Articles

Judicial Europeanisation Through Deconstitutionalisation: The Case of the Analogous Application of the Citizenship Directive

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Abstract: The Court of Justice of the European Union (the Court) is often hailed as a pioneer in integration through law. Existing scholarship on the Court's judicial power overwhelmingly focuses on constitutionalisation and the horizontal policy dimension. As a result, the judicial techniques behind the Court's policy-making and the ensuing implications for domestic policies remain largely understudied. The recent deconstitutionalisation of EU law begs the question as to whether the Court can steer national policies through its case-law without constitutionalising policy outcomes. The *Article* responds to this gap, by empirically investigating the legal techniques underpinning the Court's policy-making in a deconstitutionalised manner and the ensuing implications for Member States' policies. The analysis examines the legal reasoning in all cases where the Court applies the provisions of Directive 2004/38 by analogy, as an example of the deconstitutionalisation process, and traces the responses of all Member States to the Court's jurisprudence. The findings illustrate that the creation of rights through the analogous application of Directive 2004/38 enables the Court to diplomatically balance competing interests and is successful in generating judicial Europeanisation in the domain of migration.

Keywords: Court of Justice of the European Union – European citizenship – judicial Europeanisation – deconstitutionalisation – integration through law – migration policy.

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I. Introduction

The Court of Justice of the European Union (the Court) is widely hailed as a pioneer in integration through law as its rulings are capable of fostering Europeanisation.[1] The scholarly debate on judicial power is primarily centred on the Court's ability to independently further European integration, with a strong focus on constitutionalisation and the horizontal policy dimension.[2] The judicial techniques underpinning the Court's policy-making and the ensuing implications for domestic policies remain largely understudied.

Scholarship on the Court's horizontal policy impact implicitly touches upon the judicial techniques used by attributing the Court's capacity to steer policy developments to the extensive constitutionalisation of European Union (EU) law.[3] Under the "dynamic view",[4] the EU legislator is expected to codify the Court's interpretation of the Treaties as the "joint-decision trap"[5] deems a constitutional override highly unlikely.[6]

Similarly, judicial Europeanisation literature, studying changes in Member States stemming from Court-driven integration, does not examine whether the observed policy changes resulted from the Court's interpretation of Treaty provisions or secondary law.[7] Wasserfallen alludes to a link between constitutionalisation and judicial Europeanisation by arguing that the Court's jurisprudence cannot influence domestic policies unless it is first codified into EU legislation.[8]

[1] M Cappelletti, M Seccombe and JHH Weiler, *Integration Through Law: Europe and the American Federal Experience. A General Introduction* (De Gruyter 1986); A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) International Organization 41; A Stone Sweet, *The Judicial Construction of Europe* (1st edn Oxford University Press 2004).

[2] SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018); DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' (2016) JComMarSt 846; A Stone Sweet and T Brunell, 'The European Court of Justice, State Non-compliance, and the Politics of Override' (2012) AmPolSciRev 204.

[3] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit. 846 ff; A Stone Sweet, *The Judicial Construction of Europe* cit.; SK Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of "Over-Constitutionalisation"' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017) 17.

[4] DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

[5] FW Scharpf, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration' (1988) Public Administration 239.

[6] SK Schmidt, 'Governing by Judicial Fiat? Over-Constitutionalisation and its Constraints on EU Legislation' in M Dawson and M Jachtenfuchs (eds), *Autonomy without Collapse in a Better European Union* (Oxford University Press 2022) 105; RD Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) Journal of European Public Policy 43.

[7] SK Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland' (2014) West European Politics 769; M Blauberger, 'National Responses to European Court Jurisprudence' (2014) West European Politics 457.

[8] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) Journal of European Public Policy 1128.

The need to focus on the mechanisms of judicial law-making is exacerbated by the Court's deconstitutionalisation of EU law in recent judgments.[9] Deconstitutionalisation is broadly understood as a process "shifting attention from the right enshrined in primary law to the rights provided for in secondary law".[10] This process marks a stark departure from the Court's preferred law-making mechanism where a broad interpretation of the Treaties is relied upon to advance integration.[11] Given the change identified in the Court's interpretive methods, it is timely to examine whether the Court can still influence national policies through its jurisprudence and generate judicial Europeanisation without strictly constitutionalising policy outcomes.

This *Article* aims to respond to the gap identified in the scholarship by empirically investigating the legal techniques underpinning the Court's policy-making in a deconstitutionalised manner and the ensuing implications for Member States' migration policies. By studying together deconstitutionalisation and judicial Europeanisation the *Article* seeks to examine whether the two processes are mutually exclusive or alternatively, whether changes in domestic policies are observable in the absence of constitutionalisation. It does so by analysing all cases in which the Court applies the provisions 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 (hereinafter "the Directive") by analogy to situations falling outside its strict scope, tracing changes in national migration policies concerning Union citizens and their third country national (TCN) family members.[12] The *Article*, therefore, first asks the question of how the Court creates rights and drives policy through the process of deconstitutionalisation and second if the Court's deconstitutionalised policy-making can successfully generate judicial Europeanisation in domestic migration policies.

The case of the analogous application of the Directive to situations falling outside its scope provides a good test-ground for examining the Court's ability to generate policy change in the national domain while simultaneously engaging in a process of deconstitutionalisation. The Court's analogous application of the Directive is a prime example of the deconstitutionalisation process as the Court frequently applies the provisions of the Di-

[9] C Moser and B Rittberger, 'The CJEU and EU (de-)Constitutionalization: Unpacking Jurisprudential Responses' (2022) ICON 1038; E Muir, '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' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress* (Brill Nijhoff 2020) 170.

[10] E Muir, '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' cit. 177.

[11] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[12] 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.

rective by analogy through the interpretation of Treaty provisions and in doing so redirects the analysis to secondary law.[13] Furthermore, in instances where Treaty provisions are subject to the analogous application of the Directive, the constitutional anchorage of such rights does not shield them from a subsequent legislative override. This is because the legislator could in principle change the conditions enclosed in secondary law which guard the enjoyment of the primary right.[14] The case of the analogous application of the Directive further offers a wider access point than the analysis of a single judgment or a group of judgments concerning the same topic.

The *Article* is structured as follows. Section II presents the theoretical framework and provides an overview of the Court's ability to influence policies. The *Article* design is briefly outlined in Section III. Section IV analyses the legal reasoning in all cases where the provisions of the Directive are applied by analogy. Section V provides a follow-up to the Court's jurisprudence and highlights if and how judgments where the Court applies the Directive by analogy were implemented at national level. Section VI elaborates on the finding of judicial Europeanisation through deconstitutionalisation, characterised by the Court's expansion of citizenship rights through the analogous application of the Directive and the subsequent successful implementation of these judgments by Member States. The final section concludes.

II. The Court's ability to influence policies

Due to the overarching effect of judgments on the behaviour of other actors, the Court can, and often does, provide solutions to socio-political issues and generates policy change. The Court's judgments can influence the policy domain in a two-fold manner; through their implementation they can lead to changes in domestic laws and administrative practices, while on a supranational level they can prompt changes in EU legislation.[15]

Martinsen aptly captures the scholarly debate surrounding the Court's ability to generate policy change on either a supranational or domestic level through Rosenberg's dichotomy[16] as between the "dynamic" and "constrained" views of the judiciary.[17] Following the dynamic view, the Court can trigger policy change at a supranational level by constitutionalising policy outcomes and judicialising politics. The constitutionalisation of EU law

[13] E Muir, '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' cit.

[14] *Ibid*.

[15] DS Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) Comparative Political Studies 1622.

[16] GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (3rd edn The University of Chicago Press 2023).

[17] DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

places the Court at the forefront of the EU policy-making process.[18] In interpreting Treaty provisions as mandating a specific policy direction, the Court insulates itself, and its jurisprudence, from the court-curbing mechanism of legislative override.[19] Judgments interpreting Treaty provisions cannot be corrected by ordinary legislation and can only be subject to a constitutional override, which is deemed unlikely in the fragmented EU political set-up.[20] The Court therefore, in interpreting the Treaties generates two related effects; higher protection is afforded to the rights concerned, and the processing of disagreement on the scope and substance of such rights through ordinary political channels is discouraged.[21] As a result, the power of the Court *vis-à-vis* the EU legislator is enhanced.

The dynamic view further highlights judicial Europeanisation by tracing changes in Member States stemming from Court-driven integration. Scholarly accounts provide empirical support for the dynamic view by pointing to the presence of judicial law-making in areas of high political salience,[22] and to the replacement of the nation state by the Court as the main "welfare rights-generator".[23] Schmidt's analysis of the prompt implementation of the changes required by the *Ruiz Zambrano*[24] ruling in Ireland further suggests that judicial Europeanisation can be observed even in instances with limited political mobilisation and low costs of legal uncertainty.[25] Under the dynamic view, the Court is also perceived as able to constrain the domestic legislator's room for manoeuvre even in cases of non-compliance as this activates the legal system.[26] This is due to the unique enforcement system resulting from the direct effect and supremacy doctrines which enable the Court to rely on private litigants and national courts to enforce its rulings.[27]

The constrained view, on the other hand, questions the Court's ability to independently generate policy change on both national and supranational levels. On a supranational level,

[18] SK Schmidt, 'No Match Made in Heaven. Parliamentary Sovereignty, EU Over-Constitutionalization and Brexit' (2020) Journal of European Public Policy 779.

[19] RD Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) Law&ContempProbs 117; SK Schmidt, *European Court of Justice and the Policy Process: The Shadow of Case Law* cit.

[20] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit. 849 ff; A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) Living Reviews in EU Governance www.europeangovernance-livingreviews.org.

[21] E Muir, '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' cit.

[22] DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' (2011) Journal of European Public Policy 944.

[23] M Wind, 'Post-National Citizenship in Europe: The EU as a Welfare-Rights Generator' (2009) ColumJEurL 239.

[24] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

[25] SK Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland' cit. 781.

[26] A Stone Sweet and T Brunell, 'The European Court of Justice, State Non-compliance, and the Politics of Override' cit.

[27] JHH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) Comparative Political Studies 510.

this strand of the scholarship regards the Court's discretion as exercised only within the political boundaries as signalled by Member States' preferences.[28] Furthermore, even though a legislative override is unlikely, the EU legislator can constrain the effect of judicial decisions when they interpret secondary law through modification and non-adoption strategies.[29]

The ability of the Court's judgments to generate a vertical policy impact is also perceived as conditioned by a wide range of factors. Wasserfallen argues that due to national implementation problems, activist judicial rulings cannot influence domestic policies unless they are first incorporated into EU legislation.[30] For Conant, in the absence of legal mobilisation, the legal ambiguity underpinning the Court's law-making allows domestic policy-makers to implement rulings to the particular facts without embarking on policy reforms necessary to materialise their wider implications.[31] This view is challenged by the anticipatory obedience thesis which argues that legal ambiguity provides leverage for litigants to pressure domestic policy-makers into pro-actively going beyond what the Court's jurisprudence requires out of fear for further litigation and Court-driven policy change.[32] Blauberger provides the middle ground in arguing that national responses to the Court's rulings depend on the distribution of the costs of legal uncertainty between supporters and challengers of existing domestic rules.[33]

The review of the literature on the Court's policy impact highlighted the implicit link between judicial power and the interpretation of primary or secondary law. The interpretation of Treaty provisions is associated with the Court's expansion of EU law and judicial activism. The strong focus on constitutionalisation suggests that the Court is only able to influence policy outcomes, both horizontally and vertically, by interpreting the Treaties as mandating a specific policy outcome. Conversely, extensive reliance on secondary law manifests greater deference to the legislator and the interests of Member States.[34]

[28] O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) International Organization 377.18/10/2024 08:55:00

[29] DS Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' cit.; DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

[30] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[31] LJ Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2018).

[32] SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' (2008) Journal of Comparative Policy Analysis: Research and Practice 299.

[33] M Blauberger, 'National Responses to European Court Jurisprudence' cit.

[34] L Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013) 167.

Emerging scholarship alludes to the deconstitutionalisation of EU law in recent years by flagging the Court's shift towards secondary law following a period of extensively interpreting Treaty-based rights.[35] The deconstitutionalisation of European citizenship is perceived by scholars as the Court's response to increasing contestation to the constitutionalisation of free movement and the continued judicial expansion of citizenship rights even after the Directive.[36] As existing scholarship is heavily focused on constitutionalisation and the Court's horizontal policy impact, the Court's vertical policy impact in the absence of constitutionalisation remains at best fuzzy.

Against this backdrop, it is of interest to examine first whether the Court can create rights and drive policy through the process of deconstitutionalisation, and second whether the Court's policy-making in a deconstitutionalised manner can effectively spur judicial Europeanisation.

III. Research design

In approaching the question, an empirical enquiry is conducted, examining the legal techniques underpinning the Court's policy-making in judgments where the Directive is applied by analogy and the ensuing implications for migration policies in all Member States.

All citizenship judgments in which the Court applies the provisions of the Directive by analogy are analysed. The narrow focus on the analogous application of the Directive allows for a more nuanced analysis of the judicial techniques underpinning the deconstitutionalisation process. As already noted, the analogous application of the Directive is exemplary of this process. Furthermore, the Directive itself constitutes a legislative intervention in response to the Court's judicial expansion of citizenship rights through constitutional interpretations.[37] Therefore, cases where the Directive is applied by analogy are representative of the Court's post-constitutionalisation era where greater emphasis is placed on the Directive and the limits to citizenship rights.

The data is extracted from the Curia website[38] using the keywords "applied by analogy" or "analogous application" and the subject-matter filter "Citizenship of the Union" provided in the search function. The selected phrases distinguish cases where the Court

[35] E Muir, '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' cit.; N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) CMLRev 889.

[36] E Muir, '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' cit.; SK Schmidt, 'Extending Citizenship Rights and Losing It All: Brexit and the Perils of "Over-Constitutionalisation"' cit.; SK Schmidt, 'No Match Made in Heaven. Parliamentary Sovereignty, EU Over-Constitutionalization and Brexit' cit.

[37] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit.; F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[38] Court of Justice of the European Union, *Info Curia: Case Law* curia.europa.eu.

is applying provisions by analogy from cases where Treaty provisions are read in conjunction with legislation without the latter conditioning the scope of the primary rights granted.[39] Furthermore, the subject-matter selection ensures that cases where the Court applies the provisions of other instruments by analogy are excluded from the analysis.[40]

The results are manually reviewed to ensure that all cases in fact concern the analogous application of the Directive. The manual review identified a false positive in *K.A.*[41] where the term appears in the question referred but the Court does not apply any provisions by analogy.

The Court applies the provisions of the Directive by analogy to situations falling outside its scope in eight citizenship judgments delivered from 2011 until 2023. The Court's reasoning is analysed, highlighting the interplay between primary and secondary law.

The second part examines the national policy impact of judgments in which the Court applies the provisions of the Directive by analogy in all Member States. It does so by relying on a mixture of primary and secondary sources. The analysis first examines reports produced by national experts documenting compliance with the Court's case-law in all Member States. The analysis of secondary sources is supplemented by an examination of national instruments transposing the Directive, including amended versions, where this information is publicly available and accessible. The scope of the analysis, which considers all Member States subject to the availability of information, is considerably broader than existing judicial Europeanisation studies which trace the responses of selected Member States.[42]

IV. The analogous application of the Directive

Legal rules tend to be vague which renders them indeterminate in their application, especially in cases found in the "penumbra" of the general meaning of the term.[43] This is intensified in the context of the EU as the open-textured nature of Treaty provisions leads to inevitable gaps.[44] The Court, pursuant to art. 267 TFEU, is entrusted with the task of according substance to normative principles and policy goals enclosed in vaguely formulated Treaty provisions through interpretation.[45]

[39] See *e.g.* case C-490/20 *Stolichna obshtina, rayon "Pancharevo"* ECLI:EU:C:2021:1008.

[40] See *e.g.* case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

[41] Case C-82/16 *K.A. and Others (Family reunification in Belgium)* ECLI:EU:C:2018:308.

[42] SK Schmidt, 'Judicial Europeanisation: The Case of *Zambrano* in Ireland' cit.; M Blauberger, 'National Responses to European Court Jurisprudence' cit.

[43] HLA Hart, L Green, J Raz and PA Bulloh (eds), *The Concept of Law* (Oxford University Press 2012).

[44] FW Scharpf, 'Community and Autonomy: Multi-level Policy-making in the European Union' (1994) Journal of European Public Policy 219; A Arnull, *The European Union and Its Court of Justice* (2nd edn Oxford University Press 2006); MP Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism' (IE Law School Working Paper WPLS08-02-2008).

[45] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit.

EU law allows for rule-based reasoning by analogy when there is a lacuna in primary or secondary law which leaves room for judicial development.[46] The Court can apply a provision by analogy in so far as it can be shown that the rules applicable to the case at hand are very similar to those sought to be applied by analogy, and contain an omission which is incompatible with a general principle of EU law.[47] The Court has applied both primary and secondary law provisions by analogy across a wide range of fields.[48]

The provisions of the Directive have been applied by analogy to various situations falling outside its scope. The Court through the interpretation afforded to Treaty provisions in effect subsumed under the beneficiaries of the Directive free movers returning to their Member State of origin, free movers naturalised in the host Member State and their respective family members. Notably, the situations of returning free movers and naturalised free movers fall outside the scope of art. 3 of the Directive which limits the applicability of the provisions enclosed to "Union citizens who move to or reside in a Member State other than that of which they are a national".[49] The Court also extended the rights granted in art. 16 of the Directive in certain circumstances to holders of a residence permit issued under 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 (hereinafter Directive 68/360).[50] The following sub-sections examine the legal reasoning in all cases where the provisions of the Directive were applied by analogy to periods of residence completed under Directive 68/360, free movers returning to their Member State of origin and free movers naturalised in the host Member State.

IV.1. Periods of residence completed under Directive 68/360

The practice of applying the provisions of the Directive by analogy first transpired in *Dias*.[51] The Court applied the rule enclosed in art. 16(4) of the Directive by analogy to periods in the host Member State completed on the basis of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years legal residence completed prior to that date.[52]

[46] K Langenbucher, 'Argument by Analogy in European Law' (1998) CLJ 481.

[47] Case C-165/84 *Krohn v BALM* ECLI:EU:C:1985:507 para. 14.

[48] ND Tellis, 'Expansion of the Applicability of EU Company Law Directives via Analogy? A Study Based on the Example of Greek Sea Trading Companies' (2008) European Company and Financial Law Review 353; E Muir, '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' cit.

[49] Art. 3 Directive 2004/38/EC cit.

[50] Directive 68/360/EEC of the Council of 15 October 1968 on the abolition of restrictions on the movement and residence within the Community for workers of Member States and their families.

[51] Case C-325/09 *Dias* ECLI:EU:C:2011:498.

[52] *Dias* cit. para. 65.

In *Dias* the analogous application of the Directive was justified on the basis of filling a lacuna found in the Directive. The legal gap stems from the fact that the right of permanent residence provided for by the Directive could only be acquired from 30 April 2006. Therefore, periods of continuous legal residence of five years completed before that date could not be relied upon to acquire such right.[53]

Through the analogous application of the Directive to the facts, the Court fills the legal gap without resorting to the interpretation of the Treaties, as suggested by the referring court.[54] The Court's preference for interpreting secondary citizenship rights, as opposed to primary citizenship rights, could be perceived as a sign of deference to the political compromise embodied in the Directive. The Directive was relatively new at the time and many questions were pending as to how its provisions, especially the novel concept of permanent residence enshrined in art. 16, are to be interpreted.[55] The Court therefore, filled the lacuna by building on existing political guidance as opposed to creating a parallel stream of rights grounded in the Treaties.

The analogous application of the Directive further allows the Court to strike a balance between the grant of rights and sensitive national interests. Even though the Court in essence expands the scope of art. 16 of the Directive, it still protects public finances through the interpretation of the term "absence from the host Member State". In *Dias* the term is interpreted as including instances where an individual is absent from the labour market although physically present in the host Member State.[56] This understanding is limited to periods of residence completed under Directive 68/360 where the Directive only applies by analogy. According to the Court, "the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence".[57] The qualification of the scope of art. 16(4) of the Directive in such cases where the provision only applies by analogy partially offsets the effect of the analogous application of the Directive on public finances. This is because the status of permanent residence granted by art. 16(1) of the Directive allows EU citizens to circumvent the conditions enclosed in arts 6 and 7 of the Directive intended to protect public finances.

[53] *Ibid*. para. 57.

[54] *Ibid*. para. 33.

[55] E Guild, S Peers and J Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn Oxford University Press 2019) 213 ff.

[56] *Dias* cit. paras 63-64.

[57] *Ibid*. para. 63.

IV.2. Free movers returning to their Member State of origin

The Court repeatedly applied the content of the Directive by analogy to Union citizens returning to their Member State of origin upon having resided in another Member State through the interpretation of art. 21 TFEU. This pattern first emerged in the *O. B.*[58] judgment delivered in 2014. The case concerned the residence rights of TCN family members of Dutch nationals in the Netherlands following the return of the latter to their Member State of origin after short periods of residence in another Member State. The Court interpreted art. 21(1) TFEU as meaning that Union citizens who created or strengthened a family life with a TCN during their residence in a Member State other than that of which they are a national, in conformity with the conditions of the Directive, can upon their return to their Member State of origin enjoy the rights enshrined in the Directive.[59]

The application of the Directive via the interpretation of art. 21 TFEU to free movers returning to their Member State of origin is justified on the basis of filling a legal lacuna. In *O. and B.* the Court asserts that a literal, systematic and teleological interpretation of the Directive precludes the establishment of a derived right of residence for a TCN family member of a Union citizen in the Member State of which that citizen is a national.[60] At the same time, the Court highlights the undesirable consequences of denying TCN family members of Union citizens in circumstances such as those of the applicants a derived right of residence. The undesirability of denying such rights is emphasised by the parallels drawn with the situations of workers returning to their Member State of origin and Union citizens residing in a Member State other than of which they are a national. First, the Court's analysis reiterates that the *Surinder Singh* and *Eind*[61] judgments established such derived rights in the context of workers.[62] The Court states that the same logic of removing the same type of obstacle on leaving the Member State of origin underpinning the return of workers exists in situations such as those in the main proceedings. [63] Second, the Court notes that the Directive grants such rights to a TCN who is a family member of a Union citizen where that citizen has exercised his or her right of freedom of movement by becoming established in a Member State other than the Member State of which he or she is a national.[64] Therefore, the Court suggests that the persistence of this legislative lacuna creates an obstacle to leaving the Member State of origin for Union citizens and would undermine the effectiveness of art. 21(1) TFEU.[65]

Given the Court's emphasis on the pivotal role of such derived rights in safeguarding the effectiveness of art. 21(1) TFEU, it follows that such rights should be first granted to

[58] Case C-456/12 *O. and B.* ECLI:EU:C:2014:135.
[59] *Ibid*. para. 61.
[60] *Ibid*.paras 37-43.
[61] *Surinder Singh* cit.; case C-291/05 *Eind* ECLI:EU:C:2007:771.
[62] *O. and B.* cit. para. 46.
[63] *Ibid*. paras 47, 51.
[64] *Ibid*. para. 50.
[65] *Ibid*. paras 51-55.

all returning citizens who exercised their free movement rights, and second be afforded the maximum level of protection against legislative override. As the situation falls outside the scope of the Directive, the Court was in principle under no obligation to apply the provisions of the Directive by analogy, and thus condition the enjoyment of such rights on the requirements outlined in arts 7 and 16 of the Directive.

Against this backdrop, the interpretation of art. 21(1) TFEU as mandating the analogous application of the conditions set out in arts 7 and 16 of the Directive seems to be a panacea as it deters the undesirable consequences of maintaining the lacuna while respecting sensitive national interests. In applying the conditions of the Directive by analogy, the Court leaves it up to Member States to determine whether the sponsors genuinely resided in the host Member State and whether a derived right of residence was enjoyed by the TCN family member pursuant to and in conformity with art. 7(2) or art. 16(2) of the Directive.[66] The Court limits the scope of this principle by making such derived rights of residence conditional upon satisfying the provisions of the Directive. As a result of this formula, according to Muir, the provisions of the Directive in a sense provide a gateway to art. 21 TFEU.[67] The Court further makes a distinction between residence under arts 6 and 7 of the Directive, concluding that residence in the host Member State under art. 6 of the Directive would not suffice for unlocking the rights granted under art. 21 TFEU.[68] In doing so, the Court strikes a pragmatic balance between free movement and the financial and sovereign interests of Member States.

In *Chavez-Vilchez and Others* (hereinafter *Chavez-Vilchez*)[69] the Court briefly addressed the analogous application of the Directive to situations of returning citizens. The Court stressed that before examining the situation under art. 20 TFEU it is first appropriate to consider whether a derived right of residence could be established based on art. 21 TFEU and the Directive.[70] In doing so, the Court implicitly clarified how this newly developed legal formula fits in the broader tapestry of citizenship provisions. In *Chavez-Vilchez* the Court elaborates on its *O. and B.* ruling by stressing that it is for the referring court to assess whether the conditions of the Directive are met for the purposes of conferring a derived rights of residence based on art. 21 TFEU and the Directive.[71] The Court also emphasised the function of arts 5-7 of the Directive as gatekeepers of the rights enshrined in art. 21 TFEU in such situations.[72]

[66] *O. and B.* cit. para. 57.

[67] E Muir, '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' cit.

[68] *O. and B.* cit. paras 52, 59.

[69] Case C-133/15 *Chavez-Vilchez and Others* ECLI:EU:C:2017:354.

[70] *Ibid*. paras 56-57.

[71] *Ibid*. para. 56.

[72] *Ibid*. paras 55-56.

Coman and Others (hereinafter *Coman*)[73] offers another illustration of the Court's careful balancing between individual rights and sensitive national interests through the analogous application of the Directive. The Court held that a TCN same-sex spouse of a Union citizen has a derived right of residence in circumstances such as those in the main proceedings under art. 21(1) TFEU on conditions which cannot be stricter than those laid down in art. 7 of the Directive. The Court recalled its earlier case-law on returning free movers, concluding that Mr. Hamilton can enjoy a derived rights of residence in Romania under art. 21 TFEU since Mr. Coman during the period of his genuine residence in Belgium pursuant to art. 7 of the Directive created or strengthened a family life with him.[74]

The Court's reference frame in *Coman* entails a mixture of primary and secondary law. In considering the first question, the Court asserts that the rights enshrined in art. 21 TFEU include "the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State".[75] It then interprets the term "spouse" as gender-neutral through a close reading of art. 2(2)(a) of the Directive. The Court's analysis reassures Member States that they are not required to provide for same-sex marriages under their national laws. The Court stressed that Member States' obligations are limited to the recognition of such marriages concluded in other Member States for the purposes of granting a derived right of residence to a TCN under the Directive.[76] The Court underlines the difference in the application of arts 2(2)(b) and 2(2)(a) of the Directive in clarifying that the latter, applicable to same-sex spouses, is not conditional on national laws. Member States cannot rely on national law to justify their failure to recognise a marriage concluded between same-sex couples in another Member State in accordance with the law of that state for the purposes of granting a derived right of residence to a TCN.[77]

Muir points to the duality found in the Court's analysis, as on the one hand, the interpretation of the term "spouse" is reasoned exclusively on the basis of secondary legislation, while the rest of the judgment is characterised by a "constitutional level of protection of the right".[78] The change in the level of analysis illustrates the Court's awareness of the political sensitivity of the topic and the need to carefully balance individual rights and Member States' interests. The Court perceives the divergent national approaches towards the recognition of same-sex marriages as conditioning free movement rights on national laws.[79] As this is at odds with the rationale underpinning freedom of movement,

[73] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

[74] *Ibid*. paras 23-26.

[75] *Ibid*. para. 32.

[76] *Ibid*. para. 45.

[77] *Ibid*. para. 36.

[78] E Muir, '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' cit. 195.

[79] *Coman and Others* cit. para. 39.

the Court attempted to remedy this issue by interpreting the term "spouse" for the purposes of the Directive in a gender-neutral way.[80] Notably, the analogous application of the Directive to the case at hand allows the Court to abstain from interpreting the term "spouse" as gender-neutral in the context of art. 21 TFEU. The Court by limiting its interpretation of the term "spouse" to art. 2(2)(a) of the Directive leaves open the possibility for Member States to override this understanding through secondary legislation. After all, the term "spouse" was the result of a political compromise and was purposely drafted in an ambiguous manner to avoid further divisions amongst Member States.[81] The Commission during the drafting of the Directive was of the view that the wording should not oblige Member States to amend their family laws, an area falling outside EU legislative competences.[82] Even though the situation has changed since the introduction of the Directive, as most Member States now recognise same-sex marriages, constitutional bans on same-sex marriage still exist in some Member States. The Court, therefore, by limiting its interpretation to art. 2(2)(a) of the Directive seems to share these concerns and demonstrates respect for Member States' competences.

Altiner and Ravn[83] stands out for being the only judgment where the frame of the analysis determined by the national court is preserved. The referring court sought an interpretation of art. 21 TFEU read in conjunction and by analogy with the Directive, thus demonstrating its familiarity with the Court's earlier case-law and the nexus between the two sources of rights.[84] The Court laconically reaffirmed that the conditions for granting a derived right of residence on the basis of art. 21(1) TFEU to a TCN family member of a Union citizen upon the return of that citizen to the Member State of which he or she is a national should not, in principle, be stricter than those provided for by the Directive.[85]

Lastly, in *Banger*[86] art. 3(2)(b) of the Directive is applied by analogy to situations of returning free movers and their unregistered partners.[87] The Court's reasoning in *Banger* closely follows the earlier case-law and grants residence rights to a TCN unregistered partner of a returning free mover in the latter's Member State of nationality under art. 21 TFEU subject to the provisions of the Directive.

[80] *Coman and Others* cit. paras 37-38.

[81] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* (DJØF 2014) 65, 84.

[82] U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit.

[83] Case C-230/17 *Deha Altiner and Ravn* ECLI:EU:C:2018:497.

[84] *Ibid*. para. 18.

[85] *Ibid*. para. 27.

[86] Case C-89/17 *Banger* ECLI:EU:C:2018:570.

[87] *Ibid*. para. 35.

IV.3. Free movers naturalised in the host Member State

The Court in *Lounes*[88] applies the provisions of the Directive by analogy to free movers, naturalised in the host Member State. In *Lounes* the referring Court sought to clarify whether a Union citizen who naturalises in the host Member State following the exercise of the right to free movement under the Directive continues to benefit from its provisions while residing in the United Kingdom (UK), and holding both Spanish and British nationalities.[89] The Court held that even though the Directive does not cover such situations, the TCN spouse of a naturalised dual national, is eligible for a derived right of residence under art. 21(1) TFEU, on conditions which must not be stricter than those provided for by the Directive.[90]

The Court shifts the focus of the analysis on the interpretation of the Directive and art. 21(1) TFEU and the extent to which they can grant a derived right of residence to a TCN spouse of a Union citizen who has acquired the nationality of the host Member State following the exercise of free movement rights under art. 7(1) or art. 16(1) of the Directive.[91] The legal formula of granting rights based on art. 21 TFEU subject to the analogous application of the Directive is used in *Lounes* to freeze in time the rights acquired under the Directive. Capitalising on the paradox of stripping citizens of rights acquired by the exercise of free movement due to naturalisation, the Court expressed a desire to avert an inversely proportional relationship between rights and integration.[92]

The Court fills the legal lacuna by transplanting the formula of establishing rights on the basis of art. 21 TFEU subject to the analogous application of the Directive from the context of returning free movers to naturalised free movers. Nonetheless, the scope of the principle in the context of naturalised free movers seems to be greater than in situations of returning free movers. Citizens returning to their Member State of origin need to prove the creation and strengthening of the relationship with a TCN family member while residing in another Member State. This obstacle appears absent in situations of naturalised citizens. The fact that Ms. Ormazabal only married Mr. Lounes in 2014, long after her naturalisation in 2009, was not detrimental to the establishment of a derived right of residence for Mr. Lounes even though he was never a beneficiary of an analogous right under art. 16 of the Directive.[93]

The *Lounes* judgment was delivered at a pivotal point in the Brexit negotiations where an agreement on citizenship rights was still pending. By grounding such rights in constitutional law, the Court sets the tone for an agreement on the rights enjoyed by naturalised dual nationals and their TCN family members, which would later include British nationals, at the EU-UK negotiations. At the time, the EU legislator was, following *Metock*,[94]

[88] Case C-165/16 *Lounes* ECLI:EU:C:2017:862.
[89] *Ibid*. para. 27.
[90] *Ibid*. para. 62.
[91] *Ibid*. paras 28-30.
[92] *Ibid*. paras 56-60.
[93] *Ibid*. paras 15-16.
[94] Case C-127/08 *Metock and Others* ECLI:EU:C:2008:449.

under the impression that the rights of TCN family members are anchored in secondary law and can thus be subject to legislative corrections.[95] This was evident in the proposal to complement the Directive included in the 2016 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.[96] In *Lounes* the Court clarifies the constitutional anchorage of the rights concerned, suggesting that the scope of free movement rights for EU citizens and the derived rights enjoyed by their TCN family members, including those with no prior lawful residence, can only be altered through a Treaty reform.[97]

Yet, the judicial activism of grounding such rights in a constitutional interpretation appears to be contained by the analogous application of the Directive. The obstacle of overcoming the conditions laid down in the Directive provides a loophole for the EU legislator to limit the derived rights of residence enjoyed by TCN family members of naturalised free movers by elevating the conditions enclosed in secondary law.

Most recently, in *Chief Appeals Officer*,[98] the Court confirmed the analogous application of the Directive to situations of workers who upon exercising their freedom of movement acquired the nationality of the host Member State through the interpretation of art. 45 TFEU. The Court in *Chief Appeals Officer* held that "[e]ven though Directive 2004/38 does not cover a situation such as that referred to in paragraph 45 of the present judgment, it must be applied, by analogy, to that situation".[99] To guarantee the effectiveness of arts 21 and 45 TFEU, the Court granted a derived right of residence to family members of Union citizens who exercised their freedom of movement by working in another Member State and subsequently acquired the nationality of the host Member State.[100] On this basis, the Court concluded that Member States are precluded from refusing "to grant a social assistance benefit to a direct relative in the ascending line who, at the time the application for that benefit is made, is dependent on a worker who is a Union citizen, or even to withdraw from him or her the right of residence for more than three months".[101] Therefore, the Court's analogous application of the provisions of the Directive in *Chief Appeals Officer* appears to have migration and financial implications for Member States.

V. National responses to the analogous application of the Directive

This section provides a follow-up to the Court's jurisprudence, tracing policy developments in all Member States flowing from the analogous application of the Directive in the

[95] E Muir, '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' cit. 188.

[96] *Ibid*. 187.

[97] *Ibid*. 190.

[98] Case C-488/21 *Chief Appeals Officer and Others* ECLI:EU:C:2023:1013.

[99] *Ibid*. para. 48.

[100] *Ibid*. paras 46-47.

[101] *Ibid*. para. 72.

cases analysed above. Considering the divergent views in the scholarship as to the ability of the Court to impact national policies, the analysis seeks to elucidate whether the expansion of EU law through the process of deconstitutionalisation can lead to Europeanisation in national migration policies. The following sections survey national compliance with the *Dias*, *O. and B*. and *Lounes* judgments where the Court first applied the Directive by analogy to periods of residence completed under Directive 68/360, free movers returning to their Member State of origin and free movers naturalised in the host Member State respectively. The national responses to *Coman*, where the Court first interpreted the term "spouse" found in the Directive as gender-neutral, are also reviewed.

V.1. Periods of residence completed under Directive 68/360

The responses of the then 27 Member States to *Dias* fall in three categories. As a preliminary note, reports were not available for Denmark, France, Luxembourg and Spain. Furthermore, the issue of whether residence completed under Directive 68/360 counts towards the acquisition of a right of permanent residence was not relevant in Bulgaria and Romania due to their accession date.[102]

Most Member States were already in a position where compliance with *Dias* could be secured without changing existing national laws and policies. Under domestic law or established practices continuous periods of residence occurring before the transposition date of the Directive were already counted towards the acquisition of a permanent right of residence in Austria, Belgium, Estonia, Finland, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Sweden.[103] For example, in Estonian the Citizen of the European Union Act of 2006 counts periods of residence before its entry into force towards the acquisition of a permanent right of residence.[104] In Ireland, even though domestic law does not explicitly mention pre-transposition residence, public officials in the Irish Nationality and Integration Service indicated that pre-transposition residence was counted for such purposes even before *Dias*.[105]

The UK is the only Member State where national practices had to be modified to secure compliance with *Dias*. In the aftermath of the judgment, the Department for Work and Pensions in the UK circulated a guide advising administrators to treat *Dias* as a relevant determination while noting that decisions made before the date of delivery which would have been decided differently cannot be revised.[106]

[102] R Fernhout, 'Follow-Up of Case Law of the Court of Justice 2011-2012' (Nijmegen Migration Law Working Papers Series 2012) 108 ff.

[103] *Ibid*. 33 ff.

[104] *Ibid*. 122.

[105] *Ibid*. 114 ff.

[106] UK Department for Work and Pensions, Staff Guide, September 2011, Memo DMG 23/11 DWP para. 11.

The reports for the remaining six Member States, Cyprus, the Czech Republic, Germany, Greece, Latvia and Slovakia indicate that national legislation was ambiguous as to whether periods of residence completed before the transposition date of the Directive are taken into consideration.[107] Furthermore, there is no evidence to suggest that national administrators and courts in these Member States were confronted with a *Dias* scenario before the judgment.[108]

V.2. Free movers returning to their Member State of origin

The Court's ruling in *O. and B.* was successfully implemented by all Member States. In 21 Member States the rights granted by the Court in *O. and B.* were already safeguarded by national laws or administrative practices. National experts indicated that no changes were required in Austria, Croatia, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.[109] In Cyprus the national law transposing the Directive was amended in 2011 to include within its scope Cypriot citizens returning from another Member State after having exercised their free movement rights.[110] In Italy TCN family members of Italian nationals were already entitled to a derived right of residence as the Italian transposition of the Directive extends the family reunification rights provided therein to Italian nationals.[111] Yet, the Italian report documents minor changes in relation to the processing of applications by Italian nationals in response to the *O. and B.* judgment.[112] Similarly, in Sweden, despite the fact that Swedish law extends the rights granted by EU law to all Swedish nationals,[113] a 2014 legislative amendment fully harmonised the rights of Swedish returning nationals and the beneficiaries of the Directive.[114]

The remaining seven Member States correctly implemented *O. and B.* by promptly changing their national laws and administrative practices. National reports documented changes in line with the judgment in Belgium, Denmark, France, Lithuania and the Netherlands.[115] Furthermore, a 2017 amendment to the Bulgarian immigration laws grants residence rights to TCN family members of Bulgarian nationals returning to Bulgaria after

[107] R Fernhout, 'Follow-Up of Case Law of the Court of Justice' cit. 108 ff.

[108] *Ibid*.

[109] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) European Journal of Migration and Law 358.

[110] Law No. 181(I)/2011 adds paragraph (6) to article 4 of Law No. 7(I)/2007 www.cylaw.org.

[111] R Fernhout, 'Follow-Up of Case Law of the Court of Justice' cit. 72.

[112] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 367.

[113] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 74.

[114] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 367.

[115] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit.

exercising their free movement rights in another Member State. Even though the Bulgarian legislator opted for implementing the judgment by changing the law applicable to TCN instead of amending the national instrument transposing the Directive, the relevant provision specifies that the simplified procedure applicable to family members of Union citizens also applies to TCN family members of returning Bulgarians.[116] Lastly, in the UK the regulations implementing the Directive extended its scope to returning free movers in certain circumstances.[117] Despite being criticised for imposing stricter conditions on the grant of the rights concerned,[118] the UK rules mirror the conditions found in the Court's case-law as summarised by the Commission.[119]

The analysis illustrated that in most cases the personal scope of the Directive was already extended by national implementation measures to family members of returning nationals.[120] For example, in Finland the national rules transposing the Directive covered family members of returning free movers before the *O. and B.* judgment. In 2007 the national legislation transposing the Directive was amended to include in Section 153(4) AA "family members of a Finnish citizen if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later".[121] In other cases, such as Italy and Sweden, a liberal national transposition of the Directive extended its scope to even family members of static nationals. The *O. and B*. judgment thus had no observable impact on domestic migration policies in these Member States as such rights were already guaranteed by national law.

The impact of *O. and B.* is greater on the migration policies of Member States where the scope of the Directive was not already extended to such groups under national law. For example, in Denmark the Court's analogous application of the Directive to citizens returning to their Member State of nationality after only residing in another Member State led to significant changes in domestic migration policies. While *O. and B.* was pending before the Court, the Danish Western Appeal Court was confronted with a similar factual scenario.[122] The Danish court held that EU law was not applicable to a Danish citizen returning to Denmark accompanied by a TCN family member after having resided

[116] Foreigners in the Republic of Bulgaria Act, Article 24m www.mig.government.bg.

[117] UK Secretary of State, The Immigration (European Economic Area) Regulations 2016 of 2-3 November 2016 No. 1052, para. 9.

[118] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 368.

[119] Notice C/2023/1392 of the Commission of 22 December 2023, Guidance on the right of free movement of EU citizens and their families, para. 18.

[120] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 73.

[121] S Sankari and S Miettinen, 'Union Citizenship: Development, Impact and Challenges: Finland' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit. 513, 515.

[122] Danish Western Appeal Court judgment of 27 March 2012 B-1173-11 reported in U2012. 2187V.

in Germany without performing an economic activity in the host Member State, and on the basis of national immigration rules the national court denied the grant of a derived right of residence.[123] As already mentioned, Denmark changed its immigration laws in the aftermath of *O. and B.* and further established a mechanism for processing applications for family reunification with a Danish citizen under EU regulation.[124] The conditions imposed in fact mirror the content of the *O. and B.* judgment.

V.3. Free movers naturalised in the host Member State

The *Lounes* judgment meant that free movers and their TCN family members could continue enjoying the rights granted by the Directive even after the naturalisation of the former in the host Member State. Therefore, TCN family members of naturalised free movers no longer had to resort to domestic legislation to acquire a right of residence.[125]

The impact of the judgment is expected to be more noticeable in Member States where the family reunification rules applicable to their own nationals diverged significantly from the Directive. As reports by national experts are not available on this issue, the analysis focuses on two Member States, the Netherlands and the UK, which apply stricter rules to their own nationals than those applicable under the Directive.[126]

The guidance offered by the competent Dutch authority clarifies that the Directive also applies to Dutch nationals who lived in the Netherlands as an EU citizen in compliance with EU law before becoming Dutch nationals.[127] In the UK the Immigration (European Economic Area) Regulations of 2016 were amended in 2018 in line with *Lounes*. Following the amendments, Regulation 2 defines European Economic Area (EEA) nationals as including also "a national of an EEA State who is also a British citizen and who prior to acquiring British citizenship exercised a right to reside as such a national, in accordance with Regulation 14 or 15".[128] In contrast, the 2016 version defined EEA nationals as "a national of an EEA State who is not also a British citizen".[129] The amendment also adds Section A to Regulation 9 which applies to EEA nationals who acquired British citizenship

[123] C Jacqueson, 'Union citizenship: Limitations, Opportunities and Paradoxes – The Case of Denmark' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit. 453, 469.

[124] The Danish Immigration Service, *Family reunification with a Danish citizen under EU regulations* nyidanmark.dk.

[125] E Spaventa, N Rennuy and P Minderhoud, *The Legal Status and Rights of the Family Members of EU Mobile Workers* (Publications Office of the European Union 2022).

[126] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 372.

[127] Immigration and Naturalisation Service, *Dutch Nationals and EU Law* ind.nl.

[128] UK Secretary of State, The Immigration (European Economic Area) (Amendment) to the 2016 Regulations of 2-3 July 2018 No. 801, Regulation 2, para.1(b).

[129] UK Secretary of State, The Immigration (European Economic Area) Regulations (2016) No. 1052, para. 2.

and their family members.[130] As a result, naturalised free movers and their family members can benefit from the right of permanent residence.

The example of the UK best illustrates the constraining effect of *Lounes* on domestic migration policies. The legislative amendment grants TCN family members of naturalised free movers a derived right of residence subject to the conditions found in the Directive. The national immigration rules, previously applicable to such categories and still applicable to TCN family members of static British nationals, are stricter and more costly than those found in the Directive.[131] Furthermore, the Court's analogous application of the Directive in *Lounes* had a lasting impact on Brexit negotiations. As Davies rightly observes, the changes to the draft Withdrawal Agreement from December 2017 to February 2018 safeguard the rights of naturalised free movers post-Brexit in line with *Lounes*.[132] The subsequent EU Settlement Scheme indeed affords protection to TCN family members of Union citizens who were within the scope of the Directive and subsequently naturalised as British citizens.[133] This is commonly referred to as a Lounes Application.[134]

V.4. Same-sex spouses

To implement *Coman* Member States were required to recognise same-sex marriages for the purposes of granting a derived right of residence to TCN spouses of Union citizens in the context of the Directive and when it applies by analogy. As Nic Shuibhne and Shaw rightly point out, before *Coman*, the rights enjoyed by same-sex spouses of Union citizens greatly varied across Member States and this in turn negatively impacted the exercise of free movement rights.[135] Member States responded to the *Coman* ruling in three ways.

The first group consists of 23 Member States where no changes were required to comply with the judgment. Same-sex marriage was recognised before or shortly after the *Coman* judgment in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.[136] As a result, the term "spouse" was already viewed as gender-neutral in the implementation of the Directive. Furthermore, no changes were required in Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia as registered partnerships between same-

[130] UK Secretary of State, The Immigration (European Economic Area) (Amendment) to the 2016 Regulations (2018) No. 801, para. 9.

[131] L Morales, 'Why is the judgement in *Lounes* important for the human rights of European nationals?' (29 May 2018) Morales Advisory Services www.morales.uk.

[132] G Davies, 'Lounes, Naturalisation and Brexit' (5 March 2018) European Law Blog europeanlawblog.eu.

[133] UK Home Office, *EU Settlement Scheme: EU, Other EEA and Swiss Citizens and their Family Members* assets.publishing.service.gov.uk.

[134] UK Government, *Home Office EU Settelemt Scheme Statistics: User Guide* www.gov.uk.

[135] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 72.

[136] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' (Publications Office of the European Union 2021) 39.

sex couples were recognised under their national laws. Therefore, same-sex spouses of Union citizens were already entitled to a derived right of residence in these countries, although it is unclear whether such residence permits were issued with reference to a "spouse" or "registered partner".[137] As noted by Tryfonidou, the Court in *Coman* did not clarify whether Member States are under an obligation to attach the label "spouse" as opposed to "registered partner" when issuing a residence permit to same-sex spouses of Union citizens.[138] Consequently, the practices of these Member States are aligned with *Coman* as TCN same-sex spouses of Union citizens are entitled to a derived right of residence under the Directive and when it applies by analogy. Lastly, no changes were documented in Poland despite the country's stance on same-sex marriage. The Polish authorities stated that same-sex marriage was already accepted as proof for a durably attested relationship for the purposes of granting a derived right of residence under EU law.[139]

The shadow of *Coman* is more prominent in Member States where neither marriage nor registered partnerships between same-sex couples are recognised. The Court, in ruling that Member States must grant a derived right of residence to same-sex spouses of returning nationals regardless of whether such unions are legally recognised in that Member State, essentially mandates a policy change in the migration laws of these Member States. Changes in national laws or administrative practices were recorded in Bulgaria, Latvia, Lithuania, and Slovakia. For instance, in Bulgaria the Supreme Administrative Court confirmed on 24 July 2019 that same-sex couples married in another Member State are eligible for residence rights in Bulgaria.[140] No legislative changes were required to comply with *Coman* since the national law transposing the Directive broadly defines family members for the purposes of the status and rights conferred by art. 2(2) of the Directive as including "persons in factual cohabitation with a Union citizen".[141] In principle, same-sex couples could already benefit from this provision in so far as they were in a factual cohabitation. Nonetheless, considering Bulgaria's stance on same-sex marriages it is unlikely that same-sex spouses were granted a derived right of residence in practice before *Coman*.

Lastly, Romania, the Member State concerned in the proceedings, failed to implement *Coman*. The domestic instrument transposing the Directive was not amended to

[137] *Ibid*. cit. 45.

[138] *Ibid*. 44.

[139] D de Groot, 'Free Movement Rights of Rainbow Families' (June 2023) European Parliamentary Research Service www.europarl.europa.eu 16.

[140] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' cit. 43.

[141] Bulgarian Ministry of Interior, Law for Entering, Residing and Leaving the Republic of Bulgaria of European Union Citizens and Members of their Families of October 2006 Prom. SG. 80/3, Additional Provisions, Section 1(1)(a).

include same-sex spouses under the definition of family members.[142] The relevant Romanian authority, Inspectoratul General pentru Imigrări, continues to deny TCN same-sex spouses of Union citizens and returning Romanians a derived right of residence.[143]

EU institutions have taken various steps to force Romania to comply with *Coman*. The European Parliament's resolution of 14 September 2021 requested the Commission to assess Member States' compliance with *Coman* and initiate enforcement actions under art. 258 TFEU against those that failed to comply.[144] The resolution explicitly calls for the initiation of infringement procedures against Romania over its undeniable and ongoing failure to treat same-sex spouses as spouses for the purposes of granting free movement rights.[145] The actions of EU institutions suggest that it is relatively easy to identify the general implications of judgments where the Court applies the provisions of the Directive by analogy which in turn facilitates the monitoring of national compliance.

VI. Judicial Europeanisation through deconstitutionalisation

The two-fold analysis reveals the analogous application of the Directive to be a powerful judicial tool. Through this interpretive technique the Court managed to diplomatically balance conflicting interests and further integration, as these rulings were largely implemented by Member States. Against a background of growing accusations of over-constitutionalisation, judicial Europeanisation can thus be achieved through a process of deconstitutionalisation.

The analysis of the legal reasoning in all cases where the Directive was applied by analogy underlined how this formula facilitates the navigation of political complexities and conflicting interests. The flexibility afforded by this interpretive technique is best illustrated in *Dias* as the Court was able to tweak the conditions attached to art. 16 of the Directive in cases where it only applies by analogy through a tailored interpretation of the term "absence from the Member State". The interplay between primary and secondary law in cases where the provisions of the Directive are applied by analogy to returning and naturalised free movers further allows the Court to diplomatically balance free movement and sensitive national interests. As already discussed, the dual level of analysis in *Coman* enabled the Court to safeguard the effectiveness of free movement while respecting Member States' views on same-sex marriage. The responses of Member States which oppose same-sex marriages to *Coman* demonstrated that the Court's careful balancing of competing interests is successful in compelling compliance as these Member States implemented the judgment without changing their overall stance on same-sex marriage.

[142] Romanian Government Emergency Ordinance on the Legal Status of aliens in Romania of 12 December 2022 no. 194/2002, art. 46.

[143] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' cit. 42.

[144] Resolution 2021/2679(RSP) of the European Parliament of 14 September 2021 on LGBTIQ rights in the EU.

[145] Resolution 2021/2679(RSP) cit., para. 10.

Crucially, the analogous application of the Directive enables the Court to expand the scope of citizenship rights and drive policy developments without fuelling accusations of judicial activism and over-constitutionalisation. The Court, through the interpretation of art. 21(1) TFEU expands the scope of the Directive beyond what was agreed in the drafting process by Member States. As a result, certain groups excluded from the beneficiaries of the Directive can enjoy the rights enclosed therein. In such cases, the Court arguably interferes with the scope of rights enclosed in legislation through the interpretation given to the Treaties. These rights, stemming from a constitutional interpretation, are further shielded from corrective legislation, and can only be changed through a Treaty revision.

At the same time, the Court's reliance on secondary law when it comes to the conditions limiting the enjoyment of such rights could be perceived as a sign of judicial minimalism. The Court's analogous application of the Directive in such cases follows the letter of art. 21(2) TFEU which subjects the enjoyment of the rights enshrined in art. 21(1) TFEU to the conditions and limitations found in legislation. In theory the EU legislator can modify these rulings by altering the secondary legislation which conditions the primary rights. The emphasis on EU legislation therefore tones down the implications of constitutionalising these rights. As Muir aptly points out, the co-existence of primary and secondary law in such cases responds to over-constitutionalisation critiques and encourages Member States to process disagreements on the scope of such rights through political dialogue.[146] The Court's analogous application of the Directive to situations of returning and naturalised free movers could thus be situated between judicial activism and restraint.

The follow-up to the Court's jurisprudence demonstrated that the legal formula of expanding the scope of EU law through deconstitutionalisation effectively fosters judicial Europeanisation. In the judgments examined, the Court expanded the scope of EU law and issued decisions with indirect implications on policy areas of high political salience such as external migration, Brexit and same-sex marriages. High levels of national compliance were observed in response to the Court's analogous application of the Directive. Member States promptly changed their policies in line with the Court's jurisprudence where existing laws and administrative practices were not already compliant. Romania's response to *Coman* presents the only case of non-compliance.

The overall high levels of compliance, especially in the field of migration which is characterised by national political control and administrative discretion,[147] are likely due to three factors. First, the analysis illustrated how some Member States could secure compliance with the judgments without any need for change. In most instances national laws transposing the Directive extended its scope to periods of residence completed under

[146] E Muir, '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' cit.194.

[147] DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' cit. 945.

Directive 68/360, nationals returning to their Member State of origin after residing in another Member State and same-sex spouses before the Court did. In such cases the national legislators extended the scope of the Directive beyond what was required under EU law. The extension of the rights granted by the Directive to economically inactive returnees and sometimes even static nationals under national law is likely due to reverse discrimination concerns or anticipatory obedience strategies. Some Member States, such as Italy, in an effort to combat reverse discrimination of nationals extended the right to family reunification provided by EU law to their own static nationals. Instances where Member States extended the scope of the Directive to economically inactive nationals returning from another Member State before the *O. and B.* judgment are likely due to anticipatory obedience strategies. Following the anticipatory obedience thesis,[148] the legal uncertainty resulting from *Surinder Singh*, which grants such rights to economically active returnees, likely incentivised national policy-makers to pro-actively reform their policies out of fear of further litigation.

Second, the high compliance rates observed could stem from the sufficiently clear implementation guidelines offered to Member States by the analogous application of the Directive. Existing scholarship identifies a chasm between the implementation of case-law and secondary law.[149] The analogous application of the Directive bridges this chasm as the Court by extending the scope of art. 3 of the Directive signals to Member States that these judgments are to be implemented in the same way as EU legislation. In fact, as the analysis illustrated, most Member States responded to the Court's analogous application of the Directive by amending existing national laws transposing the Directive to include the categories stipulated. The rights granted by the Court's case-law are further afforded a lasting protection by being incorporated into the national legal framework. This is best captured by the UK's response to *Lounes* where the national migration rules were first amended and were later safeguarded post-Brexit.

The sufficiently clear guidelines found in the Court's analogous application of the Directive further target national implementation problems discussed in the scholarship. Compliance, at both formal and administrative level, with judgments where the Directive applies by analogy is relatively easy as Member States already have in place the legal framework and administrative mechanisms for granting the rights in question. Conversely, compliance with judgments where the Court creates new rights through a constitutional interpretation often requires setting up new mechanisms.

[148] M Blauberger, 'National Responses to European Court Jurisprudence' cit.; SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

[149] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.; DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' cit.; SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

Furthermore, the analogous application of the Directive secures compliance with the general implications of judgments beyond the specific facts. It is often unclear how judicial rulings translate into policy, especially in cases where the Court interprets Treaty principles which are less detailed compared to secondary law.[150] As a result, Member States not addressed by the judgment tend to contain compliance by preserving national policies and only implementing the judgment to its specific facts.[151] The national responses to the Court's analogous application of the Directive offer evidence against contained compliance in this context as Member States, particularly those not targeted by the decisions, changed their policies and complied with the general implications of judgments.

Moreover, the analogous application of the Directive overcomes implementation issues at the administrative front. Existing literature suggests that national administrators need specific instructions to implement ambiguous judicial decisions which are often provided by domestic legislation.[152] National administrators across Member States proved to be responsive to judgments where the Court applies the Directive by analogy. As illustrated by the UK's response to *Dias*, national administrators directly implemented the Court's rulings where the provisions of the Directive were applied by analogy in the absence of domestic legislative amendments.

Third, Romania's response to *Coman* illustrates that cases of non-compliance can be easily detected when the Court applies the Directive by analogy. In the only case of non-compliance considerable efforts were taken by EU institutions to ensure Romania's compliance with *Coman*. Therefore, as non-compliance is easily detectable in such cases, Member States have an incentive to promptly implement the Court's rulings where the provisions of the Directive are applied by analogy.

VII. Concluding remarks

The scholarship unveiled the Court's shift towards the interpretation of secondary citizenship rights in recent judgments, after years of consistently shaping the scope and substance of European citizenship through the interpretation of constitutional provisions.[153] In the wake of such developments, this *Article* illustrated that judicial Europeanisation can and does occur through this process of deconstitutionalisation. The findings revealed that the Court can expand the scope of EU law and is able to successfully impact domestic

[150] SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

[151] LJ Conant, *Justice Contained: Law and Politics in the European Union* cit.

[152] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.; DS Martinsen, M Blauberger, A Heindlmaier and J Sampson Thierry 'Implementing European Case Law at the Bureaucratic Frontline: How Domestic Signalling Influences the Outcomes of EU Law' (2019) Public Administration 814.

[153] E Muir, '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' cit.

policies without constitutionalising policy outcomes by applying the provisions of the Directive by analogy to situations falling outside its scope. The analysis, therefore, adds some empirical nuance to theoretical debates about the Court's ability to impact national policies. Crucially, it paves the way for decoupling the study of the Court's influence on policy from the phenomenon of constitutionalisation.

The analysis by providing a comprehensive overview of the Court's policy-making through deconstitutionalisation, revealed the analogous application of the Directive to be a powerful tool for balancing competing interests and fostering judicial Europeanisation. The first part uncovered the interpretive techniques underpinning the Court's analogous application of the Directive, highlighting how this avenue enables the Court to safeguard the effectiveness of free movement provisions while respecting sensitive Member States' interests. The second part traced national responses across Member States to the Court's use of this legal formula, attempting to determine the extent to which judicial Europeanisation occurs in the aftermath of judgments where the Court applies the provisions of the Directive by analogy. The findings demonstrated how the analogous application of the Directive led to the Europeanisation of the sensitive domain of national migration policies, even in times when the judicial expansion of citizenship rights is highly contested. The analysis further highlighted how the analogous application of the Directive effectively targets national implementation problems which according to existing scholarship hinder judicial Europeanisation.

Lastly, this *Article* offered an empirically grounded analysis of judicial Europeanisation through deconstitutionalisation by focusing on the Court's analogous application of the Directive. Even though the empirical insights concern citizenship rights, the general conclusions as to the effectiveness of this technique in fostering judicial Europeanisation, could be relied upon to understand the implications of the Court's analogous application of other secondary law instruments on national policies.