale of the Free Movement of Workers under EAEU Law*

While somewhat disconcerting, the "culture and tradition" clause is not the most striking limitation to the rights and status of an EAEU worker. There is no sign of anything comparable to the right of permanent residence introduced in EU law by Directive 2004/38[83] or even its precursors which granted the right of permanent residence in certain constellations for workers remaining in the territory of a Member State after having been employed in that State.[84] Rather, Article 96(5) EAEU Treaty provides as part of the definition of an EAEU worker that such a worker must be lawfully residing in the state of employment, but must not permanently reside there.

What EAEU law does here therefore seems to be an equation between the citizenship of a Member State and permanent residence in that state. As shown above, in doing so it does not seem that the intent of those who drafted the EAEU Treaty was to deny workers permanently residing in a Member State the rights guaranteed by the Treaty, although this might be the impression given

82 See on this point in more detail section III.6.

83 Article 16 Directive 2004/38.

84 Article 2 Regulation 1251/70 and now Article 17 Directive 2004/38.

by the Treaty at a quick glance. This view is seemingly shared by the EAEU Court, for in the *Professional Athletes case* the Court did not limit its findings to the players who are not permanently residing in the state of employment. However, the choice of words here was particularly unfortunate as it makes clear that, like the modalities of granting and revoking citizenship, the regulation of permanent residence also remains part of the exclusive competence of the Member States. The latter are hence free to provide the right to permanent residence after a certain amount of time, often based on bilateral agreements between Member States, or to deny such a right altogether. Effectively this means that neither the EECOMM through its decisions, nor Member States by way of an international agreement within the Union, will be able to provide such a right for workers since this would automatically clash with the provisions of the EAEU Treaty.

This approach appears to be particularly antagonistic towards integration: the goal is to allow the free movement of workers, but without the prospect of gaining permanent residence. At the same time, it appears to be the exact opposite approach to how EU citizenship has evolved more recently. In EU law, by contrast, the CJEU found that even the regulation of the acquisition and loss of national citizenship were within the scope of EU law[85] and that certain EU citizenship rights gained based on the exercise of free movement could even be retained after an EU citizen has been naturalized in his/her host Member State.[86]

In light of this, the purpose of the protections granted to family members is difficult to explain based on this non-integration rationale of EAEU law. The fact that it is impossible to truly become part of the society of the Member State through a permanently settled residence status is clearly counter to the rights of family members to join the EAEU worker, to receive education and so forth, as their presence arguably reinforces the need to provide for some perspective of permanent integration into the host EAEU Member State.

Moreover, the requirement that workers respect the culture and traditions of their host nation must also be read in conjunction with the lack of an integration rationale of the status of EAEU workers. If EAEU law offers no prospect

85 Court of Justice, judgment of 2 March 2010, Case C-135/08, *Rottmann*; Judgment of 12 March 2019, case C-221/17, *Tjebbes*. For a skeptical assessment of the latter case, see Kochenov, D. (2019). The *Tjebbes* Fail. *European Papers* 4 (1), pp. 319–336.

86 Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*. For a discussion of the case see e.g. Réveillère, V. (2018). Family rights for naturalized EU citizens: *Lounes*: case C-165/16, Toufik Lounes v. Secretary of State for the Home Department, EU:C:2017:862, judgment of the Court of Justice (Grand Chamber) of 14 November 2017. *Common Market Law Review* 55 (6), pp. 1855–1878. See also the chapter by David de Groot in this volume.

of permanent residence, this respect clause can hardly be understood as an encouragement to truly engage with or integrate into the culture and tradition of the state of employment. Rather, it seems to subordinate the EAEU worker's own culture and tradition and to cement the idea that under EAEU law, a transitional worker is not here to stay. Integration of such workers and their engagement with the local tradition and culture seems to be perceived thus rather as a threat than as desirable in any true sense of the term.

VI The (Long and Winding) Alternative Road towards Citizenship: the Experience of the Citizenship of the "Union state" of Russia-Belarus as a Source of Hope?

Rather than conclude on such a sombre note, an excursion into a related field of law can shed some additional light on the topic of free movement rights in the larger EAEU context. A somewhat limited attempt to create a supranational citizenship has taken place within the framework of the "Union state" of Russia-Belarus.[87] The Treaty on the creation of a "Union state" was concluded in December 1999 and came into force on January 26, 2000.[88] It proclaimed "a new stage in the process of the unification of the peoples of the two countries". Article 6 of the treaty states that Member states, while voluntarily vesting some powers into the Union State, shall retain sovereignty, independence, territorial integrity, state structure, their constitution, state flags, coats of arms, and other attributes of statehood.

Chapter 2 of the Treaty is devoted to Union citizenship. Article 14(1) proclaims that the citizens of one of the Member States are at the same time citizens of the Union state. It thus establishes a direct link between national and Union citizenship, an impression further reinforced by the statements that it is impossible to become a citizen of the Union state without obtaining the citizenship of one of the Member States.[89] The provisions referring to citizens' rights are not very detailed as from the start the parties were committed to adopting further legal acts in that regard.[90] Article 14(5) proclaims the

87 For a detailed analysis see Смирнова, Е. (2014). "Гражданство Союзного государст ва Беларуси и России во временном контексте: заявление о намерении или перс пектива реальной интеграции?" – рассуждение правоведа в аспекте региональной компаративистики. *Евразийский юридический журнал*. 5 (72), pp. 34–39.

88 Treaty on the establishment of the Union State, Moscow 8 December 1999, 2121UNTS 13.

89 Article 14(4) of the Treaty on the Union state.

90 Article 14(6) of the Treaty on the Union state.

principle of equality with respect to citizens' rights and obligations, which is highly reminiscent of Article 9 TEU. The effectiveness of this principle, however, appears rather limited since it is not further reinforced by a general prohibition of discrimination on the grounds of nationality.[91] This principle was further developed in two separate legal acts. The first is a 1996 decision of the Supreme Council of the Belarus and Russia Community on workers' rights which proclaims that workers enjoy equal rights with regard to remuneration, working time and rest, working conditions and work protection as well as other issues of work relations.[92] In this regard the Union state basically paved the way for the regulation that was created in the framework of the EAEU. Contrary to what some authors assume,[93] it does not seem that Russian workers in Belarus and workers from Belarus in Russia enjoy any privileged status or possess any additional rights as compared to other Member States' nationals. The second is a 2006 treaty guaranteeing equal rights to the citizens of the Russian Federation and the Republic of Belarus regarding free movement and free choice of temporary and permanent residence on the territory of the Union state's members (hereafter – St. Petersburg Treaty). The St. Petersburg Treaty provides that citizens are allowed to stay in the host state for up to 90 days without registration[94] and gives them the possibility to directly apply for a permanent residence permit without needing to take on temporary residence status first.[95] This seems quite advanced even compared to EU law.[96] The list of restrictions to the rights of free movement and free choice of a place for temporary or permanent residence is, however, wider than in either EU or EAEU law and alongside the traditional grounds of public security, public order, public health and public morality it also includes the necessity to "protect the rights and freedoms of the citizens".[97]

The treaty on the Union state also includes some political rights including the right to elect and be elected in the Parliament of the Union state and to work in the Union states bodies.[98] What is even more interesting is a clause

91 Similar to Art. 18 TFEU.

92 Decision No.4 of 22 June 1996 "On equal rights of the citizens with regard to access to work, remuneration and other social work-related guarantees", para 2.

93 See Абдуллаев, Э. (2016). Особенности правового регулирования трудовой миграции в странах ЕАЭС на современном этапе, *Современная научная мысль* 2, pp. 217–224, 223.

94 Art. 3 of the St. Petersburg treaty.

95 Art. 4 of the St. Petersburg treaty.

96 Art.16(1) of Directive 2004/38 grants a right of permanent residence for Union citizens who have resided legally for a continuous period of five years in the host Member State.

97 Art. 5 of the St. Petersburg treaty.

98 Art. 14(7) of the Union state treaty.

on mutual diplomatic and consular protection of the Union citizens in third countries.[99]

Thus, the Union citizenship falls short of granting citizens a general right to non-discrimination and essentially contains similar provisions to EAEU law in relation to workers. However, it also contains some important rights with regard to free movement including the possibility to directly apply for a permanent residence permit based solely on one's citizenship. It remains to be seen whether these provisions could be used as a source of inspiration for the EAEU. So far, given the purely economic focus of the EAEU and the unwillingness of the Member States to move in the direction of a political union, such an evolution seems unlikely.

Another hypothesis could be that of a gradual spill-over. As some authors have pointed out, in many ways the Maastricht Treaty and the Citizens' Rights Directive represented a de facto codification of pre-existing case law. In this regard it has been argued that "a citizenship-like status represented a natural spill-over accompanying the maturation of the internal market".[100] Would such a spill-over and an emergence of a quasi-citizenship be possible for the EAEU? The inclusion of certain rights for economically inactive migrants like family members and job seekers certainly seem like steps in this direction. On the other hand, these advances are mostly negated by the non-integration logic of the EAEU Treaty which tends to view workers merely as a factor of production and does not even go as far as granting them a right to permanent residence. Most importantly, when analysing the pre-Maastricht quasi-citizenship one cannot ignore the fundamental role played by the Court of Justice whose case law largely contributed to moving lines. Could the EAEU Court follow the same route and, relying on teleological interpretation, contribute to gradually moving lines? The *Professional Athletes case* certainly demonstrated its willingness to do so. However, without a preliminary reference procedure and without a *locus standi* for physical persons in annulment actions, it seems highly unlikely that the Court will be able to accumulate a significant amount of case law to trigger such a spill-over.

VII Conclusion

In light of all that we have seen, what does it mean if a citizen of one of the EAEU Member States were to exclaim "*Civis Eurasiaticus sum*"? Given the above,

99 Similar to Art. 20(2)c and 23 TEU Treaty and Art. 46 of the EU Charter of Fundamental Rights.

100 Kochenov, D. and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text. *European Law Review* 37 (4), pp. 369–396, 373.

the vision underlying EAEU law's legal framework seems to be fairly limited. In essence, you can work in another EAEU Member State, be protected from unjustified restrictions and discrimination, bring your family with you and enjoy some protections that appear a bit unclear as to their content and scope. By contrast, you are not supposed to permanently settle in a foreign country under EAEU law, and your right to residence is very tightly linked to your employment contract. In contrast to EU law, where even before the advent of EU citizenship, the status of workers went beyond such narrow confines, EAEU law seems to adhere to a very narrow "*Homo Oeconomicus*" perspective with regard to "its" citizens. Or at least, that is the story so far. As shown throughout this chapter, the protections of EAEU law do offer some "wiggle-room". In particular, nothing excludes – and some elements promote – a broader, more rights-based reading of the law, including the right to family life. Much will thus depend on the interpretative evolution of the EAEU legal order, through the case law of the EAEU Court, and also of national courts. Some inspiration may also be found in the citizenship provisions of the Russia-Belarus Union state legal framework. As in the case of EU citizenship, the prevailing vagueness and interpretive leeway may sometimes eventually work to the benefit of EAEU citizens, and sometimes to their disadvantage. However, in light of the earlier willingness of the EAEU Court to look in the direction of EU law, it is hopefully not wrong to expect at least some "citizenship spirit" in the jurisprudence to come.