



ARTICLES

SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW: CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

AIM AND DUTY, SWORD AND SHIELD: ANALYSING THE CAUSE AND EFFECTS OF THE MALLEABILITY OF “SOCIAL INTEGRATION” IN EU LAW

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ABSTRACT: Social integration is often depicted as a means of enhancing the Union’s legitimacy. Most recently, a reinvigorated “social Europe” has been back on the agenda following the United Kingdom’s Brexit vote. And yet, ironically, the EU citizenry often appears resistant to the very mechanisms that seek to make the Union about its *people* rather than the market. To explore this phenomenon, this *Article* conducts a much-needed historical analysis of the concept of “social integration” within the EU legal order. The investigation identifies the operation of an economic/social di-

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chotomy operating across European/national dividing lines, established by the Rome Treaty. As the market freedoms expanded, coming into ever-more frequent contact with domestic social policies, this dichotomy ultimately proved to be a myth. And yet, the legacy of the economic/social dichotomy has been not only to leave national social policymaking structurally disadvantaged when it clashes with the market freedoms but to constrain the Union's capacity to offer social integration as a counter-balance to the deregulatory effects of the internal market at the supranational-level: European social policymaking is conceptualised as further interference with the traditionally national social sphere. Efforts to pursue social integration, instead, via the mechanisms of the internal market through Union citizenship have also been inherently limited by its market origins. Indeed, as the political winds have changed, "social integration" has been converted from a Union "aim" into an individual duty of economic activity in that context. This undermines the Union's contemporary social aims, whilst doing little to address perceived Euroscepticism. Instead, a further model of social integration is needed; one which sees domestic and Union activities as jointly contributing to a shared constitutional social space and which is realised through a new method of adjudication that structurally recognises the significance of social goals in the present-day Union.

KEYWORDS: social integration – social policy – single market – free movement – Union citizenship – Court of Justice.

I. INTRODUCTION

Although the Rome Treaty sought "ever-closer union among the peoples of Europe" and to "ensure the economic and social progress" of the Member States,¹ its integrative focus was very much economic. The contemporary functioning of the Single Market arguably vindicates the decision to build European integration on economic foundations. Yet recent political events – not least the UK electorate's decision to leave the EU – might suggest that the Union is now entering a period of "disintegration", casting doubt on the solidity of its integrative roots. Today, integration of a more socially-oriented nature seems to be viewed as crucial to winning the hearts and minds of Europe's citizens. In the context of a "roadmap for a more united, stronger and more democratic union",² the Commission President called, *inter alia*, for a Union in which "Europeans wake up to a Europe where we have managed to agree on a strong pillar of social standards".³

However, to be effective such an approach must offer something genuinely novel. After all, the Maastricht Treaty sought to expand the EU's decidedly economic *raison d'être* to include social and political union as far back as 1993. Indeed, the vast array of policy

¹ See the Preamble of the 1957 Treaty establishing the European Economic Community (TEEC).

² European Commission, *Roadmap for a more united, stronger and more democratic Union*, available at ec.europa.eu.

³ J.-C. JUNCKER, *State of the Union Address*, 13 September 2017, available at ec.europa.eu. Though returning to the market is also often presented as the way to tackle Euroscepticism. For a critical analysis of this approach, see C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford: Hart, 2017.

areas covered by the contemporary Treaties have already greatly extended the manner in which the Member States can pursue European integration, albeit that the Union's competence to act differs across various fields. Critically, though each policy area boasts its own successes, the broadening of the Treaties' remit seems to have done relatively little, one way or the other, to convince the "peoples of Europe" of the merits of "ever-closer union". In fact, ironically the EU citizenry – or at least those sections of it able to vote in relevant popular referenda – appears resistant to some of the political and social mechanisms that seek to make the Union about its *people* rather than the market.

Accordingly, as it prepares to enter the post-Brexit era, the EU must pursue social integration differently if it is to avoid the same old pitfalls. As a vital means of informing potential ways forward, this *Article* conducts a much-needed historical analysis of the evolving nature of "social integration" within the Union legal order, providing essential insights into the causes of existing tensions. Ultimately, the investigation demonstrates the inherent malleability of "social integration" as a concept in Union law. Its content has not only evolved over the decades of the EU's development; it can simultaneously represent a number of approaches, which can, themselves, come into conflict with one another.

Specifically, in the Union context, "social integration" can embody, *inter alia*, the aim of social progress, pursued as a mere by-product of the internal market or as an independent EU objective. It can encompass concrete Union social policymaking. It can cover integration in the sense of securing the effectiveness of Union law across the Member States by means of both minimum and maximum standards of social protection whilst facilitating economic activity. It can signify attempts to create a European social space through the negative integrative process of requiring Member States to open up their existing domestic social spaces to non-national EU citizens. This "European social space" can be understood as concrete access to social assistance but also as an effort to re-create the collective bonds of solidarity between *Union* citizens that are traditionally presented as existing between nationals and as underpinning domestic welfare states.⁴ Finally, social integration can operate as an individual duty on EU citizens to integrate into their host society. Thus, for the purposes of this discussion, the concept should be understood as an umbrella term for diverse social integration endeavours, rather than an explicitly adopted nomenclature within specified activity.

In order to explore these developments, first, section II examines the early manifestation of social integration as a by-product of economic integration. It identifies the early acceptance of an economic/social dichotomy structured along a European/national divide, which ultimately proved to be a myth as the expansion of the market freedoms led to increased interactions between free movement and national social rules. Falling

⁴ On the connection between nationality, citizenship and the welfare state, see e.g. C. O'BRIEN, *Unity in Adversity*, cit., pp. 9-10.

within the internal market, these tensions were adjudicated in a manner which structurally favoured the Union's economic integrative endeavours.

Section III tracks the emergence of social integration as an independent Union aim. It notes that the strengthening of Union social values has long been seen as a crucial factor in securing Union legitimacy but demonstrates that, regardless of the EU's increasing social competence, the legacy of the economic/social dichotomy has been to constrain the Union's capacity to offer an EU-level social counter-balance to the potentially deregulatory effects of economic integration.

Section IV highlights, nevertheless, that the success of the internal market inspired a new manifestation of social integration in the form of equal access for EU citizens to existing domestic social spaces. Free movement and the Union's social integration endeavours could be used by citizens as twin swords to enforce their rights. This approach appeared to be concretised by the formal recognition of Union citizenship at Maastricht. However, shaped by the structures of the internal market, the social integration potential of EU citizenship has always been inherently restricted and these limitations ultimately paved the way for a new model of social integration focused on individual duty.

Section V charts this metamorphosis of social integration within Union citizenship. It recognises that, in practice, this form of integration is reduced to economic activity and compliance with the domestic criminal law, rendering any broader form of social integration as a means of enforcing one's rights irrelevant. Rather "social integration" operates as a mechanism by which Member States can "shield" the national social sphere from non-national EU citizens. This overlooks the genuine social bonds that non-national EU citizens can form in their host State communities, arguably directly undermining the core integrative ambition of Union citizenship. Meanwhile, this shift in judicial approach has made little difference to the operation of free movement more generally and so is unlikely to address popular concerns about the Union project over the longer-term, while its focus on already marginalised EU citizens undercuts the Union's wider social objectives.

Consequently, section VI proposes that the Court of Justice take a new approach to its adjudication of tensions between the market freedoms and domestic social policies; one which views the latter as potentially contributing to a shared constitutional space. This would require assessment of the reciprocal impacts of economic and social objectives on one another. This more holistic method of adjudication would serve a number of aims. First, it would provide a means by which the Union can pursue its social ambition despite the persistent confines of the economic/social dichotomy. Second, greater flexibility across free movement law generally might reduce the political pressure to limit social integration to the performance of economic duties within the host State, which marginalises sections of the EU citizenry. Finally, an approach more respectful of Member States' "social sovereignty" might actually strengthen the legitimacy of the EU social space, facilitating supranational policymaking, where appropriate, in the future.

II. EXPLAINING THE PARADOX: THE HISTORICAL LIMITATIONS ON EUROPEAN “SOCIAL INTEGRATION” AS A COUNTER-BALANCE TO THE INTERNAL MARKET

When it comes to social integration, the EU seems to find itself in a paradoxical situation. Socially-oriented activity appears necessary to counteract some of the deregulatory effects of economic integration. Yet, “social Europe” often seems at risk of being represented as further European interference. This section explains this phenomenon. First, it identifies that the Rome Treaty maintained and solidified an economic/social dichotomy across a European/national divide, largely leaving concrete social policymaking within the domestic realm. Second, it highlights that the judicially-driven expansion of the Treaty’s market freedoms nevertheless blurred these lines, leading to tensions between the Union’s economic rules and domestic social policy. Third, the section demonstrates that, although the economic/social dichotomy had been exposed as a myth, it continues to limit the EU’s capacity to pursue social integration, presenting supranational social activity as a further erosion in to the domestic social space.

II.1. THE TRADITIONAL EUROPEAN/NATIONAL DIVIDE IN THE ECONOMIC/SOCIAL DICHOTOMY: SOCIAL PROGRESS AS A BY-PRODUCT OF ECONOMIC INTEGRATION

With the ambition of creating an “ever-closer union among the peoples of Europe” in the aftermath of the Second World War, the European Economic Community (EEC) was always about more than economic integration. Nevertheless, the Rome Treaty clearly created an economic framework for this European project. One of the EEC’s primary tasks was the “harmonious development of economic activities” by means of the establishment of a common market and the progressive approximation of the economic policies of the Member States,⁵ while the Community’s activities, such as the abolition of barriers to freedom of economic movement, focused on this objective.⁶

This is not to say that the Rome Treaty did not have social ambition. Its preamble asserted that the EEC was “resolved to ensure the economic *and* social progress [emphasis added] of its Member States”. Nonetheless, structured on a liberal market ideology, social progress was principally viewed as a by-product of economic integration. Art. 2 TEEC proclaimed that an “accelerated raising of the standard of living” would be achieved “by establishing a common market”. As Schiek puts it, since “social integration would be the natural result of unfettered markets [...] The EEC itself would only need social policies directly related to the common market”.⁷ Thus, Rome’s limited social chapter focused on promoting improved working conditions and raising the standard of

⁵ Art. 2 TEEC.

⁶ Art. 3 TEEC.

⁷ D. SCHIEK, *Economic and Social Integration: The Challenge for EU Constitutional Law*, Cheltenham: Edward Elgar, 2012, p. 39.

living for workers,⁸ while provisions such as Art. 119 TEEC – requiring Member States to ensure and maintain the principle that women and men receive equal pay for equal work – were, at the time, targeted at preventing distortions of competition.⁹

Nevertheless, from an historical perspective, the Rome Treaty provided an apposite means of accomplishing European integration. Where previous attempts at building the European Defence Community and the European Political Community had failed,¹⁰ the handing over of economic governance to the “spontaneous order of competitive markets”,¹¹ at the European-level spoke to the ordo-liberal ideologies of the era. Meanwhile social integration could be achieved as a welcome side-effect – in terms of raised standards of living – while more concrete social policy-making could be left to individual Member States, given the democratic legitimacy arguably needed in such a “highly political” field.¹² In short: “the original constitutional deal was premised upon a transfer of responsibilities for economic integration to EU institutions while domestic institutions retained their fundamental role in defending social solidarity”.¹³

However, the presumption that an economic/social dichotomy could be neatly divided across European/national lines has proven untenable. As the Treaty’s market freedoms expanded, the line between the European economic space and the national social sphere became more blurred.

II.2. EXPANDING THE MARKET FREEDOMS INTO THE DOMESTIC SOCIAL SPACE

Most would accept that the contemporary functioning of the internal market is the result, rightly or wrongly, of the progressive extension of the market freedoms, primarily at the instigation of the Court of Justice. Crucially, however, as this subsection demonstrates those same expansions brought free movement into more frequent contact with domestic social policies blurring the lines of the economic/social dichotomy. More importantly, as the next subsection establishes, those interactions were adjudicated through a judicial methodology that prioritised the market freedoms. This revealed the presumptions upon which the Rome Treaty’s social integration strategies were based to be fallacious.

As is well-known, over the decades since Rome, the material scope of the market freedoms has broadened to cover indirect discrimination,¹⁴ dual regulatory burdens¹⁵

⁸ Art. 117 TEEC; see also N. BUSBY, *A Right to Care? Unpaid Work in European Employment Law*, Oxford: Oxford University Press, 2011, pp. 96-97.

⁹ N. BUSBY, *A Right to Care?*, cit., pp. 96-97.

¹⁰ See J. PINDER, *The Building of the European Union*, Oxford: Oxford University Press, 1998.

¹¹ D. SCHIEK, *Economic and Social Integration*, cit., p. 230.

¹² *Ibidem*.

¹³ K. ARMSTRONG, *Governing Social Inclusion: Europeanization through Policy Coordination*, Oxford: Oxford University Press, 2010, p. 232.

¹⁴ Court of Justice: judgment of 6 June 2000, case C-281/98, *Angonese* [GC] (workers); judgment of 31 March 1993, case C-19/92, *Kraus* (workers and establishment).

and, in most cases, national measures that hinder or make less attractive intra-Union trade.¹⁶ Their personal scope has also been extended, for instance, to the service recipient¹⁷ and the workseeker.¹⁸ Moreover, all of the Treaty's economic freedoms now enjoy some degree of direct effect.¹⁹ Thus, individuals can enforce their free movement rights in national courts, and can, except in exceptional circumstances,²⁰ rely on the twin doctrines of primacy and effective judicial protection to ensure the immediate disapplication of conflicting domestic rules.²¹

While these developments have undoubtedly helped to underpin the market freedoms as the "pillars of a powerful economic constitution",²² they also brought free movement into increasingly frequent contact with domestic social policy, broadly conceived, including but not limited to national rules on healthcare,²³ housing,²⁴ criminal injuries compensation,²⁵ public health,²⁶ wage-levels in the context of public procurement,²⁷ access to social assistance²⁸ and access to education.²⁹ As a specific example, the now infamous *Viking* and *Laval* judgments³⁰ – which saw clashes between the freedoms of establishment and services respectively, on the one hand, and the Scandinavi-

¹⁵ Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (goods).

¹⁶ Court of Justice: judgment of 30 November 1995, case C-55/94, *Gebhard* (services); judgment of 11 December 2007, case C-438/05, *Viking* [GC] (establishment); judgment of 15 December 1995, case C-415/93, *Bosman* (workers); judgment of 8 July 2010, case C-171/08, *Commission v. Portugal* (capital). Judgment of 24 November 1993, joined cases C-267/91 and C-268/91, *Keck and Mithouard* arguably re-focused the goods case-law on differential treatment. However, Court of Justice, judgment of 10 February 2009, case C-110/05, *Commission v. Italy (mopeds)* [GC] and judgment of 4 June 2009, case C-142/05, *Mickelsson and Roos* [GC] suggest a market access approach in certain contexts.

¹⁷ Court of Justice, judgment of 2 February 1989, case 186/87, *Cowan*.

¹⁸ Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*.

¹⁹ Court of Justice: judgment of 19 December 1968, case 13/68, *Salgoil* (goods); judgment of 4 December 1974, case 41/74, *van Duyn v Home Office* (workers); judgment of 21 June 1974, case 2/74, *Reyners* (establishment); judgment of 8 April 1976, case 48/75, *Royer* (workers, establishment and services); judgment of 14 December 1995, joined cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera* (capital).

²⁰ Court of Justice, judgment of 28 July 2016, case C-379/15, *Association France Nature Environnement*.

²¹ Court of Justice, judgment of 9 March 1978, case 106/77, *Simmenthal*.

²² D. SCHIEK, *European and Social Integration*, cit., p. 82.

²³ Court of Justice: judgment of 12 July 2001, case C-157/99, *Geraets-Smits and Peerbooms*; judgment of 16 May 2006, case C-372/04, *Watts* [GC].

²⁴ Court of Justice, judgment of 8 May 2013, joined cases C-197/11 and C-203/11, *Libert*.

²⁵ *Cowan*, cit.

²⁶ Court of Justice, judgment of 8 March 2001, case C-405/98, *Gourmet*.

²⁷ Court of Justice: judgment of 3 April 2008, case C-346/06, *Rüffert*; judgment of 17 November 2015, case C-115/14, *RegioPost*.

²⁸ Court of Justice: judgment of 23 May 1996, case C-237/94, *O'Flynn*; judgment of 31 May 1978, case 207/78, *Ever*; judgment of 30 September 1975, case 32/75, *Cristini*.

²⁹ Court of Justice, judgment of 7 July 2005, case C-147/03, *Commission v. Austria*.

³⁰ *Viking* [GC], cit.; Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval* [GC].

an industrial relations model, on the other – could not have occurred without the expansion of the scope of Arts 49 and 56 TFEU to include restrictions to market access and the extension of the direct effect of those provisions horizontally to certain private parties. In both cases the Court of Justice rooted its application of the relevant market freedoms to trade unions in the Union's economic integrative objectives.³¹

Accordingly, over time, these interactions have called into question the validity of the economic/social dichotomy. Rather than simply facilitating social integration in a general sense, by contributing to improved living standards whilst leaving the rest to the Member States, the instruments of the internal market were frequently coming into contact with specific domestic social policies. Moreover, since the market freedoms pursue economic integration principally through a deregulatory logic,³² the social aims behind national policies were at risk of being overlooked and treated primarily as barriers to movement.

II.3. UNFIT FOR PURPOSE: THE STRUCTURAL PRIORITISATION OF FREE MOVEMENT AND THE FALLACY OF THE ECONOMIC/SOCIAL DICHOTOMY

An examination of the manner in which the Court of Justice adjudicates tensions between the market freedoms and national law demonstrates how and why internal market mechanisms are not yet adequately equipped to acknowledge the social endeavours behind national rules. From the very beginning, the Court has adjudicated tensions between primary free movement law and domestic rules through a two-stage breach/justification procedure.³³ This model asks, first, whether there has been a restriction on the market freedom in question and, second, if this can be justified. This places national law and policy on the procedural back-foot,³⁴ since it is structurally presented as a *prima facie* wrong that must be defended. Member State rules are treated as *derogations*³⁵ to be interpreted strictly.³⁶

In the context of protectionist or directly discriminatory domestic policies, with which the market freedoms originally interacted, such an approach made sense. Such rules strike directly at the heart of the integrative ambition the Member States had agreed upon at Rome: economic integration via the internal market. However, the

³¹ *Laval* [GC], cit., para. 98: “the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by the activities of actors not governed by public law”; *Viking* [GC], cit., para. 34.

³² L. MANCANO, *The Place for Prisoners in European Union Law?*, in *European Public Law*, 2016, p. 721.

³³ Court of Justice: judgment of 8 July 1975, case 4/75, *Rewe-Zentralefinanz*; judgment of 5 October 1977, case 5/77, *Tedeschi*.

³⁴ C. BARNARD, *Social Dumping or Dumping Socialism?*, in *Cambridge Law Journal*, 2008, p. 262 *et seq.*

³⁵ This is arguably supported by the positioning of the Treaty derogations of Arts 36, 45, para 3, 52, 62 and 65, para. 1, let. b) TFEU after the market freedoms in Arts 34, 45, 49, 56 and 63 TFEU. See N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford: Oxford University Press, 2013, p. 26.

³⁶ Court of Justice, judgment of 11 September 2008, case C-141/07, *Commission v. Germany, Salgoil*, cit.

breach/justification model was retained when the expanded free movement provisions began to interact with the qualitatively different Member State rules on social policy.³⁷ This raised serious doubts about the economic/social dichotomy upon which the Union's integrative project was originally based. First, Union-level social integration could no longer be viewed only as a congruent by-product of the internal market, since the latter was coming into direct conflict with national-level social measures. Second, relatedly, Member States were not being left alone to "provide the requisite [social] protection without unnecessary interference".³⁸ Rather the breadth of the free movement provisions was leaving Member States' social policy choices exposed to evaluation by the Court of Justice via an adjudicative framework that left them structurally disadvantaged.

Specifically, significant evidentiary hurdles operate at the justification phase of the Court's two-stage model. Activity conflicting with the market freedoms must pursue a legitimate aim, in a way that is both appropriate and necessary.³⁹ Necessity is usually defined by reference to whether measures less restrictive of free movement are available.⁴⁰ This can impose particularly onerous evidential burdens on domestic social considerations. For instance, in *Commission v. Luxembourg* public order legislation targeted at worker protection but in conflict with free movement had to be "so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons on the territory".⁴¹ Likewise, Gallo points out that within the free movement of capital's golden-shares case-law, the retention of special powers held by the State in formerly public companies is very rarely justified in practice.⁴² He identifies the requirement that Member States demonstrate a "genuine and sufficiently serious threat" to the supply of public services, affecting one of the fundamental interests of society⁴³ at the justification stage as one of the reasons for this. The Court's adjudicative architecture presumes that "the State performs a regulatory

³⁷ *Viking* [GC], cit.; *Laval* [GC], cit.; Court of Justice, judgment of 19 June 2008, case C-319/06, *Commission v. Luxembourg*; *Rüffert*, cit.; *Libert*, cit.; *Gourmet*, cit. Indeed, the breach/justification model was reinforced by these expansions. See S. REYNOLDS, *Explaining the Constitutional Drivers behind a Perceived Judicial preference for Free Movement over Fundamental Rights*, in *Common Market Law Review*, 2016, p. 643 *et seq.*

³⁸ N. BUSBY, *A Right to Care?*, cit., p. 96.

³⁹ *Gebhard*, cit.

⁴⁰ *Ibidem*.

⁴¹ *Commission v. Luxembourg*, cit., paras 29 and 50.

⁴² D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules: The Case of Golden Shares and Sovereign Investments*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, pp. 824 and 830, citing Court of Justice: judgment of 8 July 2010, case C-171/08, *Commission v. Portugal*; judgment of 4 June 2002, case C-367/98, *Commission v. Portugal*; judgment of 14 February 2008, case C-274/06, *Commission v. Spain*; judgment of 4 June 2002, case C-503/99, *Commission v. Belgium* being the exception.

⁴³ *Commission v. Spain*, cit., para. 47.

function with the primary aim of restricting market access"⁴⁴ and overlooks the fact that "the underlying purpose of golden shares – at least on paper – is the protection of national general interests" in a profit-making environment.⁴⁵ Indeed, the manner in which tensions between free movement and domestic social policies are adjudicated can lead to a number of issues that ultimately expose the economic/social dichotomy as a myth.

First, the idiosyncrasies of domestic social spaces can be overlooked despite national competence retention. In *Laval*, a trade union was found to have committed an unjustified breach of Art. 56 TFEU by engaging in collective action to seek to ensure that a Latvian service provider afforded workers who it posted into Sweden the terms and conditions contained in a Swedish collective agreement. The Court accepted worker protection as a legitimate aim, in principle, for restrictions on intra-EU service provision.⁴⁶ However, it found that the Posted Workers' Directive (PWD)⁴⁷ imposed a ceiling of protection as regards which rules host States could apply to posted workers.⁴⁸ As a brief aside, this reveals another variant of social integration focused on the effectiveness of EU law and understood as, at best, the operation of an effective European legal space within which the Union's coordination of maximum standards offers basic protection to workers whilst facilitating economic activity.⁴⁹ Although Art. 3, para. 10, Posted Workers' Directive (PWD) allowed for the applications of terms and conditions going beyond the core nucleus of protection contained in the PWD for reasons of public policy, trade unions, as private actors, could not access this justification.⁵⁰ This arguably underappreciates the particular role of trade unions within the idiosyncrasies of the Scandinavian social model.⁵¹ Similarly, the Court of Justice held that although the PWD allowed for the imposition of minimum rates of pay, collective action to ensure this could not be justified within a national system of case-by-case determination of that minimum, which made it impossible or excessively difficult for undertakings to determine their obligations.⁵² Thus, even though both pay and the right to strike are explicitly ex-

⁴⁴ D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules*, cit., p. 830.

⁴⁵ *Ibidem*.

⁴⁶ *Laval*[GC], cit., para. 103.

⁴⁷ 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.

⁴⁸ *Laval*[GC], cit., para.108.

⁴⁹ This arguably does not cohere with the original motives of the EU legislature, which introduced the PWD as an anti-social dumping measure. See e.g. Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final, para.12.

⁵⁰ *Laval*[GC], cit., para. 85.

⁵¹ See M. RÖNNMAR, *Free Movement of Services vs National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective*, in *Cambridge Yearbook of European Legal Studies*, 2007-2008, p. 493 *et seq.*

⁵² *Laval*[GC], cit., para. 110.

cluded from the Union's competences,⁵³ the broad nature of the internal market provisions, and the requirement that Member States comply with Union law when acting within their competence,⁵⁴ meant that key aspects of the Scandinavian industrial relations model would, at the very least, need to be re-thought.

Second, alongside an under-appreciation of the idiosyncrasies of domestic social approaches is a lack of consideration of the knock-on consequences of the Court's current adjudicative approach for the practical delivery of national social schemes, funded from budgets that face competing demands. The *Watts* case offers an example of these inter-related issues.⁵⁵ There, the fact that service recipients fell within the personal scope of Art. 56 TFEU and that the applicant had paid for medical treatment in another Member State meant that, under certain conditions, she was entitled to claim reimbursement from the UK's National Health Service. This was despite the fact that, as a free-at-the-point-of service healthcare system, funded from general taxation, the NHS had no system for allocating or distributing resources for such reimbursement at that time. As Nic Shuibhne and Maci argue, the Court opens a "precarious avenue of review in the suggestion that it, or any court, can work out the financial 'balance' of an entire national budget by reflecting on whether one policy choice could have been implemented less restrictively".⁵⁶

Finally, the current approach can undermine the specific nature of the social right in question. In *Viking*, the Court called upon the referring court to consider whether measures less restrictive of the freedom of establishment than the collective action under consideration were available.⁵⁷ Yet, in the context of disputes between trade unions and cross-border undertakings, any industrial action less restrictive of free movement would also inevitably reduce the effectiveness of exercising the right to strike as a means of securing social protection in the first place.⁵⁸ Of course, this might raise questions about how to balance the right to take collective action with the market freedoms of service providers should there be instances of clearly protectionist collective action. However, the requirement that actors pursue a legitimate aim already addresses this concern, without the additional need for a one-sided assessment of the proportionality

⁵³ Art. 153, para. 5, TFEU.

⁵⁴ *Laval* [GC], cit., paras 86-88.

⁵⁵ *Watts* [GC], cit.

⁵⁶ N. NIC SHUIBHNE, M. MACI, *Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law*, in *Common Market Law Review*, 2013, p. 1003.

⁵⁷ *Viking* [GC], cit., para. 84.

⁵⁸ A. DAVIES, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, in *Industrial Law Journal*, 2008, p. 126 *et seq.*; T. NOVITZ, *A Human Rights Analysis of the Viking and Laval Judgments*, in *Cambridge Yearbook of European Legal Studies*, 2008, pp. 560-561.

of collective action. On the nature of the collective action, domestic rules already seek to demarcate collective action and political protest from more problematic conduct.⁵⁹

The purpose of this discussion, however, is not to assert that the breach/justification model has had particular, deleterious effects on domestic social endeavours in specific cases; nor to suggest, one way or the other, that individual Member States have been making an especially good job of social integration. Rather, what this historical analysis has demonstrated is that, while the Rome Treaty foresaw the pursuit of social integration as a by-product of the internal market, whilst leaving concrete social policymaking to the domestic-level, the reality of the route to economic integration via the internal market has laid bare the presumptions of this economic/social dichotomy. The expansion of the market freedoms has brought them into direct conflict with national social choices, placing the latter on the procedural back-foot. This has arguably contributed to the Union's legitimacy deficit.

II.4. CONTRIBUTING TO A LEGITIMACY DEFICIT?

First, by narrowing the EU's social integration endeavours to social progress as a by-product of the internal market, while largely leaving concrete social policymaking to the Member States, the economic/social dichotomy visible in the Rome Treaty reinforced the idea of the Member States' social sovereignty.⁶⁰ However, the subsequent expansion of the market freedoms instead risked triggering competition between domestic regulatory systems. As Schiek notes, though workers might be attracted to Member States with, for example, the best public childcare, since "real people move with less ease than capital", companies and capital will generally benefit from regulatory competition more than workers do,⁶¹ exercising their free movement entitlements to select favourable regulatory environments.⁶² This can lead to the perception that the positive effects of European economic integration are mainly enjoyed by an elite population,⁶³ whilst putting established social entitlements at risk. A high-profile example of this is the Lindsey oil refinery strikes in which British construction workers walked out in protest – some under the controversial slogan "British Jobs for British Workers" – at apparent attempts by an Italian service provider IREM, themselves awarded the contract by

⁵⁹ See e.g. Court of Justice, judgment of 9 December 1997, case 265/95, *Commission v. France (Spanish Strawberries)* in which action taken to protest the import of Spanish agricultural produce into France already fell within the French criminal code, though France was found not to be enforcing it in that case.

⁶⁰ K. ARMSTRONG, *Governing Social Inclusion*, cit., p. 232.

⁶¹ D. SCHIEK, *Economic and Social Integration*, cit., p. 86.

⁶² Consider e.g. Court of Justice, judgment of 9 March 1999, case C-212/97, *Centros*.

⁶³ D. SCHIEK, *Economic and Social Integration*, cit., p. 30.

French multinational TOTAL, to undercut existing wages and conditions by posting migrant workers to the site.⁶⁴

Second, the current breach/justification procedure requires Member States to justify the restrictions their social policy choices impose on free movement by means of high evidentiary hurdles,⁶⁵ even where these restrictions might only be indirect or potential.⁶⁶ By contrast, the EU is “under no obligation to justify the intrusion in national policies and the rejection of the complementary social values in the name of economic freedoms”.⁶⁷ Given that the economic/social dichotomy divides across European/national lines, this approach risked looking very much like unchecked interference with Member States’ traditional social sovereignty. The legitimacy questions this raises are exacerbated by the fact that much of the momentum for free movement’s expansion came from the EU’s judicial branch. Horsley argues that, in its free movement case-law, the Court has “interposed itself as a political actor in EU integration”⁶⁸ and made policy choices in sensitive areas that, in the Court’s absence “would simply not make it onto the discussion table”.⁶⁹ This arguably risks causing a disconnection between the EU and its citizenry.⁷⁰ Consequently, though the reasons for the various Treaty changes since Rome are manifold, a frequently occurring justification has been the need to counter-balance the potentially detrimental effects of the internal market on social progress.

III. “SOCIAL EUROPE”: MAINTAINING THE ARTIFICIAL BOUNDARIES OF SOCIAL AND ECONOMIC INTEGRATION

The examples of increased interaction between internal market rules and national social policy provided above are drawn from various points in the Union’s developmental history. Accordingly, the analysis should not be understood as linear but as encapsulating a matrix of economic and social dynamics. Within this matrix is the accompanying expansion of the EU’s social remit, within which social integration began to manifest as an independent Union aim. This section, first, charts this evolution, establishing that it was motivated, at least in part, by the acknowledgement that the economic/social di-

⁶⁴ See A. INCE, D. FEATHERSTONE, A. CUMBERS, D. MACKINNON, K. STRAUSS, *British Jobs for British Workers? Negotiating Work, Nation, and Globalisation through the Lindsey Oil Refinery Disputes*, in *Antipode*, 2015, p. 139 *et seq.*

⁶⁵ *Gebhard*, *cit.*: legitimate aim, suitability, necessity and general proportionality.

⁶⁶ Court of Justice, judgment of 11 July 1974, case 8/74, *Dassonville*.

⁶⁷ D. SCHIEK, *Economic and Social Integration*, *cit.*, p. 236.

⁶⁸ T. HORSLEY, *Reflections on the Role of the Court of Justice as the “Motor” of European Integration: Legal Limits to Judicial Lawmaking*, in *Common Market Law Review*, 2013, p. 942.

⁶⁹ *Ibid.*, p. 944.

⁷⁰ See also S. 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 Solidarity in the EU*, Oxford: Hart, 2018, p. 17 *et seq.*

chotomy was unfit for purpose and the belief that social integration was an essential component in enhancing Union legitimacy. Nevertheless, second, the section identifies the continuing constraints the economic/social dichotomy places on the extent to which the EU can deliver social integration as a counter-balance to the internal market.

III.1. THE EMERGENCE AND EVOLUTION OF SOCIAL INTEGRATION AS A (CONSTRAINED) INDEPENDENT UNION AIM

The Union's political branches took steps relatively early on to assert that "economic expansion is not an end in itself but should result in an improvement in the quality of life as well as the standard of living".⁷¹ The Council's 1974 Resolution on a Social Action Programme explicitly recognised that social policy had "an individual role to play",⁷² and saw this as an important means of "enhancing EEC legitimacy in the eyes of citizens".⁷³ This was also the period in which the Court recognised the direct effect of the Union's primary law provisions on equal pay.⁷⁴ Nevertheless, the Council remained conscious of the traditional social sovereignty of the Member States, emphasising that EEC measures should not seek "a standard solution to all social problems".⁷⁵ The EU's social evolution has followed this pattern ever since.

First, the Union strengthens its recognition of its social aims. Thus, the Commission's 1985 White Paper, though still viewing economic integration as an effective stimulus of social progress,⁷⁶ accepted that facilitating free movement to "areas of greatest economic advantage might exacerbate existing discrepancies between regions".⁷⁷ The subsequent Single European Act (SEA) spoke of an EEC "determined to improve the economic and social situation by extending common policies and pursuing new objectives".⁷⁸ By Maastricht, the Union had pledged to "implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields".⁷⁹ The Amsterdam Treaty confirmed the Union's "attachment to fundamental social rights"⁸⁰ and broadened the EU's social policy endeavours to include "proper social protection" and the "combating of exclusion".⁸¹ The contemporary Union, under the Lisbon Treaty, has as its aim the promotion of peace, its values and the well-being of its peo-

⁷¹ Council Resolution of 21 January 1974 concerning a Social Action Programme.

⁷² *Ibid.*, p. 2.

⁷³ D. SCHIEK, *Economic and Social Integration*, cit., p. 40.

⁷⁴ Art. 119 TEEC in Court of Justice, judgment of 8 April 1976, case 43/75, *Defrenne*.

⁷⁵ Council Resolution, Social Action Programme, cit., p. 2.

⁷⁶ Communication COM(1985) 310 final of 13 June 1985 from the Commission, *Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, para. 20.

⁷⁷ *Ibid.*, para. 21.

⁷⁸ Preamble of the 1987 Single European Act (SEA).

⁷⁹ Preamble of the 1992 Treaty on European Union.

⁸⁰ Preamble of the 1997 Amsterdam Treaty.

⁸¹ Now Art. 151 TFEU.

ple.⁸² Crucially, social integration is no longer presented as a by-product of a functioning internal market. Rather, the internal market must “work for the sustainable development of Europe based [*inter alia*] on a highly competitive social market economy, aiming at full employment and social progress”.⁸³ Most recently, the Commission President has called for a European Social Standards Union to foster a “common understanding of what is socially fair in our single market”.⁸⁴

Second, these developments are presented as a crucial factor in securing the Union’s legitimacy. The move towards political and social union at Maastricht, for example, had been initiated, *inter alia*, by the belief of the French President and German Chancellor that this would offer a means of “strengthening the democratic legitimacy of the union”.⁸⁵ The Laeken Declaration, which preceded the Convention on the Future of Europe and the drafting of the now abandoned Constitutional Treaty stated that “[c]itizens want results in the fields of employment, combating poverty and social exclusion, as well as in the field of economic and social cohesion”.⁸⁶

Third, the growing independence of the Union’s social aims was accompanied by new tasks, legislative competences, and decision-making efficiency measures. The SEA, for instance, introduced new competence in relation to the working environment⁸⁷ and required the strengthening of economic and social cohesion to be taken into account in the implementation of the internal market.⁸⁸ The introduction of co-decision and the expansion of qualified majority voting (QMV) paved the way for greater legislative activity including as regards employment protection for pregnant workers.⁸⁹ At Maastricht, the European Economic Community became the European Community,⁹⁰ which itself was just one pillar of a European Union alongside new intergovernmental pillars in common foreign and security policy⁹¹ and justice and home affairs.⁹² Union citizenship was formalised within Union primary law⁹³ and new more socially-oriented Titles were

⁸² Art. 3, para. 1, TEU.

⁸³ Art. 3 TEU.

⁸⁴ See J.-C. JUNCKER, *State of the Union Address*, cit.

⁸⁵ Joint message of 8 April 1990 from François Mitterrand and Helmut Kohl on the necessity of accelerating the construction of Political Europe.

⁸⁶ European Council Conclusions of 14-15 December 2001, Annex I on the *Laeken Declaration on the Future of Europe*, pp. 20-21.

⁸⁷ Art. 21 SEA/Art.118a, para. 1, TEEC.

⁸⁸ Art. 130, let. b), TEEC.

⁸⁹ Directive 92/85/EEC of the Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. See also N. BUSBY, *A Right to Care?*, cit., p. 100.

⁹⁰ Art. G(A) of the Maastricht Treaty.

⁹¹ Title V TEC.

⁹² Title VI TEC.

⁹³ Art. 8 TEC.

added covering, *inter alia*, culture,⁹⁴ public health⁹⁵ and consumer protection.⁹⁶ While Maastricht had strengthened and broadened the EU's socially-focused activities through the Social Policy Protocol,⁹⁷ Amsterdam brought this within the Treaty proper. Moreover, a new Employment Title⁹⁸ focused on unemployment was "indicative of a move away from a purely economic conception of the EU towards a more overtly political organisation".⁹⁹ Lisbon, *inter alia*, widened the TFEU's horizontal provisions. In particular, the contemporary Union is required, in defining its policies and activities, to take into account the promotion of social protection, high employment, social inclusion, education, training and public health,¹⁰⁰ as well as environmental protection,¹⁰¹ consumer protection,¹⁰² and combating discrimination.¹⁰³

Nevertheless, each (potential) expansion of the Union's social remit is accompanied, fourth, by reassurances that the EU understands the importance of domestic social sovereignty. Thus, though it asserted that European citizens "undoubtedly supported the Union's broad aims", the Laeken Declaration also accepted that "[m]any also feel that the Union should involve itself more with particular concerns, instead of intervening...in matters by their nature better left to Member States and regions' elected representatives. This is even perceived by some as a threat to their identity".¹⁰⁴

At Maastricht, the EU's venture into areas such as education was accompanied by statements that it was "fully respectful of the responsibility of the Member States for the content of teaching, organisation of their education systems and their cultural and linguistic diversity".¹⁰⁵ Most notably, with the UK initially opting out of the Social Chapter, Maastricht saw the concept of differentiated participation become part of the Union's integration processes. Lisbon strengthened the national identity clause,¹⁰⁶ while measures such as the emergency brake – which allows a Member State to refer draft legislation to the European Council where it would affect fundamental aspects, or the financial balance, of its social security system – were introduced.¹⁰⁷ Indeed, while the EU's social competence has grown greatly since Rome, the Union is still far from being

⁹⁴ Title IX TEC.

⁹⁵ Title X TEC.

⁹⁶ Title XI TEC.

⁹⁷ Agreement on Social Policy concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, Art. 2.

⁹⁸ Then Title XI TEC, now Title IX TFEU.

⁹⁹ N. BUSBY, *A Right to Care?*, cit., p. 100.

¹⁰⁰ Art. 9 TFEU.

¹⁰¹ Art. 11 TFEU.

¹⁰² Art. 12 TFEU.

¹⁰³ Arts 10 and 8 TFEU.

¹⁰⁴ European Council Conclusions of 14-15 December 2001, cit., p. 20.

¹⁰⁵ Arts 126 and 128 TEC.

¹⁰⁶ Art. 4, para. 2, TEU.

¹⁰⁷ Art. 48 TFEU.

able to boast a social constitution as powerful as its economic one. Its ability to offset the effects of economic integration on social integration remains constrained.

III.2. LIMITS ON SOCIAL INTEGRATION RESULTING FROM THE ECONOMIC/SOCIAL DICHOTOMY

Though the economic/social dichotomy has proven to be a myth, its legacy is the continuing concern that Union-level social integration represents further European interference rather than a necessary counterweight to the internal market. Consequently, while the Union enjoys a range of exclusive and shared regulatory competences in the internal market domain,¹⁰⁸ the expansion of EU activity into social policy and related areas, such as consumer protection, the environment, education and health is largely restricted to shared¹⁰⁹ or complementary¹¹⁰ competence, often with a focus on minimum requirements.¹¹¹ That is not to say that the EU does not act in key areas, but simply that its general social competences are more limited than its economic powers.¹¹² Crucially, the free movement provisions have remained largely unchanged,¹¹³ despite the Treaties' wider, evolving social goals. Social concerns are still treated as *derogations* from fundamental market freedoms in the internal market context.¹¹⁴ In this sense, rather than offering a counterweight to the deregulatory effects of economic integration, and the ultimately insufficient model of social integration as a by-product of the internal market, the notion of European social integration as an independent aim is largely functionally distinct from the internal market. The market freedoms continue to benefit from direct application within the Member States, "enforced by a judiciary enjoying a wider competence than the EU legislator",¹¹⁵ and so still pose the same challenges to social policy regardless of the Union's own concrete social policymaking. Thus, for instance, the EU's merely complementary competence in the field of health did not preclude the Court from assessing a free-at-the-point-of-delivery healthcare system as a restriction on the free movement of services.¹¹⁶

¹⁰⁸ See e.g. Art. 53 TFEU (recognition of qualifications); Art. 50 TFEU (harmonisation of company law); Art. 59 TFEU (liberalisation of the service economy); Art. 103 TFEU (competition rules); Art. 113 TFEU (harmonisation of indirect taxes); Art. 118 TFEU (European intellectual property rights).

¹⁰⁹ Art. 4 TFEU.

¹¹⁰ Art. 6 TFEU.

¹¹¹ E.g. Art. 153, para. 2, let. b), TFEU *inter alia* on workers' health and safety, working conditions, equality between men and women as regards labour market opportunities.

¹¹² See e.g. N. COUNOURIS, R. HORTON, *The Temporary Agency Work Directive: Another Broken Promise?*, in *Industrial Law Journal*, 2009, p. 329 *et seq.*; L. RODGERS, *The Self-employed and the Directive on Working Time for Mobile Transport Workers*, in *Industrial Law Journal*, 2009, p. 339 *et seq.*

¹¹³ With the exception of the removal of e.g. references to transitional periods in relation to establishment and services and the more incremental nature of the free movement of capital.

¹¹⁴ See e.g. *Laval* [GC], cit.; *Commission v. Luxembourg*, cit.

¹¹⁵ D. SCHIEK, *Economic and Social Integration*, cit., p. 229.

¹¹⁶ *Watts* [GC], cit.

The Treaty's express exclusion of competence as regards pay and the right to strike¹¹⁷ did not deter the Court from finding that the trade union in *Laval* had unjustifiably breached Art. 56 TFEU, nor did the Court's recognition of the Union's "social purpose",¹¹⁸ in that case, make any difference to the judicial processing of collective action as a derogation from the free provision of services.

Even if Union-level social integration is needed to offset the effects of economic integration, it seems unlikely that more potent social instruments, at least as regards hard law, could be offered under the Treaties anytime soon. The economic/social dichotomy is indicative of a paradox in the EU's constitutional framework: the Union is often perceived as lacking the popular legitimacy needed to introduce the social and political mechanisms that might otherwise contribute to its legitimacy. Thus, to secure a "yes" vote from the Danish electorate, following its rejection of the Maastricht Treaty, a declaration stated that the newly-formalised EU citizenship was additional to and did not replace national citizenship.¹¹⁹ This was seemingly rooted, *inter alia*, in concerns that Union citizenship could extend the Treaty's scope into social security.¹²⁰ Lisbon removed the Charter from the main Treaty text following the Dutch and French rejection of the Constitutional Treaty, while the Eurobarometer identified social issues as central to the French "no" vote.¹²¹ The European Council had to "carefully note the concerns of the Irish people [...] relating to taxation policy, family, social and ethical issues",¹²² before a vote in favour of Lisbon was delivered. Even as President Juncker identified social standards as essential for continuing support for the Union in the post-Brexit era, he emphasised that "national systems will still remain diverse [...] for a long time".¹²³

Ultimately, even as the internal market impacts on Member State discretion to pursue social values, the EU might "not be capable of generating the kind of popular legitimacy" needed to secure those values at the Union-level.¹²⁴ The Court of Justice is not unaware of the Gordian knot that the judicially-driven process of economic integration has tied the Union's political organs up in. Thus, alongside the expansion of the Treaties' social remit, we must add judicial contributions to the concept of social integration to our evolutionary matrix.

¹¹⁷ Art. 153, para. 5, TFEU.

¹¹⁸ *Laval* [GC], cit., para. 105.

¹¹⁹ European Council Conclusions of 12 December 1992, Annex III, Unilateral Declaration of Denmark to be associated with the Danish Act of Ratification of the Treaty of the European Union and of which the Eleven other Member States will take Cognizance, Declaration on Citizenship of the Union, para. 1.

¹²⁰ T. WORRE, *First No, then Yes: The Danish Referendums on the Maastricht Treaty 1992 and 1993*, in *Journal of Common Market Studies*, 1995, p. 242.

¹²¹ Eurobarometer, *The European Constitution: Post-referendum Survey in France*, June 2005, p. 17, available at ec.europa.eu.

¹²² European Council Conclusions of 11-12 December 2008.

¹²³ See J.-C. JUNCKER, *State of the Union Address*, cit.

¹²⁴ K. ARMSTRONG, *Social Inclusion*, cit., p. 234.

IV. FREE MOVEMENT AS A SWORD TO ACCESS THE DOMESTIC SOCIAL SPACE: EUROPEAN SOCIAL INTEGRATION VIA THE NEGATIVE PROCESSES OF THE INTERNAL MARKET

Though the expansion of the free movement provisions into areas of national social policy exposed the economic/social dichotomy as a fallacy, this judicially-driven negative integrative process pointed to a potential way forward as regards European social integration. Specifically, free movement rights and the aim of social integration could be understood as a sword, securing access to existing domestic social spaces. The inclusion of non-national EU citizens within previously closed-off national social spheres¹²⁵ would be emblematic of a socially integrated Union. The potential of this model of social integration, however, has proven to be inherently restricted by its internal market roots and these limitations have ultimately paved the way for social integration to be converted into an individual duty.

The Union's political and judicial branches both recognised fairly early on that the free movement of labour, as a pillar of the internal market, was unlikely to be realised if the needs of the human being behind the EU worker were not met. Thus, Union legislation was introduced, for example, to permit EU workers to be accompanied by certain family members in their host State¹²⁶ and for their children to be educated there.¹²⁷ Union workers were also entitled to "enjoy the same social and tax advantages as national workers".¹²⁸ The Court interpreted this provision widely, extending it to cover not only benefits accompanying worker status but those attached to residence on the host State territory.¹²⁹ The acknowledgement that it was necessary to cater for the social aspects of free movement revealed the potential of free movement as a tool of social integration. Indeed, the Commission recognised free movement as "*le premier aspect d'une citoyenneté européenne*" in the early 1960s.¹³⁰

This form of social integration is a negative process, working towards a European social space by requiring Member States to welcome non-national EU citizens into existing domestic social assistance schemes ordinarily the preserve of nationals. As O'Brien notes, "the very concept of the welfare state implies a citizen-state relationship and, by extension

¹²⁵ See M. FERRERA, *The Boundaries of Welfare, European Integration and the New Spatial Politics of Social Protection*, Oxford: Oxford University Press, 2005.

¹²⁶ Arts 10-12 of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; Arts 6, para. 2, and 7, para. 2, 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 (CRD).

¹²⁷ Art. 12 of Regulation 1612/68, now Art. 10 of Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on the freedom of movement for workers within the European Union.

¹²⁸ Art. 7, para. 2, of Regulation 1612/68, now Art. 7, para. 2, of Regulation (EU) 492/2011.

¹²⁹ *Cristini*, cit.

¹³⁰ Cited in A.C. EVANS, *European Citizenship*, in *Modern Law Review*, 1982, p. 500.

is linked to nationality and citizenship. The idea of social justice is bound up with that of solidarity, suggesting a network of relationships and the notion of membership”.¹³¹ Thus, this form of social integration not only claims to facilitate the inclusion of non-national EU citizens within the circle of solidarity that is traditionally thought to exist between nationals but also implicitly seeks to encourage their acceptance within that circle.¹³² Since the free movement rights of economic actors was the route to this form of social integration, the Court began to broaden the definition of economic actor. “EU worker” covered those whose work was “genuine and effective” even if they were not net contributors to their host State’s social security system.¹³³ The judicial introduction of the “service recipient” opened up, for instance, Member States’ criminal injuries compensation schemes to EU citizens who were tourists on their territory.¹³⁴ Eventually, in the 1990s, the EU legislature began extending free movement rights to non-economically active EU citizens, though they had to be self-sufficient.¹³⁵ In this way, free movement emerged as a tool by which to “transcend the character of European integration as a purely economic project and to develop it in the direction of a political community”.¹³⁶

As is well-known, this incremental “market citizenship” culminated in the formal recognition of Union citizenship in the Maastricht Treaty.¹³⁷ This strengthened the opportunity for a Court-driven pursuit of social integration via the same negative processes that had been so successful in the internal market. Specifically, exercise of one’s personal, primary right to move under Art. 21 TFEU triggered the principle of non-discrimination, under Art. 18 TFEU, and therefore equal access to domestic social welfare systems.¹³⁸ *Grzelczyk*¹³⁹ implied that this was firmly rooted in the EU’s broader integrative ambition: Union citizenship was “destined to be the fundamental status of nationals of the Member States”.¹⁴⁰ Accordingly, non-economically active Union citizens were entitled to equal access to national social assistance if they were legally resident in their host State.¹⁴¹ Though they could not constitute an “unreasonable burden” upon

¹³¹ C. O’BRIEN, *Unity in Adversity*, cit., p. 9.

¹³² O’Brien argues, however, that ultimately Union citizenship is not defined by the social justice obligations that are the traditional rationale behind national welfare states but resolutely remains a market citizenship. C. O’BRIEN, *Unity in Adversity*, cit.

¹³³ Court of Justice: judgment of 23 March 1982, *Levin*; judgment of 3 June 1986, case 139/85, *Kempf*.

¹³⁴ *Cowan*, cit.

¹³⁵ Council Directive 90/364/EEC of 28 June 1990 on the right of residence; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their economic activity; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

¹³⁶ N. NIC SHUIBHNE, *The Third Age of EU Citizenship*, in P. SYPRIS (ed.), *The Judiciary, the Legislature and the EU Market*, Cambridge: Cambridge University Press, 2013, p. 331, fn. 15.

¹³⁷ Art. 20 TFEU.

¹³⁸ Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*.

¹³⁹ Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*.

¹⁴⁰ *Ibid.*, para. 31.

¹⁴¹ *Ibid.*, para. 44.

domestic welfare, a “certain degree of financial solidarity” was expected between the nationals of the Member States.¹⁴² Under certain conditions, this rationale also saw national jobseekers’ allowance extended to Union workseekers¹⁴³ and student maintenance made available to EU students,¹⁴⁴ where previously these had been denied.¹⁴⁵

This fostering of a European social space by ensuring non-national EU citizens’ inclusion in the national social sphere also extended to protecting them from expulsions. Thus, in *Orfanopoulos*,¹⁴⁶ the Court held that a “particularly restrictive approach” to expulsions was needed since such removals constituted an obstacle to the primary free movement rights of individuals holding the fundamental status of Union citizen.¹⁴⁷ Later, in *Tsakouridis*, the Court also acknowledged that “expulsion of Union citizens [...] can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State”.¹⁴⁸ Thus, integration was something to be maintained and protected and, seemingly, about more than just economic activity.

Nevertheless, since it has its origins in the internal market, the pursuit of social integration through free movement is inherently limited. For non-economically active EU citizens, the Court of Justice expressly introduced integration requirements for access to host State social systems, including the “real link” test¹⁴⁹ and the “certain degree of integration” condition.¹⁵⁰ More broadly, the Court has made plain that integration has “qualitative elements” that principally rest on economic activity¹⁵¹ and, more recently, on compliance with the values of the host State society as expressed in its criminal code.¹⁵² These developments paved the way for the conversion of “social integration” from a Union aim, which EU citizens could use together with free movement rights as a sword to access domestic social spaces, to an individual duty to contribute to one’s host State society, which, if not met, would leave non-national EU citizens excluded from national social assistance. Moreover, the notion of integrating in host State generally boils down to economic activity. In *Commission v. Netherlands*, the Court explained: “The link of integration arises from [...] the fact that, through the taxes which he pays in the host

¹⁴² *Ibidem*.

¹⁴³ *Collins*, cit.

¹⁴⁴ Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC].

¹⁴⁵ Court of Justice: judgment of 18 June 1987, case 316/85, *Lebon* (jobseekers allowance); judgment of 21 June 1988, case 197/86, *Brown*.

¹⁴⁶ Court of Justice, judgment of 29 April 2004, case C-482/01, *Orfanopoulos*.

¹⁴⁷ *Ibid.*, para. 65.

¹⁴⁸ Court of Justice, judgment 23 November 2010, case C-145/09, *Tsakouridis* [GC], para. 24, citing recital 23 of Directive 2004/38/EC.

¹⁴⁹ *Collins*, cit., para. 47.

¹⁵⁰ *Bidar* [GC], cit., para. 57.

¹⁵¹ Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64.

¹⁵² Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*, para. 235.

Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers".¹⁵³

Thus, while the notion of a Union citizenship might seem intrinsically connected to the concept of "social integration", its origins in the internal market have meant that what it offers, in practice, has always been more limited. While at first glance, the *Grzelczyk* case might indeed indicate a re-drawing of the boundaries of solidarity as regards non-economically active Union citizens, this was limited, in practice, to financial solidarity for a temporary period. As O'Brien argues, this does "not amount to a direct entitlement for non-nationals to equal treatment, but to a much more muted right to have restrictions on benefit eligibility applied proportionally".¹⁵⁴ *Trojani* made plain that a non-national EU citizen could still be viewed as a potential burden on national social assistance schemes.¹⁵⁵ Subject to proportionality assessments, if a non-economically active EU citizen were not self-sufficient, they could be found not to be legally resident and therefore not to be entitled to equal treatment within the domestic social space. Removals from the host State could merely not be the "automatic" consequence of a request for social assistance.¹⁵⁶ Accordingly, Union citizenship appears, at best, to offer individuals the opportunity to demonstrate that they qualify for access to national solidarity mechanisms, rather than redefine the boundaries of (national) solidarity itself.¹⁵⁷ Any "European social space" created through this process is generally only accessible to those who are economically active or can demonstrate their integration into the host State under other more limited circumstances, calling into question whether it is a truly "social", rather than market-focused, space at all. Interestingly, the Opinion of AG Geelhoed in *Trojani* appears to situate this approach within the economic/social dichotomy: "So long as social security systems have not been harmonised...there remains a risk of social tourism [...] And that is certainly not the intention of the EC Treaty, which to a considerable extent leaves responsibility for social policy in the hands of the Member States".¹⁵⁸

The Court itself has also endorsed the argument that Member States should be able to ensure that providing assistance to non-economically active EU citizens does not have "consequences for the overall level of assistance that may be granted by that State",¹⁵⁹ where historically economic justifications for restrictions on free movement

¹⁵³ Court of Justice, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*, para. 66.

¹⁵⁴ C. O'BRIEN, *Unity in Adversity*, cit., p. 37.

¹⁵⁵ Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani* [GC].

¹⁵⁶ *Ibid.*, para. 45.

¹⁵⁷ This idea was developed thanks to discussions with Harriet Gray about her doctoral thesis on the operation of the principle of solidarity within the EU's Common European Asylum System.

¹⁵⁸ Opinion of AG Geelhoed delivered on 19 February 2004, case C-456/02, *Trojani*, cit., para. 18.

¹⁵⁹ *Bidar* [GC], cit., para. 56.

have not been permitted.¹⁶⁰ Acceptance by the Union's judicial branch of the existence of social tourism, alongside the continued prioritisation of economic activity as a route to wider integration, meant that when the political winds changed – against a broader backdrop of global economic crisis, connected concerns about the Eurozone¹⁶¹ and a rise of austerity economics – and clamping-down on “rogue EU benefits claim” became increasingly popular within mainstream domestic political rhetoric,¹⁶² Member States already had the necessary tools to re-close their social systems.

V. RESTRICTING FREE MOVEMENT RIGHTS: “SOCIAL INTEGRATION” AS AN INDIVIDUAL DUTY AND COURT OF JUSTICE-ENDORSED MEMBER STATE SHIELD

Crucially, the Court of Justice has recently endorsed these emerging Member State practices of re-closure. Thus, the Union aim of social integration is flipped to an individual duty to contribute to the host State society. Importantly, this duty can generally only be met through economic activity, rendering wider forms of social integration largely immaterial as regards EU citizens' access to domestic social assistance. In this sense, a further Union approach to social integration emerges, that of irrelevance: it is not only diminished as an EU objective; the social integration of Union citizens in host State communities, which might once have been viewed as an aim of EU citizenship, goes unrecognised. This provides Member States with a shield by which to exclude non-nationals from their domestic social assistance scheme, demonstrating that while the negative processes of the internal market might once have been viewed as a route to a “European social space”, its constant roots in economic activity have left it unable to re-shape the national boundaries of solidarity.¹⁶³

Of course, the Court's recent case-law could be viewed as an acknowledgement of the effects free movement can have on national social spaces, identified in section II. However, in narrowing this reframing of free movement to non-economically active Union citizens, based on under-founded claims about benefit tourism,¹⁶⁴ the Court risks undermining the EU's broader social goals by alienating those EU movers who often require a socially-inclusive approach. Moreover, the effectiveness of the Court's latest citi-

¹⁶⁰ *Commission v. Netherlands*, cit. Where the Court has accepted economic justifications in principle, Member States have usually faced a high evidentiary burden (*Commission v. Austria*, cit.).

¹⁶¹ See e.g. M. RUFFERT, *The European Debt Crisis and European Union Law*, in *Common Market Law Review*, 2011, p. 1777 *et seq.*

¹⁶² See e.g. D. CAMERON, *Free Movement within Europe Needs to be Less Free*, in *Financial Times*, 26 November 2013.

¹⁶³ See also C. O'BRIEN, *Unity in Adversity*, cit.

¹⁶⁴ See e.g. C. DUSTMANN, T. FRATTINI, *The Fiscal Effects of Immigration to the UK*, in *Journal of the Royal Economic Society*, 2014, p. 593 *et seq.*

zenship decisions, in meeting their presumed purpose of tackling Euroscepticism, is open to serious question.

V.1. SCALING BACK ON SOCIAL INTEGRATION VIA FREE MOVEMENT AND CONCRETISING INTEGRATION AS AN INDIVIDUAL DUTY

A shift in judicial approach, from viewing social integration as a Union aim running congruent to free movement and equal treatment rights towards an individual duty, was clearly visible in *Dano*,¹⁶⁵ and confirmed in the Court's subsequent case-law.¹⁶⁶ In *Dano*, the Court held that Germany was entitled to exclude a non-economically active Union citizen from access to a national subsistence benefit because she did not have a right of residence under Directive 2004/38/EC (CRD), which requires long-term residents to be economically active or economically self-sufficient.¹⁶⁷ The Court's methodology marked a change in direction from the *Grzelczyk*-era in three ways. These correspond to a parallel shift, along similar axes, as regards the expulsion of EU citizens from their host State, which will also be discussed where relevant.

First, in *Dano*, the CRD's aim was flipped. Though much of the CRD consolidated the existing requirements attached to residence rights that had operated in the internal market context – i.e. general conditions of economic activity or self-sufficiency – its bringing together of the rights of economically active and non-economically active citizens within one instrument, alongside its introduction of permanent residence rights, and its codification of principles established in the Court's post-Maastricht citizenship case-law, suggested that the CRD sought to bring free movement rights beyond a market logic. And indeed, in its early case-law, the Court had held that the purpose of the Directive was to “facilitate and strengthen” primary and individual free movement rights.¹⁶⁸ The CRD's objective in *Dano*, however, was to ensure that non-economically active Union citizens did not become an “unreasonable burden on the social assistance scheme of the host Member State”.¹⁶⁹ Allowing Union citizens who did not meet the Directive's residence requirements to access social benefits “would run counter” to this objective.¹⁷⁰

In other words, “social integration” for a non-national EU citizen is no longer understood as an aim realised, for instance, through (temporary) “financial solidarity” be-

¹⁶⁵ Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC].

¹⁶⁶ E.g. Court of Justice: judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC]; judgment of 25 February 2016, case C-299/14, *Garcia-Nieto*; judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

¹⁶⁷ Art. 7 CRD; *Dano* [GC], cit., para. 82.

¹⁶⁸ Court of Justice: judgment of 25 July 2008, case C-127/08, *Metock* [GC], para. 89; judgment of 7 October 2010, case C-162/09, *Lassal*, para. 30.

¹⁶⁹ *Dano* [GC], cit., para. 74; Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*, para. 54.

¹⁷⁰ *Ibidem*. See also *Alimanovic* [GC] and *Garcia-Nieto*, cit.

tween Member State nationals but as an individual responsibility not to “burden” one’s host State. A similar reinterpretation of the CRD is visible in the case-law on expulsions in which the role of permanent residence rights, under Art. 16 CRD, has shifted from a facilitator of social integration – *inter alia* by enhancing protection from expulsion from the host State within which one has lived for many years – to a reward for (a narrowly defined) social integration. For example, in *Onuekwere*,¹⁷¹ the Court held that periods of imprisonment could not be considered “legal residence” for the purposes of attaining permanent residence rights.¹⁷² Nor could periods of legal residence before and after time spent in prison be aggregated to accumulate the necessary five years.¹⁷³ Although the Court viewed permanent residence rights under the CRD as a “key element in promoting social inclusion” and in strengthening feelings of Union citizenship,¹⁷⁴ it considered the non-compliance by an individual with the values of their host State, as expressed in its criminal code, to undermine integrating links in a manner that was “clearly contrary” to the aim of the Directive.¹⁷⁵ Accordingly, social integration was presented as an individual duty and a precondition for permanent residence status within the host State society.¹⁷⁶ Moreover, an EU citizen’s performance of this duty is always on trial, since her/his integrative links can be reduced back down to zero years in the event of criminal activity carrying a custodial sentence.¹⁷⁷

Second, the focus on the residence requirements contained in the CRD marks a swing away from an emphasis on Union primary law as conferring free movement rights and facilitating the EU’s social integration objectives towards a preference for secondary Union legislation as constitutive of free movement rights.¹⁷⁸ EU citizens must fulfil their individual duty, understood as compliance with the residence requirements of the CRD, if they are to be considered sufficiently integrated to access the domestic social space. Thus, in *Dano*, while the Court made a cursory reference to Union citizenship as a personal and fundamental status,¹⁷⁹ it proceeded to treat Art. 24 CRD as a

¹⁷¹ *Onuekwere*, cit.

¹⁷² Art.28, para. 2, CRD.

¹⁷³ *Onuekwere*, cit., paras 30-32.

¹⁷⁴ *Ibid.*, para. 25.

¹⁷⁵ *Ibid.*, para. 26. See also Court of Justice, judgment of 16 January 2014, case C-400/12, *G.*, paras 31-32, in which the Court stated that an individual’s integration was a “vital consideration” in determining protection from expulsion.

¹⁷⁶ *Onuekwere*, cit., para. 25.

¹⁷⁷ S. COUTTS, *Union Citizenship as Probationary Citizenship: Onuekwere*, in *Common Market Law Review*, 2015, p. 531 *et seq.* refers to this as a “probationary citizenship”. In the recent Court of Justice, judgment of 24 April 2018, joined cases C-316/16 and C-424/16, *B.*, concerning the enhanced protection available after ten years’ residence, the Court stated that the more solid the integrative links – including from a social, cultural and family perspective – the lower the probability that detention will break those links, para. 72.

¹⁷⁸ N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 894.

¹⁷⁹ *Dano* [GC], cit., paras 57-58.

concrete expression of the Treaty's prohibition of discrimination on grounds of nationality and therefore held that Union citizens could only rely on equal treatment in their host State if they resided there in accordance with the Directive,¹⁸⁰ i.e. through economic activity or self-sufficiency. The subsequent *Commission v. United Kingdom* case was decided entirely by reference to secondary Union legislation and there was no mention of EU citizenship as a fundamental status of Member State nationals.¹⁸¹

This has also meant the gradual disappearance of individualised assessments. In the days of *Grzelczyk*, the requirement that Member States consider whether a person, based on their individual circumstances, might still be legally resident and therefore entitled to equal access to domestic social assistance was reflective of the view of social integration as a Union aim. In *Dano*, no individualised assessment was carried out.¹⁸² Instead, the Court appeared to accept that an application for social benefits would indicate a lack of sufficient resources, a consequent absence of residence rights, and therefore, an inability to trigger the equal treatment rights that could entitle an individual to social assistance.¹⁸³ Since then, the Court has also found the time-limits contained in the CRD, for instance as regards retention of worker-status or in respect of the initial right of residence under Art. 6 CRD, to cater sufficiently for a person's situation, without an individualised assessment of their personal circumstances being necessary.¹⁸⁴ In addition, it has asserted that "while a single applicant can scarcely be described as an 'unreasonable burden' [...] the accumulation of all individual claims which would be submitted would be bound to do so".¹⁸⁵ Accordingly, social integration is no longer understood as a Union aim that obliges Member States to show financial solidarity to one another's nationals by taking their individual situations into account. Instead, in not performing their economic duty, non-economically active Union citizens are considered a collective, foreign burden. Indeed, in *Garcia-Nieto*, having found it permissible to define "legal residence" and equal treatment by reference to the CRD, the Court considered it unnecessary to answer the referring court's question as regards whether the EU citizens concerned should be able to access equal treatment by demonstrating "a genuine link to their host Member State" in some other way than economic activity or self-sufficiency.¹⁸⁶ Similarly, in *Alimanovic*, the Court did not engage with the applicants' longstanding links with the German labour market, when considering whether they

¹⁸⁰ *Ibid.*, para. 61.

¹⁸¹ *Commission v. United Kingdom*, cit.

¹⁸² O'Brien considers this to be the result of an overloading of the concept of proportionality in *Brey*, cit.: C. O'BRIEN, *Unity in Adversity*, cit., pp. 44-52.

¹⁸³ *Dano* [GC], cit., para. 80.

¹⁸⁴ *Alimanovic* [GC], cit.; *Garcia-Nieto*, cit. In *Commission v. United Kingdom*, cit., the evidential burden was flipped entirely and imposed on to the Commission.

¹⁸⁵ *Alimanovic* [GC], cit., paras 54-62; *Garcia-Nieto*, cit., paras 49-50.

¹⁸⁶ *Garcia-Nieto*, cit., paras 34 and 54.

should enjoy equal access to social assistance, instead focusing on their formal categorisation as “job-seekers”.¹⁸⁷ This approach can hardly be said to reflect a model of social integration focused of redefining the boundaries of the welfare state. In truth, it cannot even be understood as an individual duty to integrate oneself into the host State society, since wider integrative links appear immaterial. Thus, the Union approach to “social integration” in this context appears to be to consider it an irrelevance. The emphasis, instead, is on the much narrower duty to reside in one’s host State in strict accordance with the residence requirements of the CRD, which have their origins in the economic integration of the internal market.

Finally, *Dano* sees this approach to integration dominate the wider coordination of the European social space. Specifically, as already touched upon, another understanding of social integration in the EU context might be the coordination of a European social area that offers certain social protections whilst facilitating free movement. However, in *Brey*¹⁸⁸ and *Dano*, the Court held that Member States could require non-national EU citizens to be residing in their territory in accordance with the CRD for access to “special non-contributory cash benefits” under Regulation 883/2004. This was the case even though the latter instrument uses a broader “habitual residence” test,¹⁸⁹ as a means of determining which Member State’s social security scheme is responsible for Union citizens in order to ensure that the exercise of free movement rights did not cause individuals to fall between Member State regimes. The Court’s approach in *Brey* and *Dano* was extended to benefits falling firmly within the category of “social security” in *Commission v. United Kingdom*,¹⁹⁰ namely child benefit and child tax credit. The Court held that if a claimant were unable to access social security because she/he did not meet the requirements of the “right to reside” test, i.e. residence in compliance with the CRD, this would be because she/he had failed to satisfy a substantive eligibility condition within the applicable domestic social security regime, which it was for individual Member States to lay down.¹⁹¹ Echoing the fallacious economic/social dichotomy, this over-emphasis on an EU citizen’s individual duty to reside in their host State in accordance with the CRD before she/he will be considered sufficiently integrated to access social support there undermines the Union’s wider ambition of creating an effective European economic and social space. As the Training and reporting on European Social Security (trESS) Report on the relationship between the coordinating regulations and the CRD makes plain, when Member States are able to define residence at national-level, a

¹⁸⁷ See also C. O’BRIEN, *Unity in Adversity*, cit., p. 56.

¹⁸⁸ *Brey*, cit.

¹⁸⁹ Arts 1, let. j), and 4 (equal treatment) of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

¹⁹⁰ *Commission v. United Kingdom*, cit. For comment, see C. O’BRIEN, *The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom*, in *Common Market Law Review*, 2017, p. 209 *et seq.*

¹⁹¹ *Commission v. United Kingdom*, cit., para. 71.

person living in their host State might find that they are not considered to be resident in any Member State for the purposes of residence-based benefits, despite having lived within the EU territory for her/his entire life.¹⁹²

In sum, the *Dano* line of case-law indicates a scaling back from the Court's use of the negative processes of free movement to pursue the Union's social integration goals by requiring Member States to open up their existing domestic social spaces. Instead, if it can be considered relevant at all, social integration can only really be conceptualised as a duty to "contribute", which must be met by Union citizens if they are to be considered an equal participant in the host State society. More often than not, this societal duty is to be met through economic activity. Though this is certainly a change in direction for the Court, it is not a total U-turn. An examination of the *Brey* judgment, as a bridge between the *Grzelczyk* and the *Dano* lines of case-law, reminds us that even the case-law traditionally considered as rights-enhancing introduced concepts such as "unreasonable burden" as regards non-economically active Union citizens, while economically active EU citizens could access the domestic social space unencumbered by such conditions. Thus, the Court relied on judgments such as *Grzelczyk*, *Martinez Sala*¹⁹³ and *Bidat*¹⁹⁴ to assert in *Brey* that "there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host State",¹⁹⁵ since non-economically active citizens must not represent an "unreasonable burden" on their host State.¹⁹⁶ Similarly, the requirement of compliance with the host State's criminal law as an individual duty of social integration in *Onuekwere* is not a complete about-turn from the more generous days of *Orfanopoulos*. Like the *Brey* case, the *Tsakouridis* decision acted as a bridge between these two generations of decisions. The manner in which the Court accepted that integrative links might be broken by absences from the host State, including where the EU citizen has only returned there as a result of the enforcement of a criminal sanction, paved the way for criminal conduct to break integrative ties.¹⁹⁷

Thus, even if the concept of social integration has shifted from a Union aim to an individual duty within the Union citizenship case-law, as a strategy for a socially integrated Europe the opening-up of domestic social spaces via the negative processes of

¹⁹² M. COUCHIER, M. SAKSLIN, S. GIUBBONI, D. MARTINSEN, H. VERSCHUEREN, *The Relationship and Interaction between the Coordination Regulations and Directive 2004/38/EC*, in *trESS Think Tank Report*, 2008, available at ec.europa.eu.

¹⁹³ *Martinez Sala*, cit.

¹⁹⁴ *Bidat* [GC], cit.

¹⁹⁵ *Brey*, cit. paras 44-45, citing *Martinez Sala*, *Grzelczyk* and *Trojani* [GC], cit.

¹⁹⁶ *Brey*, cit., para. 54, citing Court of Justice, judgment of 21 December 2011, case C-425/10, *Ziolkowski and Szeja*.

¹⁹⁷ *Tsakouridis* [GC], cit., paras 30-32.

the primary free movement provisions has always been inherently limited in what it can achieve. Its roots in, and recent re-emphasis on, transnational economic activity is exclusionary, exposing “more starkly the differences and disadvantages faced by certain members of society”.¹⁹⁸ Consequently, though this evolution of Union citizenship is historically explainable, the current state of play nevertheless undermines the EU’s contemporary social objectives.

V.2. UNDERMINING THE UNION’S SOCIAL AIMS

Arguably, the pursuit of social integration via the free movement provisions has proved a usefully flexible means of attaining the Union’s social goals within the EU’s constitutional confines. The Court has been able to overcome the economic/social dichotomy that continues to restrict the social capacities of the Treaties and create a European social space via the negative integration processes of the internal market. This same elasticity has allowed the Court of Justice to pull back when it seems politically expedient, in an attempt to maintain popular support for European integration.¹⁹⁹

Yet, this very possibility makes plain, first, that a fully inclusive European social space cannot be achieved by pursuing Union social integration via negative free movement processes since it is inherently exclusionary. As O’Brien highlights, the “many characters of the EU citizen, with variegated rights according to circumstance” lead in practice to “steep status gaps and welfare cliff edges for nationals of other States; gaps and losses not currently tolerated for own nationals”.²⁰⁰ Various Member States have used Union citizenship’s connections with economic activity to introduce right to residence tests for access to their social assistance schemes. Under such tests, now permitted by the Court,²⁰¹ resident host State nationals will automatically have the required “right to reside” but non-national EU citizens generally have to be economically active.²⁰² If the negative integration process outlined above seeks to ensure a socially-integrated Europe by ensuring the equal treatment of all EU citizens within national social mechanisms, then this objective has not been achieved. Host State nationals contribute to the fabric of their communities as a result of numerous factors including residence, family relationships, and community ties. Conversely, non-national EU citizens must primarily rely on economic activity to display their social integration regardless of their broader contributions and participation. Similarly, the case-law on expulsion

¹⁹⁸ S. COUTTS, *Union Citizenship as Probationary Citizenship*, cit., p. 531.

¹⁹⁹ For analysis of the broader reasons for a new judicial approach, see U. ŠANDL, S. SANKARI, *Why Did the Citizenship Jurisprudence Change?*, in D. THYM (ed.), *Questioning EU Citizenship*, cit., p. 89 *et seq.*

²⁰⁰ C. O’BRIEN, *I Trade Therefore I Am: Legal Personhood in the European Union*, in *Common Market Law Review*, 2013, p. 1649.

²⁰¹ *Dano* [GC], cit.; *Commission v. United Kingdom*, cit.

²⁰² See the dissenting judgment of Lord Walker in the UK Supreme Court, judgment of 16 March 2011, *Patmalniece (Appellant)*, [2011] UKSC 11, who concluded that this rendered the test directly discriminatory.

measures holds non-national EU citizens to a higher standard of social integration by virtue of the very fact that they can be expelled.²⁰³ Specifically, rather than facilitating a European space, *Onuekwere* compartmentalises the Member States as individual “social and cultural units”,²⁰⁴ by reference to their criminal codes. Yet, when a non-national EU citizen commits a crime in her/his host State, she/he will rarely commit acts that distinguish her/him entirely from the criminal conduct of host State nationals. Nor is it likely, that she/he has acted in a way that is totally unproblematic within the value system of their Member State of origin. Thus, nationality still matters in the European social space.²⁰⁵

Second, the exclusionary nature of social integration in the context of free movement now risks being in direct conflict with the Union’s wider aims and approach. Art. 3, para 3, TEU charges the Union with “combat[ing] social exclusion and discrimination [...] promot[ing] social justice and protection, [and] equality between women and men”. While the Union’s legislative competence might still restrict the manner in which it pursues these goals, the operation of the free movement provisions risks undermining them altogether. Specifically, the current connection between “integrating links” to one’s host State and the financial contributions made to its social security system through economic activity²⁰⁶ has a gendered tilt in its non-recognition of the societal contributions of non-economic activity. Reproductive labour and the majority of unpaid care work is performed by women and, as O’Brien points out, this “de-valuing of non-economic activity fails on its own terms, in that studies show that national economies are subsidised to a very significant degree by the unpaid labour of parents and carers”.²⁰⁷ More broadly, the permissibility of right to reside tests as “potent barriers”²⁰⁸ to social support can leave non-economically active Union citizens lawfully present in their host State for residence purposes but not legally resident as regards equal treatment, exposing them to the risk of destitution. Likewise, the impact of expulsions on a different form of social integration, that of social rehabilitation, and the integrative purposes of prisons appear to have been overlooked in

²⁰³ Of course, host State nationals can still face measures that indicate that they are not considered to be fully integrated into society, such as loss of voting rights.

²⁰⁴ S. COUTTS, *Union Citizenship as Probationary Citizenship*, cit., p. 539.

²⁰⁵ Recently, in *B.*, cit., the Court required an individual assessment of whether integrative links had been broken, particularly where a non-national EU citizen had lived in their host State from a young age and for over twenty years prior to a custodial sentence. However, it remains possible for imprisonment to break the integrative links.

²⁰⁶ *Commission v. Netherlands*, cit.

²⁰⁷ C. O’BRIEN, *Unity in Adversity*, cit., p. 94, citing L. BUCKNER, S. YEANDLE, *Valuing Carers 2015: The Rising Value of Carers’ Support*, London, Carers UK report 2015, www.carersuk.org, p. 4.

²⁰⁸ K. PUTTICK, *EEA Workers’ Free Movement and Social Rights after Dano and St Prix: Is a Pandora’s Box of New Economic Integration and ‘Contribution’ Requirements Opening?*, in *Journal of Social Welfare and Family Law*, 2015, p. 253.

Onuekwere,²⁰⁹ though the Court has acknowledged, very recently, in *B*, that individual behaviour whilst in prison could either indicate continued disconnection, or the re-forging of links, with the host State society.²¹⁰

Third, as well as undermining the Union's aims in a general sense, the evolution of the primary free movement provisions now brings them into increasing conflict with other well-developed areas of EU law and policy, risking a fragmented approach to EU social integration. *Jessy Saint Prix* offers a particularly pertinent example here.²¹¹ In permitting an extension of the situations in which worker status can be retained beyond those contained in Art. 7, para. 3, CRD, to cover pregnancy-related employment breaks, the decision appears progressive at first glance. However, as Currie identifies, the reliance on worker status as a route to equal treatment in the free movement context is indicative of the gender disparate way in which the internal market, and its secondary legislation, functions in the first place.²¹² Indeed, it would appear that the EU's "highly-regarded and well-developed body of gender equality law has failed to have a tangible impact as far as free movement law and policy is concerned".²¹³ This echoes our finding, in section III, that the internal market and the EU's concrete social objectives remain functionally distinct. Relying on existing free movement law,²¹⁴ the Court held that Ms Saint Prix could maintain her access to social assistance by retaining her connection to the labour market and only if she had returned to work "in a reasonable period".²¹⁵ Where the realities of pregnancy and childbirth leave a woman unable to resume her economic duties within such a period, Union citizenship will leave her without a safety net.²¹⁶

And yet, while free movement's social justice offering has proven itself rather lacking, the presumed impact of the Court's negative approach to social integration via free movement on what the economic/social dichotomy has long presented as the sovereign domestic social space²¹⁷ frequently takes centre-stage in media and public discourse, particularly in the UK. It is therefore arguably unsurprising that in recent years, in the face of rising Euroscepticism, the Court has scaled back on this approach. However this

²⁰⁹ L. MANCANO, *The Place for Prisoners in European Union Law?*, cit., at p. 742 argues that social rehabilitation is a general principle of EU law.

²¹⁰ *B*, cit., para. 74.

²¹¹ Court of Justice, judgment of 19 June 2014, case C-507/12, *Jessy Saint Prix*.

²¹² S. CURRIE, *Pregnancy-related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship: Jessy Saint Prix*, in *Common Market Law Review*, 2016, p. 555.

²¹³ *Ibidem*.

²¹⁴ *Orfanopoulos*, cit.

²¹⁵ *Jessy Saint Prix*, cit., para.41.

²¹⁶ S. CURRIE, *Pregnancy-related Employment Breaks*, cit., p. 561.

²¹⁷ See S. REYNOLDS, *It's Not Me It's You: Examining the Print Media's Approach to 'Europe' in Brexit Britain*, in E. DRYWOOD, M. FARRELL, E. HUGHES (eds), *Human Rights in the UK Media: Fear and Fetish*, London: Routledge, forthcoming.

retreat has seemingly done little to address the apparent increase in antipathy towards the Union project.

V.3. SACRIFICING EQUAL TREATMENT IN VAIN: THE ONGOING QUESTION MARK OVER EUROPEAN INTEGRATION

While the Court might have sought to placate the UK voting public by allowing further exclusions from the national social space in *Commission v. United Kingdom*,²¹⁸ this was ultimately “in vain”.²¹⁹ The UK voted to leave the EU anyway and, while European leaders might take comfort in its history of begrudging participation in Europe, the UK is not the only Member State experiencing rising Euroscepticism.²²⁰ As Nic Shuibhne points out, the “Court is undoubtedly between a rock and a (very) hard place as the original defender of a version of citizenship too detached from a wider mood of integration estrangement”. However, as she also advances, by “neither reconcil[ing] rooted [Union citizenship] case-law on conditions and limits with its revised logic, nor openly reversing it”,²²¹ the *Dano* line of case-law will arguably do little to resolve the EU’s ongoing popularity crisis.

Specifically, though it might now be mentioned less frequently, Union citizenship remains the “fundamental status” of EU citizens, bestowing primary and personal free movement rights, which require equal access to domestic social spaces as a result of the “certain amount of financial solidarity” between Member States.²²² These rights appear both nebulous and all-encompassing. While the Court has introduced accompanying limitations, including that EU citizens must not pose an “unreasonable burden”²²³ on national social assistance schemes and that they must, at times, demonstrate a “real link”²²⁴ or a “certain degree of integration”²²⁵ within their host State, these restrictions are equally open-ended. Consequently, where Member States incorporate Union citizenship’s expansive principles into their legal systems, its limitations increasingly operate at the administrative-level.²²⁶ For instance, non-economically active Union citizens might bear the burden of proving to administrative welfare assessors that they are “legally resident” and therefore not an “unreasonable burden” as a mere result of their

²¹⁸ *Commission v. United Kingdom*, cit.

²¹⁹ C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain*, cit.

²²⁰ T. CHOPIN, *Euroscepticism and Europhobia: the Threat of Populism*, in *Fondation Robert Schuman: European Issue No 375*, 2015, www.robert-schuman.eu.

²²¹ N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 916.

²²² *Grzelczyk*, cit.

²²³ *Ibidem*.

²²⁴ *Collins*, cit.

²²⁵ *Bidar* [GC], cit.

²²⁶ D. SINDBJERG MARTINSEN, G. PONS ROTGER, J. SAMPSON THIERRY, *Free Movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes*, in *Journal of European Social Policy*, 2018, p. 1 *et seq.*

application for social assistance.²²⁷ This amounts to a double failure: in exposing Union citizens to “rights cliff-edges”,²²⁸ the Union’s social claims are undermined; and, since these difficult administrative hurdles are generally only visible to those who must endure them, these placatory limitations on Union citizenship rights are also unlikely to address the EU’s perceived legitimacy crisis in any case. This is particularly so when host State nationals continue to be told not only by sections of the media but by mainstream politicians and by the Court itself that social tourism is a sizeable problem.²²⁹

More importantly, the *Dano* line of judgments do little to foster a European social community. Instead, they isolate the Union’s social integration problems to the non-economically active Union migrant, legitimating under-founded²³⁰ claims about social tourism and depicting the relationship between host State nationals and EU citizens as oppositional. This short-term political response might “in the longer-term threaten EU integration as [Union] citizens are marginalised within their host societies and singled out as negative examples” of EU free movement.²³¹ Indeed, this is already visible in what O’Brien terms a “law as lists” approach to the conferral of residence and equal treatment rights at the administrative-level, in which even economically active Union citizens must overcome arduous administrative obstacles, purportedly introduced to tackle “rogue benefits claims”²³² to demonstrate that they qualify for equal treatment.

Ultimately, the Court’s current trajectory of the Union citizenship case-law reinforces the economic/social dichotomy that section II proved to be erroneous. It presents economic activity as the most appropriate trigger for Union action, maintaining the misconception that economic and social matters can otherwise be kept separate. Rather than restricting its review of the free movement provisions to the EU’s often most marginalised citizens, and in a manner which does little to involve static EU citizens in the EU project, a wider re-thinking of the Court’s approach to free movement is needed; one which accepts that while domestic social policy might clash with the market freedoms it might nevertheless facilitate the Union’s wider goals.

²²⁷ E.g. the UK’s “right to reside” test, found to be lawful in *Commission v. UK*, cit.

²²⁸ C. O’Brien, *Unity in Adversity*, cit.

²²⁹ European Council Conclusions of 19 February 2016, p. 23; *Dano*, cit. para. 78; see also S. REYNOLDS, *It’s Not Me It’s You*, cit.

²³⁰ Eurofound Report, *Social Dimension of Intra-EU Mobility: Impact on Public Services*, 10 December 2015, www.eurofound.europa.eu.

²³¹ R. ZAHN, *Common Sense or a Threat to European Integration? The Court, Economically Inactive EU Citizens and Social Benefits*, in *Industrial Law Journal*, 2015, p. 582.

²³² See e.g. UK Department for Work and Pensions, Press release of 21 February 2014, *Minimum Earnings Threshold for EEA Migrants Introduced*, www.gov.uk, that openly discusses tackling “abuse” though it accompanied UK reforms that impact on the equal treatment rights of EU workers. For analysis, see C. O’BRIEN, *Unity in Adversity*, cit., p. 263.

VI. LEGITIMISING THE EUROPEAN SOCIAL SPACE THROUGH AN HOLISTIC APPROACH TO THE TREATIES

In particular, the Court of Justice must reconsider its continuing use of the breach/justification methodology, discussed in section II, to adjudicate wider tensions between free movement and domestic social policies. This section argues, first, that the procedural disadvantage facing domestic social activities under the current model does not sufficiently reflect the Union's own contemporary constitutional framework. Second, the section identifies the emergence of a judicial willingness to take a more holistic approach to the Treaties in its adjudicative approaches.

VI.1. THE POST-LISBON CALL FOR AN HOLISTIC APPROACH TO ECONOMIC AND SOCIAL INTEGRATION

Though the Lisbon Treaty did not alter the substantive content of the Union's primary free movement provisions, it signalled a shift in the wider constitutional framework towards greater recognition of its social endeavours.²³³ This not only justifies, but requires, the incorporation of social integration as a Union endeavour within the operation of the internal market. The Union's explicit values, laid down in Art. 2 TEU, have a distinctly social dimension, including, *inter alia*, non-discrimination, tolerance, solidarity, and equality between women and men. Art. 3, para. 3, TEU tasks the Union with "combating social justice" and working towards a "highly competitive social market economy, aiming at full employment and social progress". While both Schiek and Armstrong accept that the concept of a "social market economy" is historically rooted in *ordo-liberal* approaches that generally sought social goals through market means, both reject the argument that this definition is fixed.²³⁴ In the contemporary Union context, it is "more likely that those insisting on this term [...] meant to anchor a compromise between [...] economic and social objectives in the EU constitution of the internal market".²³⁵ As Armstrong notes, prior to Lisbon, social Europe had been pursued only by "adding-in" social values and competences to the Treaties. By contrast, removal of the reference to "undistorted competition" from Art. 3 TEU's description of the internal market marked a clear turn towards social values as constraints on the pursuit of economic goals.²³⁶

In contrast to the current functional distinction between the internal market and EU social policy, Art. 7 TFEU seeks to avoid compartmentalisation of the Treaties' policy areas, requiring the Union to "ensure consistency between all of its policies and activities, taking all of its objectives into account". More substantively, the TFEU's horizontal claus-

²³³ D. SCHIEK, *Economic and Social Integration*, cit., p. 218.

²³⁴ K. ARMSTRONG, *Governing Social Inclusion*, cit., pp. 243-244; D. SCHIEK, *Economic and Social Integration*, cit., p. 220.

²³⁵ D. SCHIEK, *Economic and Social Integration*, cit., p. 220.

²³⁶ K. ARMSTRONG, *Governing Social Inclusion*, cit., p. 244.

es require the Union to take the principles of gender equality,²³⁷ non-discrimination,²³⁸ environmental protection,²³⁹ and consumer protection²⁴⁰ into account in the formulation and implementation of its policies and activities. Significantly, the Art. 9 TFEU “horizontal social clause”²⁴¹ obliges the Union to “take into account the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health” in the definition and implementation of its policies and activities. Finally, the Lisbon Treaty confers primary legal status upon the Charter of Fundamental Rights.²⁴² This arguably concretises the place of the EU’s social goals within its constitutional framework, since the Charter seeks equal status across civil and political, and economic and social rights.²⁴³

Accordingly, the EU’s contemporary constitutional framework, as represented in its values, tasks and human rights agenda “establishes new constitutional demands” that require economic integration to be embedded with social aims and the internal market to be reined in by the Union’s social values.²⁴⁴ Against this backdrop, clashes between the primary free movement provisions and domestic social policies can no longer be conceptualised simply as conflicts between EU law and national rules. They must also be understood as representing tensions between competing Union goals, which cannot continue to be treated as functionally distinct. As Poiares Maduro noted far before the arrival of the Lisbon Treaty:

“[W]hen market integration [challenges] the regulatory powers of the States, which are in many cases aimed at protecting...social rights, such as the right to education, health and social protection, fair working conditions, minimum income, and, in a broader sense, ‘other ‘social’ rights, such as consumer and environmental protection [it also clashes with] many of [the] rights...recognised in the Treaties as goals of the European Union”.²⁴⁵

²³⁷ Art. 8 TFEU.

²³⁸ Art. 10 TFEU.

²³⁹ Art. 11 TFEU.

²⁴⁰ Art. 12 TFEU.

²⁴¹ M. FERRERA, *Mapping the Components of Social EU: A Critical Analysis of the Current Institutional Patchwork*, in E. MARLIER, D. NATALI (eds), *Europe 2020: Towards a More Social EU?*, Oxford: Peter Lang, 2010, pp. 57-58.

²⁴² Art. 6, para. 1, TEU.

²⁴³ N. BUSBY, *A Right to Care?*, cit., p. 24. There are, of course, questions marks over the Charter’s capacity to realise this equal status given its distinction between rights and principles and its frequent reference to “national laws and practices” in its social provisions e.g. Art. 28 of the Charter on the right of collective bargaining.

²⁴⁴ D. SCHIEK, *Economic and Social Integration*, cit., pp. 221 and 224.

²⁴⁵ M. POIARES MADURO, *Striking the Elusive Balance between Economic Freedom and Social Rights in the EU*, in P. ALSTON, M. BUSTELO, J. HEENAN (eds), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p. 471.

Accordingly, while Member States pursue their own social integration goals through domestic social policies, their more-established legitimacy also makes them well-positioned to act as agents for the Union's social integration goals, with would otherwise be constrained by the economic/social dichotomy. As Armstrong puts it: "[i]nstead of leaving social solidarity in a sort of constitutional limbo, one might look to the continuing realisation of social solidarity within the boundaries of the nation state but buttressed and reinforced by the interaction between the domestic and European levels".²⁴⁶ Arguably, such an approach is supported by Art. 2 TEU, which, in identifying values common to the EU and its Member States "implies the potential for creating a shared constitutional space" comprising of both national and EU law.²⁴⁷

Crucially, however, since market integration has principally been judicially-driven, and the economic/social dichotomy still places constraints on the Union's legislative organs, the EU's new obligations to incorporate social issues into the design and implementation of its own activities must also apply to the Court. There is no reason why this should not be so. Horsley highlights that the Court has made itself a "leading institutional actor in the integration process. A constitutional responsibility to fully engage with the legal limits to Union lawmaking set out in the Treaties attaches to this decision".²⁴⁸ Arguably, then, the Court is constitutionally required to change its adjudicative approach, from one that presents national social policy as a *prima facie* unlawful restriction of free movement, which must be defended by means of a one-sided proportionality assessment, towards one that seeks to balance the Union's goals of economic and social integration. Rooted in Alexy's theory of balancing, under which, "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other",²⁴⁹ such an approach would analyse the effects of free movement and social policy on *each other*, seeking an outcome that is least restrictive of both the Union's economic and social integration goals. Under such a model the Treaty's free movement derogations and the mandatory requirements would no longer be mere "justifications" for the *prima facie* wrongful conduct of restricting the market freedoms, but a mechanism by which the Court can seek to reconcile the Union's competing integrative endeavours through a more reciprocal approach to proportionality.

For example, given the principle of conferral, while a *prima facie* restriction under Art. 56 TFEU would remain the "hook" to Union law that triggers Union judicial assessment in a *Lava*-type case, the existence of Art. 152 TFEU – which requires the Union to promote the role of social partners while taking into account the diversity of national systems – along-

²⁴⁶ K. ARMSTRONG, *Governing Social Inclusion*, cit., p. 236, though referring to strengthened use of the Open Method of Coordination.

²⁴⁷ D. SCHIEK, *Economic and Social Integration*, cit., p. 218.

²⁴⁸ T. HORSLEY, *Reflections on the Role of the Court of Justice as the "Motor" of European Integration*, cit., p. 954.

²⁴⁹ R. ALEXY, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2010, p. 102.

side Art. 153, para. 5, TFEU – which leaves matters of pay and the right to strike within domestic competence – and Arts 28 and 31 of the Charter – which recognise the right to take collective action and to fair and just working conditions respectively – would channel the interaction between free movement and national social activity away from the standard adjudicative model towards a balancing framework. This would take into account not only the effects of collective action on free movement but the potential impact on collective action and worker protection of alternative measures ostensibly less restrictive of free movement. Indicators of impact on both the exercise of the market freedoms and the realisation of social goals and policies can be presented to the Court during oral and written submissions.²⁵⁰ However, though the Court should act as a forum for the articulation of genuine supranational concerns, final decisions of fact should continue to be taken as closely as possible to the site of the dispute, namely at the level of national courts. The Court is well-placed to highlight to national courts the potential impact of domestic social policies on the EU's economic objectives and require Member States to show give and take²⁵¹ where it appears possible to pursue social objectives in a way less restrictive of free movement. It must also acknowledge that what appears less restrictive of free movement might have consequences for the practical realisation of social policies within the continuing idiosyncrasies of domestic social orders. Whilst the Court of Justice has a responsibility to try to frame these competing principles in a systematically coherent way,²⁵² national courts must be able to decide on the specific balance within a particular factual situation. Not only do they “enjoy the best knowledge of the facts, and can assess the impact of different interpretations”,²⁵³ but this approach “tighten[s] the connection between the decision-maker and the policy-maker, as well as to the parties actually affected by the outcome”.²⁵⁴

As Gallo discusses, elsewhere in the Treaties, the combination of Lisbon's horizontal provisions and substantive derogations is already impacting on how the latter operate. Specifically, the “distinctive feature of [services of general economic interest], as regulated by the EU, is that they do not merely represent a derogation from competition rules under Art. 106, para 2, TFEU [...] but also a positive provision in line with what is now Art. 14 TFEU”.²⁵⁵ As a result, services of general economic interest (SGEIs) do not

²⁵⁰ On the significance of the preliminary reference procedure in the related area of defining fundamental rights norms, see A. TORRES PEREZ, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford: Oxford University Press, 2009, pp. 128-129.

²⁵¹ Consider e.g. Court of Justice, judgment of 12 March 1987, case C-178/84, *Commission v. Germany (Beer Purity)*, in which the Court noted that while consumers conceptions may vary from State to State they will also evolve as part of the establishment of the internal market.

²⁵² N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law*, cit., pp. 183-184 and 225.

²⁵³ A. TORRES PEREZ, *Conflicts of Rights in the European Union*, cit., p. 120.

²⁵⁴ N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law*, cit., p. 250.

²⁵⁵ D. GALLO, *On the Content and Scope of National and European Solidarity under Free Movement Rules*, cit., p. 827.

reflect a conflict between EU law and national approaches but are strongly connected to shared European and national interests.²⁵⁶ This can be contrasted with the approach within the free movement of capital, in which golden-shares are still conceptualised as a derogation from a market freedom. There, “European solidarity” functions only as a corollary of economic integration and not social regulation.²⁵⁷ This does not mean, of course, that Member State social approaches would win-out every time. Sometimes, measures less restrictive of free movement will exist that do not disproportionately affect the effectiveness of the social endeavours concerned. The crucial factor is the reciprocity of the proportionality assessment.

A more holistic approach to the operation of primary free movement law has three potential advantages. First, acknowledgment that national social policies can contribute to shared social goals, rather than operating only as barriers to economic movement, conceptualises domestic activity as a mechanism by which the EU can pursue its own social integration goals, despite the confines of the economic/social dichotomy. Second, this might then also help to ease the Union’s legitimacy headache. Since EU and Member State rules are no longer in conflict but are understood as driven by the same fundamental objectives, supranational social activity is less likely to be viewed as an incursion into the domestic realm. Of course, a new judicial approach is not a catch-all solution but must work alongside other institutional means of working towards a “social Europe”. For example, Armstrong has persuasively argued for an Open Method of Coordination-driven social constitutionalism, which would require Member States to explain how exercises of domestic social sovereignty attain the social policy objectives of the Union.²⁵⁸ Third, greater acknowledgement of the potential of the market freedoms, as a whole, to impact on social concerns might release some of the pressure on the specific interaction between the free movement of persons and domestic welfare systems. The various evolutions of social integration in that area reflect an attempt to be seen to be addressing perceived problems with European integration. However, by artificially sectioning off free movement of persons from the wider tensions between the market freedoms and the national social space, the Court’s current approach risks over-emphasising the actual impact of this particular interaction, legitimising rather than addressing under-founded concerns about EU immigration, and undermining the Union’s own social goals by scapegoating already marginalised sections of the EU population.

VI.2. THE EMERGENCE OF A NEW ADJUDICATIVE APPROACH

Post-Lisbon, there has been an emerging acceptance of the need to alter the adjudicative framework in recognition of the Union’s broader integrative aims, mainly from the

²⁵⁶ *Ibidem*.

²⁵⁷ *Ibid.*, p. 829.

²⁵⁸ K. ARMSTRONG, *Governing Social Inclusion*, cit., p. 262.

Advocates General. In *Santos Palhota*, AG Cruz Villalón posited that the changes brought about by the Lisbon Treaty, specifically Art. 9 TEU, Art. 3, para. 3, TEU and the primary status of the Charter, required a different approach to restrictions placed on free movement as a result of social policy.²⁵⁹ Worker protection, for example, could no longer be viewed as a “simple derogation from a freedom, still less an unwritten exception inferred from case-law”.²⁶⁰ Insofar as the Treaty seeks to work towards a high level of social protection,²⁶¹ it “authorises the Member States”, for the purposes of safeguarding social protection, to restrict the fundamental freedoms and to do so *without* Union law regarding this as something “exceptional”, requiring “strict” interpretation.²⁶² Since the proportionality assessment had to be particularly sensitive to the social protection of workers,²⁶³ AG Cruz Villalón was able not only to consider whether measures less restrictive of free movement were available but whether these would be as *effective* in achieving the goal of social protection.²⁶⁴

Similarly, AG Trstenjak argued in *Commission v. Germany* that exposing fundamental social rights to a one-sided proportionality assessment²⁶⁵ sat “uncomfortably alongside the principle of equal ranking for fundamental rights and freedoms”.²⁶⁶ She called instead for a methodology that sought the optimum effectiveness of both goals, through a reciprocal assessment of free movement and, in this case, collective bargaining, on one another.²⁶⁷ Although the Court of Justice was not as explicit as its AG in opting for a new model of adjudication, there is still evidence that it saw the need for a more holistic approach to the Treaties.²⁶⁸ Rather than running the legal issue through the two-stage breach/justification model, the Court spoke of “reconciling competing interests”,²⁶⁹ and achieving “a fair balance” between them.²⁷⁰

Since then, however, apart from its recent decision, in *RegioPost*²⁷¹ – to allow local authorities to use public procurement to pursue certain social policy objectives, regard-

²⁵⁹ Opinion of AG Cruz Villalón delivered on 5 May 2010, case C-515/08, *Santos Palhota*.

²⁶⁰ *Ibid.*, para. 53.

²⁶¹ Art. 3, para. 3, TEU.

²⁶² Opinion of AG Cruz Villalón, *Santos Palhota*, cit., para. 53.

²⁶³ *Ibid.*, para. 55.

²⁶⁴ *Ibid.*, paras 71-76.

²⁶⁵ Opinion of AG Trstenjak delivered on 14 april 2010, case C-271/08, *Commission v. Germany*, paras 179-182.

²⁶⁶ *Ibid.*, paras 183-184.

²⁶⁷ *Ibid.*, paras 190-191.

²⁶⁸ Court of Justice, judgment of 15 December 2014, case C-271/08, *Commission v. Germany*.

²⁶⁹ *Ibid.*, para. 44.

²⁷⁰ *Ibid.*, para. 52.

²⁷¹ *RegioPost*, cit. Specifically, the application of certain minimum wage requirements to tenders. For comment, see C. KAUPA, *Public procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 127 *et seq.*

less of its previous finding in *Rüffert* that this could constitute a breach of the free movement of services²⁷² – the Court has done little to reconsider its adjudicative approach to free movement. It seems to have a stronger preference, instead, for isolating the Union's free movement troubles to the area of persons, where it has converted social integration from a Union aim to an individual duty. This is doubly problematic, however, since this does not seem to have addressed the Union's ongoing legitimacy crisis and, in focusing on those EU citizens that are already marginalised, it undermines the Union's own social integration goals.

VII. CONCLUSION

The historical analysis, conducted here, of the evolution of "social integration" within the Union legal order has shown it to be a malleable concept. Over the decades social integration could be conceptualised as: a mere by-product of the internal market; as a positive Union goal; as concrete supranational policymaking; as a means of securing the effectiveness of Union law by coordinating standards of basic social protection whilst facilitating economic activity; as the creation of a European social space through the negative process of requiring Member States to open up their existing domestic social systems to non-national EU citizens; and as an individual duty imposed on Europe's citizens. This latter incarnation also reveals that different forms of "social integration" can come into conflict with one another. By marginalising those already at risk of social exclusion, "social integration" as an individual duty can undermine the Union's own, wider social goals under the Treaties.

All of these embodiments of social integration have been shaped by the legacy of the Rome Treaty's confirmation of an economic/social dichotomy along European/national dividing lines. Yet, at the same time, these manifestations have also proven this economic/social distinction to be a myth. Against these findings, the Court's continued juxtapositioning of economic and social endeavours, in its adjudication of tensions between free movement and national social rules through a breach/justification methodology, cannot continue. Instead, another new version of social integration is needed; one which sees domestic and Union social activities as jointly contributing to a shared constitutional space, within which the Union's equal economic and social endeavours must be balanced against each other.

²⁷² *Rüffert*, cit.