European Papers

A Journal on Law and Integration

Vol. 3, 2018, No 3

www.europeanpapers.eu

European Papers is a double-blind peer-reviewed journal. This Issue of the *e-Journal* (final on 31 January 2018) may be cited as indicated on the *European Papers* web site at *Official Citation*: *European Papers*, 2018, Vol. 3, No 3, www.europeanpapers.eu.

ISSN 2499-8249 – *European Papers* (Online Journal)

Registration: Tribunal of Rome (Italy), No 76 of 5 April 2016.

European Papers

A Journal on Law and Integration

Vol. 3, 2018, No 3

Editorial

Articles

Special Section – EU Citizenship, Federalism and Rights

edited by Dimitry Kochenov

Editorial

Extra Unionem Nulla Salus?
The UK Withdrawal and the European Constitutional Moment

It is possible that the 29th of March 2019 will be considered as the date on which the Union has ceased to be a quarrelsome community of sovereign States and has become a community of destiny.

This may well occur if, on that date, EU law will cease to apply to the UK, thus transforming the withdrawal of that State into a disorderly and ruinous retreat. This course is foretold by the insane sequence of resolutions taken by UK House of Commons on January 29. The House approved an amendment calling for re-opening the negotiations of the withdrawal agreement; it rejected an amendment to postpone the Art. 50 TEU negotiations period beyond March 29; passed an amendment to reject a no-deal Brexit in principle. An outside observer can hardly understand the route that is followed by the British Institutions less than two months from that fateful date.

However, far from revealing the fragility of the European edifice, this inauspicious outcome can turn out to magnify the Constitutional dimension of the process of integration.

A few weeks ago, *Wightman* (Court of Justice, judgment of 10 December 2018, case C-621/18) has opened a crack in this progressive *cupio dissolvi*. Awaited with feverish attention, the CJEU decision ruled that a State is entitled to revoke unilaterally its intention to withdraw, notified under Art. 50 TEU, as long as the withdrawal agreement between that State and the Union has not entered into force or the two years deadline established by that provision has not expired.

The Court did not follow the radical international law approach suggested by the AG Sánchez-Bordona in his Opinion released on 4 December 2018, but rather preferred to frame the unilateral power of withdrawal in its traditional Constitutional conception.

In para. 44, the Court said: "it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union, established, unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals".

ISSN 2499-8249
doi: 10.15166/2499-8249/278

This sentence broadly follows the lines of previous and well know case law. Before the entry into force of the Lisbon Treaty, it would have probably included a further qualification of the Constitutional nature of Union, namely the irrevocability of the transfer of competence from the Member States. This is what the Court did in *Simmenthal* (judgment of 9 March 1978, case 106/77): "[a]ny recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community" (para. 18).

Viewed against this precedent, Art. 50 TEU seems thus to constitute a regression from the previous achievements of the case law. Of course, neither a holding of a Court nor a legal provision could prevent the splitting of a political community. However, and conversely, the inclusion in a legal text of a right to withdraw or to secede, namely the right to determine in splendid isolation its own destiny, appears to be at odds with the very idea of a Constitutional community. As indicated by the Supreme Court of Canada, (judgment of 20 August 1998, case [1998] 2 S.C.R. 217, *Reference re Secession of Quebec*, para. 90 *et seq.*), the destiny of a part of that community cannot be unilaterally determined, but it ought to be determined through a process that takes into account the part as well as the whole.

Possibly to soothe the anxieties of the Member States (MS), Art. 50 TEU departed from this logic. As recognized in *Wightman*, the unilateral power to withdraw from the Union constitutes a corollary of the enduring quality of the MS as sovereign States, entitled to self-determine their own fate (para. 50). Starting from this premise, the Court went on to determine that a MS, which has notified its intention to withdraw, has the power "to revoke that notification unilaterally in an unequivocal and unconditional manner" (para. 75).

This consequence is logical from both a sovereignty-based perspective and a Constitutional perspective.

From a sovereignty-based perspective, it seems natural to assume that a State, which is empowered to express its intention to withdraw from the Union by virtue of its sovereignty, must be equally empowered, on the same basis, to revoke this intention, as long as it does not take effect. If would be illogical that State sovereignty, unilaterally exercised at the moment of the notification of its intention to withdraw, would downgrade during the interim period of negotiation to the point that the same State cannot unilaterally revoke it.

Second, and quite paradoxically, the same conclusion is logical also from a Constitutional perspective. In four paras, from 61 to 64, the Court recalled that the entire Union – the ever closer Union –, together with its citizens, are affected by the unilateral decision of one of its MS to withdraw. The revocation thus contributes to recast the unity of

that Constitutional order. In a sense, the unilateral power of revocation is the backstop that remedies the unwarranted consequences of the establishment of a unilateral power to withdraw.

Precisely the UK could still make wise use of that backstop. Without stepping into issues touching upon deep-rooted political sensitivities, there is a case to be made that this option would not necessarily betray the free will of the British peoples expressed by the referendum of 23 June 2016. As convincingly said by the Canadian Supreme Court (*Reference re Secession of Quebec*, cit., para. 93), respect for democracy demands that, in a process of secession or withdrawal, peoples must be called to decide on a "clear question", unveiling all the consequences of a possible choice to leave a wider community. Otherwise, a referendum will be transformed into a plebiscite and the free will of the peoples transformed into a mad race towards an unknown destination.

Is that what is happening with the UK? Were the consequences of a decision to leave the Union clear to the voters of the 2016? Is it sacrilegious to assume that the seductive, yet generic idea to take back control, that played a decisive role in the 2016 campaign, ought to be re-meditated in light of a debate that did not take place before the referendum? Whilst an attempt to answer these questions appears to be temerarious, at least for the current Author, it does not seem illegitimate to ask them.

Regardless of the final outcome of Brexit, the events of these days may show that the links among the peoples of Europe have become so close that it is very difficult to untie them. They could make the prophecy of the functionalist philosophy come true, which advocated a *de facto* solidarity as the indispensable premise for the creation of a community sharing a common destiny.

It is certainly not the function of this *Editorial* to determine whether the moment has arrived to speak of Europe as a community of destiny. The relation between law and fact is ambivalent, and one should be wary of any attempt to encapsulate it in a predetermined legal doctrine. Sometimes the facts precede the law; sometime the law conditions the social facts. Who can say whether the inclusion in the founding treaties of a unilateral withdrawal clause has weighed on the decision to call a referendum on Brexit? And who can foretell whether, in spite of Art. 50 TEU, reality will disprove the realists by showing that a unilateral withdrawal from the Union, albeit permitted by the law, entails unacceptable consequence and becomes factually unbearable?

But the difficulty, if not even the impossibility, for the peoples of the Member States to part ways seems to indicate that the process of integration is becoming *de facto* irreversible and that these peoples are gradually being transformed into a full-fledged community. It is this process of transformation that heralds, in spite of the harsh present time, a Constitutional moment for Europe.

E.C.

ARTICLES

EU-US DATA TRANSFER FROM *SAFE HARBOUR* TO *PRIVACY SHIELD*: BACK TO SQUARE ONE?

FABIEN TERPAN*

TABLE OF CONTENTS: I. Introduction. – II. From *Safe Harbour* to *Privacy Shield*: EU-US data transfer as a feedback loop. – II.1. Action: *Safe Harbour* and the first agreement on EU-US data transfer. – II.2. Effect: *Safe Harbour* invalidated by the CJEU in *Schrems*. – II.3. Feedback: *Safe Harbour* replaced by *Privacy Shield*. – III. *Privacy Shield*: non compliance, full or partial compliance? – III.1. Slightly improved protection of personal data. – III.2. Persistent shortcomings. – IV. Why only partial compliance? – IV.1. Reasons why non-compliance was not an option. – IV.2. Reasons why full compliance was not possible. – V. Conclusion.

ABSTRACT: This *Article* focuses on data transfer from the European Union to the United States, and compares the new EU-US legal framework (*Privacy Shield*) with the former one (*Safe Harbour*), which was invalidated by the CJEU in the case of *Schrems* (judgement of 6 October 2015, case C-362/14). It combines legal analysis with a more political perspective taking into account the wider context in which these decisions were taken. This allows us to see whether the CJEU is able to ensure compliance with EU law, and EU fundamental rights in particular, in a sensitive area of external relations. It also brings some insights to bear on normative change, or the lack thereof, in fields where external relations and EU politics are intertwined. The conceptual model of the feedback loop is used to analyse the evolution from the *Safe Harbour* to the *Privacy Shield* regime. The action (adoption of *Safe Harbour* in 2000) has provoked an effect (the *Schrems* ruling adopted by the Court in response to the demands of data protection activists), which has finally led to feedback (adoption of *Privacy Field* in 2016). A legal analysis of this feedback effect shows that *Privacy Shield* only partially complies with the *Schrems* ruling. This partial compliance can be explained both by normative constraints and actors' preferences.

KEYWORDS: *Safe Harbour* – *Privacy Shield* – data protection – EU-US relations – data transfer – compliance.

* Senior Lecturer in Public Law and European Studies, Sciences po Grenoble, Univ. Grenoble Alpes, Centre for the study of international security and European cooperation (CESICE), Jean Monnet Chair, fabien.terpan@iepg.fr.

I. Introduction

On 2 February 2016, the United States and the European Union agree on a new regime for the transfer of personal data over the Atlantic.[1] The so-called *Privacy Shield* becomes part of the EU legal order thanks to a decision made by the Commission on 12 July 2016.[2]

Two main logics are accommodated: the economic logic aimed at allowing businesses to transfer data and at providing legal certainty to these operations; and the fundamental rights logic whereby EU citizens' personal data must not be unduly processed in the United States, a country where personal data is less protected than in Europe.

Privacy Shield is not the first transatlantic regime to deal with data transfer as it takes over from *Safe Harbour*, which was enacted by a Commission decision dating back to 26 July 2000.[3] The evolution, from *Safe Harbour* to *Privacy Shield*, was triggered by a CJEU ruling of 6 October 2015,[4] which invalidated the old legal regime which dealt with transatlantic data transfer. To a large degree, *Privacy Shield* can be understood as an attempt by EU political institutions to respond to a ruling made by the EU judiciary to better protect EU citizens' personal data *vis-à-vis* a third state.

This *Article* aims to analyse the EU's reaction to the *Schrems* ruling to assess whether the guarantees provided to EU citizens by *Privacy Shield* match the demands of the CJEU in view of *Schrems*. I will argue that this is not really the case, and will examine the reasons why the changes have been so limited.

This research question relates more generally to two different streams of academic literature. First, it contributes to the debate on legal integration and the role of the CJEU in the process of "integration through law".[5] Is the CJEU still a cornerstone of the EU integration process? What are the conditions under which EU law is respected, not only at national level but also at EU level (where secondary legislation must comply with "constitutional" primary law)? Second, it can be seen as a classic case of institutional change,

[1] European Commission Press Release 216/16 of 2 February 2016, *EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-US Privacy Shield*, europa.eu.

[2] Commission Implementing Decision 2016/1250 of 12 July 2016 pursuant to Parliament and Council Directive 95/46/EC on the adequacy of the protection provided by the EU-US Privacy Shield.

[3] Decision 2000/520/EC of the Commission of 26 July 2000 pursuant to Parliament and Council Directive 95/46/EC on the adequacy of the protection provided by Safe Harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

[4] Court of justice, judgement of 6 October 2015, case C-362/14, *Schrems* [GC]. For an overview of mass surveillance and privacy issues in the context of the transatlantic relations: D. Cole, F. Fabbrini, S. Schulhofer (eds), *Surveillance, Privacy and Trans-Atlantic Relations*, Oxford: Hart, 2017.

[5] S. Saurugger, F. Terpan, *The Court of Justice of the European Union and the Politics of Law*, Basingstoke: Palgrave, 2017; D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*, Oxford: Oxford University Press, 2015.

or normative change, where factors of change or inertia are scrutinised.[6] What triggers change? Why does inertia sometimes occur, even when the sophisticated judicial system of the European Union strives towards change? The specificity of the debate on EU-US transfer of data is that it cannot be considered as purely "internal". Although the *Schrems* ruling has to be complied with at European level, it is not merely an EU political issue. On the contrary, external relations and EU politics are intertwined, and external factors, including the position of the United States, need to be addressed. Thus, studying reactions to *Schrems* will also help us to determine how external factors alter both the conditions for institutional change in the EU, and compliance with CJEU rulings.

In order to better encapsulate the evolution from *Safe Harbour* to *Privacy Shield*,[7] and the lack of normative change, I will apply a law and politics approach, based on the assumption that law is embedded in a wider system of social facts and causal mechanisms, and is better understood when situated in a wider political context. I will use the framework of the *feedback loops*, which helps to understand how relationships between actors are shaped and reconfigured. Three steps can be distinguished: an action (adoption of *Safe Harbour*) triggers a reaction (the *Schrems* judgment), which leads to a feedback effect (*Privacy Shield*). Three possible outcomes can result from this feedback effect: a return to the original situation (non-compliance with the requirements of *Schrems*), a radical move towards greater protection of personal data (full compliance with *Schrems*), and, in between the two, a limited evolution (selective compliance with *Schrems*). The evaluation of the feedback effect will be carried out through legal analysis, while its explanation will require a larger perspective based on EU politics and governance.

Section II will present the empirics through the application of the feedback loop model. Section III will then analyse the content of *Privacy Shield* in order to determine the outcome of the feedback effect. Finally, in section IV, the factors that explain this outcome will be investigated.

II. From *Safe Harbour* to *Privacy Shield*: EU-US data transfer as a feedback loop

With the development of digital technologies and the Internet in the 1990s, rules controlling the transfer of personal data between Europe and the US were introduced in the so-called *Safe Harbour* "agreement". Non-governmental organizations (NGOs) as well as national and EU institutions expressed their concern, arguing that EU citizens'

[6] J. Mahoney, K. Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge: Cambridge University Press, 2009; A. Héritier, *Explaining Institutional Change in Europe*, Oxford: Oxford University Press, 2007.

[7] M.A. Weiss, K. Archick, *US-EU Data Privacy: From Safe Harbour to Privacy Shield*, Report prepared for Members and Committees of Congress, 19 May 2016, fas.org.

personal data was not sufficiently protected. In the end, the CJEU ruled on the issue, making the adoption of a new regime necessary.

II.1. Action: *Safe Harbour* and the first agreement on EU-US data transfer

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, adopted by the Parliament and the Council on 24 October 1995,[8] states that the transfer of personal data to a third country may take place only if the third country in question ensures an "adequate level of protection" (Art. 25, para. 1). The adequacy of the protection must be ascertained by the Commission. When a State does not ensure an adequate level of protection, transfer remains possible by way of derogation to Art. 25. Art. 26 specifies the conditions of such derogations.

Yet, it would be detrimental to EU-US relations if data transfer were only possible on the basis of derogations negotiated by private operators. This is precisely why the EU and the US introduced *Safe Harbour*. The Commission decision 2000/520/EC,[9] based on Art. 25, para. 1, of Directive 95/46/EC, certifies that the new EU-US data transfer regime offers an adequate level of protection for European citizens whose personal data are transferred to the US.

According to *Safe Harbour*, American companies must comply with a series of principles if they want to legally process personal data that comes from Europe. In particular, they must inform individuals that their data is being collected and specify how it will be used. Individuals must have the option to opt out of their data being collected and transferred to third parties. Transfer of data to third parties may only be carried out by those organizations that follow adequate data protection principles. Reasonable efforts must be made to prevent loss of collected information. Data must be relevant and reliable for the purpose for which it was collected. Individuals must be able to access information held about them, and correct or delete it, if it is inaccurate. Effective means of enforcing these rules are included in *Safe Harbour*. They combine self-regulation by the private sector with public authority control, more specifically the Federal Trade Commission (FTC).

However, according to an annex to Decision 2000/520/EC, issued by the US Department of Commerce, adherence to these principles may be limited "to the extent necessary to meet national security, public interest, or law enforcement requirements". These limitations are themselves "limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization".[10] In other words, when US intelligence requires US companies to cooperate for reasons of national security, protection

[8] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[9] Decision 2000/520/EC, cit.

[10] Annex I to Decision 2000/520/EC, cit.

of EU citizens' personal data becomes a secondary consideration. This limitation, although not the only problem in terms of data protection, has been the main reason why *Safe Harbour* has been targeted by privacy activists.

II.2. Effect: *Safe Harbour* invalidated by the CJEU in *Schrems*

Maximilian Schrems, an Austrian student and privacy activist, asked the Irish Data Protection Commissioner (DPC) to prohibit the transfer of personal data to the United States via Facebook Ireland (Facebook having its head office in Ireland). He considered that Internet users are not protected against the intrusion of US agencies, in particular the National Security Agency (NSA), the latter having unlimited access to the personal data of European citizens, without the need to resort to a judicial decision. The Commissioner rejected this demand, arguing that Facebook had been certified under the *Safe Harbour* agreement.

Maximilian Schrems then filed an application for judicial review to the Irish High Court in response to the inaction of the Irish DPC, invoking both Directive 1995/46/EC and Arts 7 and 8 of the Charter of Fundamental Rights of the European Union (on respect for private life and the protection of personal data respectively). The High Court appealed to the CJEU, asking whether the adequacy decision prevented a national control authority from stopping the transfer of data on the grounds that privacy is not protected enough. The Grand Chamber of the CJEU issued a ruling on 6 October 2015 making it clear that national authorities must maintain the right to exert control, provided they do not declare the adequacy decision invalid. The Court then looked at the legality of the decision and decided that Art. 1 of Decision 2000/520/CE[11] was in breach of Art. 25, para. 6, of Directive 1995/46/CE, in light of the Charter of Fundamental Rights of the European Union. As the decision did not include any evaluation of the US rules, the Commission did not provide evidence that an adequate level of protection had been reached.

In addition, this protection level had to be regularly re-evaluated when confronted with new circumstances. Most certainly, the revelations from Mr Snowden regarding the NSA programme of mass surveillance (PRISM) could be considered a new occurrence justifying a re-evaluation. The Commission should have mentioned the fact that US

[11] *Schrems* [GC], cit., para. 98. On the *Schrems* ruling: S. Carrera, E. Guild, *The End of Safe Harbor: What Future for EU-US Data Transfers?*, in *Maastricht Journal of European and Comparative Law*, 2015, p. 651 *et seq.*; C. De Terwangne, C. Gayrel, *Flux transfrontières de données et exigence de protection adéquate à l'épreuve de la surveillance de masse. Les impacts de l'arrêt Schrems*, in *Cahiers de droit européen*, 2017, p. 35 *et seq.*; R.A. Epstein, *The ECJ's Fanal Imbalance: Its Cavalier Treatment of National Security Issues Poses Serious Risk to Public Safety and Sound Commercial Practices*, in *European Constitutional Law Review*, 2016, p. 330 *et seq.*; J.F.M. Marques, *And [They] Built a Crooked H[arbour] – The Schrems Ruling and What it Means for the Future of Data Transfers Between the EU and US*, in *EU Law Journal*, 2016, p. 54 *et seq.*; X. Tracol, *Invalidator Strikes Back: The Harbour Has Never Been Safe*, in *Computer Law & Security Review*, 2016, p. 345 *et seq.*

agencies had generalized access to the content of digital communications, without any external and independent control, and without any precise criteria limiting the number of cases where access for national security reasons was allowed. In fact, the Commission had by this time started to discuss the issue with US authorities, but this was not enough to change the Court's position/ruling.

The Court's ruling was consistent with previous case law supporting data protection, which was quite cautious in the early 2000s,[12] and more audacious in the post-Lisbon period, after the Charter of Fundamental Rights of the European Union (which included a provision on data protection) had become legally binding.[13]

Although it contributed to the CJEU's "constitutionalisation" of European law,[14] the *Schrems* ruling prompted a renegotiation of the rules contained in *Safe Harbour*.

II.3. Feedback: *Safe Harbour* replaced by *Privacy Shield*

Safe Harbour was replaced by *Privacy Shield* thanks to an agreement between EU and US representatives announced on 2 February 2016. The new regime is supposed to secure the transfer of data in accordance with EU primary and secondary law. On 12 July 2016, the Commission adopted a decision declaring that the United States, and the Department of Commerce in particular, should ensure an adequate level of protection as required by the Directive 95/46/EC.[15] This adequacy decision was based on one declaration and several letters that came from US authorities, which are reproduced in Annexes 1 to 7.

Annex 2 shows a declaration made by the Department of Commerce setting out the principles of *Privacy Shield*. Annexes 3 to 5 contain letters from the Secretary of State, the President of the Federal Trade Commission and the Secretary of Transport, which were sent to the European Commission. Annexes 6 and 7 originate from the Director of National Intelligence and the Assistant Attorney General, and were sent to senior officials at the Department of Commerce, and not to the Commission.

III. *Privacy Shield*: non-compliance, full or partial compliance?

Are personal data better protected thanks to *Privacy Shield*? To what extent does the new regime comply with the requirements in *Schrems*? We distinguish between three possible

[12] See for instance, Court of justice: judgment of 20 May 2003, joined cases C-465/00, C-138/01, C-139/01, *Österreichischer Rundfunk and Others*; judgment of 29 January 2008, case C-275/06, *Promusicae*; judgment of 16 December 2008, case C-73/07, *Satakunnan Markkinapörssi and Satamedia*.

[13] Court of justice: judgment of 8 April 2014, joined cases C-293/12, C-594/12, *Seitlinger and Others*; judgment of 13 May 2014, case C-131/12, *Google Spain*. For a general view, O. Lynskey, *The Foundations of EU Data Protection Law*, Oxford: Oxford University Press, 2015.

[14] S. Saurugger, F. Terpan, *The Court of Justice of the European Union and the Politics of Law*, cit., pp. 158-179; F. Terpan, *Le constitutionnalisme européen: penser la Constitution au-delà de l'État*, in *Mélanges en l'honneur du Professeur Henri Oberdorff*, Paris: Lextenso, 2015, p. 181.

[15] Commission Implementing Decision 2016/1250, cit.

scenarios. Full compliance refers to a situation where the level of protection ensured by the US authorities is similar to the level required by the European Union. Non-compliance is when, apart from a formal change (adoption of a new adequacy decision), the new regime is substantially similar to the old one. In between these two scenarios, we may have partial compliance if *Privacy Shield*, albeit improving the level of protection of European personal data, remains quite far from the requirements laid down by *Schrems*.

III.1. Slightly improved protection of personal data

Legal analysis of the new documents shows that three main improvements have been made to the EU-US transfer of data regime.

First, *Privacy Shield* is based, like *Safe Harbour*, on a system of certification: corporations can transfer data as soon as they are certified by the US Department of Commerce. To be certified, they need to comply with a series of privacy requirements.

While the system remains unchanged, *Privacy Shield* private operators are subject to greater commitments with regard to notifications, limits to data retention, rights of access, publicity of privacy policies etc. The Department of Commerce has the power to investigate and control the implementation of these commitments.

Second, the Department of Justice and the Director of National Intelligence provided written assurance (annexed to the adequacy decision) that security agencies' access to European data will be clearly limited and controlled. The Commission, together with the Department of Commerce, and European as well as US data protection authorities, will provide an annual assessment.

Third, EU citizens benefit from better control mechanisms. They now have the ability to file a claim: *1*) against US companies, which have 45 days to resolve the complaint; *2*) against European data protection authorities, which may refer the complaint to the Department of Commerce. In a more indirect way, European citizens can appeal to the Department of Commerce or an alternative mechanism if the latter does not follow it up. As for complaints about intelligence agencies, an ombudsperson was appointed by the Department of State, presently Mrs Manisha Singh (Under Secretary of State for Economic Growth, Energy, and the Environment).

The ombudsperson, who is responsible for the cases submitted by European data protection authorities, is presented by the European Commission as being independent from the intelligence authorities.[16] In addition to *Privacy Shield*, the Obama administration introduced, on 24 February 2016, a new law – the Judicial Redress Act – under which European citizens can benefit from the same rights guaranteed to US citizens by the US Privacy Act of 1974. The Commission welcomed this development.[17]

[16] *Ibid.*, para. 121.

[17] Commission Press Release of 24 February 2016, *Statement by Commissioner Věra Jourová on the Signature of the Judicial Redress Act by President Obama*.

III.2. Persistent shortcomings

However, despite these improvements, the protection ensured by US authorities still suffers from several major shortcomings.[18] *Privacy Shield*, like *Safe Harbour*, does not take into account the evaluation carried out by the Commission on US data protection rules. The lack of a proper assessment was one of the main motivations for the CJEU to declare the decision 2000/520/EC on *Safe Harbour* illegal. As this major flaw has not been corrected, there is enough evidence to believe that *Privacy Shield* could also be invalidated; the validity of the new regime remains fragile.[19]

Moreover, the legal nature of the documents provided by US authorities is a matter for discussion. The general principles that apply to US companies are established on the basis of a simple declaration from the Department of Commerce, which cannot be seen as a legal commitment. It is also doubtful whether these documents can be seen as international agreements between the EU and the US.

While the letters from the Secretary of State (Annex 3), the President of the Federal Trade Commission (Annex 4), as well as of the Secretary of Transport (Annex 5), might be considered "executive agreements" at best, this cannot be the case with the letters from the Director of National Intelligence (Annex 6) and the Assistant Attorney General, which were not sent to EU institutions.

Privacy Shield also raises concerns on both the commercial and security dimension. At least three types of shortcomings affect the commercial part of *Privacy Shield*. The first one relates to the way data is collected and circulated. No specific rules are applied to automated data collection. And very few guarantees are provided regarding the transfer of data to third countries as well as the role played by sub-contractors. The second category of shortcomings concerns the degree of rights protection. There is no obligation for private organisations to delete personal data when it is no longer required by them. Consumers have no right to oppose the collection of data. Thirdly, the complaints mechanisms remain complex and there are serious reasons to doubt their effectiveness.

Regarding the security dimension, we have already mentioned that the mechanism still relies on letters from US public authorities, more than actual legal commitments. While the Office of the Director of National Intelligence declare that they will refrain from collecting massive and indiscriminate amounts of data, there is no legal means to ensure that they will respect this declaration of intent. Even the independence of the Ombudsperson remains an issue, as she works under the vice-secretary of the US State Department. The fact

[18] The Art. 29 Working Party emphasised the remaining shortcomings on 13 April and 29 July 2016, before and after the adequacy decision. See: G. Vermeulen, *The Paper Shield, on the Degree of Protection of the EU-US Privacy Shield Against Unnecessary or Disproportionate Data Collection by the US Intelligence and Law Enforcement Services*, in D.J.B. Svantesson, K. Dariusz (eds), *Transatlantic Data Privacy Relationships as a Challenge for Democracy*, Portland: Intersentia, 2017.

[19] X. Tracol, *EU-US Privacy Shield: The Saga Continues*, in *Computer Law & Security Review*, 2016, p. 1 *et seq.*

that the Commission, in its adequacy decision, has mentioned the independence of the Ombudsperson, is not exactly a guarantee that this independence will be effective.

The emphasis on guarantees and control mechanisms can easily be understood, for both commercial and security reasons. We have witnessed this before; Safe Harbour contained obligations that were not respected either by businesses or public authorities. The Federal Trade Commission opened procedures against no more than ten companies during the 13 years of existence of *Safe Harbour*. Dozens of companies have declared activities within the framework of *Safe Harbour* while they are not actually covered by this regime.[20] Although complaints procedures have improved, the effectiveness of *Privacy Shield* will depend, as was the case with its predecessor, on the willingness of the Federal Trade Commission. As for Public authorities, they have largely and indiscriminately made use of the exception concerning national security. If the same causes produce the same effects, there is enough reason to believe that practices that do not respect private life and data protection will persist.

Thus, *Privacy Shield* appears to have only partially complied with the *Schrems* ruling. While it perhaps did not fully return to square one, as a few improvements have been made, it clearly did not really progress much further, leading to doubts about the legality of the new regime.

IV. Why only partial compliance?

To explain why *Privacy Shield* constitutes a case of only partial compliance, I will proceed in two stages. I will first identify the reasons why non-compliance was not an option, before turning to the reasons why full compliance was not possible either, leading to the middle ground of partial compliance. Two considerations will inform the analysis, pertaining first to the legal and normative context, and second to the preferences of the actors.

IV.1. Reasons why non-compliance was not an option

a) Legal and normative explanations.

In the EU system of governance, it is unlikely that EU institutions ignore or even circumvent a ruling of the CJEU. In the case of *Schrems*, the Court based its decision on Directive 1995/46/EC as well as Arts 7 and 8 of the Charter of Fundamental Rights of the European Union. Non-compliance with *Schrems* would mean revising secondary legislation and, possibly, revising the Charter in order to be sure that the Court would have no legal grounds for invalidating the new adequacy decision. This would imply that the Commission, as well as the Council and the Parliament, would have to be ready to lower

[20] G. Vermeulen, *The Paper Shield*, cit. See also: R.R. Schriver, *You Cheated, You Lied: The Safe Harbour Agreement and Its Enforcement by the Federal Trade Commission*, in *Fordham Law Review*, 2002, p. 277 *et seq.*

the level of data protection in Europe and bring it closer to US rules, which is hardly conceivable. On the contrary, the adoption of the General Data Protection Regulation (GDPR) in May 2016[21] clearly indicates that the Union has set in motion new moves towards greater data protection.

Art. 7 of the Charter of Fundamental Rights of the European Union states that "everyone has the right to respect for his or her private and family life, home and communications". Art. 8 of the same Charter brings with it three kinds of guarantees.

First, it provides a general right for personal data to be protected. Second, it specifies the nature of this right, by stating that "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law" and that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified". And third, Art. 8 includes a mechanism for the control of these rules by an "independent authority". Thanks to these provisions, data protection in the EU has been elevated to the level of a constitutional principle, allowing the CJEU to use it against any act or practice that does not conform to it. A similar evolution has occurred in the Council of Europe, where the European Court of Human Rights has issued decisions quite similar to the CJEU because of *Schrems*. Mass surveillance was condemned in *Zakharov*[22] and *Szabo*,[23] which, just like *Schrems*, show how far European Courts have gone to constitutionalise the protection of personal data and provide effective guarantees to citizens.[24] The emergence of a constitutional principle of data protection, in the EU as well as in the Council of Europe, creates normative constraints that cannot be evaded by political institutions.

b) Actor-centered explanations.

This process of constitutionalisation of data protection at EU level has been supported by different actors, whose mobilization explains why non-compliance was not a feasible option. In particular, the use of litigation by civil society organizations has had a huge impact since 2013, as well as the disclosure of PRISM. Both national courts and NGOs have contributed effectively to the control of *Safe Harbour*. The Irish High Court, which made a reference to the CJEU in the *Schrems* case, had already criticized the NSA and the US programmes of mass surveillance.

[21] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[22] European Court of Human Rights, judgment of 4 December 2015, no. 47143/06, *Zakharov v. Russia*.

[23] European Court of Human Rights, judgment of 12 January 2016, no. 37138/14, *Szabo v. Hungary*.

[24] J.-F. FOEGLE, *Chronique du droit Post-Snowden: La CJUE et la CEDH sonnent le glas de la surveillance de masse*, in *La Revue des droits de l'homme*, 2016.

As we have already seen, Maximilian Schrems, data protection activist and founder of "Europe vs. Facebook", is the one who triggered the downfall of *Safe Harbour*, by starting the judicial procedure in Ireland. Yet the judicial incentive could have come from other actors engaged in the cause of data protection, if they have chosen to litigate, in addition to their lobbying activities.[25] NGOs have remained active since the *Schrems* ruling. As a matter of fact, some of them have already sought the annulment of the adequacy decision regarding *Privacy Shield*, showing that they are willing to act as a counter-weight to the power of EU and US institutions with regard to data transfer.[26] This is not to say that this is always successful. The action brought by Digital Rights Ireland (DRI) in case T-670/16 has already been declared inadmissible by the General Court of the CJEU, which argued first, that DRI does not have any interest in initiating proceedings, and second, that it does not have legal standing to act in the name of its members and supporters or on behalf of the general public.

EU political institutions have also adapted to the new "post-Snowden" climate. In the European Parliament, voices were raised in favour of the suspension of *Safe Harbour*; and they are still actively lobbying against *Privacy Shield*. Jan Philipp Albrecht, for example, has been one of the most active Members of the European Parliament, criticizing a system that is mostly based on declarations of intent from US authorities.[27] The way that *Privacy Shield* is configured has been negotiated by the Commission with a view to meeting the approval of the Parliament.

Similarly, the Commission has taken into account the concerns expressed by Member States, in particular France and Germany, who reacted strongly to the revelations by Snowden about PRISM and have remained alert during the negotiations over *Privacy Shield*.[28] The Art. 29 working party aims to enable the Commission to exert some kind of national control, and is composed of a representative from the supervisory authorities designated by each EU country, as well as a representative from the authorities established by the EU institutions and bodies, and a representative from the European Commission.

Furthermore, the Commission itself expressed concerns about *Safe Harbour*, even before the Snowden revelations. Two documents in 2002[29] and 2004[30] underlined the

[25] For instance, among others: Cyber Privacy Project (CPP), Digitale Gesellschaft e. V., Electronic Frontier Finland (EFFi), Epicenter.Works (prior: AKVorrat), European Digital Rights, Facebook Class Action, Human Rights Watch, IT-Political Association of Denmark (IT-Pol), Privacy International, Stichting Bits of Freedom (Bof), Transatlantic Consumer Dialogue (TACD), Verein für Konsumenteninformation (VKI), Panoptykon Foundation.

[26] General Court: order of 22 November 2017, case T-670/16, *Digital Rights Ireland v. Commission*; action brought on 9 December 2016, case T-738/16, *La Quadrature du Net and Others v. Commission*.

[27] Cited in N. LOMAS, *Europe and US Seal Privacy Shield Data Transfer Deal to Replace Safe Harbour*, in *Techcrunch.com*, 2 February 2016, techcrunch.com.

[28] K. DORT, J.T. CRISS, *Trends in Cybersecurity Law, the Privacy Shield, and Best Practices for Businesses Operating in the Global Marketplace*, in *The Computer and Internet Lawyer*, 2016, p. 5 *et seq.*

[29] Commission Staff Working Paper SEC(2002) 196 of 13 February 2002 on the application of Commission Decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament

shortcomings of *Safe Harbour*, and more specifically its lack of legal commitments and effectiveness. A few months after the PRISM disclosure, in November 2013, the Commission adopted two communications, the first one entitled "Rebuilding Trust in EU-US Data Flow",[31] the second one "on the functioning of Safe Harbour from the perspective of EU citizens and companies established in the EU".[32]

With regard to the latter, it has been clearly established that Microsoft, Google, Facebook, Apple, Yahoo!, Skype and YouTube, although certified within the framework of *Safe Harbour*, are all involved in PRISM. This programme, thus, goes far beyond what is necessary to protect national security under the exception included in decision 2000/520/EC. In 2014, the Commission negotiated a revision of *Safe Harbour* with the US Department of Commerce (*Safe Harbour 2.0*) aimed at greater transparency and control of data transfer. This renegotiation is consistent with the EU internal evolution towards better protection of personal data, starting with the legislative package presented by the Commission in 2012 and culminating in the adoption of a new regulation (on 27 April 2016, in force since 24 May 2016)[33] and a new directive (on 5 May 2016, in force since 6 May 2018).[34]

This section has shown that compliance was necessary not only due to strong legal and normative constraints, but also because of a consensus that emerged among different actors. In the following section, I will identify the reasons why compliance could not be full but only partial.

IV.2. Reasons why full compliance was not possible

Privacy Shield is the result of a difficult negotiation process with a US partner whose main objective is not to adapt to the requirements of European law as interpreted by the CJEU. Contrary to purely "internal" compliance issues, compliance in this case thus includes an "external" dimension, which hinders the prospects for full compliance. Both legal/normative and actor-centered factors explain why changes have been limited.

a) Legal and normative explanations.

and of the Council on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce.

[30] Commission Staff Working Document SEC(2004) 1323 of 20 October 2004, *The implementation of Commission Decision 520/2000/EC on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related frequently Asked Questions issued by the US Department of Commerce*.

[31] Communication COM(2013) 846 final of 27 November 2013 from the Commission to the European Parliament and the Council, *Rebuilding Trust in EU-US Data Flow*.

[32] Communication COM(2013) 847 final of 27 November 2013 from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU.

[33] Regulation 2016/679/EU, cit.

[34] Directive 2016/680/EU, cit.

At a normative level, full compliance could only be possible if the guarantees given by US authorities to citizens dramatically improved, which has not been the case in recent years. There is still a huge gap between EU and US rules in the field of data protection, a gap that increased with the adoption of GDPR in 2016.[35]

This is precisely why a growing number of proposals for federal privacy legislation in the United States have arisen over recent months. In particular, the draft Consumer Data Protection Act,[36] would require certain organizations to submit annual data protection reports to the FTC and would empower the FTC to impose fines of up to 50.000 dollars per violation or four percent of the total annual gross revenue of an organization for a first time offense. Under the new Bill, the FTC would also be given rulemaking authority to establish new regulations with regard to privacy. But for now, the level of protection in the US remains lower than in Europe.

Furthermore, apart from the "level" of protection, the "nature" of the protection afforded by the US system also differs from EU law, with greater involvement of private organisations in the resolution of disputes.

b) Actor-centred explanations.

There is no serious will to change in the US administration, with regard to data protection. The most recent changes in the United States date back to the Obama period, and the election of Donald Trump seems to have closed the door on any hope of further improvement. The European internal market is attractive for US companies, which may give some leeway to the EU in its negotiations on EU-US data transfer,[37] and confirm the idea of a "Market Power Europe";[38] however, it might not be attractive enough to trigger a radical change in the level of data protection. The US government has not given any guarantees that mass surveillance carried out by the NSA will be stopped or limited in the near future. Thus, there is no real sign from the United States that US rules could be aligned with those of the EU.

From an EU perspective, data protection, important as it may be, must be reconciled with economic objectives. Transatlantic data flows must not be hindered by overprotective rules. This explains why the Commission, before the Irish High Court submitted a preliminary question to the CJEU, had never really considered the demands of Maximilian Schrems and some Members of the European Parliament to suspend *Safe Harbour* because of the Snowden revelations. The Commission feared that such a decision would have a negative impact on business in Europe and transatlantic economic

[35] K. DORT, J.T. CRISS, *Trends in Cybersecurity Law, the Privacy Shield, and Best Practices for Businesses Operating in the Global Marketplace*, cit., p. 2.

[36] US Congress, *H.R.4544 – Consumer Data Protection Act*, introduced in House on 12 April 2017, www.congress.gov.

[37] G. SHAFFER, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of US Privacy Standards*, in *Yale Journal of International Law*, 2000, p. 82 *et seq.*

[38] C. DAMRO, *Market Power Europe*, in *Journal of European Public Policy*, 2012, p. 682 *et seq.*

relations.[39] This is why *Safe Harbour* was discussed but never really challenged before the Court issued its decision on *Schrems*.

The same reasoning applies to the post-*Schrems* period. The invalidation of Decision 2000/520/EC by the CJEU has made the adoption of a new decision necessary, but the logic of economic interest still plays a central role. The Court's decision has created legal uncertainty for some 5500 US companies that are active in the EU's internal market.

Commissioner Jourová (in charge of justice, consumer and gender equality) as well as Commissioner Günther Oettinger (in charge of the digital economy) and Vice-President Andrus Ansip (in charge of the digital internal market) have made it clear that facilitating transatlantic data transfer is a top priority.[40]

Member States have agreed with the Commission's position. Despite a general feeling of worry and some concern expressed particularly by France and Germany, they all understand the necessity of maintaining a political discourse regarding transatlantic trade.[41]

In early 2018, the new French government defended *Privacy Shield* during the proceedings at the General Court of the CJEU: this ran contrary to the idea of renegotiating the agreement, which was extolled by Emmanuel Macron during his presidential campaign.[42] In seeking to raise the importance of data protection, national governments risk putting transatlantic economic relations in jeopardy. What remains to be seen is whether a more difficult EU-US climate, with Donald Trump threatening Europe with commercial war, will change the position of EU member states.

V. Conclusion

The objective of this *Article* was to shed some light on the transformation of the EU-US data transfer regime, from *Safe Harbour* to *Privacy Shield*. In section I, the theoretical model of the feedback loop was used to distinguish between an action (the adoption and implementation of *Safe Harbour*), an effect (the invalidation of *Safe Harbour* by the CJEU due to *Schrems*) and feedback (the replacement of *Safe Harbour* by *Privacy Shield*).

Legal analysis of the feedback effect, in section II, shows that the judgment in the case of *Schrems* has not been ignored, but has not been fully taken into account either. It can be seen as a case of partial compliance, given that several concerns about *Safe Harbour* have not disappeared with the advent of *Privacy Shield*. One major shortcoming is that the adequacy decision as regards *Privacy Shield*, like its predecessor, does not meet the CJEU requirement that the Commission should make an evaluation of US rules and guar-

[39] Communication COM(2013) 847 final, cit.

[40] G. Vermeulen, *The Paper Shield*, cit., p. 6.

[41] K. Dort, J.T. Criss, *Trends in Cybersecurity Law, the Privacy Shield, and Best Practices for Businesses Operating in the Global Marketplace*, cit., p. 5.

[42] On the French position with regard to *Privacy Shield*: M. Rees, *Le gouvernement défend le Privacy Shield et la conservation généralisée des données*, in *NextInpact*, 28 February 2018, www.nextinpact.com.

antees. As these guarantees continue to be mostly based on declarations of intent, there are sufficient reasons to believe that the legality of the new regime is fragile.

The explanations for this partial compliance must stem from the constraints brought about by legal and normative factors as well as the preferences of actors. Data protection has been highly constitutionalized and is now supported by several actors, NGOs, member states and EU institutions, all of which are concerned about its effectiveness. However, there are strong limitations to this effectiveness as regards external data transfer. Given that US law remains less protective of personal data than EU law, and economic interests being prioritised on both sides of the Atlantic, the changes made in *Privacy Shield* are limited.

The adoption of *Privacy Shield* has initiated a new feedback loop, the trajectory of which remains to be discovered. Digital Rights Ireland and La Quadrature du net brought a case before the General Court of the CJEU,[43] seeking the annulment of the new adequacy decision, on different grounds: the collection of data afforded by US rules is indiscriminate; processing of data is not limited to what is strictly necessary; the lack of an effective mechanism of control; the lack of truly independent control etc.. They are facing serious difficulties, due to the fact that NGOs that defend the public interest do not have legal standing in annulment actions. Yet, the European system of governance opens up other opportunities to litigate and wage a legal battle against *Privacy Shield*. Litigation at member state level, culminating in a preliminary question to the CJEU, may have the same result as the *Schrems* ruling. The pending case of *Facebook Ireland and Schrems* (C-311/18) will give an opportunity for the CJEU to rule on *Privacy Shield*. If the latter is declared illegal, this time the feedback effect will have to be of a different nature, otherwise the feedback loop will lead to normative and institutional deadlock.

[43] *Digital Rights Ireland v. Commission*, cit.; *La Quadrature du Net and Others v. Commission*, cit.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS
edited by Dimitry Kochenov

EU CITIZENSHIP: SOME SYSTEMIC CONSTITUTIONAL IMPLICATIONS

TABLE OF CONTENTS: I. Citizenships in Europe: harmony and conflict. – I.1. A curious legal status perched on limitations. – I.2. EU citizenship: two lessons. – II. EU citizenship: questioning the established narrative. – II.1. Empowering the citizen – Humiliating the State. – II.2. Promoting democracy – Undermining democratic outcomes. – II.3. Promoting non-discrimination – Undermining equality. – II.4. Implications for the rule of law: the sole possibility of one type of constitutionalism. – III. We have time: the new picture is here to stay.

I. The EU boasts layered citizenships[1] – the nationalities of the Member States are supplemented by an "additional",[2] "independent"[3] EU-level citizenship granted to Member State nationals and impossible without the nationalities of the Member States.[4] According to the Court of Justice, it is "destined to be the fundamental status of nationals of the Member States".[5] This prophesy from the shapers of the law is slowly being fulfilled, unsurprisingly, as the status has received a significant boost over recent decades,[6] some disagreements in the literature about its occasional retreat notwithstand-

[1] C. SCHÖNBERGER, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen: Mohr Siebeck, 2005.

[2] Art. 20 TFEU.

[3] Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottmann*, para. 23.

[4] C. SCHÖNBERGER, *European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism*, in *European Review of Public Law*, 2007, p. 63 *et seq.*; M. SZPUNAR, M.E. BLAS LÓPEZ, *Some Reflections on Member States Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017; H.U. JESSURUN D'OLIVEIRA, *Union Citizenship and Beyond*, in *EUI Working Papers LAW*, no. 15, 2018.

[5] E.g. Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31; judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 82; judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*, para. 41; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, para. 29; judgment of 5 June 2018, case C-673/16, *Coman and Others*, para. 30.

[6] D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, p. 233 *et seq.*; G. PALOMBELLA, *Whose Europe? After the Constitution: A Goal-Based Citizenship*, in *International Journal of Constitutional Law*, 2005, p. 377 *et seq.*; D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 55 *et seq*.

ing.[7] Ulli Jessurun d'Oliveira's age of the "pies in the sky", if it was ever correctly diagnosed at all,[8] is now definitely over, even if the question is open as to what precisely to count as the starting point of its demise. Candidates for the starting moment of EU citizenship abound. The point of citizenship's proverbial "birth" could overlap with *Ruiz Zambrano*,[9] *Rottmann*,[10] *Grzelczyk*,[11] *Martínez Sala*,[12] the Treaty of Maastricht,[13] *Micheletti*,[14] or could have even taken place earlier than that.[15] Important rights effective throughout all EU territory accrue to this supranational citizenship, which stems directly from EU law, thus fulfilling the historic prophecy of *Van Gend en Loos* concerning the "constitutional heritage" of every European.[16] However, this picture is nuanced by the fact that EU citizenship is sometimes, quite surprisingly, characterised as "not intended

[7] O. Garner, *The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status*, in *Cambridge Yearbook of European Legal Studies*, 2018, p. 116 *et seq.*; N. Nic Shuibhne, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit.

[8] H.U. Jessurun d'Oliveira, *Union Citizenship: Pie in the Sky?*, in A. Rosas, E. Antola (eds), *A Citizens' Europe. In Search of a New Order*, London: Sage Publications, 1995, p. 58.

[9] *Ruiz Zambrano*, cit.; D. Kochenov, *A Real European Citizenship*, cit.; S. Platon, *Le champ d'application des droits du citoyen européen après les arrêts Zambrano, McCarthy et Dereci: de la boîte de Pandore au labyrinth du Minotaure*, in *Revue trimestrielle de droit européen*, 2012, p. 21 *et seq.*; M. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, in *Legal Issues of Economic Integration*, 2012, p. 273 *et seq.*; M. Hailbronner, S. Iglesias Sánchez, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status*, in *Vienna Journal of International Constitutional Law*, 2011, p. 498 *et seq*.

[10] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*; G. Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, in *EUI Working Papers RSCAS*, no. 62, 2011; D. Kochenov, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010*, in *Common Market Law Review*, 2010, p. 1831 *et seq.*; G.-R. de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, in *Asiel- en Migrantenrecht*, 2010, p. 293 *et seq.*; H.U. Jessurun d'Oliveira, *Ontkoppeling van nationaliteit en Unieburgerschap?*, in *Nederlands Juristenblad*, 2010, p. 785 *et seq.*; S. Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea? TJUE Sentencia de 2 de marzo de 2010 (gran sala), Janko Rottmann C. Freistaat Bayern, Asunto C-135/08*, in *Revista de derecho comunitario europeo*, 2010, p. 933 *et seq*.

[11] *Grzelczyk*, cit.

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

[13] C. Closa, *Citizenship of the Union and Nationality of Member States*, in *Common Market Law Review*, 1995, p. 487 *et seq*. Cf. S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, The Hague, Boston: Kluwer Law International, 1996.

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

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

[16] Court of Justice, judgment of 5 February 1963, case C-26/62, *Van Gend en Loos*. O. Due, *The Law-Making Role of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings*, in *Nordic Journal of International Law*, 1994, p. 123 *et seq*.

to enlarge the scope *ratione materiae* [of EU law]"[17] – a *dictum* of the Court which is most likely *ultra vires*,[18] and certainly significantly out of tune with the case law in other areas. Having been dissected and criticised by the author with Sir Richard Plender elsewhere,[19] it is most likely bad law by now.

I.1. Crucially, EU citizenship is one of those rare legal statuses which, although entirely dependent on the determination of the boundary of the material scope of the law which created it[20] – being a derivative supranational legal status produced by a Union founded on the principle of conferral[21] – is not yet unquestionably endowed with fundamental rights.[22] While numerous rights are obviously there – and this Special Section scrutinises an array of those in detail too, from free movement and family reunification to social assistance, citizens' initiative and fundamental rights in times of economic crisis, to freedom to move investments around the Union and voting rights – the dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States unquestionably demonstrates the far-reaching limits of EU citizenship.[23] This is because the division of competences between the EU and the Member States generally follows what one can term as a cross-border or internal market logic.[24] Consequently, the actual usefulness of supranational citizenship in taming the negative externalities of the internal market, as well as in establishing a firm ethical and moral grounding and justification for EU citizenship outside the frame of the internal market

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

[18] Although Paul Craig does not use it as an example in his notable account: P. CRAIG, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, in *Common Market Law Review*, 2011, p. 395 *et seq*.

[19] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, p. 369 *et seq*.

[20] See, for a very detailed account, D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit.

[21] This being said, it is impossible to claim that this derivative status does not impact, in the most direct way, the rules of conferral and withdrawal of the nationalities of the Member States, from which it is derived: D. KOCHENOV, *Member State Nationalities and the Internal Market*, in N. NIC SHUIBHNE, L.W. GORMLEY (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Oxford: Oxford University Press, 2012, p. 241 *et seq*.

[22] E. SHARPSTON, *Citizenship and Fundamental Rights – Pandora's Box or a Natural Step Towards Maturity?*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart, 2012, p. 245 *et seq*. Cf. S. IGLESIAS SÁNCHEZ, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, in *European Law Journal*, 2014, p. 464 *et seq*.; D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance?*, cit.; P. CARO DE SOUSA, *Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?*, in *European Law Journal*, 2014, p. 499 *et seq*.

[23] M. VAN DEN BRINK, *EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems*, in *European Law Journal*, 2018, p. 1 *et seq*.

[24] See, most importantly, A. TRYFONIDOU, *Reverse Discrimination in EC Law*, The Netherlands: Kluwer Law International, 2009.

has been, although theoretically possible,[25] truly feeble if not non-existent in practice.[26] The result has been the weakening of the EU's justice claims,[27] and the punishment and undermining of the life-chances of those citizens who fail to qualify as "good enough" when scrutinised through the internal market lens.[28] One of the core features of the EU as it stands consists, accordingly, in ignoring the pain of such unworthy citizens and failing to help those in need, explaining away their plight, as Charlotte O'Brien among others has splendidly demonstrated.[29] As far as EU law is concerned, those who are not "good enough" for its scope do not exist, falling between the cracks in the dogmas of the internal market rationality.

It is while burnishing the label on this citizenship which fosters its internal market logic, ignoring the vulnerable instead of defending citizenship bearers from market externalities, that the oxymoronic "market citizenship" was born.[30] With respect to those proclaiming it – and they are no doubt correct in their meticulous engagement with the case law[31] – "market citizenship" is without doubt a misnomer: it simply cannot be taken seriously unless deployed, as the majority of the literature has done, purely descriptively. The reason for this is that to do more requires an inevitable reversal of all the key principles informing the understanding of citizenship and the reasons for the articulation of the term in the first place, which occurs when the full enjoyment of this citizenship's rights and status is made the prize for one's employability and history of travel around the Union, instead emerging from any idea of equality before the law and protecting the vulnerable.[32]

[25] E.g. D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, 2013, p. 502 *et seq*.

[26] C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq.*; G. PEEBLES, "*A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law*, in *Law and Social Inquiry*, 1997, p. 581 *et seq*.

[27] G. DE BÚRCA, *Conclusion*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford, Portland: Hart, 2015, p. 459 *et seq*.

[28] That a citizenship would punish those who do not qualify as "good citizens" in the eyes of the authority in charge is one of the core functions of the legal status. On this count the EU is not at all atypical, compared with any other public authority in the world, which selects "citizens" among the available bodies, whatever criteria are employed: D. KOCHENOV, *Citizenship*, Cambridge MA: MIT Press, 2019 (forthcoming).

[29] C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford, Portland: Hart, 2017.

[30] N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

[31] N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 147 *et seq.*; M. VAN DEN BRINK, *EU Citizenship and (Fundamental) Rights*, cit.

[32] See, for a very detailed treatment, D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as the Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 3.

All the talk of democracy and rights[33] within the unchangeable market citizenship paradigm[34] could thus be nothing but a renewed entrenchment and glorification of the "wholly internal situation" and "reverse discrimination" thinking accompanied by the presumption that those who opt to remain outwith the scope of EU law[35] – by staying at home for instance[36] – deserve zero protection and respect within the legal context of the Union. This is an old and deeply troubling story ably characterised by Joseph Weiler as the loss by the Union of a mantle of ideals – and not much has changed in all the years since this characterisation appeared in print.[37] By connecting human worth and dignity, any claim to rights, to employability and the mantras of a citizen's usefulness in the context of the Internal Market, "market citizenship" is the epitome of the ideological space where a human being is openly – not tacitly – commodified, and those evading commodification or perceived as not useful enough are not deemed worthy of the quasi-citizenship at stake.[38] They are not "market citizens" and any other citizenship is apparently not on offer.

The result of this is troubling. When made dependent on the division of competences in the scope of the rights it protects, EU citizenship is turned into a neo-mediaeval "citizenship of personal circumstances":[39] a judge first needs to see your full *curriculum vitae* with all your jobs, travel history,[40] the nationality of your current and former spouses,[41] partners and children,[42] and bank accounts,[43] to see whether you – a

[33] K. Lenaerts, J.A. Gutiérrez-Fons, *Epilogue on EU Citizenship: Hopes and Fears*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 751 *et seq.*; S. Platon, *The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1245 *et seq*.

[34] G. Davies, *Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People*, in D. Kochenov, G. de Búrca, A. Williams (eds), *Europe's Justice Deficit?*, cit., p. 259 *et seq.*; A. Somek, *Europe: Political, Not Cosmopolitan*, *in European Law Journal*, 2014, p. 142 *et seq*.

[35] E.g. H. Kroeze, *Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination* in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1209 *et seq*.

[36] S. Iglesias Sánchez, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 371 *et seq.*; G. Davies, *A Right to Stay at Home: A Basis for Expanding European Family Rights*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 468.

[37] J.H.H. Weiler, *Bread and Circus: The State of the European Union*, in *Columbia Journal of European Law*, 1998, p. 231.

[38] G. Peebles, "*A Very Eden of the Innate Rights of Man"?*, cit.; P. Caro de Sousa, *Quest for the Holy Grail*, cit.; C. O'Brien, *Civis Capitalist Sum*, cit.; D. Kochenov, *On Tiles and Pillars*, cit., pp. 3-82.

[39] D. Kochenov, *The Citizenship of Personal Circumstances in Europe*, in D. Thym (ed.), *Questioning EU Citizenship*, Oxford, Portland: Hart, 2018, p. 37 *et seq*.

[40] Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*; N. Nic Shuibhne, *(Some of) the Kids Are All Right: Comment on McCarthy and Dereci*, in *Common Market Law Review*, 2012, p. 349 *et seq*.

[41] Court of Justice, judgment of 12 July 2005, case C-403/03, *Schempp*; E. Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 21, note 34.

citizen – "deserve" any EU citizenship rights. This story would not be complete without mentioning that, unlike in the earlier case law, dual nationality could be interpreted against you, as David de Groot's ground-breaking research has shown.[44] Neither disability nor pregnancy will help characterise you as a "good" EU citizen either.[45] A truly minor crime will disqualify you from supranational rights, dignity and respect.[46] Not even being deemed a worker is enough anymore:[47] EU law will eagerly side with the Member States oppressing their ethnic and linguistic, and presumably other minorities, as long as frowning upon these groups is part of their "constitutional identity", thus capable of creating a *de facto* wholly internal situation, depriving "market citizens" otherwise not unworthy *per se* of rights under EU law.[48] The result is a self-proclaimed constitutional system without a free and self-determining constitutional subject endowed with rights:[49] a neo-mediaeval construct where liberty and entitlements are strictly apportioned based on esoteric considerations rooted in personal histories, wealth, potential and actual employability, and travel and the willingness to do so: a triumph of contin-

[42] *Coman and Others*, cit.; Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*. Very much depends on whether one of the spouses is an EU citizen and whether this citizenship counts: also S. TITSHAW, *Same-Sex Spouses Lost in Translation? How to Interpret 'Spouse' in the EU Family Migration Directives*, in *Boston University International Law Journal*, 2016, p. 58.

[43] Court of Justice: judgment of 10 October 2013, case C-86/12, *Alokpa and Moudoulou*; judgment of 19 October 2004, case C-200/02, *Zhu and Chen*. Cf. E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 204 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

[44] D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1075 *et seq*.

[45] C. O'BRIEN, *Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 509 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

[46] U. BELAVUSAU, D. KOCHENOV, *Kirchberg Dispensing the Punishment: Inflicting 'Civil Death' on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*; C. O'BRIEN, *Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity*, in *European Law Review*, 2008, p. 643 *et seq*.

[47] This development was predicted by Síofra O'Leary long ago: S. O'LEARY, *Developing an Ever Closer Union between the Peoples of Europe?: A Reappraisal of the Case-Law of the Court of Justice on the Free Movement of Persons and EU Citizenship*, in *Edinburgh Mitchell Working Papers*, no. 6, 2008, pp.14-24. See, for a majestic treatment, A. TRYFONIDOU, *Impact of Union Citizenship on the EU's Market Freedoms*, Oxford, London: Hart, 2016.

[48] Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*. The case is analysed in this vein in D. KOCHENOV, *When Equality Directives are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU*, in U. BELAVUSAU, K. HENRARD (eds), *EU Anti-Discrimination Law beyond Gender*, Oxford, London: Hart, 2018, p. 119 *et seq*. Cf. A. ŁAZOWSKI E. DAGILYTĖ, P. STASINOPOULOS, *The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights*, in *Croatian Yearbook of European Law and Policy*, 2015, p. 1 *et seq*.

[49] Cf. L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, Oxford, Portland: Hart, 2016.

gent and morally vacant acts necessary to be performed to enter the Union's field of vision and thereby become endowed with personality in its law, which is the law which purports to have claimed you as its citizen, on top of your own national legal order.[50]

The main outcome of such an approach to the individual is as atypical as it is troubling: before a person's CV and bank accounts have been investigated, the most fundamental, essential legal principles of Western constitutionalism will not apply. This especially concerns *equality before the law*, which does not kick in if you are too poor, like Miss Dano; too pregnant, like Jessy Saint Pris;[51] or too Polish for the Lithuanian State, like Małgorzata Runiewicz. We are thus confronted by the lack of equality before the law as the main starting principle for dealing with EU citizens in a context where the EU produces and constantly re-enacts a neo-mediæval presumption of difference the goodness of which is presumed and does not *per se* require justification.[52] Why this is the case has been explained to the citizens a thousand times: Niamh Nic Shuibhne might indeed be right that this is the Court willing "to accept the limitations coded into the current federal bargain".[53] Yet it is not the protection of a perfect Constitution from human rights concerns – which the Court famously did, *inter alia*, in Opinion 2/13[54] – but taking such concerns seriously, which ensures that legal systems are both respected and effective. Honouring the bargain, when viewed in this light, could obviously be a big problem.[55]

I.2. Armed with respect for the federal bargain which requires blind faith in and strict adherence to a context-sensitive neo-mediævalism, EU citizenship sends two signals. Firstly, it significantly empowers the willing Member State nationals, "good enough" in the eyes of the supranational authorities, to fall within the scope of EU law. Volumes have been written about the freedom of movement of persons and the right is significant. The very horizon of opportunities of all Member State nationals is broadened by the intercitizenship logic of the supranational status, working as a package of

[50] D. KOCHENOV, *On Tiles and Pillars*, cit., p. 3 *et seq*.

[51] Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*; 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. 543 *et seq*.

[52] D. KOCHENOV, *Neo-Mediaeval Permutations of Personhood in the European Union*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, cit., p. 133 *et seq*.

[53] N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 176.

[54] Court of Justice, opinion 2/13 of 18 December 2014, para. 170. P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955 *et seq*.; D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, 2015, p. 94 *et seq*.

[55] J. BALKIN, *Agreements with Hell and Other Objects of Our Faith*, in *Fordham Law Review*, 1997, p. 1703 *et seq*.

dozens of national legal statuses fused into one.[56] Secondly, being silent on the scope of the law, EU citizenship is constantly presented to us as relatively weak, all the numerous successes reported notwithstanding. Crucially, it is respectful even when the issues to hand unquestionably fall within the scope of EU law: if a Member States wants to ignore EU law to grant fewer rights to women – it can.[57] If a Member State wishes to continue abusing its own ethnic minorities by denying them a right to a name – it can.[58] Both the rights of individuals and the sovereignty of the Member States thus stand protected – to a point.[59] The flexibility of this arrangement seems to be key, however, which seems to be fundamental to the proverbial "federal bargain". Moreover, if a Member State you are associated with leaves the EU, your supranational "new" citizenship is thereby extinguished: it is not that personal after all.[60]

II. Although the literature on EU citizenship has been booming in recent years, the absolute majority of analyses have been confined to reactions to the ever-growing and byzantine case law and trying to make sense of the Court's hints in various directions.[61] This is no doubt the core of legal research and some of the contributions developing scholarship in this direction have been spectacularly illuminating.[62] The majority of the contributions to this Special Section fit equally well within this established tradition. But what if we tease the "true" lawyers a little and entertain scrutiny of the very context of EU law, using its citizenship as a pretext, in the vein of Pedro Caro de Sousa, Agustín Jo-

[56] D. KOCHENOV, *Interlegality – Citizenship – Intercitizenship*, in J. KLABBERS, G. PALOMBELLA (eds), *The Challenge of Interlegality*, Cambridge: Cambridge University Press, 2019 (forthcoming); O. GOLYNKER, *European Union as a Single Working-Living Space*, in A. HALPIN, V. ROEBEN (eds.), *Theorising the Global Legal Order*, Oxford: Hart, 2009, p. 151.

[57] C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom*, in *Common Market Law Review*, 2017, p. 209 *et seq*.

[58] *Runevič-Vardyn and Wardyn*, cit.; D. KOCHENOV, *When Equality Directives are Not Enough*, cit.

[59] K. LENAERTS, *"Civis Europaeus Sum'" From the Cross-Border Link to the Status of Citizen of the Union*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System*, cit., p. 213 *et seq*.; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit.; D. CARTER, M. JESSE, *The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1179 *et seq*.

[60] M. VAN DEN BRINK, D. KOCHENOV, *Against "Associate EU Citizenship"*, in *Journal of Common Market Studies*, 2019 (forthcoming). But see D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq*.

[61] See, e.g. a great example of the opposing interpretations of the same case law by two of the most eminent scholars of EU citizenship: N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., and E. SPAVENTA, *Earned Citizenship*, cit.

[62] E.g. F. WOLLENSCHLÄGER, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, in *European Law Journal*, 2010, p. 34 *et seq*.; N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit.

sé Menéndez, Charlotte O'Brien and Alexander Somek?[63] Questioning the established story can be a useful way to see the well-known case law, as well as all the twists and turns of the European citizenship story, in quite a different light.

It can be argued that EU citizenship works against the established understandings of *a*) statehood, *b*) citizenship, *c*) democracy and *d*) equality, situating these in the context of cosmopolitan constitutionalism.[64] The current dynamics illustrate the well-noted Joppkean global weakening of citizenship[65] and the rise of a new way of organising political communities.[66] European citizenship exemplifies key future global trends in citizenship and the development of constitutionalism, even if as already mentioned, with a necessary, surprising neo-mediaeval twist.[67]

II.1. EU citizenship rights are of great importance, enlarging citizens' horizons of opportunities by a factor of twenty-eight:[68] work, residence, family reunification and non-discrimination on the basis of nationality where EU law is applicable – all have become claims to be turned against the government of *any* participating State, whether an EU member or not. Moreover, the direct effect of EU law, including its citizenship rights provisions, ensures that national law cannot prevail in the face of EU citizens' supranational entitlements.[69] States stand "humiliated",[70] obviously enjoying no power – legally at least – to close their territories and their nations to *others*, however friendly these are proclaimed to be. This touches the core of statehood, if not nationhood: no Member State can decide (some exceptions notwithstanding)[71] who among the EU's citizens may enter its territory, reside and work there. Going further, a similar regime applies to a huge number of foreigners too, be they EEA nationals, third country national family

[63] E.g. C. O'Brien, *Unity in Adversity*, cit.; A.J. Menéndez, *Whose Justice? Which Europe?*, in D. Kochenov, G. de Búrca, A. Williams (eds), *Europe's Justice Deficit?*, cit., p. 137 *et seq.*; P. Caro de Sousa, *Quest for the Holy Grail*, cit.; A. Somek, *On Cosmopolitan Self-Determination*, in *Global Constitutionalism*, 2012, p. 405 *et seq*.

[64] A. Somek, *The Cosmopolitan Constitution*, Oxford: Oxford University Press, 2014.

[65] C. Joppke, *The Inevitable Lightening of Citizenship*, in *European Journal of Sociology*, 2010, p. 9 *et seq*.

[66] A. Somek, *Europe: Political, Not Cosmopolitan*, cit.

[67] D. Kochenov, *Neo-Mediaeval Permutations of Personhood in the European Union*, cit.

[68] Until the UK leaves, that is. The figure is not really precise though, since core citizenship rights, including to work and to reside in the territory are enjoyed by EU citizens also outside of the EU territory proper, including, especially, in the EEA and Switzerland, as well as in some overseas possessions of the Member States.

[69] A. Arena, *The Twin Doctrines of Primacy and Pre-Emption*, in R. Schütze, T. Tridimas (eds), *Oxford Principles of European Union Law: Vol. 1: The European Union Legal Order*, Oxford: Oxford University Press, 2018, p. 300 *et seq*.

[70] G. Davies, *The Humiliation of the State as a Constitutional Tactic*, in F. Amtenbrink, P.A.J. van den Berg (eds), *The Constitutional Integrity of the European Union*, Hague: T.M.C. Asser Press, 2010, p. 147.

[71] D. Kostakopoulou, *When EU Citizens Become Foreigners*, in *European Law Journal*, 2014, p. 447 *et seq.*; M. Meduna, *"Scelestus Europeus Sum": What Protection Against Expulsion Does EU Citizenship Offer to European Offenders?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 394 *et seq*.

members of EU citizens or other privileged categories.[72] Furthermore, States have lost the ability to favour "their own" – the first key feature of any citizenship, distinguishing between "us" and "them" – in a growing array of situations: the core outcome of the prohibition of discrimination on the basis of nationality in within the scope of application of EU law.[73] EU citizens are now virtually always "us", striking at the heart of national citizenships. Being unable to empower "their own" affects the nature of European States. Rather than picking citizens through the framing of migration and naturalisation legislation, in the EU the States are picked by citizens directly empowered by EU law. The essential legal characteristics of European States and their nationalities are thereby seriously altered. The new reality has not yet been fully internalised by the legal-political systems of the Member States.

II.2. The implications for the nature of democracy are equally significant. In terms of procedure, EU citizens participate in EU-level and municipal-level elections in their State of residence,[74] as well as being able to register citizens' initiatives, provided what these propose is within the scope of EU law.[75] Even without covering national elections, the EU and its citizenship is a vehicle of democratic inclusion. Simultaneously, however, EU citizenship can shield its bearers from the application of legitimate democratic outcomes to them, once a connection with EU law is found. Having its final say, the Court of Justice then tests the reasonableness and proportionality of any national measure. This potentially covers any national rule objected to by an EU citizen, including rules on nationality itself.[76] Democracy's function is thus changed significantly, placing absolute emphasis on contestation.[77] This produces new users of democracy: cosmopolitans

[72] D. KOCHENOV, M. VAN DEN BRINK, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in D. THYM, M. ZOETEWIJ-TURHAN (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Leiden, Boston: Brill Nijhoff, 2015, p. 66.

[73] G. DAVIES, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003; K. LENAERTS, *Union Citizenship and the Principle of Non-Discrimination on the Grounds of Nationality*, in N. FENGER, B. VESTERDORF, K. HAGEL-SØRENSEN (eds), *Festskrift til Claus Gulmann: Liber Amicorum*, Copenhagen: Forlaget Thomson, 2006, p. 289 *et seq*.

[74] Cf. F. FABBRINI, *The Political Side of EU Citizenship in the Context of EU Federalism*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 271 *et seq*.

[75] A. IANNÌ, *The European Citizens' Initiative in Light of the European Debt Crisis: A Gateway Between International Law and the EU Legal System*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1159 *et seq*.

[76] *Rottmann*, cit.; D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern*, cit.

[77] M. KUMM, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, in *Law & Ethics of Human Rights*, 2010, p. 1938 *et seq*.

fighting "unreasonable" regulation.[78] While the trend is not new,[79] the EU context reinforces it. Having used EU law to choose a State, EU citizens both participate in democratic decision-making and enjoy protection from its legitimate outcomes. This is valid at all levels of the law, including legislation, constitutional-level rules and the duties of State-level citizenship. That said, citizens cannot do much supranationally, given that the design of the Union prevents the essential principles of the internal market from being subjected to democratic contestation, or any other form for that matter.[80] In a curious ideological twist, the internal market as it stands is presented to the Europeans as rational, technocratic and apolitical, foreclosing any democratic dialogue about Europe's future development.[81]

II.3. Akin to sorting "us" from "them", equality among the holders of the status is a core feature of citizenship. Its practical realisation depends on how clearly the scopes of EU and national law are delineated: *both* promise equality. Since, as we have seen, EU citizenship cannot bring citizens automatically within the material scope of EU law, additional factors are determinant. The law is malleable: the nationality of your former wife,[82] being born across a border[83] or the vague likelihood of changing States in the future[84] can suffice to bring EU-level equality into play, covering a flexible group of EU citizens; though not all. While EU and national citizenships extend equally to the same people, the application of EU equality – not dependent only on status – is an either/or question which disables national equality claims, as the question is not answered by analysing the objective situation of the person concerned. The Court's attempts to frame EU law's scope through the severity of the actual or potential violation of the essence of EU-level rights[85] met strong resistance, ruining clarity. When France promises equality to all Frenchmen it cannot possibly deliver, since two French neighbours living largely similar lives can be subject to two different legal systems for reasons bearing no relation to their lives or legal status. The promises of national and EU-level equality are fictitious: indeed, it is the differentiation in the face of the law, rather than equality be-

[78] A. SOMEK, *Europe: Political, Not Cosmopolitan*, cit.; A. SOMEK, *The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment*, in *Transnational Legal Theory*, 2013, p. 258 *et seq.*; A. SOMEK, *On Cosmopolitan Self-Determination*, cit.

[79] A. BADIOU, *L'éthique: Essai sur la conscience du mal*, France: Nous, 2003.

[80] E.g. G. DAVIES, *Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, cit., p. 259 *et seq*.

[81] M.A. WILKINSON, *Politicising Europe's Justice Deficit: Some Preliminaries*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, cit., p. 111 *et seq.*; A.J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, cit., p. 137 *et seq*.

[82] *Schempp*, cit.

[83] *Zhu and Chen*, cit.

[84] Court of Justice, judgment of 2 October 2003, case C-148/02, *Garcia Avello*.

[85] *Ruiz Zambrano*, cit.

fore the law, which emerges as the main supranational – and thus national-level – legal principle, as far as EU citizenship is concerned.

II.4. As a result of the blurred and contested essence of EU citizenship, the nature of the state, democracy and national citizenship in the EU are profoundly transformed. By its very existence, the EU and its citizenship promote one particular type of constitutionalism[86] to which the Member States are bound to adhere, which implies an emphasis on proportionality and justification,[87] and a toning down of representative democracy and equality claims. Due to the penetrating nature of EU law, the relationship between the levels of the law in this model is far more complex than in the majority of "straightforward" federations:[88] the EU is much more malleable and haphazard.[89] Two key features of national citizenship do not hold true here: in a Union where EU law enjoys supremacy and direct effect and the scope of this law is necessarily blurred, citizenship firstly does not bring about equal treatment. Secondly, national citizenship does not provide better treatment than other EU citizens within the scope of application of EU law. EU law thus brings about a very significant alteration to the very legal essence of the Member States' nationalities. Crucially, the humiliation of the state and undermining of the key features of citizenship is not accompanied by a solid doctrinal or practical alternative: we are not shown a new way. Instead, we are constantly treated to the dogmatic mantra of the perceived benefits of the "apolitical" internal market. As a result, morally and ethically vacant reasons rooted in the internal market – such as the programmed-in belief that those who chose to move about in space are entitled to more constitutional protections and are more "valuable" as EU citizens – can set aside fundamental human rights concerns and key principles of the national constitutional law of the Member States. Setting aside the norms of a particular legal order is not a problem *per se*, of course. It becomes a problem, however, when the reasons underpinning this are not sufficiently clear – if not arcane – and are entirely removed from the realm of democratic testing.

III. The legal context of the EU, amplifying and reinforcing the global trends in citizenship, equality and democracy, also brings with it grave challenges, and as a path-dependent process faces virtually no serious challenge. Critical analyses of it are equally

[86] V. Perju, *Proportionality and Freedom – An Essay on Method in Constitutional Law*, in *Global Constitutionalism*, 2012, p. 334 *et seq*.

[87] J. Neyer, *Justification of Europe: A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012.

[88] O. Beaud, *Théorie de la fédération*, Paris: Presses universitaires de France, 2007.

[89] R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009.

limited and surprisingly new.[90] Hungary and Poland, with their crises of the rule of law,[91] or the United Kingdom, with its anti-immigration populism,[92] oppose the EU for entirely different reasons. However, the ongoing process of reinvention both of citizenship and the state in the EU has only just begun. Exposing it with clarity and scrutinising its implications for the development of the constitutional systems around the world is a starting point for coping with a reality which is here to stay. The sterile and cartoonish official story retold in EU textbooks simply does not hold, and States which fail to take note are in danger of getting a rude awakening in the near future, be it through absurd populist victories or by finding themselves attempting to implement Brexit-like claims. An alternative narrative of EU citizenship, to contribute to a sound dynamic understanding of the evolution of statehood and citizenship in Europe and beyond is sorely needed at the moment. EU citizenship, focused on fundamental rights, equality and a critical rethinking of the core grounds behind the division of competences between the EU and the Member States, could provide such a much-needed narrative and a starting point, offering a sounder and less awkwardly "depoliticised" paradigm of European integration than the *pure* internal market. One can coexist with the other, but the realisation that the essential starting points of the internal market and of EU citizenship are incompatible should necessarily be the starting point of such a journey.[93]

This is the context that the contributions to this Special Section should be considered within. All the *Articles* which follow are rooted in the conference dedicated to the publication of *EU Citizenship and Federalism*, which dissected the role EU citizenship rights could play as potential triggers of jurisdiction, to save this supranational personal legal status from the internal market contamination currently opposing, as we have seen, citizenship's necessary rationale and purpose. The conference was held at the Court of Justice and the University of Luxembourg in November 2017, and was made possible with the generous help from the *Amicale des référendaires*, William Valasidis of the Court of Justice and Eleftheria Neframi of the University of Luxembourg. The core

[90] See, e.g., Editorial comments, *The Critical Turn in EU Legal Studies*, in *Common Market Law Review*, 2015, p. 881 *et seq*. (and the literature cited therein). Cf. A. WILLIAMS, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge: Cambridge University Press, 2009; F. DE WITTE, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015.

[91] L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*; W. SADURSKI, *How Democracy Died (In Poland): A Case Study on Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, no. 1, 2018; Z. SZENTE, *Challenging the Basic Values – Problems with the Rule of Law in Hungary and the Failure to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press, 2017, p. 456.

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

[93] Cf. D. KOCHENOV, *The Citizenship Paradigm*, in *Cambridge Yearbook of European Legal Studies*, 2013, p. 197 *et seq*.

question this Special Section engages with is simple: how far is EU citizenship deserving of its name and what kind of rights could Europeans legitimately see as unquestionably associated with it – as opposed to with a proxy of the internal market, that is. Let us cast another glance at EU citizenship's lived reality and systemic implications and join these nine wonderful authors – both upcoming and already famous – in attempting to move the debate forward.

Dimitry Kochenov[*]

[*] Professor of EU Constitutional Law, University of Groningen, d.kochenov@rug.nl. I am grateful to Enzo Cannizzaro, Nina M. Havig Bredvold, Harry Panagopulos, Kyrill Ryabtsev, Flips Schøyen and Jacquelyn Veraldi for their kind help with this Special Section. Thanks are also due to all the reviewers for their generous and critical engagement: Ўładzisłaŭ Belavusaŭ (TMC Asser Institute), Egle Dagylitė (East Anglia), David A.J.D. de Groot (Bern), Thomas Horsley (Liverpool), Sara Iglesias Sánchez (Luxembourg), Anastasia Karatzia (Essex), John Morijn (NYU Law and Groningen), Jurian Langer (The Hague and Groningen), Charlotte O'Brien (York), Dagmar Schiek (Belfast), Peter Spiro (Temple), Alina Tryfonidou (Reading), Peter Van Elsuwege (Ghent) and other colleagues.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

FREE MOVEMENT OF DUAL EU CITIZENS

DAVID A.J.G. DE GROOT*

ABSTRACT: This *Article* will introduce the principle of ranking of nationalities and mobility quality in EU free movement law and will explain how this applies to dual EU citizens. It describes how the right to return case-law was detrimental to dual EU citizens moving between Member States of nationality and how the recent *Lounes* judgment (judgment of 14 November 2017, case C-165/16) affects this. The *Article* furthermore explains how *Lounes* should be applied by reference to the geographical and individual scopes, as well as the consequences of this judgment. The conclusion drawn is that, in the near future, the Court of Justice will be faced with a major choice: either it will extend the right to return, by largely abandoning the principle of reverse discrimination, as well as by revising its case-law on individuals who lost the nationality of their Member State of origin and the rights attached thereto; or it will restrict the nationality laws of Member States as to the duty to renounce nationality, and the automatic loss of nationality upon acquisition of a nationality.

KEYWORDS: EU citizenship – dual EU citizens – nationality – free movement of persons – right to return – *Lounes*.

* PhD student, National Center of Competence in Research – the Migration-Mobility Nexus (NCCR on the move) and University of Bern, dajg.degroot@alumni.maastrichtuniversity.nl. This research was funded by the Swiss National Science Foundation. With this *Article* I would also like to honour Professor Dr Hans-Ulrich Jessurun d'Oliveira, a champion in the field of nationality law, who turned 85 on the 2nd of July 2018.

I. Introduction

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

In the book that was launched at the conference where this *Article* was first introduced,[1] AG Szpunar and Blas López wrote that situations where the nationality of a person does not reflect the Member State of origin where this person was born and always resided, and situations of dual EU citizens "should be taken into account, firstly, by the EU legislator and, secondly, by the Court of Justice in its interpretation of EU law, to prevent Union citizenship becoming in part a victim of its own success".[2] In many cases where nationality is a connecting factor for the establishment of rights, the Court only considers the implications of the judgment on dual EU citizens when they are a party to the case, but fails to do so when they are not a party.[3] However, it is not only the EU legislator and the Court, but also academia that should take more account of the free movement rights of dual EU citizens. There is extensive literature that touches upon the subject of dual nationality in general. This mostly relates to topics of whether it should be allowed or not;[4] private international law;[5] loyalty issues;[6] political participation;[7]

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

[2] M. Szpunar, M.E. Blas López, *Member State Nationality*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 122-123.

[3] The Court of Justice did consider it in *Bogendorff von Wolffersdorff* and in *Freitag*, where the applicants were dual EU citizens. However, for example in *Runevič-Vardyn* the fact that there was a dual EU citizen child of the applicants was mentioned and that he was born after the case was submitted and therefore couldn't be an applicant, but for the effects of the judgment it seemed to be not considered. Nor did the Court even consider what would happen if Sayn-Wittgenstein had also had the German nationality next to the Austrian one. Such a situation would have led to a clash of constitutions. Court of Justice: judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*; judgment of 8 June 2017, case C-541/15, *Freitag*; judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn*; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*.

[4] See, *i.a.*, G.R. de Groot, M. Vink, *Meervoudige nationaliteit in Europees perspectief: een landenvergelijkend overzicht, Voorstudie voor de Adviescommissie voor Vreemdelingenzaken*, Den Haag: ACVZ, 2008; T. Faist (ed.), *Dual Citizenship in Europe: From Nationhood to Societal Integration*, Aldershot: Ashgate, 2007; G.R. de Groot, *Een pleidooi voor meervoudige nationaliteit*, in M. Faure, M. Peeters (eds), *Grensoverschrijdend recht*, Antwerpen, Oxford: Intersentia, 2006, p. 73 *et seq.*; G.R. de Groot, H.E.G.S. Schneider, *Die zunehmende Akzeptanz von Fällen mehrfacher Staatsangehörigkeit in West-Europa*, in H. Menkhaus, F. Sato (eds), *Japanischer Brückenbauer zum deutschen Rechtskreis*, Berlin: Duncker&Humblot, 2006, p. 65 *et seq.*; G.R. de Groot, *The Background of the Changed Attitude of European States in Respect to Multiple Nationality*, in A. Kondo, C. Westin (eds), *New Concepts of Citizenship: Residential/Regional Citizenship and Dual Nationality/Identity*, Stockholm: CEIFO, 2003, p. 99 *et seq.*

[5] See, *i.a.*, S. Pfeiff, *La portabilité du statut personnel dans l'espace européen. De l'émergence d'un droit fondamental à l'élaboration d'une méthode de la reconnaissance*, Bruxelles: Bruylant, 2017; P. Franzina, *The*

whether or not one should renounce the other Member State's nationality upon naturalisation in another Member State;[8] and more general questions of loss[9] and acquisition of nationality,[10] and an independent EU citizenship.[11] There is furthermore quite abundant literature concerning purely internal situations,[12] which focuses either on persons who only possess the nationality of the Member State of residence, or on dual EU citizens who have never moved or have a Third Country background.[13]

Evolving Role of Nationality in Private International Law, in A. ANNONI, S. FORLATI (eds), *The Changing Role of Nationality in International Law*, London: Routledge, 2013, p. 193 *et seq.*; O. VONK, *Dual Nationality in the European Union. A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of the Member States*, Leiden, Boston: Martinus Nijhoff Publishers, 2012; O. VONK, *De rol van dubbele nationaliteit voor toegang to the Unieburgerschap en voor rechts – en forumkeuzebevoegdheid in het Europese international privaatrecht*, in *Nederlands Juristenblad*, 2011, p. 1760 *et seq.*; G. DE GEOUFFRE DE LA PRADELLE, *Dual Nationality and the French Citizenship Tradition*, in R. HANSEN, P. WEIL (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe*, New York: Berghahn Books, 2002, p. 191 *et seq.*; M. VERWILGHEN, *Conflits de nationalités, plurinationalité et apatridie*, in *Recueil des cours de l'Académie de droit international de la Haye*, 1999, p. 9 *et seq.*; N. DETHLOFF, *Doppelstaatsangehörigkeit und Internationales Privatrecht*, in *Juristenzeitung*, 1995, p. 64 *et seq.*; K. BOELE-WOELKI, *Die Effektivitätsprüfung der Staatsangehörigkeit im niederländischen internationalen Familienrecht*, Deventer: Kluwer, 1981.

[6] See, *i.a.*, P.J. SPIRO, *Multiple Citizenship*, in A. SHACHAR, R. BAUBÖCK, I. BLOEMRAAD, M. VINK (eds), *The Oxford Handbook of Citizenship*, Oxford: Oxford University Press, 2017, p. 621 *et seq.*; M. JONES-CORREA, *Under Two Flags: Dual Nationality in Latin American and Its Consequences for Naturalisation in the United* States, in *International Migration Review*, 2001, p. 997 *et seq*.

[7] See, *i.a.*, R. BAUBÖCK, *Stakeholder Citizenship and Transnational Political Participation. A Normative Evaluation of External Voting*, in *Fordham Law Review*, 2007, p. 2393 *et seq.*; P.J. SPIRO, *Political Rights and Dual Nationality*, in D.A. MARTIN, K. HAILBRONNER (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects*, New York: Kluwer Law International, 2003, p. 135 *et seq*.

[8] See, *i.a.*, D. KOCHENOV, *Double Nationality in the EU: An Argument for Tolerance*, in *European Law Journal*, 2011, p. 323 *et seq*.

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

[10] See, *i.a.*, N. WITTE, *Legal and Symbolic Membership. Symbolic Boundaries and Naturalisation Intentions of Turkish Residents in Germany*, in *EUI Working Paper RSCAS*, no. 100, 2014.

[11] See, *i.a.*, C. MARGIOTTA, O. VONK, *Nationality Law and European Citizenship: The Role of Dual Nationality*, in *EUI Working Paper RSCAS*, no. 66, 2010.

[12] See, *i.a.*, A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, in *Legal Issues of Economic Integration*, 2008, p. 43 *et seq.*; K. LENAERTS, '*Civis Europeaus Sum': From the Cross-border Link to the Status of Citizen of the Union*, in *Online Journal on Free Movement of Workers within the European Union*, 2011, ec.europa.eu, p. 6 *et seq.*

[13] K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, in E. GUILD (ed.), *The Reconceptualization of European Union Citizenship*, Leiden: Brill, 2014, pp. 173-176.

However, free movement law as applied to dual EU citizens who have already moved is an almost forgotten issue in recent years.[14] It used to be an issue of interest before 2011,[15] when a dual EU citizen was considered a "Super Citizen" based on the *Garcia Avello* case.[16] At the time, Alina Tryfonidou stated quite clearly what seemed to be on the minds of many scholars dealing with dual citizens and reverse discrimination: "In my view, reverse discrimination is discrimination based on the ground of 'non-contribution to the internal market'. This is due to the fact that, in cases of reverse discrimination, the only person/traders that are disadvantaged and discriminated against are those that rely on EC law against their own Member State and cannot show the existence of the requisite link with the fundamental freedoms".[17] Since dual EU citizens can establish an intracommunity connection from their other Member State's nationality, they are able to rely on Community law; hence free movement law applies to them in all cases. Indeed, at the time this could have been validly argued based on the existing case-law. However, with the *Shirley McCarthy* case, things changed, and have, nearly unnoticed, become worse and worse for dual EU citizens.[18]

One can now find statements like "[w]ith dual citizenship, migrants can freely pursue economic opportunity in states of original and adopted citizenship, a benefit to growing numbers of circular migrants".[19] This is correct, but solely for the dual citizen, not for his Third Country National (TCN) family members, because all applicable laws

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

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

[16] Court of Justice, judgment of 2 October 2003, case C-148/02, *Garcia Avello*. After *Garcia Avello*, Thomas Ackermann had argued that a dual EU citizen could never fall within a purely internal situation as long as (s)he had residence in an EU Member State. Dimitry Kochenov wrote that "[a]ll of them [read: dual EU citizens] are now within the scope *ratione materiae* of EU law whatever happens". After *Shirley McCarthy*, Janek Nowak stated that this was obviously not the case. See: T. Ackermann, *Case C-148/02,* Carlos Garcia Avello v. Etat Belge*, Judgment of the Full Court of 2 October 2003, [2003] ECR I-11613*, in *Common Market Law Review*, 2007, p. 146; D. Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, in *Jean Monnet Working Paper*, no. 8, 2010, p. 47; J.T. Nowak, *Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'Emploi (Onem) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department*, in *Columbia Journal of European Law*, 2010, p. 703.

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

[18] A. Tryfonidou, *Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci Trilogy*, in *European Public Law*, 2012, p. 511.

[19] P.J. Spiro, *Multiple Citizenship*, cit., p. 635.

concerning family reunification would be national legislation, and not derived rights from EU law. That is, until *Lounes* was decided by the Court.[20]

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

[20] Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC]. See also on the case with a different analysis: E. GUALCO, *Is* Toufik Lounes *Another Brick in the Wall? The CJEU and the On-going Shaping of the EU Citizenship*, in *European Papers – European Forum*, *Insight* of 21 June 2018, europeanpapers.eu, p. 1 *et seq.*

[21] "Right to return" or "returners" refers to its meaning according to the case-law of the Court of Justice of the European Union on persons who resided in a Member State (of which they did not have the nationality) and then returned to the Member State of nationality. EU law grants in these cases a retention of rights which is not necessarily provided for in the general provision of "right to return" in international law, as established in *i.a.* Art. 12, para. 4, of the International Covenant on Civil and Political Rights (ICCPR). Concerning this general right see A. EDWARDS, *The Meaning of Nationality in International Law in an Era of Human Rights*, in A. EDWARDS, L. VAN WAAS (eds), *Nationality and Statelessness under International Law*, Cambridge: Cambridge University Press, 2014, pp. 35-38.

citizen who has made use of the free movement rights, which means that extensive case-law has to be changed.

II. Setting the scene

II.1. Applicable nationality – Ranking and mobility quality

Applicable nationality is a matter of recognition of nationality, but principally a matter of giving effect to a nationality. A State has to recognise that a person has the nationality of another state based on International Law; whether it applies this nationality, which is connected to a certain set of rights, or another, which is connected to a different set of rights, is another issue.[22] While in International Law, based on *Nottebohm*,[23] a genuine-link principle or most-effective-nationality principle is applied, in EU law there is a sort of ranking of nationalities, based especially on *Micheletti*.[24] Depending on the legal situation, be it applicable law to the name, or applicability of Directive 2004/38/EC, the ranking is different.[25]

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

With these four ranks one can have nine different combinations of dual nationalities (see Table 1)[28]:

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

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

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

[25] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

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

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

[28] Diagonal pattern means that the person is an EU citizen. A "Home MS/Home MS" constellation for the nationality purpose is impossible, as it would mean that a person has two nationalities which are,

TABLE 1

Nationality 2 / Nationality 1	Third Country	Third Country + (TC+)	Other MS (MS)	Residence/Destination MS
Third Country	TC/TC			
Third Country+	TC+/TC	TC+/TC+		
Other MS	MS/TC[29]	MS/TC+	MS/MS	
Residence/ Destination MS	Home MS/TC	Home MS/TC+[30]	Home MS/MS[31]	Same nationality

Based on the case-law of the European Court of Justice it can be established that of these types of nationality, in case of application of Directive 2004/38/EC, the Home MS's nationality is ranked highest.[32] This leads to many (possible) conflicts where it concerns dual EU citizens, as the Directive might simply not be applied to the case on the ground that the dual EU citizen has the nationality of that Member State.

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

The MS rank gives full access to the rights under the Treaties, especially Arts 20 and 21 TFEU, and access to Directive 2004/38/EC with the privileged family reunification rules concerning TCN family members. It is, however, limited by the condition that the person must have made use of his free movement rights. This I will call having activated the "mobility quality". It is furthermore limited by the requirement of having sufficient means, or by being a worker or self-employed. If these conditions are fulfilled it is granted all rights of a Home MS rank, with only a few exceptions, like the right to vote in national elections and protection against expulsion (which is already very limited). These exceptions are even more limited when the person gains the long-term resident status. The MS rank is, however, ranked (for the moment) lower than the Home MS.

however, of the same Member State. It is therefore shaded with a grid pattern. As will be seen for the movement factor this is different as one can move between two Member States of nationality.

[29] *Micheletti*, cit.

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

[31] If mover: Right to return case-law (*Singh/ Eind/ O&B*, cit., see sections II.3. and II.4.). If non-mover: *Shirley McCarthy,* cit. If naturalised: *Lounes,* cit.

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

Thus, for a dual EU citizen who has both the Home MS rank and an MS rank nationality (Home MS/MS), the Home MS takes precedence.

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

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

There are in total twelve different types of movement, as is shown in Table 2.[33]

TABLE 2

Previous residence/ destination country	Third Country	Third Country+	Other MS	Residence MS (home MS)
Third Country	TC/TC	TC+/TC	MS/TC	Home MS/TC
Third Country+	TC/TC+	TC+/TC+	MS/TC+	Home MS/TC+
Other MS	TC/MS	TC+/MS	MS/MS	Home MS/MS
Destination MS (home MS)	TC/Home MS	TC+/Home MS	MS/Home MS	Home MS/Home MS[34]

To give some examples:

– a dual EU citizen moving from a Member State of which he has the nationality, to a Member State of which he does not have the nationality is "MS/MS movement Home MS/MS";[35]

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

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

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

– a dual EU citizen moving between the Member States of nationality is "Home MS/MS movement Home MS/Home MS";[36]

– an EU citizen that is born and continues to reside in a Member State of which (s)he is not a national is "MS residence MS;[37]

– an EU citizen that naturalises in the host Member State while retaining the other Member State's nationality is "Home MS/MS residence MS/Home MS".[38]

On the contrary, when one considers the case-law of the Court on names' recognition, the Member States' nationalities are equal, and the dual EU citizen may choose between the two. A Member State can only refuse to recognise a name established by the law of the other Member State of nationality if there is an absolute constitutional prohibition.[39]

II.2. Constellations

There are many different constellations and lines of case-law in free movement law. If one considers the free movement of persons and workers, and EU citizenship cases,[40]

[36] As the point of view of only the Member State of destination has to be taken, only one of the nationalities of the person is a Home MS rank, the other nationality is MS rank, irrespective of the fact that the person came from another Member State of nationality. For the movement it is different. There both the point of view of the Member State of origin and the Member State of destination have to be considered. As the EU citizen moving between Member States of nationality is considered by either as its national, it is "movement Home MS/Home MS".

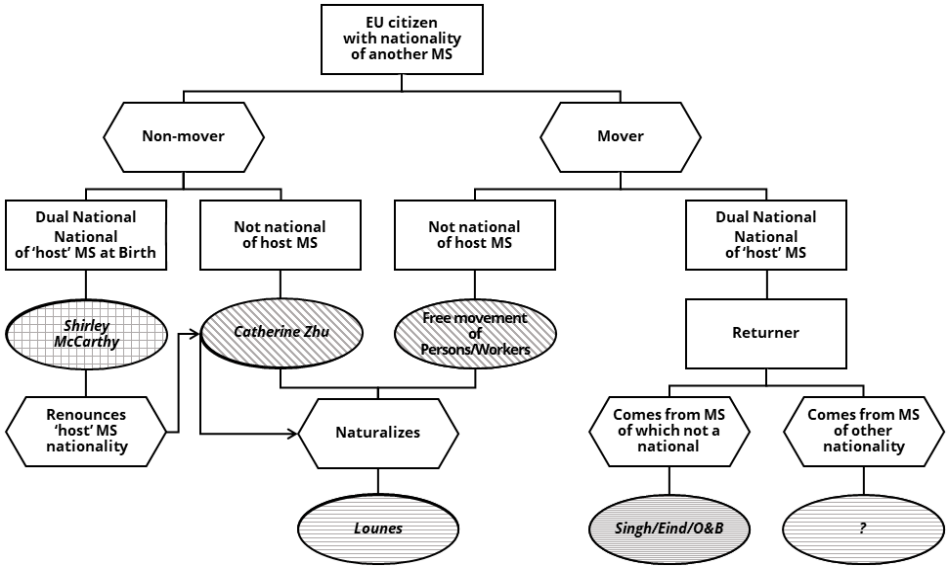
[37] It is "residence MS" as there is no actual movement between Member States. This is the *Catherine Zhu* constellation. Court of Justice, judgment of 19 October 2002, case C-200/02, *Zhu and Chen*.

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

[39] One has to distinguish in the case-law of the Court "absolute constitutional prohibitions" from "conditional and inconsistently applied constitutional prohibitions". Whereas the first can justify a refusal to recognise the name, the latter also has to fulfil the condition of proportionality. In my view, in the case of dual EU citizens, a conditional and especially an inconsistently applied constitutional prohibition, can never justify a restriction, since it cannot be proportional. To give some examples of different types: in *Sayn-Wittgenstein* it concerned an absolute constitutional prohibition; in *Bogendorff von Wolffersdorff* it concerned a "conditional constitutional prohibitions" and in *Runevič-Vardyn* it concerned an inconsistently applied constitutional prohibition.

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

the entire setting where it concerns family reunification under Directive 2004/38/EC looks like this Picture.[41]

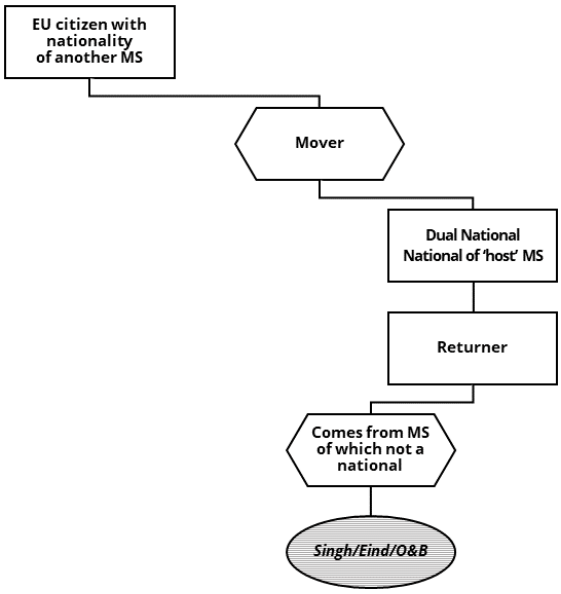


I will especially address the *Lounes* and the "returner" constellations.

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

II.3. Right to return – Conditions (Home MS(/MS) movement MS/Home MS)

In *O and B*[42] the Court in essence set out three conditions[43] for the right to return,[44] which have to be fulfilled next to the exhaustive list of documents required based on Art. 8, para. 2, and Art. 10, para. 2, of the Directive, which is applicable by analogy:[45]



a) the Union citizen made use of his free movement rights under the Directive by application of Art. 7, para. 1, or even Art. 16, para. 1, of the Directive;[46]

b) the family life must have been established, or the TCN must have joined the Union citizen while the Union citizen was exercising his rights under Art. 7, para. 1, or Art. 16, para. 1;[47]

c) the family member must have had residence in the host Member State based on Union law, specifically Art. 7, para. 2, or Art. 16, para. 2, of the Directive.[48]

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

---

[42] Court of Justice, judgment of 12 March 2004, case C-456/12, *O and B* [GC].

[43] *Ibid.*, para. 57.

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

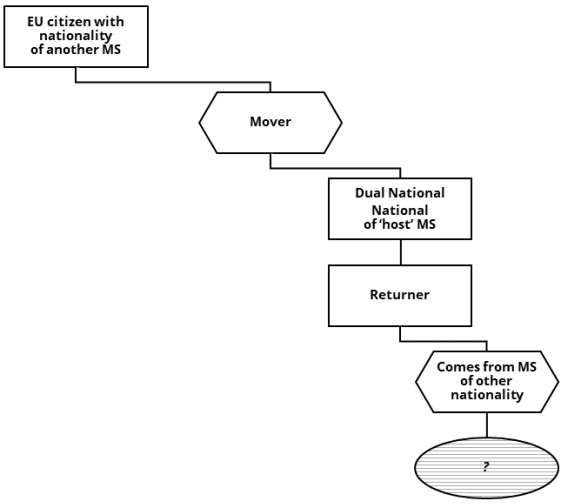
[45] *O and B* [GC], cit., para. 50.

[46] *Ibid.*, paras 51 and 56.

[47] *Ibid.*, paras 54-55.

[48] *Ibid.*, para. 54.

II.4. "Circular" right to return – (Home MS/MS movement Home MS/Home MS)



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

The Court stated that "[i]t follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national".[49] From a teleological interpretation, the Court argues that the aim of the Directive is to "facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States" as is stated in Art. 1, let. a), of the Directive.

Here, the Court emphasises the point that one is actually exercising that right.[50] By "move", the Court seems to mean a movement within the territory of the Union, and "reside" refers to the territory of all the Member States minus one, the Home Member State.

The Court also mentioned that, because international law does not allow a State to refuse to its own nationals the right to enter and remain there, the Directive only applies to cases where the Union citizen wants to enter a Member State of which he is not a national.[51] Thus, the Court states that "Directive 2004/38 is therefore also not intended to confer a derived right of residence on third-country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national".[52] Derived rights of residence for a TCN family member of a Union citizen who resides in a Member State of nationality would only be possible in some circumstances

[49] *Ibid.*, para. 37.
[50] *Ibid.*, para. 41.
[51] *Ibid.*, para. 42.
[52] *Ibid.*, para. 43.

based on Art. 21 TFEU.[53] As stated before, the Directive would apply by analogy in these cases, but not directly.

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

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

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

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

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

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

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

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

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

> "Community law does not require the authorities of that State [the home Member State] to grant a right of entry and residence to a third-country national who is a member of that worker's family because of the mere fact that, in the host Member State where that worker was gainfully employed, that third-country national held a valid residence permit issued on the basis of Article 10 of Regulation No 1612/68".[54]

[53] *Ibid.*, para. 44.

[54] *Eind*, cit., para. 26.

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

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

It is very unfortunate that this case of the dual German-Romanian national is not just a theoretical scenario meant to describe the disadvantages for dual nationals, but it is an actual case from 2016 where the *Bayerischer Verwaltungsgerichtshof* had to decide on a family reunification case with a dual German-Romanian citizen who had lived his entire life in either Germany or Romania.[55] The Court considered it unclear, though it refrained from referring a preliminary question to the Court of Justice, whether a person who has the nationality of two Member States and moves from one to the other in order to work, has made use of his free movement rights and whether – upon returning to the first Member State after four years – the right to return also applies.[56] The uncertainty about this was based upon the reason that the dual EU citizen had always lived in a Member State of which he has the nationality.[57]

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

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

In *Freitag,* the Court stated that "[a]ccording to settled case-law, a link with EU law exists in regard to nationals of one Member State lawfully resident in the territory of another Member State [...].That is the case as regards the applicant in the main proceedings, who is a Romanian national and is resident in the territory of the Federal Republic of

[55] Administrative Court of Munich, judgment of 20 January 2016, 10 C 15.723.

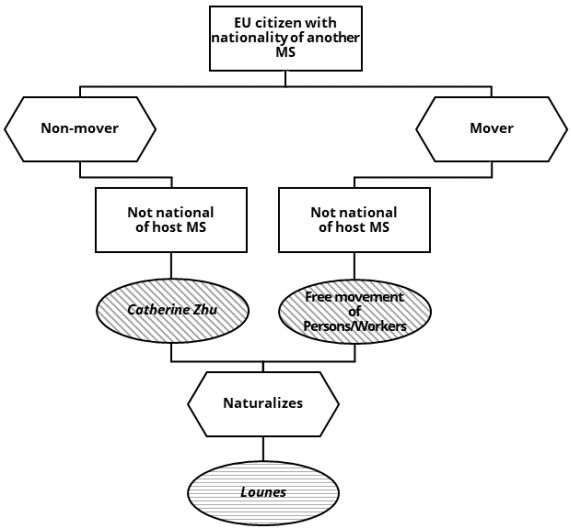
[56] *Ibid.*, para. 46.

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

Germany, of which he is also a national". [58] Furthermore, the Court considered that making recognition of the name established by another Member State conditional upon having the habitual residence there – which means in essence that Art. 7, para. 1, of the Directive is applicable to the person – is a restriction of the free movement rights.[59]

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

II.5. Naturalisation – *Lounes* (Home MS/MS residence MS/Home MS)



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

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

b) the TC+ naturalisation cases, where it was decided that preferential rights on migration acquired under the legal framework applicable to nationals of a TC+ continue to be applicable after naturalisation.[60]

This second option concerns the *Kahveci and Inan* case-law.[61]

---

[58] *Freitag*, cit., para 34.

[59] *Ibid*., para. 39.

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

[61] *Kahveci and Inan*, cit.

As was explained concerning the ranking, privileged Third Countries are called here TC+. This does not mean that each of these countries has the same rights. Some have more than others. Swiss citizens have, due to the Bilateral Treaties, nearly equal rights with EU citizens, and the same applies to nationals of the EEA States.[62] Others have fewer rights but are still quite privileged, such as Turkish nationals who benefit from the EEC-Turkey Association Agreement[63] and Decision 1/80.[64]

In *Kahveci and Inan,* the question was whether a Turkish national could still invoke Decision 1/80 after he had acquired the nationality of the host State, *in casu* the Netherlands, while retaining Turkish nationality.[65] The Court stated that "[a] rule [...] providing that the rights conferred by the first paragraph of Article 7 of Decision No 1/80 can no longer be relied upon where the Turkish worker who is already legally integrated in the host Member State has obtained Netherlands nationality, would have precisely the effect of undermining the legal status expressly conferred on Turkish nationals by the law resulting the EEC-Turkey Association Agreement".[66] Here, the Court made a similar argumentation as in *Micheletti*, though in this case, ironically, the third-country nationality gained preference, as more rights were attached to it than to having the nationality of the host State. The Court concluded that "Article 7 of Decision No 1/80 must be interpreted as meaning that the members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State can still invoke that provision once that worker has acquired the nationality of the host Member State while retaining his

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

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

[64] Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association.

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

[66] *Kahveci and Inan*, cit., para. 38.

Turkish nationality".[67] This, however, only applies to cases where the TC+ rights concern family reunification, and not to other rights, such as social security.[68]

The reasoning behind this decision of the Court was that, if integration results in the loss of rights, this would lead to discouraging TC+s from pursuing the ultimate form of integration, "naturalisation".[69]

In his Opinion on *Lounes*, AG Bot comes, to a certain extent, to the same conclusion as the Court in *Kahveci and Inan*.[70] However, he makes things rather confusing, by not referring to this case-law.[71] Instead, he first applies option 1, coming to the conclusion that only rights attained before naturalisation can still be applied, but then changes his mind.[72]

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

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

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

[67] *Ibid.*, para. 41.

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

[69] *Kahveci and Inan*, cit., paras 33 and 35.

[70] Opinion of AG Bot, *Lounes*, cit.

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

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

Member State, returning, and having a life-long application of the Directive; or only for a certain period? And what if they renounce one nationality, and then reacquire it?".

III. *Lounes* judgment

III.1. Dual nationality and the Directive – Home MS rank always applicable

Concerning the Directive, the Court considered that the purpose of it is to "facilitate the exercise of the primary and individual right to move freely within the territory of the Member States", a right that is granted to EU citizens. Family members of these citizens have a derived right. However, the Court confirmed here that TCN family members cannot derive any autonomous rights from the Directive.[73] The Court furthermore reiterated what it had stated in *O and B*, that through a "literal, contextual and teleological interpretation", the Directive does not confer a derived right of residence to TCN family members of an EU citizen in his Home MS. The Court once again considered that the wording used in the Directive – "Member State other than that of which they are a national", "another Member State" and "host Member State" – clearly indicates that it is not supposed to be applicable in a Member State of which the person is a national.[74] The Court also stated that the Directive only governed the exercise of the free movement rights (and consequently not the retention of these rights).[75]

Moreover, the Court considered that the Directive is not intended to grant the right of entry and residence in the Home MS since, based on a principle of international law, a Member State cannot refuse such a right to its own nationals. Since the EU citizen already has an unconditional right of residence in the Member State of nationality, the Directive is consequently not intended to grant a derived right of residence to the TCN family members of such a person.[76]

Applying these considerations to the case, the Court concluded that there is no doubt that Mrs García Ormazábal had indeed exercised her right of free movement when she moved to the UK, as a Spanish national. She therefore had held the status of beneficiary under Art. 3, para. 1, of the Directive and had resided there based on Art. 7, para. 1, and even Art. 16, para. 1, of the Directive. However, this had changed when she

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

[74] *Lounes* [GC], cit., paras 34-35.

[75] *Ibid.*, para. 36.

[76] *Ibid.*, para. 37.

naturalised. According to the Court the "acquisition of British citizenship gave rise to a change in the legal rules applicable to her, under both national law and the directive".[77] From the moment of naturalisation she ceased to be a beneficiary for the purpose of the Directive, as her residence was no longer a conferred right, but an inherently unconditional right under national law.[78]

The fact that she still had Spanish nationality, or that she had exercised her free movement rights did not change this. The Court considered that, despite these conditions, Mrs García Ormazábal had, since her naturalisation, no longer "been residing in a 'Member State other than that of which [she is] a national'".[79] Consequently, the Directive is not applicable to the Home MS/MS combination as the Home MS rank gains preference.

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

III.2. Dual nationality and Art. 21, para. 1, TFEU

Concerning Art. 21, para. 1, TFEU the Court considered, first, that just like the Directive, Art. 21, para. 1, TFEU does not grant an autonomous right of residence to the TCN family member of an EU citizen, but only a derived right of residence. The "purpose and justification" for this derived right are based on the fact that the refusal would interfere with the free movement rights, its exercise, and its effectiveness accorded to the EU citizen.[80]

The government of the UK argued that it concerned a purely internal situation. The Court disagreed with this, considering that a situation where an EU citizen has made use of the free movement rights by residing legally in another Member State cannot be treated as a purely internal situation solely on the ground that the person has acquired the nationality of the Member State of residence. The Court emphasised, referring to *Freitag,* that it "has already held that there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals".[81]

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

[77] *Ibid*., paras 38-39.

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

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

[80] *Lounes* [GC], cit., paras 45-48.

[81] *Ibid*., paras 49-50.

citizen who has naturalised in the Member State of residence would undermine the effectiveness of Art. 21, para. 1, TFEU.[82]

The Court then provides several grounds for this.

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

Secondly, the rights conferred by Art. 21, para. 1, TFEU are intended for integration into the host Member State. Naturalisation is the show of intent "to become permanently integrated in that State". It would be illogical, according to the Court, that an EU citizen who has acquired rights by making use of the free movement rights, would have to "forego those rights" because (s)he wants to naturalise in order to be more deeply integrated into the society of that State.[83]

The Court further stated that an EU citizen who had acquired the nationality of the Member State of residence next to the original Member State nationality would be treated less favourably for the purpose of family life than the EU citizen who holds only the nationality of origin. The Court considered that these rights "would thus be reduced in line with their increasing degree of integration in the society of that Member State and *according to the number of nationalities that they hold*".[84] The last part of the sentence is rather cryptically formulated – one should consider for this the situation described above concerning the consequences of Option 1 (applying *O and B* strictly to the case), which would result in a situation where a person having the nationalities of every Member State would never be able to derive rights from the Directive and consequently from EU law.

The Court concluded that a person who naturalised in the Member State of residence, while retaining the original nationality of another Member State, should be able to continue to enjoy the rights derived from Art. 21, para. 1, TFEU, especially the right to "build a family life" with the TCN spouse, by means of a derived right of residence for the spouse. The conditions for granting this derived right of residence should not be stricter than those provided for in the Directive, as was already stated in *O and B*.[85]

III.3. Discussion

This case is interesting from many points of view.

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

[82] *Ibid.*, paras 51-53.

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

[84] *Lounes* [GC], cit., para. 59 (emphasis added).

[85] *Ibid.*, paras 60-61.

Home MS. The Court further confirmed the theory presented in this *Article*, of giving effect to nationality and the mobility quality.

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

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

a) For the Directive: Home MS rank nationality highest. As regards giving effect to nationality according to the Directive, the Court made it absolutely clear with its detailed analysis that the Home MS rank nationality gains absolute priority over any other nationality. With this, the Court limited *Shirley McCarthy* even further, by excluding the MS rank nationality of a dual EU citizen from being applicable to the Directive in a Home MS, even if they have made use of their free movement rights.[86] As explained above in section II.4., the Court had already done this in *O and B*, but without direct reference to it also being applicable to dual EU citizens.

Thus, the Court has now confirmed that the Directive is not applicable in a situation such as above, concerning circular dual EU citizens moving between the two Home MS. This is the case even if the first move is to the other Home MS, and where no other link exists with that Member State except for the nationality.

b) Confirmation of giving effect to a nationality and the mobility quality. As the Directive is not directly applicable, one has to check whether the mobility quality is activated, which puts the MS rank nationality above the Home MS rank nationality, for the purpose of Art. 21, para. 1, TFEU. The Court stated in *Lounes* that "[a] Member State cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement".[87]

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

---

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

[87] *Lounes* [GC], cit., para. 55.

IV. "New" issues

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

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

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

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

a) has made use of the free movement rights, specifically Art. 7, para. 1, or Art. 16, para. 1, of the Directive; and

b) has acquired the nationality of the Member State of residence; and

c) has retained the nationality of the other Member State; and

d) marries several years later with the TCN; and

e) continues to reside in "that Member State", meaning the Member State of naturalisation, has no right of residence under the Directive, but has that right under Art. 21, para. 1, TFEU for which the conditions on entry and residence may not be stricter than under the Directive.

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

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

Instead, the Court should have stated something like:

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

ercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national".

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

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

IV.1. Does *Lounes* apply only in the Member State of naturalisation? – Geographical scope

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

Such consideration must be denied. As stated above, the Court held that there does exist a link with EU law for dual EU citizens who reside in a Home MS, based on *Freitag*. The Court consequently ruled that a dual EU citizen, who has exercised the free movement rights in a Member State other than the Member State of origin – which one should read as Member State of birth – continues to rely on the rights derived from Art. 21, para. 1, TFEU, "also against one of those two Member States".[88]

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

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

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

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

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

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

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

IV.2. To whom does *Lounes* apply? – Individual scope

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

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

According to Art. 5, para. 2, of the European Convention on Nationality (ECN), to which many Member States are party, "[e]ach State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently". According to the Explanatory Report to the Convention, "shall be guided by" indicates a declaration of intent and not a mandatory rule. The explanatory report further clarifies that it is aimed at "eliminating the discriminatory application of rules in matters of nationality between nationals at birth and other nationals, including naturalised persons". It then explicitly states that Art. 7, para. 1, let. b), is an exemption from this rule, which concerns loss of nationality because of acquisition by fraudulent means.[89] One should thus consider that only profound reasons could allow for a deviation from this general principle of non-discrimination based on the mode of acquisition.

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

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

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

[89] Explanatory report to the ECN of 6 November 1997, paras 45-46.

effects of *Lounes* to naturalised dual EU citizens, we should still have a look at all the consequences that different forms of limited interpretation of the judgment might have concerning naturalisation.

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

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

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

Could a Member State now refuse to give effect to the MS rank nationality of a dual EU citizen in the Home MS, because it was acquired via a facilitated mode of acquisition instead of through the ordinary naturalisation?[90]

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

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

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

[90] A similar question was asked by Steve Peers in his comment on the judgment. See: S. Peers, *Dual Citizens and EU Citizenship: Clarification from the ECJ*, in *EU Law Analysis*, 15 November 2017, eulawanalysis.blogspot.com.

One should also consider that the Court accepted only on one occasion that a nationality of a Member State would not be applied, because of the way in which it had been acquired. However, there it concerned the Home MS rank nationality acquired *ex lege* by marriage to a national, which would otherwise have resulted in a loss of rights derived from the MS rank nationality.[91]

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

Imagine the following situations:

– what if, a person of Hungarian origin would naturalise in Hungary in accordance with Section 4, para. 3, of the Act on Hungarian Citizenship, which does not require residence, but only knowledge of the language, while still residing in the other Member State of nationality?[92]

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

All these questions have the same answer.

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

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

Therefore, if at any moment before in life, a person has made use of free movement rights, he or she can derive rights from Art. 21, para. 1, TFEU on acquiring the nationality of the other Member State and becoming a "Home MS/MS residence Home MS/Home MS". In the latter situation though, the person must be a returner; thus, it would be rather curious that the mobility quality would first be dormant upon return, and only the rights previously used would be retained, because of attachment to the Home MS rank.[93] Conversely, without movement, but by acquiring the nationality of another Member State, the mobility quality would become reactivated for eternity, because of automatic attachment to the MS rank.

---

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

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

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

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

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

c) Must the individual have retained the other Member State nationality? The condition of retention of the previous Member State nationality is where the main crux in this story is. The Court emphasises on multiple occasions in the judgment concerning Art. 21, para. 1, TFEU that Mrs García Ormazábal had retained her nationality of origin.[94] Considering how restrictively certain national courts and governments interpret CJEU judgments, this can lead to the conclusion that, if the EU citizen does not retain the other MS rank nationality when naturalising in the Member State of residence, the case is not applicable.

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

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

According to the Court's judgments in *Micheletti* and in *Rottmann*, Member States must, "when exercising their powers in the sphere of nationality, have due regard to European Union law".[95] The judgment of *Rottmann* has been discussed a lot in the literature and was considered by some to be surprising, despite the fact that this exact line of reasoning had already been put forward as far back as the 1980s and 90s.[96] One could thus wonder whether a duty to renounce the other Member State nationality upon nat-

[94] *Lounes* [GC], cit., paras 49, 54, 60, and 62.

[95] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann* [GC], para. 45.

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

uralisation, or the automatic loss of the original Member State nationality, would be in accordance with EU law.

Presuming that *Lounes* only applies to dual EU citizens: automatic loss upon acquisition of the nationality of another Member State. Automatic loss or withdrawal of one nationality upon acquisition of another used to be quite common practice back when dual nationality was still considered a bad thing. However, many Member States abandoned that practice,[97] although in some exceptional cases they then (re)introduced it.[98]

Art. 7, para. 1, let. a), ECN provides that such a mode of loss is permitted. However, if *Lounes* applies only to dual EU citizens, automatic loss of the original Member State nationality upon acquisition of another Member State's nationality would mean that EU citizens who "have acquired rights under [Art. 21, para. 1, TFEU] as a result of having exercised their freedom of movement, must forgo those rights […] because they have sought, by becoming naturalised in [the other] Member State, to become more deeply integrated in the society of that [other] State".[99]

Therefore, one should consider the only case that truly concerned loss of EU citizenship based on loss of the nationality of a Member State: *Rottmann*.[100]

In that case, the Court decided that:

> "[t]he provis[ion] that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court, […] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protect-

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

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

[99] With slight alterations, *Lounes* [GC], cit., para. 58.

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

> ed by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law".[101]

The Court further stated in *Rottmann* "that the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality".[102]

This means that judicial review by the Member State of origin would also have to be applied if it wants to take away rights derived from EU law. A similar issue is under consideration in *Tjebbes*.[103] That case concerns the ground for automatic loss of the Dutch nationality for dual nationals while residing outside of the EU and without applying for a new Dutch identity document within ten years. Next to Dutch nationality, several of the applicants also have Swiss citizenship and reside in Switzerland. If the Swiss courts were to apply *Lounes*, which conflicts with their own recent case-law, a situation as in *Tjebbes* would mean that they had EU citizen rights, in Switzerland – irrespective of the fact that these were denied by the Swiss authorities – and would have lost them, due to the automatic loss resulting from living outside the territories of the EU.[104] It is yet unclear how the Court will decide.

In *Rottmann*, the Court stated that "[h]aving regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation [read 'the nationality'] it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union".[105]

Considering the fact that in *Lounes*, the Court accepted that the naturalised dual EU citizen continues to have family reunification rights derived from Art. 21, para. 1, TFEU, this has to include future family members. What the Court will decide in *Tjebbes* is im-

---

[101] *Rottmann* [GC], cit., para. 48.

[102] *Ibid.*, para. 62.

[103] Court of Justice, case C-221/17, *Tjebbes and Others*, pending.

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

[105] *Rottmann* [GC], cit., para. 56.

portant in relation to this point. If the Court decides that the nationality of a Member State may be lost while residing in a Third Country, it should strongly distinguish this from the same person residing in a Member State or a TC+.

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

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

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

If *Lounes* only applies to dual EU citizens, then such a duty to renounce the other Member State nationality would mean that the EU citizens would have to forgo his acquired rights in order to naturalise in another Member State. Consequently, such a duty to renounce the other Member State's nationality upon naturalisation may not be required.

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

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

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

If *Lounes* were to apply only to naturalised EU citizens, it would mean that *Lounes* would clearly give an advantage to naturalised EU citizens, compared to those who did

not acquire the nationality by naturalisation, but by another mode of acquisition. This is incompatible with Art. 5, para. 2, ECN.

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

As this is not allowed, the Court would have to change its approach concerning *O and B* and also give the same rights as dual EU citizens in the Home MS to persons who only had one nationality at birth and subsequently never acquired another one. The Court recently decided on three cases concerning the right to return. The *Coman* case concerns the right to return as regards same-sex marriages and the *Banger* case concerns the right to return as regards non-marital relationships.[106] In these cases, the Court could have considered the issue. It has not been addressed specifically in either case though, and the Court did not deal with it.[107]

However, in *Altiner and Ravn*, it concerns exactly the question of whether the mobility quality stays active after return.[108] The case concerns a Danish national married to a TCN, who resided together in Sweden. They returned to Denmark and were covered by the right to return. After a while, they requested family reunification with the son of the TCN spouse from a previous marriage, who was also covered as a privileged family member under Art. 2, para. 2, let. c), of the Directive. The son did, however, not reside with them in Sweden and consequently would be excluded from the scope set by *O and B*. This would have been the perfect opportunity for the Court to overrule or enlighten its judgment in *O and B*.[109]

---

[106] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others* [GC]; Court of Justice, judgment of 12 July2018, case C-89/17, *Banger*.

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

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

[109] *Altiner and Ravn* was decided without an Opinion of AG Wahl. This means that AG Wahl probably considered that the "return" case-law, meaning *O and B*, is clear and should be applied directly to this case. This would mean that no "new" family reunification would be granted after return to Denmark. The Court followed this approach. Consequently, this means that there is a different line of case-law applicable to dual EU citizens and "single" EU citizens. This must have as a consequence that Member States are no longer permitted to provide for automatic loss of their nationality upon acquisition of another Mem-

That *Lounes* would apply to any naturalised EU citizen who previously held another Member State's nationality has, however, also other consequences. It means that the Court will have to rethink its case-law in other fields as well, like the *Baldinger* case.[110] This case concerned war victim benefits that were granted to Austrian nationals. Mr Baldinger was an Austrian national in the Second World War and was taken prisoner of war. Later, he moved to Sweden and naturalised. As Austria has a strict single nationality policy, Mr Baldinger subsequently automatically lost Austrian nationality. Because of this loss of nationality, Mr Baldinger was considered not to fall within the scope of Austrian war victim benefits. The Court accepted this. In a subsequent case, *Tas-Hagen*, it also concerned the refusal of war victim benefits, but in this case it was based on residence abroad while the applicant had retained the nationality of the country granting the benefit – the Netherlands – while residing in Spain.[111] In that case, the Court considered that the condition of residence in the Member State granting the benefit was incompatible with the right to free movement.[112]

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

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

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

ber State's or TC+'s nationality, nor may the condition for acquisition be made that the previous nationality is renounced, where this nationality is of a Member State or TC+, as was explained *supra*.

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

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

[112] M. Cousins, *Citizenship, Residence and Social Security*, in *European Law Review*, 2007, p. 393.

IV.3. Emphasis on having the mobility quality

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

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

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

This also means that it would theoretically be possible to maximize the applicability of EU law by influencing the order of acquisition of nationality, each resulting in another legal basis for residence.[113] It also means that a child who is born and resides in a Member State of which it does not have the nationality, but acquires the nationality of two other Member States at birth *iure sanguinis*, automatically is covered by Art. 21, para. 1, TFEU for its entire life.[114]

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

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

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

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

[114] Thus "MS/MS residence MS".

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

Another issue is the question what if Shirley McCarthy had renounced her British Citizenship based on Section 12 of the 1981 British Nationality Act?[115]

In that case, she would have been in a similar position as Catherine Zhu, and the Directive would have applied, had she been a worker.[116] This renouncement would technically speaking be an *abus de droit*. The rules on *abus de droit* state that an action by an EU citizen, which is entirely artificial and only done to come within the ambit of EU law is prohibited. But one can hardly argue that renouncing a Member State's nationality should be required to fall within the ambit of EU law. This would be paradoxical.

What makes this similar to *Lounes* is that it should also be considered whether Mrs McCarthy could afterwards have re-acquired or resumed her British citizenship based on Section 13, para. 3, of the British Nationality Act, or if she could have re-naturalised.[117] This Section requires approval from the Secretary of State, who might refuse to grant resumption because the renouncement was only made in order to fall within the ambit of EU law, which might be considered abusive.

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

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

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

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

a) Art. 12 EC (now Art. 18 TFEU) – principle of non-discrimination based on nationality;

b) Art. 18 EC (now Art. 21 TFEU) – EU citizenship;

c) Art. 40 EC (now Art. 46 TFEU) – Free movement of workers;

---

[115] W. Maas, *The Origins, Evolution, and Political Objectives of EU Citizenship*, in *German Law Journal*, 2014, p. 816.

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

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

d) Art. 44 EC (now Art. 50 TFEU) – Free movement of establishment;

e) Art. 52 EC (now Art. 59 TFEU) – Free movement of services.

It is curious that where a *Carpenter*[118] and *S and G*[119] constellation exists for a person who only has the nationality of the Home MS, Art. 45 TFEU is applicable, and therefore the Directive is also applicable by analogy. If the person is a dual EU citizen, the Court only considers Art. 21 TFEU, and consequently is mostly more restrictive on any application of the Directive.

Another option of what the Court could have done is applying *Micheletti* more strictly. Before the *Shirley McCarthy* case, this was also considered an *acte clair* by the national courts, with the exception apparently of the British courts. The requirement of not-having-the-nationality-of-the-Member-State-of-residence was considered an additional requirement to the "recognition" of the nationality of another Member State. Some courts even applied this principle to persons who naturalised at a moment when their State of nationality had not yet acceded to the EU.[120] They considered that from the moment that State had joined, the person, although already a national of the resident Member State, was exercising the free movement rights.[121]

One could argue that the wording of Art. 3, para. 1, of the Directive is substantially different from the wording of Art. 1 of its predecessor Regulation 1612/68,[122] and that therefore its scope is also different. However, in *Scholz*,[123] which concerned a dual German-Italian citizen in Italy, the Court stated that:

> "It should be borne in mind, first of all that Article 7 of the Treaty [now Art. 18 TFEU], which prohibits any discrimination on grounds of nationality, does not apply independently where the Treaty lays down, as it does in Article 48(2) [now Art. 45 TFEU] in re-

---

[118] *Carpenter*, cit.

[119] Court of Justice, judgment of 12 March 2014, case C-457/12, *S and G.*

[120] Dutch Council of State, judgment of 25 March 2013, BZ7520.

[121] *Ibid.*, para. 5.2: "Het standpunt van de minister dat de referente is genaturaliseerd voordat Bulgarije tot de Europese Unie toetrad en zij om die reden geen rechten kan ontlenen aan haar Bulgaarse nationaliteit, veronderstelt dat het bezitten van de Nederlandse nationaliteit kan afdoen aan de rechten die referente aan haar hoedanigheid van burger van een andere lidstaat aan het Unierecht ontleent. Voor die veronderstelling bestaat, gelet op jurisprudentie van het Hof, geen grond". Similar also Dutch Council of State, judgment of 28 January 2013, BZ0412, para. 2.2. See for the case-law up to 2013: A. VAN ROSMALEN, *Conditional Citizenship of the Union? Family Migration for EU citizens and the Outdated Notion of "Internal Affairs"*, Hanneke Steenbergen Scriptieprijs, 2013, steenbergenscriptieprijs.nl.

[122] Art. 1 of Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community: "1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State. 2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State".

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

> lation to the free movement of workers, a specific prohibition of discrimination. [...] In addition, Articles 1 and 3 of Regulation No 1612/68 merely clarify and give effect to the rights already conferred by Article 48 of the Treaty. Accordingly, that provision alone is relevant to this case".[124]

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

In that case, the Court also held that "[a]ny Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of the aforesaid provision".[125]

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

However, the option taken by the Court is the most favourable by a simple reference to the name case-law, which it did by referring to this sentence from *Freitag* which is similar to *Scholz*, but based on Art. 21 TFEU: "[a]ccording to settled case-law, a link with EU law exists in regard to nationals of one Member State lawfully resident in the territory of another Member State [...]. That is the case as regards the applicant in the main proceedings, who is a Romanian national and is resident in the territory of the Federal Republic of Germany, of which he is also a national".[126] It should be remembered, though, that for the name case-law, actual movement, and therefore the mobility quality, is not required.

V. Conclusion – A choice: Nationality competence or abandonment of reverse discrimination

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

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

---

[124] *Ibid.*, para. 6.
[125] *Ibid.*, para. 9.
[126] *Freitag*, cit., para. 34.

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

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

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

The earliest option for the Court to make this choice was *Coman*, *Banger* or *Altiner and Ravn*. Especially in *Altiner and Ravn* the Court seems to have made the choice that *Lounes* is not applicable to "single" EU citizens. The Court did relax the residence requirement to some extent by replacing the Art. 7, para. 2, residence requirement with a previously in the host Member State established and uninterrupted family life requirement.[127] Also in *Tjebbes* the Court should be very careful to distinguish between those applicants living in a

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

third country and those living in a privileged third country. If it does not make a distinction, this will have consequences for future relations with the UK after Brexit.

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

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

The Court should also, in cases of recognition of names, be very careful where it allows for a restriction based on constitutional values, because this might lead to a conflict of national Constitutions.[128] It should especially be careful where it is aware that there is a third party who is a dual EU citizen and would be directly affected by the case. For, did the Court ever consider in, for example, *Runevič-Vardyn*,[129] what would happen to the son?[130]

It is regrettable that this son was not also an applicant in this case, for, would the Lithuanian authorities have issued a document for the child with his father's surname in its original form? No, they would not have. In fact, they refused to do so! In April 2016, the District Court of Vilnius ruled in a case where the authorities refused to register the name of a dual Lithuanian-Polish national who was born in Belgium, whose father is Polish and mother is Lithuanian, with the name Wardyn.[131] The District Court decided

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

[129] *Runevič-Vardyn*, cit.

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

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

that the name had to be entered with the "W" and thus the Polish spelling was to be used. Additional five years of litigation could have been saved if the Court had taken the effects of its judgment on this child into consideration.[132]

Dual EU citizenship is a symptom of European integration. European integration has led to EU citizens moving to other Member States and meeting and falling in love with nationals from these Member States. This, in combination with gender equality in nationality transmission, and acceptance of retention of other Member State's nationalities, leads to the logical consequence of an increasing number of dual and multi EU citizens. More and more cases on the free movement and dual citizenship will arise, because of a simple reason: we are nearing the final stages of full European integration.[133]

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

[133] E.g. *Tjebbes and Others*, cit., concerning loss of a Member State's nationality of a dual national while living abroad.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE PERNICIOUS INFLUENCE OF CITIZENSHIP RIGHTS ON WORKERS' RIGHTS IN THE EU: THE CASE OF STUDENT FINANCE

ARACELI TURMO*

ABSTRACT: A series of rulings by the Court of Justice, dating back to 2007, have seamlessly introduced an inequality between frontier workers and migrant workers within the EU, especially in terms of access to social advantages. This series of precedents culminated in December 2016, in two rulings in which the Court of Justice accepted the validity of Luxembourgish rules relying on tests based on the duration of work in that Member State in order to determine who, among frontier workers, could benefit from portable funding to help their children to pursue higher education abroad. The lack of justification for this development of the case law concerning frontier workers is made all the more surprising by the fact that it is clearly *contra legem*. Both previous case law and secondary law have always held that frontier workers are workers exercising their freedom of movement under Art. 45 TFEU, who should benefit from equal treatment. The potential scope of this new restriction to frontier workers' rights under freedom of movement remains to be determined. This *Article* argues that these rulings are not only *contra legem* but also that they are based on highly questionable lines of reasoning, and that the explanation for this development can be found in the influence of Member States' gradual adaptation to rules granting equal treatment to certain economically inactive citizens, as well as in insufficient legislative intervention at EU level.

KEYWORDS: free movement of workers – frontier workers – Union citizenship – discrimination – student finance – social advantages.

* Maître de conférences, University of Nantes, araceli.turmo@univ-nantes.fr. I would like to thank in particular Professors Dimitry Kochenov and Eleftheria Neframi for inviting me to the conference where an earlier version of this *Article* was presented, and the anonymous reviewers for their helpful comments.

I. Introduction

The need to move beyond an understanding of EU citizenship as a component of freedom of movement within the internal market is emphasized throughout *EU Citizenship and Federalism: The Role of Rights*. As Dimitry Kochenov writes, EU citizenship cannot be restricted to such a role and must take on a different meaning if it is to fulfil its potential.[1] However, this is not, as it often appears to be, only apparent in the case law related to "inactive" or static Union citizens. The free movement of workers can also suffer from the current uncertainties through the insidious influence of integration tests initially applicable only outside the scope of Art. 45 TFEU. In that sense, it is not entirely true that the CJEU "might reasonably now believe that it has done its job"[2] in creating a single physical space in the Union through free movement rules. Such a statement does not take into account the potential for reversal in the rights associated with free movement within the internal market. Indeed, the absence of a true shift towards a new vision of citizenship and solidarity within the European Union can also produce unfortunate regressions in citizens' rights where they used to be most well-established.

Since the early 2000s, a limited but noticeable trend of CJEU case law has extended the application of the "sufficient link of integration" test to the social advantages of workers, more specifically frontier workers. The most problematic aspect of this case law concerns the right of students to benefit from funding in the Member State where their parents work, under the same conditions as the children of migrant workers, in order to study in another Member State.[3] This trend clearly clashes with the traditional approach to the free movement of workers, which under the fifth recital of Regulation 492/2011 "should be enjoyed without discrimination by permanent, seasonal and frontier workers".[4] This freedom includes the right to equal treatment concerning enjoyment of social advantages under Art. 7, para. 2, of Regulation 492/2011. Facing resistance from Member States, the Court of Justice has long confirmed that access to such social advantages should extend without discrimination to frontier workers.[5] The Court had also ruled that the dependent child of a national of a Member State who is employed in another Member

[1] D. Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 3 *et seq*.

[2] To borrow the phrase used in D. Sarmiento, E. Sharpston, *European Citizenship and Its New Union: Time to Move On?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 230.

[3] Court of Justice: judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*; judgment of 20 June 2013, case C-20/12, *Giersch and Others*; judgment of 14 December 2016, case C-238/15, *Bragança Linares Verruga and Others*; judgment of 15 December 2016, joined cases C-401/15 and C-402/15, *Depesme and Kerrou*.

[4] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[5] Court of Justice, judgment of 27 November 1997, case C-57/96, *Meints v. Minister van Landbouw, Natuurbeheer en Visserij*, paras 49-50.

State as a frontier worker could rely on this provision in order to obtain study finance under the same conditions as the child of a national of the State of employment.[6]

Frontier workers have doubtless long been a problematic category in EU law. Although Art. 45 TFEU and Regulation 492/2011 are, in principle, applicable to both migrant and frontier workers, granting the full benefit of the right to equal treatment to frontier workers had previously been perceived as less necessary or more questionable.[7] Indeed, frontier workers often retain their residence in their State of origin[8] and cannot truly be considered "migrants", which means it is not as necessary to grant them advantages that will allow them to truly integrate in another Member State. The use of the "sufficient link of integration" test in these cases is nevertheless surprising, since Regulation 492/2011 does not allow for any additional requirements related to a worker's integration in another Member State, instead clearly stating that frontier worker status is in and of itself sufficient to enjoy full equal treatment. This type of test comes from the case law concerning the right of non-economically active citizens to benefit from social programmes: jobseekers,[9] students,[10] civilian war victims[11] and disabled European citizens[12] can be required to prove that they have a real or sufficient link to the society of the Member State, in which they applied for benefits. These tests were introduced by Member States and accepted by the Court of Justice as a form of compensation for the right to equal treatment granted, in principle, to all European citizens lawfully residing in other Member States regardless of their economic activity. As such rights were granted to new categories of European citizens, they were immediately curtailed by new "entry tests" into the welfare State.[13] However, this was initially always done under the premise that it was justified only insofar as it helped prevent "social tourism" and did not apply to economically productive members of the employment market.

The extension of such tests to workers' access to social advantages such as student funding, constitutes a worrying new encroachment of protectionist views on EU citizens' right to equal treatment. It will be argued that the requirement of "sufficient links" for the children of frontier workers is not only *contra legem* (I), but also highly questionable re-

[6] Court of Justice, judgment of 8 June 1999, case C-337/97, *Meeusen*, para. 21.

[7] A. ILIOPOULOU, *Le rattachement à l'Etat comme critère de l'intégration sociale*, in *Revue des affaires européennes*, 2013, p. 655.

[8] The Court of Justice has, however, held that EU citizens who work in their State of origin but reside in another Member State are also frontier workers under Art. 45 TFEU.

[9] Court of Justice: judgment of 11 July 2002, case C-224/98, *D'Hoop*; judgment of 23 March 2004, case C-138/02, *Collins*; judgment of 25 October 2012, case C-367/11, *Prete*.

[10] Court of Justice: judgment of 15 March 2005, case C-209/03, *Bidar*; judgment of 18 November 2008, case C-158/07, *Förster*.

[11] Court of Justice, judgment of 26 October 2006, case C-192/05, *Tas-Hagen and Tas*.

[12] Court of Justice, judgment of 1 October 2009, case C-103/08, *Gottwald*.

[13] A. ILIOPOULOU, *Le rattachement à l'Etat comme critère de l'intégration sociale*, cit., p. 654.

garding both its legitimacy and actual effectiveness (II), and is due to an evolution of the law concerning the rights of Union citizens that requires ambitious legislative reforms (III).

II. The perplexing extension of "sufficient links" tests to frontier workers' social advantages

The CJEU's case law shows a very gradual, and perhaps not entirely intentional, progression towards fully accepting the use of "sufficient links of integration" tests, previously reserved for economically inactive citizens, to frontier workers. The initial transfer was made in three questionable rulings in 2007, but its explicit validation appears later, in case law concerning the rights of the children of frontier workers to apply for study finance in the Member State where their parent works. These developments appear to run contrary to secondary law and to previous case law concerning the rights which workers derive from the Treaties.

II.1. A questionable but minor initial development

Before the rulings concerning student finance, there was one previous line of case law that was noticed at the time[14] which seemed to extend "sufficient links" tests to migrant workers. This line is in fact limited to three rulings, made in 2007, concerning provisions excluding non-residents from the German child-raising allowance[15] and the Wajong, a Dutch incapacity benefit for young people.[16] Child-raising allowances typically constitute social advantages within Art. 7, para. 2, of Regulation 1612/68,[17] whereas the Wajong had been found to be a special non-contributory benefit within Art. 10, let. a), of Regulation 1408/71.[18] Two of these cases dealt with "reverse frontier workers", nationals of the Member State where they worked who had simply changed their residence to another Member State. This could reasonably have been held to exclude them from migrant worker status, however, it did not seem to have a significant impact on the CJEU's assessment of the applicability of free movement rights as it held that both applicants

[14] See, in particular, the Comment on all three rulings by C. O'Brien, *Comment on Case C-212/05, Gertraud Hartmann v. Freistaat Bayern, Judgment of the Grand Chamber of 18 July 2007, Case C-213/05, Wendy Geven v. Land Nordrhein-Westfalen, Judgment of the Grand Chamber of 18 July 2007, nyr; Case C-287/05, D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen, Judgment of the Grand Chamber of 11 September 2007, nyr*, in *Common Market Law Review*, 2008, p. 499 *et seq*.

[15] Court of Justice: judgment of 18 July 2007, case C-212/05, *Hartmann*; judgment of 18 July 2007, case C-213/05, *Geven*.

[16] Court of Justice, judgment of 11 September 2007, case C-287/05, *Hendrix*.

[17] Now Art. 7, para. 2, of Regulation 492/2011.

[18] "Special non-contributory cash benefits" are now covered by Art. 70 and Annex X of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

could claim the status of migrant workers.[19] Moreover, in all three cases, reliance upon Regulation 1612/68 and worker status for these frontier workers is combined with the acceptance of "sufficient links" tests in an effort to mitigate the extension of the scope of such benefits to non-resident citizens. The result is a problematic series of precedents which would later be used as a foundation for an entirely different line of case law concerning student finance.

The main issue at stake was whether Member States could restrict access to these advantages and benefits to residents, regardless of the claimants' nationalities. The German Government argued that the child-raising allowance was granted in order to benefit persons who, "by their choice of residence, [had] established a real link with German society".[20] An exception was provided for frontier workers who had more than a "minor occupation" in Germany. This was not rejected by the Court, who held that the fact that this exception meant that frontier workers with more than minor occupations could, as it were, automatically pass the "real links" test. As the Court put it, the rule applicable to frontier workers meant that "residence was not regarded as the only connecting link [...] a substantial contribution to the national labour market also constituted a valid factor of integration".[21] The result was that, while Mrs Hartmann must be granted the allowance because her spouse had a full-time job in Germany, Mrs Geven who was only in minor employment could be considered ineligible.[22]

Distinctions among migrant EU citizens based on the number of hours worked or the nature of the employment in a Member State were not new to the CJEU which had already admitted that migrant worker status depended on genuine and effective employment.[23] The test applied here to determine whether someone was in minor seems stricter than the traditional test defining workers under Art. 45 TFEU. The main issue, however, is that non-resident EU citizens with "major" and "minor" occupations are both submitted to a test which does not apply to people who reside in Germany. There simply appears to be a presumption that frontier workers with major occupations meet the requirement of a real link with German society. This test was accepted in relation to a stated objective of increasing natality rates in Germany. The Court does not call into question the legitimacy of such an objective, nor its link with the number of hours worked in that Member State, which seems tenuous at best.[24] Nor does the Court criti-

[19] *Hartmann*, cit., para. 18; *Hendrix*, cit., para. 46.

[20] *Hartmann*, cit., para. 33.

[21] *Ibid.*, para. 36.

[22] *Geven*, cit., para. 8.

[23] Court of Justice: judgment of 23 March 1982, case 53/81, *Levin v. Secrétaire d'Etat à la justice*; judgment of 31 May 1989, case 344/87, *Bettray v. Staatsecretaris van Justitie*.

[24] *Geven*, cit., paras 21-23. In fact, the Court refuses to engage with the issues of the legitimacy of the objective and the link with a residence criterion and instead chooses to focus on the fact that the residence criterion is not strictly applied so as to allow certain frontier workers to benefit from the child-raising allowance.

cise the fact that this German law establishes a distinction between migrant workers and frontier workers. It seems to accept the idea that frontier workers who only have a minor occupation in Germany are not "sufficiently integrated" in German society.

The discrimination between frontier workers and residents constitutes a break with long-established case law which the Court does not even attempt to justify. The criterion chosen in this German legislation shows how awkward the attempt to apply "real link" tests to workers can become. Here the CJEU requires the Member State to extend the territorial scope of a social advantage whose objective can only really be understood within the domestic territory. This is necessary for frontier workers because they benefit from equal treatment under Regulation 1612/68. However, proving that a frontier worker has a "sufficient link" with German society to the extent that they will contribute to increasing natality rates in that State is nigh impossible. The Court, nevertheless, has to accept a link between residence and the stated objective, as well as the unequal treatment between frontier workers and migrants. Yet this issue only arises because the Court accepts the "sufficient link" test as a valid approach to determine whether frontier workers should benefit from social advantages in the Member State where they work. If one accepts that the child-raising allowance at issue constitutes a social advantage within the meaning of Art. 7, para. 2, of Regulation 1612/68, no difference should be established between migrant and frontier workers. If such a difference must be introduced, there is no justification for applying a type of "real link" test to frontier workers. Moreover, within the framework of the justification plus the proportionality test, the Member State has the upper hand in suggesting the type of test they deem appropriate. Here, the number of hours worked in Germany is the main criterion and could almost be understood as seeking to determine whether the person is in genuine and effective employment in the host State. However, this was not the type of criterion relied upon in the later case law concerning student finance.

In the *Hendrix* case, although Regulation 1408/71 enabled Member States to establish residency requirements for special non-contributory benefits, the Court held that since the Wajong also constituted a social advantage under Art. 7, para. 2, of Regulation 1612/68, such a requirement, which does not ensure equal treatment, must be proportionate to the legitimate objective pursued by the Dutch legislation.[25] According to the CJEU, national courts must interpret the national provisions in such a way as to take into account the worker's "economic and social links" to the State in which they applied for the benefit.[26] The situation was somewhat different in this last case and called into question the overlap between Regulation 1408/71, which allows Member States to restrict access to certain benefits to residents, and Regulation 1612/68, which relies upon the principle of equal treatment for workers exercising their freedom of movement. At

[25] *Hendrix*, cit., para. 54.
[26] *Ibid.*, para. 57.

first glance, the priority given to the scope of Art. 7, para. 2, of Regulation 1612/68, thus including frontier workers, appears to grant better protection to EU citizens who do not reside in the State in which they have applied for a specific benefit.[27] However, here too, the problem lies in the way in which the Court frames the *ratio decidendi*, which grants significant leeway to the Member State in establishing a "sufficient links" test restricting frontier workers' access to a social advantage.

The ease with which the Member States got the CJEU to accept the legitimacy of their aims, the pertinence of "sufficient link" tests and the criteria introduced to carry them out seems to indicate a lack of awareness on the Court's part of the importance of the break with previous case law concerning frontier workers. The Court certainly insisted upon applying equal treatment under the free movement of workers to borderline cases, and upon a proportionality test under which the citizen's personal circumstances must be examined. This could *prima facie* be considered a positive development for Union citizen's rights,[28] but the problem lies in the broader impact of allowing Member States to require frontier workers to prove their integration into their society. Despite these cases' peculiarities, the three rulings created precedents which the Court relied upon in later cases, a reference made easier by the insufficient care given to the processes by which precedents create norms in EU law.[29] In these rulings, the Court enabled Member States to introduce differences between migrant workers and frontier workers, and among frontier workers, based on tests aiming to establish whether their links with the Member State are "sufficient" to deserve access to social advantages. These rulings seemed relatively innocuous until they reappeared in the case law relating to portable student finance.

II.2. A problematic extension to student finance

One unfortunate aspect of the right of students to free movement is that it does not create a uniform status for Union citizens travelling to other Member States to study. Rather, students benefit from very different rights, especially regarding access to certain forms of financial support from their host Member State or their State of origin, depending on whether they themselves or their parents are exercising their free movement rights as economically active Union citizens. Indeed, many forms of financial support for students are considered social advantages for their parents under Art. 7, para. 2, of Regulation 492/2011. A student will therefore benefit from support from the Member State where at least one of his/her parents work, whether they are nationals of that State or not, as long

[27] M. Dougan, *Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States*, in C. Barnard, O. Odudu (eds), *The Outer Limits of European Union Law*, Oxford: Hart, 2009, pp. 127-128.

[28] *Ibid.*, pp. 159-161.

[29] On this issue, see *infra*, section IV.1.

as the worker continues to support the student. In this respect, as with other types of social advantages, frontier workers and migrant workers must in principle benefit from equal treatment under Art. 7, para. 2, of Regulation 492/2011.

A specific line of case law deals with the right of the children of frontier workers to benefit from a Member State's financial support for university studies abroad. Once again, we find Member States granting social advantages to residents first, thus restricting frontier workers' access to the same advantages. Here, the criterion based on major *v.* minor work in the host State has disappeared. The Member States, and the Court, seamlessly transition to "duration of work" criteria based on the "duration of residence" criteria applied to economically inactive citizens – another step in the pernicious influence of citizenship case law within the scope of the free movement of workers. The use of criteria based on the duration of the worker's employment in the host State makes it clear in these later cases that the Court is not inviting national authorities to determine whether there is a sufficient economic link, in the sense of genuine employment, justifying the application of Art. 7, para. 2, but whether there is a sufficient link to the society as a whole, an integration within the national community.

The first ruling to apply the "sufficient link" test to such cases is *Commission v. Netherlands*. The Netherlands made portable student funding conditional on the student having resided in the Netherlands for at least three of the six years preceding his/her enrolment for higher education abroad.[30] This constituted indirect discrimination against frontier workers and migrant workers. This discrimination could not be justified by budgetary considerations in and of themselves, but the CJEU, somewhat surprisingly, stated that it had already recognised Member States' power to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages, even when they are economically active – while recalling that in principle, such a requirement for migrant and frontier workers is "inappropriate".[31] In fact, AG Sharpston examined whether evidence of a sufficient degree of integration could be required by a transfer of the Court's reasoning in the *Förster* and *Bidar* rulings, neither of which dealt with the free movement of workers.[32] She refused to transfer the reasoning in these rulings to migrant workers insofar as it was invoked to avert an unreasonable financial burden, insisting that residence could not be the only acceptable evidence of connection with the Member State.[33] She also warned of the dangers of allowing Member States to "justify less favourable treatment of (both eco-

[30] *Commission v. Netherlands*, cit., para. 39.

[31] *Ibid.*, paras 63 and 65-66.

[32] Opinion of AG Sharpston delivered on 16 February 2012, case C-542/09, *Commission v. Netherlands*, para. 74.

[33] *Ibid.*, paras 87 and 122.

nomically active and inactive) EU citizens in terms of social policy (integration) by applying access criteria such as length of residence".[34]

The Court did not follow its AG and returned to the idea that the "link of integration" is to be presumed, but is an appropriate criterion, in cases involving migrant and frontier workers. The reasoning was similar to that followed in the three 2007 rulings; there is discrimination, but it may be justified if the Member State uses criteria conducive to identifying the person's integration in its society and based on a legitimate overriding requirement. The CJEU proceeded to reject the Netherlands' justification based on the risk of an unreasonable financial burden, but accept the government's reasoning concerning the second justification, that of increasing student mobility. In a rather counterintuitive line of reasoning, the Court agreed that student mobility was indeed an overriding reason relating to the public interest,[35] and that a residence requirement was appropriate to meet that aim, because it could ensure that the scheme was aimed, first, at students who would, in its absence, study in the Netherlands, *and* because Dutch authorities could legitimately expect students who benefit from the scheme to return to the Netherlands to enrich that Member State's job market.[36] AG Sharpston had, indeed, stated that requiring a degree of integration from migrant workers was possible if justified by a legitimate social objective but did not support this with any reference to previous case law – in fact, the most explicit occurrence of this statement appears in a footnote.[37]

Despite the rejection of the actual criteria used in the Netherlands this ruling creates another precedent allowing Member States to apply "sufficient link" tests to frontier workers. Indeed, the rejection of the actual criteria used by Member States in applying a "real link" test does not constitute a rejection of the test itself, of its pertinence in a given situation, nor of the aims which the Member States rely upon. The force of the precedent lies in the *ratio*, thus the motives given by the Court for rejecting the specific rules at issue (or their later interpretation) are more important than the rejection itself. Once the Court accepts that Member States can look for "sufficient links" between fron-

[34] *Ibid.*, para. 85.

[35] *Commission v. Netherlands*, cit., para. 72.

[36] *Ibid.*, paras 76-77. The Court accepts the appropriateness of the residence requirement, for the purposes of attaining the objective of promoting student mobility, by simply rephrasing the government's argument based notably on the fact that "the Kingdom of the Netherlands expects that students who benefit from that scheme will return to the Netherlands after completing their studies, in order to reside and work there". No further justification or any explanation is given as to the basis for this expectation, however, both the Commission and AG Sharpston seem to have found the aim of targeting students likely to enrich the Dutch employment market legitimate, see Opinion of AG Sharpston, *Commission v. Netherlands*, cit., paras 135-136.

[37] Opinion of AG Sharpston, *Commission v. Netherlands*, cit., para. 91, footnote 54: "This conclusion does not mean that I consider that in all circumstances Member States are precluded from requiring a degree of connection from migrant workers. Indeed, the social objective invoked by the Netherlands Government as justifying a degree of connection from all applicants is a legitimate aim which is justified by overriding reasons in the public interest".

tier workers and their societies, the issue of legitimacy of such requirements transforms into a search for the appropriately worded overriding requirements and, more importantly, the specific threshold which the Court will deem proportionate.

A good illustration appears in *Caves Krier Frères Sàrl*,[38] concerning Luxembourgish subsidies for the recruitment of older unemployed persons. In this case, the CJEU seemed to firmly reject discrimination against a Luxembourgish frontier worker who had always worked in that State but lived in another Member State. However, the idea that a frontier worker's integration in the State where they work is not automatic but only to be presumed appears to make another appearance. The Court cites *Commission v. Netherlands* as precedent in order to allow the use of integration tests but holds that, in the case at hand, "Ms Schmidt-Krier is a frontier worker and a national of that Member State who has spent her entire working life there. Accordingly, she would appear to be integrated into the Luxembourg labour market".[39] Although this ruling appears to confirm that frontier workers should be treated as migrant workers, it, in fact consolidates the case law according to which such an equivalence is only based on a presumption that frontier workers have sufficient links with the State where they work. As later rulings show, this presumption is not absolute and perhaps only citizens whose links with the host Member State are as strong as Ms Schmidt-Krier can safely assume they will fulfil the criteria.

The surprising combination of EU public interest objectives and purely national aims found in *Commission v. Netherlands* was seized upon by Luxembourg in the legislation at issue in the infamous *Giersch* case, now confirmed in two 2016 rulings: *Depesme and Kerrou* and *Bragança Linares Verruga*. The Luxembourgish legislation established a residence requirement for nationals of other Member States wishing to benefit from portable student funding. This clearly created a discrimination against frontier workers, which the Court held to be incompatible with EU law – but in doing so, the Court reaffirmed that unequal treatment between resident and frontier workers was possible, provided the criteria were based on a legitimate aim and were proportionate. The reasoning followed in *Commission v. Netherlands* seemed coherent insofar as portable funding should reasonably not be used by students residing in other Member States for studies carried out in these States. However, the second stage was much more problematic as it implies that States are entitled to expect students to come back to the State which (partly) funded their studies in order to, as it were, justify the investment made. This seems to run absolutely contrary to the stated objective since if students are expected to take full advantage of freedom of movement, they should be able to choose which part of the EU they want to work in. The Luxembourgish justification set out in *Giersch* is slightly different. Instead of encouraging student mobility, the stat-

[38] Court of Justice, judgment of 13 December 2012, case C-379/11, *Caves Krier Frères*.
[39] *Ibid.*, para. 54.

ed objective here is the promotion of the development of the national economy.[40] Having all but abandoned any pretence that these rulings are based on EU public interest objectives,[41] the Court accepts a straightforwardly protectionist justification to the indirect discrimination caused by a residence requirement for financial aid for higher education studies in another Member State.

In both *Commission v. Netherlands* and the *Giersch* line of cases, the Court finds that the national provisions are not proportionate to the objective pursued by the Member State, if they set residence requirements which exclude frontier workers, or if they establish criteria, which do not enable national authorities to take into account the specific circumstances of each case, e.g. by requiring an uninterrupted five year period of work in the Member State.[42] However, it allows Member States to use the fear of social tourism to establish a potentially damaging distinction between migrant and frontier workers under Art. 45 TFEU.

II.3. A clear break with established case law and secondary law

The case law concerning the access of frontier workers' children to portable study finance, clearly appears contrary to the traditional understanding of frontier workers' rights. Despite the Court's unsubstantiated claim in *Commission v. Netherlands*, apart from the 2007 rulings which could otherwise have been considered an anomaly, there was no indication in previous case law that "sufficient links" tests could be applied to frontier workers. Indeed, such tests should, in principle, be impossible if frontier workers are to benefit from migrant worker status under Regulation 492/2011.[43]

As AG Wathelet put it, "there is, as it were, a presumption that the migrant or frontier worker is integrated into the Member State in which he works and to which he pays taxes and social contributions which contribute to the financing of the social policies of that State".[44] This presumption is not, however, equivalent to automatic equal treatment deriving from migrant worker status under Art. 45 TFEU. The Court stated in *Commission v. Netherlands* that the link between migrant workers and frontier workers arises from their contribution to the financing of the State's social policies through tax-

[40] *Giersch*, cit., para. 48.

[41] The Court and AG Mengozzi do tie this objective to the promotion of tertiary education in the Europe 2020 strategy (*Giersch*, cit., paras 53-55; Opinion of AG Mengozzi delivered on 7 February 2013, case C-20/12, *Giersch*, para. 42).

[42] *Bragança Linares Verruga and Others*, cit., para. 69. It must be noted that this Luxembourgish rule was an attempt to conform to the Court's earlier ruling in *Giersch v. Luxembourg*, whose para. 80 seemed to encourage such a criterion as an alternative to a residency requirement.

[43] *Contra*, A. Hoogenboom, *Export of Study Grants and the Lawfulness of Durational Residency Requirements: Comments on Case C-542/09, Commission v. the Netherlands*, in *European Journal of Migration Law*, 2012, p. 427.

[44] Opinion of AG Wathelet delivered on 2 June 2016, case C-238/15, *Bragança Linares Verruga and Others*, para. 69.

es.[45] This was the position which justified equal treatment in access to social advantages for all workers exercising their free movement rights, regardless of the duration of their residence or employment in the Member State.

Requiring proof of integration for frontier workers thus amounts to ignoring their contribution to the costs of the social policies they want to benefit from. By considering such criteria as a valid step in the proportionality test of a justification, the Court has introduced a new requirement that is clearly incompatible with Art. 7, para. 2, of Regulation 492/2011. In doing so, despite its insistence on the presumption of integration and on a case-by-case examination of individual situations, the Court has created the risk of further differentiation between migrant workers and frontier workers. The difficulties in articulating the territorial and personal scopes of Regulation 492/2011 and Regulation 1408/71 emphasize the issues posed by the status of frontier workers. They cannot fully be considered members of the national community of the host Member State in the sense associated with traditional understandings of solidarity within the national community, and do not fulfil the residence criteria often used to extend that solidarity within Union citizenship on the basis of "real link" tests. However, by including them in the scope of the free movement of workers, EU law requires Member States to find different mechanisms to allow them to benefit from social welfare. The use of "duration of work" criteria for frontier workers seems to be an ill-conceived attempt to solve this issue by resorting to "real link" tests that are applied without sufficient care or rigour.[46] Another risk in applying *contra legem* criteria linked to the duration of work, to determine whether frontier workers can access social advantages, is that it is difficult to see why such requirements should only apply to frontier workers and not to resident migrants. In any case, the Court's reasoning is insufficient to establish a clear motive for different implementations of Regulation 492/2011, based on the worker's place of residence. This line of case law is based on a highly problematic approach, whose viability in practice has not been proven.

III. A contentious "investor's approach" to social advantages

The case law derived from *Commission v. Netherlands* is not only questionable because of its practical implications for the rights of frontier workers and their children. Its social and political consequences are unfortunate but remain rather limited to this day. More worrying are the facts that this case law does not rely on a convincing line of argument and that the leeway it grants Member States could have unpredictable consequences,

[45] *Commission v. Netherlands*, cit., para. 66.

[46] We are certainly very far from the "rigorous comparability model" advocated for in M. Dougan, E. Spaventa, *"Wish You Weren't Here"... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (eds), *Social Welfare and EU Law*, Oxford: Hart, 2005, p. 181 *et seq*.

considering the often insufficiently reasoned use of precedent in CJEU case law.[47] Both the legitimacy of the objectives presented as overriding reasons of public interest, and the logical connection between them, and the tests used to establish "sufficient links" are highly contentious.

III.1. Questionable legitimacy

The reasoning followed by the Court in the cases *Commission v. Netherlands* and *Giersch* seems to be that the difference between cases concerning migrant workers and those concerning economically inactive citizens, is not that migrant workers do not need to prove their degree of integration, but that such a requirement cannot be based on purely budgetary preoccupations, such as an unreasonable burden on financial assistance programmes, and must instead be linked to a social objective.[48] Even if one accepts the introduction of such a criterion to restrict frontier workers' access to certain social advantages, the validity of the governments' reasoning is highly doubtful.

First, the objectives put forward by both governments are clearly linked to protectionist concerns that are almost indistinguishable from the financial objectives which the Court purports to reject. This was already clear in *Commission v. Netherlands* since, although the objective recognised by the Court of Justice was to increase student mobility, which is indeed a matter of public interest for the EU as a whole, the Court also seemed to accept the idea that Member States could legitimately expect students who benefit from financial support to return to the country that funded their studies.[49] Funding student mobility thus becomes an investment in the State's *own* economy[50] and *not* a contribution to the general EU objective of promoting the free movement of persons. The ruling does not appear to take into account the flagrant contradiction between these objectives, only one of which could reasonably be linked to an overriding requirement. To the contrary, the Court almost seems to be encouraging Member States to establish rules which allow them to restrict funding to students who are likely to later enter their job markets.

The leniency towards Member States appears even more clearly in the *Giersch* line of cases, in which the Court accepts as an overriding requirement, not the promotion of student mobility, but an increase in the percentage of Luxembourg residents with a higher education degree. A justification of the way in which this national objective is supposed to contribute to European public interest is nowhere to be found, beyond the very loose connection drawn by AG Mengozzi and the Court with the Europe 2020 strat-

[47] See *infra*, section IV.1.

[48] Opinion of AG Mengozzi, *Giersch*, cit., paras 49-52.

[49] See *supra*, section II.2.

[50] H. Skovgaard-Petersen, *There and Back Again: Portability of Student Loans, Grants and Fee Support in a Free Movement Perspective*, in *European Law Review*, 2013, p. 798.

egy promoting a knowledge economy.[51] However, the strategy promotes higher education as an aim for the EU job market as a whole, not for each Member State individually. Why this European strategy can be more effectively pursued by promoting the return of students having obtained such degrees to Luxembourg rather than allowing them to choose the Member State where they wish to work is never explained. Similarly, the Court never explains why Luxembourg should legitimately expect to meet aims related to the composition of its labour market by promoting the return of students, whose parents already have links with its economy, rather than by attracting other graduates.[52] Indeed, it seems unlikely that such an explanation can be found.

Commission v. Netherlands thus seems to have opened Pandora's box in allowing Member States to present the funding of portable student finance as an investment, on which they can legitimately expect a return. This is not only problematic in that it serves as the basis for the application of "sufficient links" tests implementing a justification to an indirect discrimination, it goes against the Court's usual position on overriding requirements. In principle, there must be a clear European public interest aim to justify obstacles to free movement and protectionist or purely national aims are not acceptable – this is the basis for the exclusion of budgetary concerns as an overriding requirement, except in certain specific areas of CJEU case law. The admission of the "investor's approach" to student funding raises serious questions. Firstly, the aim of ensuring the return of students who have benefited from financial support seems to run contrary to the aims of Union citizenship and free movement rights, if one accepts that citizens should be encouraged to think of the whole of the single market as a space in which they can freely choose where to study or work. Secondly, it omits the other costs related to higher education, for instance, those incurred by the Member State where the worker's child wishes to study. Even in States where higher education is not free, universities depend to a very large extent on government spending and the costs of hosting students from another Member State was the basis for previous rulings relating to student mobility within the EU. Thirdly, it is difficult to determine how far beyond portable student finance this type of reasoning could be acceptable. Since these cases partly rely on precedents concerning child-raising allowances and incapacity benefits, it is conceivable that Member States will try to use similar criteria to restrict frontier workers' access to all types of social advantages.

III.2. Questionable workability

The aims, which the Netherlands and Luxembourg relied upon to justify residence or duration of work requirements, do not merely appear to be of questionable legitimacy

[51] Opinion of AG Mengozzi, *Giersch*, cit., paras 42-45; *Giersch,* cit., paras 53-55.

[52] A. Turmo, *Accès des frontaliers aux aides aux études luxembourgeoises. Des précisions insatisfaisantes sur l'arrêt Giersch*, *in Revue des affaires européennes*, 2016, p. 706.

in and of themselves. The connection established between them and the "sufficient link"-based proportionality tests, and the appropriateness of the criteria chosen by the Member States in order to establish whether such a link exists, are both highly doubtful. Even if one were to accept that the investor's approach to student finance can form the basis for overriding reasons of public interest, it seems unlikely that Member States can, in fact, implement this approach while complying with freedom of movement, by establishing objective criteria which Union citizens may rely on.

The two Member States' reasoning appears to be based on the postulate that a student with a "sufficient link" with the Member State in which she applies for student funding, is extremely likely to join that State's labour force after she has obtained her degree, thus benefiting the national economy. However, not only does this expectation seem contrary to the aims of freedom of movement within the internal market, which should prevent Member States from trying to force graduates to enter their own employment markets,[53] but as AG Sharpston wrote in *Commission v. Netherlands*, "it is not self-evident that past residence is a good way of predicting where students will reside and work in the future".[54] Indeed, it seems just as likely that the student will seek their first job in the very Member State where they have obtained their degree.

This is made all the more obvious, by the fact that, since these cases deal with student finance understood as a social advantage granted to the student's parent, the test seeking to establish integration in the State's society applies not to the student but to their parent.[55] Significantly, the Court itself had rejected the opposite argument that a person residing close to the border with the State where they completed their studies is more likely to enter that State's labour market, because "the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market".[56] If the place where a person studies cannot be considered a systematic indication of the labour market they will join, the same must be true for the place(s) where their parents live, or where they have worked in recent years as frontier workers. Moreover, even if it were possible to prove that a student whose parents work in a Member State is more likely to seek employment there after obtaining a degree, the very nature of the single market means that there is no way to predict

[53] A. VAN DER MEI, *EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems*, in M. DOUGAN, E. SPAVENTA, *Social Welfare and EU Law*, cit., p. 219 *et seq.*, p. 228.

[54] Opinion of AG Sharpston, *Commission v. Netherlands*, cit., paras 43 and 147. The AG was "not convinced that there is an obvious link between where students reside prior to pursuing further education and the likelihood that they will return to that Member State after completing their studies abroad".

[55] *Ibid.*, para. 43: "the Kingdom of the Netherlands cannot legitimately assert that the place where the migrant worker or his dependent children will study will be determined, in a quasi-automatic manner, by the place of residence".

[56] *Prete*, cit., para. 45.

whether they will remain there for a long period of time. The "return on investment" can only be presumed in the short term, if at all.

Systems which make the grant (or the non-reimbursement) of portable funding conditional upon the student's "return" to join a State's labour market, would establish a much clearer logical foundation for the investor's approach. Member States, in fact, seem to be encouraged to resort to such solutions. While AG Sharpston noted that she was not convinced that past residence was a good way of predicting where students would reside and work in the future, she referred in a footnote to "ways of encouraging that to happen", such as making the grant of funding "conditional upon the student returning to the Netherlands to work there for a minimum period of time".[57] Although such rules again appear to clash with the aims of freedom of movement, they at least have the advantage of relying on a demonstrable logical connection between the criterion used and the expected short-term results.

Nowhere in this case law do we find any proof that the Member States gave concrete and precise evidence of the link, between the parents' previous residence or work in a State and their children's integration in that State's labour market, after pursuing higher education abroad. This is mostly apparent in the Court's examination of the proportionality of the specific requirements that are supposed to establish the "sufficient link". The Court's *Commission v. Netherlands* and *Giersch* rulings clearly exclude residence requirements which discriminate against frontier workers but do not exclude the use of criteria based on the duration of the link with a Member State, in order to prove integration. The question then becomes how many years constitute "sufficient" integration and whether non-continuous periods of residence and/or work can be taken into account. The fact that, in the specific cases at issue, the Court found criteria that excluded frontier workers incompatible with the Treaty, does not suffice since the later case law shows that certain criteria, which are discriminatory towards frontier workers, can be acceptable.

In *Bragança*, the Court held that the requirement of an uninterrupted five years period of work in the Member State was discriminatory because it did not apply to residents, and disproportionate to the objective already set out in *Giersch*. Current Luxembourgish law requires the student's parent to have worked in that State for five out of the seven years preceding the application for financial support.[58] It is likely that the Court will consider this proportionate to the overriding requirement, which very clearly refers to the type of situation at issue in *Bragança*. The Court had held that the five-year residence criterion which did not permit

> "the competent authorities to grant that aid where, as in the main proceedings, the parents, notwithstanding a few short breaks, have worked in Luxembourg for a significant

[57] Opinion of AG Sharpston, *Commission v. Netherlands*, cit., para. 147, footnote 74.
[58] *Loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures*.

> period of time, in this case for almost eight years, in the period preceding that application, involves a restriction that goes beyond what is necessary in order to attain the legitimate objective of increasing the number of residents holding a higher education degree, inasmuch as such breaks are not liable to sever the connection between the applicant for financial aid and the Grand Duchy of Luxembourg".[59]

However, even the five-out-of-seven-years rule seems a very high threshold considering the children of migrant workers are, in principle, able to benefit from the grant regardless of the duration of their parent's work in Luxembourg. Moreover, the ruling contains no evidence that the Luxembourgish government showed how such a criterion would be better suited than another to ensure that the students join its labour market after obtaining their degrees abroad. The CJEU's lax approach to the proof of the appropriateness and necessity of national measures discriminating against frontier workers in these rulings clashes with the general trend in the case law.[60]

The only explanation for the explicit admission of a protectionist goal as an overriding requirement (after less explicit admission in *Commission v. Netherlands*) and the lack of proper examination of the proportionality of the national provisions, must be the specific sociological and economic circumstances visible in Luxembourg today. These factors are only partly in AG Mengozzi's Opinion in *Giersch*[61] but they must have played a significant role in the Court's understanding of the Luxembourgish justification for such restrictions to frontier workers' rights. In 2016, Luxembourg's population included 46,71 per cent foreign residents and, in the second trimester of 2017, 45 per cent frontier workers among its employees.[62] Previous case law has shown that this State's small size and large proportion of migrant and frontier workers leads to specific issues regarding the application of freedom of movement under EU Law.[63] Fears that the stability of a portable student finance programme could be threatened by full access for the children of frontier workers, indeed seem more reasonable in the Luxembourgish context than in most Member States. However, precisely because the Court does not consider budgetary concerns acceptable overriding reasons in the public interest, no reference is ever made to the true motives of Luxembourg's restrictive criteria.

[59] *Bragança Linares Verruga and Others*, cit., para. 69.

[60] S. O'LEARY, *The Curious Case of Frontier Workers and Study Finance: Giersch. Case C-20/12, Elodie Giersch v. État du Grand-Duché de Luxembourg, Judgment of the Court of Justice (Fifth chamber) of 20 June 2013*, in *Common Market Law Review*, 2014, p. 612, quoting N. NIC SHUIBHNE, M. MACI, *Proving Public Interest: The Growing Impact of Evidence in Free Movement Cases*, in *Common Market Law Review*, 2013, p. 965 *et seq*.

[61] Opinion of AG Mengozzi, *Giersch*, cit., para. 46: the AG only refers to Luxembourg's atypical economic history and current situation.

[62] According to data collected by STATEC, Luxembourg's National Institute of Statistics, www.statistiques.public.lu.

[63] S. O'LEARY, *The Curious Case of Frontier Workers and Study Finance*, cit., pp. 619-620.

If the Luxembourgish context was a deciding factor in these three rulings, this was not made explicit by the Court. The lack of any indication within the rulings themselves that the admissibility of the overriding reason in the public interest, or any other aspect of the Court's reasoning, is only applicable in the very specific circumstances found in Luxembourg, leaves the rulings open for wider interpretation and creates dangerous precedents. The more or less implicit admission of similar national goals in *Commission v. Netherlands* and the lack of circumscription of the Luxembourg rulings to a specific local context could lead to a multiplication of similar provisions restricting access to social advantages, such as student finance for frontier workers. Once again, the lack of sufficient care in construing and creating precedents is at the root of the problem. A clear indication of the scope the Court wanted to give these rulings would have significantly reduced the potential impact of this ruling and the gravity of the *contra legem* rule being created.

IV. A problematic case law caused by the absence of ambitious legislative reforms

The four rulings concerning student finance could have major consequences for portable student finance in the EU, encouraging Member States to introduce provisions that could make such funding conditional upon the student's return and integration into their own labour markets after having completed their studies. However, more importantly, this case law could have wide-ranging consequences for frontier workers and the status of migrant workers as a whole. The access to social advantages under Regulation 492/2011 is being restricted on the basis of criteria, such as the duration of one's residence or work in the host Member State, which were developed in the secondary law and case law applicable to economically inactive Union citizens. This appears to be an involuntary result of Member States' adaptation to the Court's case law. As new rights become available for economically inactive Union citizens and, as the duration of one's stay in a Member State becomes a determining factor to establish one's status under instruments such as Directive 2004/38,[64] worker status is losing the power it once had. As Member States prioritise the rights derived from Union citizen resident status, legislative reform is necessary to establish a new balance between these rights and those derived from migrant worker status.

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

IV.1. The uncertain development of a specific status for frontier workers

The first consequence of this case law, beyond the specific case of student finance, is an explicit admission by the Court of Justice that unequal treatment between frontier and migrant workers may be justified in relation to social advantages. Indeed, the Court has not yet held that "sufficient links" tests are applicable to migrant workers who reside in the Member State where they work.

This difference cannot be based on Regulation 492/2011 nor on traditional case law on the free movement of workers, but seems to have been introduced by the Court in the 2007 cases *Hartmann* and *Geven*, which are referred to in *Giersch*, and in *Commission v. Netherlands* which itself does not refer to any sources on this issue but can only be understood if one takes into account those rulings.[65] In these three rulings, the Court certainly tried to resist Member States' attempts to exclude frontier workers from access to social advantages. However, in doing so, by introducing a proportionality test linked to a justification, it enabled States to reason in terms of "sufficient links" to their labour markets. The Court thus introduced a fundamental shift in the understanding of the status of frontier workers in EU law and of the basis for their access to equal treatment regarding social advantages.

The Court, in fact, accepts this inequality between migrant and frontier workers as a valid option for Member States. For instance, there is nothing in the case law to suggest that the new Luxembourgish rules on student finance, introduced before the 2016 rulings, are incompatible with either the Treaties or secondary law, despite the fact that they explicitly grant different rights to the children of migrant workers (or of Union citizens having acquired permanent residence) and to the children of frontier workers, with only the latter being submitted to a test establishing the duration of employment.[66] The Court states that such a difference can lead to indirect discrimination,[67] but may be justified by an objective in the public interest if the distinction is based on criteria aiming to establish the student's parents' integration in Luxembourgish society. The fact that frontier workers contribute to paying for these social advantages through taxes, in the same way as migrant workers, no longer seems to shield them from requirements that do not apply to residents. To what extent such distinctions can affect the integrity of frontier worker rights under Art. 45 TFEU is as yet unclear. But there is no reason to suppose that they will remain restricted to the specific cases dealt with in the 2007 rulings and to student finance.

[65] AG Sharpston did refer to *Geven*, cit., but only in support of the statement that Art. 7, para. 2, of Regulation 1612/68 expresses the principle of equal treatment set out in Art. 45 TFEU. The Court referred to the same ruling in support of the equality of migrant and frontier workers as regards Art. 7, para. 2.

[66] Art. 3, paras 2 and 5, of the loi concernant l'aide financière de l'État pour études supérieures, cit.

[67] *Bragança Linares Verruga and Others*, cit., para. 47.

The uncertainty associated with the risk of extension of such exceptions, beyond the limited scope of the current case law, is due to the CJEU's insufficient rigour in developing and applying precedent. There can be no doubt that the Court does rely on precedent, but this line of case law is a good illustration of the deficiencies of the current absence of any clear doctrine of precedent in EU law.[68] For instance, note the ease with which the 2007 cases are quoted as precedent in para. 64 of *Giersch* as a sufficient basis for the statement according to which "with regard *inter alia* to frontier workers, the Court has allowed certain grounds of justification concerning legislation which distinguishes between residents and non-residents carrying out a professional activity in the State concerned, depending on the extent of their integration in the society of that Member State or their attachment to that State".[69] The facts that two of these cases concerned "reverse" frontier workers, that they did not deal with student grants, or that the German legislation at issue in two of them based the criterion applicable to frontier workers on the intensity of the economic activity pursued in the host state are not mentioned. No attempt is made to justify the analogy and a general rule is derived from three peculiar rulings made six years earlier, which seems to allow Member States to impose "real link" tests, which discriminate against non-resident workers. In *Giersch*, this seems to be introduced as a wide-ranging exception to the presumption, restated in *Caves Krier Frères*, that frontier workers have established sufficient integration through participation in the employment market.[70]

Similarly, although the Luxembourgish cases clearly seem linked to the specific circumstances in that Member State, the rulings do not make any reference to a specific economic or social context justifying an exception but appear to state a general rule. This means that they could potentially be quoted as precedent by any Member State seeking to restrict frontier workers' access to social advantages. Such transfers from one line of case law (or one area of the law) to another are frequent in CJEU case law and do not meet the standards of rigour and justification that should be expected in a complex precedent-based system. Greater care in formulating new case law and, most importantly, in engaging explicitly with precedent would probably have allowed the Court to restrict the impact of the 2007 rulings, as well as that of *Commission v. Netherlands* and *Giersch*.

[68] On the use of precedent by the Court of Justice, see the brilliant analyses by J. KOMÁREK, *Precedent in European Union Law: Reasoning with Previous Decisions of the Court of Justice*, Ph.D. Thesis, University of Oxford, 2007, on file with Author; and M. JACOB, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business*, Cambridge: Cambridge University Press, 2014.

[69] *Giersch*, cit., para. 64.

[70] This is quoted in *Giersch*, cit., para. 63.

IV.2. A consequence of Member States' adaptation to Union citizen rights

One interesting aspect of all these rulings is that the Member States were clearly trying to comply with Directive 2004/38. They agreed to grant full equal treatment to migrant workers and to citizens who had acquired permanent residence, as is the case in the legislation passed in Luxembourg following *Giersch*. A test related to the "major" or "minor" nature of the work carried out in the host Member State only appears in the 2007 cases and we see a clear shift towards criteria based on the duration of one's integration in the host State. Even in *Commission v. Netherlands*, where national authorities wanted to apply a criterion related to the duration of residence to all migrant workers, such a solution was clearly inspired by previous case law concerning the "sufficient links" tests applicable to economically inactive citizens and by Art. 24, para. 2, of Directive 2004/38.[71]

The link between frontier workers' rights and the rights derived from permanent residence under the Directive was brought up by the Court of Justice itself in *Giersch*, when it suggested that Member States could make financial support conditional on the parent of the student having worked in Luxembourg, for a minimum period of time. The Court seemed to add an indication as to what that period could be by referring to the five years' residence condition set in Art. 16, para. 1, of Directive 2004/38,[72] although it then denied this analogy's relevance and rejected such a strict criterion in *Bragança.*[73] Despite this apparent contradiction in the case law, the relevance of analogies between the status of frontier workers and that of all citizens under Directive 2004/38 is made clear by the introduction of a test, developed within the case law, concerning economically inactive citizens into the interpretation of Art. 45 TFEU and of Regulation 492/2011.

These rulings clearly show an influence of the case law and legislation concerning economically inactive citizens over the status of certain workers exercising their free movement rights. Although migrant workers' rights appear to be guaranteed, frontier workers find themselves excluded from the full benefit of equal treatment simply because they do not reside in the Member State. This criterion is contrary to the traditional approach which links rights granted under Art. 45 TFEU not to residence but exclusively to worker status. The "sufficient links" test, which is typically based on the duration of residence, finds itself being implemented through duration of work criteria which bear no relation to the principle that the very status of migrant or frontier worker is sufficient, in and of itself, to justify equal treatment.

[71] Cf. Art. 24, para. 2, of Directive 2004/38, cit.: "By way of derogation from paragraph 1, the host Member State shall not be obliged [...] prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families".

[72] *Giersch*, cit., para. 80.

[73] *Bragança Linares Verruga and Others*, cit., paras 65-70.

The transfer of tests constructed in the context of economically inactive citizens' rights to frontier workers also leads to a clear restriction of the rights associated with migrant worker status, a reversal which gives priority to the rights derived from long-term residence in a Member State. Although migrant workers are not necessarily impacted by this case law in the short-term, there seems to be a shift from the higher protection granted to workers, to a distinction between migrant workers and other citizens residing in a Member State, and those workers who do not permanently reside there. This is a fundamental shift in the traditional hierarchy among categories of citizens exercising free movement rights, and it could eventually lead to significant restrictions of frontier workers' rights, as well as those of all citizens exercising their Art. 45 TFEU rights if duration of work or residence criteria became the general rule for economically active citizens too. This would not be a major issue if it was part of a more general and well-reasoned shift towards granting priority to Union citizenship rights and applying tests derived from the idea of a "real link" with sufficient rigour and legal certainty.[74] However, the case law provides no clear indication that this is the case and, instead, gives the impression that the CJEU is almost unwittingly expanding the scope of an exception that was highly questionable in the first place.

IV.3. The need for legislative reform

One of the root causes for this case law is clearly the attempt by many Member States to introduce restrictions on Union citizens' access to social benefits while conforming to Directive 2004/38, and the Court of Justice's attempt to assuage fears of "social tourism" or, more specifically, "study grant forum shopping".[75] By trying to take into account what it felt were legitimate concerns about granting access to social benefits to people who were not truly migrant workers, in the sense that they were "reverse" frontier workers or that they only had a minor professional occupation in the host Member State, the Court made three very awkward rulings which have served as a precedent for a potentially far-reaching limitation of all frontier workers' rights. As in other aspects of free movement law, it has transformed an issue related to the applicability of free movement rights and the appropriateness of national measures to their stated objectives into one of proportionality,[76] using a test which the Court itself considers inapplicable, in principle, to the free movement of workers. This will lead Member States to construct ever more complex legislation establishing criteria designed to prove the (lack of) integration into their societies of Union citizens who are already working there. Unfortunately, the Court's efforts to

[74] See M. Dougan, E. Spaventa, *"Wish You Weren't Here"*, cit., pp. 217-218.

[75] In the words of the Court in *Giersch*, cit., para. 80, and *Bragança Linares Verruga and Others*, cit., para. 57.

[76] N. Nic Shuibhne, M. Maci, *Proving Public Interest*, cit., p. 1005.

maintain frontier workers' rights do not fully compensate for the impact of allowing such a distinction with migrant workers to develop in the first place.[77]

In relation to student finance, one cannot help noticing that this is the result of the absence of an EU-wide mechanism to determine which State should be responsible for funding access to higher education for mobile EU citizens. The case law already shows the absurd complexity of a system designed to fund student mobility, which depends on one of the student's parents being sufficiently "integrated" in a State's economy. *Depesme and Kerrou* shows that proof of what constitutes a parent-child relationship for the purposes of determining access to social advantages is not always easy. The frontier worker may be a step-parent but they must actually contribute to the maintenance of the student, whereas student finance is, in principle, designed specifically so that students whose parents *cannot* support them have access to higher education.[78]

The specific examples which appear in the *Depesme and Kerrou* cases show how problematic the existence of separate categories of mobile students under EU law can become. At the very least, it seems excessively convoluted to have the right to access higher education in another Member State or to benefit from financial support for such studies depend on whether one or one's parents are migrant workers, frontier workers, inactive citizens with permanent residence in another Member State or "static" Union citizens. Moreover, the Court almost seems to be encouraging Member States to set up systems which restrict access to full financial support to students who return to join their labour markets.

Such schemes, indeed, answer Member States' concerns but they are contrary to the aims of free movement. These issues clearly derive from the lack of a sufficient legislative or regulatory framework for student mobility in the EU.[79] The same could be said for the whole of EU citizenship rights, among which the differentiation of separate categories of mobile Union citizens is now rendered even more complex by the apparent pre-eminence of rights derived from residence over those derived from the historical worker status under Art. 45 TFEU. The specific treatment of frontier workers and their children in these rulings defines the "ideal citizen" in an even more restrictive sense than the one identified by Sara Iglesias Sánchez.[80] If the ideal citizen is generally defined as one who moves to another Member State to pursue an economic activity, the ideal student, from the point of view of a Member State providing funding, is one who moves to another Member State temporarily, in order to return and enrich the first State's employment market. While the

[77] Regarding the 2007 cases, see *contra* M. DOUGAN, *Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States*, cit., p. 158.

[78] F. DE WITTE, *Who Funds the Mobile Student? Shedding some Light on the Normative Assumptions Underlying EU Free Movement Law: Commission v. Netherlands*, in *Common Market Law Review*, 2013, p. 210.

[79] H. SKOVGAARD-PETERSEN, *There and Back Again*, cit., p. 802.

[80] S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 371 *et seq.*

general aim of promoting free movement remains, the continuing understanding of free movement and exportable welfare as essentially exchanges between Member States, rather than rights associated with EU citizenship across a common territory, creates limitations on citizens' right to move across the Union.

A major overhaul of secondary law concerning the free movement of citizens is long overdue. Unfortunately, the current political climate does not seem to indicate any progress on this issue. In the absence of an ambitious legislative reform, it is nevertheless imperative that the differentiation between migrant and frontier workers is curtailed if we are to avoid unacceptable restrictions on the rights granted to Union citizens under Art. 45 TFEU. Of course, a more desirable reform should not only concern students or frontier workers but the concept of EU citizenship itself. However, as Niamh Nic Shuibhne writes, such a change would, in reality, require a new federal bargain.[81] In the meantime, she rightly states that "Union citizenship is overburdened with expectations, both polity-related and rights-related, which it simply cannot deliver"[82] and this will remain so for as long as such a fundamental political change remains unlikely. However, while the Court tries to strike an appropriate balance between the rights derived from citizenship and Member States' concerns, we must be careful not to weaken those rights which do have a firm footing in the Treaties.

[81] N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 176.

[82] *Ibid.*, p. 175.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

EU CITIZENSHIP AS A MEANS OF EMPOWERMENT FOR FUNDAMENTAL RIGHTS DURING THE FINANCIAL CRISIS

KATERINA KALAITZAKI*

ABSTRACT: The financial crisis has revealed gaps in the protection of EU citizens against unjust deprivations of their rights, including the right to effective judicial protection, due to the difficulty in challenging the consequences of the conditionality imposed. This *Article* suggests that the deficient protection derives from the limited scope of application of fundamental rights under the Charter of Fundamental Rights of the European Union (Charter) and its unstable judicial interpretation, along with the fact that EU citizenship rights have not developed sufficiently. I will, however, argue that there is a duty to protect citizens within a constitutionalised Union, against any deprivations of their rights contrary to the values of the Union itself. This *Article* aims to fill these gaps, by developing the connection between EU fundamental and EU citizenship rights, using the judicially developed "substance of the rights" doctrine. Various attempts have been made to achieve this end, yet some loose ends remain which are largely addressed in this *Article* through the establishment of a new jurisdictional test, which combines a dynamic reading of Art. 20 TFEU and the "substance of the rights" doctrine, and Art. 2 TEU and fundamental rights as general principles of EU law.

KEYWORDS: EU citizenship – financial crisis – substance of the rights doctrine – constructivism – *Ruiz Zambrano* – fundamental rights.

* PhD candidate, University of Central Lancashire, Cyprus, kkalaitzaki1@uclan.ac.uk.

I. Introduction

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

Although EU citizenship has not played a substantial role in the financial crisis, this *Article* suggests that it is not constrained to its current, "confined" form, since it is designed to encounter constant evolution and progress.[3] Its constructive character culminated in the judicially developed "substance of the rights" doctrine, which has substantially altered the architecture of EU fundamental rights protection towards including purely internal violations within the Union's scope if they amount to emptying Union citizenship rights of their substantive meaning. When placed within a new jurisdictional test, the doctrine can arguably fill the gaps of the current protection system in an effort to link EU fundamental and citizenship rights and propose an alternative, more effective use of rights.

II. Setting the scene: legal characteristics of the "triangular" fundamental rights protection system

The first corner of the "triangle" is the legal concept of Union citizenship,[4] which constituted a decisive step towards a constitutionalised Union;[5] although a relevant personal

[1] D. Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *The Modern Law Review*, 2005, p. 250 *et seq*.

[2] A.J. Menéndez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 455.

[3] Commission of the European Communities, *Intergovernmental Conference: Contributions by the Commission*, Luxembourg: Office for Official Publications of the European Communities, 1991, p. 87; C. Closa, *The Concept of Citizenship in the Treaty on European Union*, in *Common Market Law Review*, 1992, p. 1167.

[4] D. Kostakopoulou, *Ideas, Norms and European Citizenship*, cit., p. 250.

status had clearly matured long before its formal incorporation in the Maastricht Treaty.[6] The list of rights provided under Art. 20 TFEU, although non-exhaustive, fell short of establishing the full range of modern citizenship rights,[7] since no legal connection was declared with fundamental rights. The Commission, however, defined EU citizenship as a dynamic concept which should always reflect "the aims of the Union, [...] stemming from the gradual and coherent development of the Union's political, economic and social dimension".[8] It has indeed proved to be of "constructivist" nature, especially through the Court of Justice's case law, by deepening European integration, based on a federal logic, while broadening the potential impact on EU fundamental rights. Namely, after *Martínez Sala*,[9] EU citizenship demonstrated a shift away from "economic and market citizens", to a social and political dimension,[10] while establishing protection against discrimination based on nationality and a free-standing right to move and reside freely.[11] The constructivist nature of EU citizenship culminated with the inclusion of new, unwritten rights into the concept, through the "substance of the rights" doctrine.

Regardless of the influence exerted by EU citizenship in forming current policies, a significant role was also played by the "effects of institutional interaction",[12] such as the

[5] A. WIENER, *The Constructive Potential of Citizenship: Building European Union*, in *Policy & Politics*, 1999, p. 271 *et seq.*

[6] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, p. 372; R. WELGE, *Union Citizenship as Demoicratic Institution: Increasing the EU's Subjective Legitimacy Through Supranational Citizenship*, in *Journal of European Public Policy*, 2015, p. 56; T. KOSTAKOPOULOU, *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press, 2010; S. O'LEARY, *The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law*, in *Common Market Law Review*, 1995, p. 519.

[7] European Parliament, Resolution of 14 June 1991 on Union citizenship, Doc. A3-0139/91; C. CLOSA, *Citizenship of the Union and Nationality of Member States*, in *Common Market Law Review*, 1995, p. 490.

[8] Commission of the European Communities, *Intergovernmental Conference: Contributions by the Commission*, cit., p. 87.

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

[10] S. O'LEARY, *Putting Flesh on the Bones of European Union Citizenship*, in *European Law Review*, 1999, p. 68 *et seq.*; D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 173 *et seq.*

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

[12] D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship*, cit., p. 264; J.B. LIISBERG, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law of Just an Inkblot*, in *Jean Monnet Working Papers*, no. 4, 2001, p. 7; K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2012, p. 375; G. ARESTIS, *Fundamental Rights in the EU: Three Years After Lisbon, the Luxembourg Perspective*, in *College of Europe Cooperative Research Papers*, no. 2, 2013, p. 2; C.B. SCHNEIDER, *The Charter of Fundamen-*

Charter, whose list of rights is far more extensive, as it reunites a wide range of rights and freedoms – including socioeconomic rights – which have been violated the most during the financial crisis.[13] On the contrary, considering the nature of the two concepts, the list under EU citizenship might currently be limited, but its constructivist nature arguably allows for expansion of the "*inter alia* list" under Art. 20 TFEU. Therefore, while the list of rights under the Charter adequately incorporates the rights violated during the financial crisis, the precise extent of Union citizenship rights cannot be clearly defined from a strictly textual perspective. However, it is generally believed that the essence of EU citizenship is much broader than the list provided by Art. 20, para. 2, TFEU, in the broader sense of what supranational citizenships entail.[14]

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

Nevertheless, the effectiveness and potential use of the instruments in a crisis largely depends on their material and/or personal scope of application and the existence of any legal restrictions. The scope of EU citizenship was largely based on the logic of economic growth,[18] which has arguably diminished its essence and the attempts made in the Maas-

tal Rights of the European Union: The Evolution of the First Bill of Rights of the European Union and Its Position Within the Constellation of National and Regional Fundamental Rights Protection Systems, in *Bridging Europe Working Paper*, 2014, p. 2 *et seq.*

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

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

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

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

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

[18] S. Douglas-Scott, *In Search of Union Citizenship*, in *Yearbook of European Law*, 1998, p. 30 *et seq.*; P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, in *Common Market Law Review*, 2002, p. 971; N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1621 *et seq.*; D. Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 61.

tricht Treaty to connect it with the citizen.[19] However, the CJEU has identified an increasing number of "citizenship cases in which the element of true movement is either barely discernible or non-existent",[20] while the scope *ratione materiae* of EU law has been further stretched to cover virtually hypothetical cross-border situations.[21] EU citizenship has further managed to overcome the strict requirement for a cross-border element completely, by creating an independent, EU citizenship-based right,[22] and redefining the material and personal scope of EU citizenship[23] to allow more cases to fall within the CJEU's jurisdiction. Most importantly, in *Ruiz Zambrano* the Court ruled that Art. 20 TFEU prevents Member States from taking measures which have the effect of "depriving EU citizens of the genuine enjoyment of the substance of rights conferred on them by the citizenship of the Union".[24] It, therefore, created the possibility of EU law "intervening", once the enjoyment of the essence of EU citizenship rights is brought into question.[25]

The restriction on the field of application of the Charter under Art. 51, para. 1,[26] also severely limits the scope of fundamental rights policies, including the relevant jurisdiction for challenges to austerity measures. The Court has not accepted the restriction easily, although it continues to be difficult to predict whether a domestic measure will be found to be bound by the Charter.[27] The Court has interestingly interpreted "implementation" under Art. 51, para. 1, broadly as meaning to "fall within the scope of EU law".[28] In *Åkerberg Fransson*[29] a remote connection with EU law was enough to trigger

[19] E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 40; J. SHAW, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in *Edinburgh School of Law Working Paper Series*, no. 14, 2010, p. 11.

[20] Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*; H. VAN EIJKEN, S.A. DE VRIES, *A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano*, in *European Law Review*, 2011, p. 710; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, in *Legal Issues of Economic Integration*, 2008, p. 50 *et seq.* See further Court of Justice, judgment of 14 October 2008, case C-353/06, *Grunkin and Paul* [GC].

[21] Court of Justice: judgment of 2 October 2003, case C-148/02, *Garcia Avello*, para. 45; judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, para. 45; judgment of 12 July 2005, case C-403/03, *Schempp* [GC], para. 47; E. SPAVENTA, *Seeing the Wood Despite the Trees*, cit., p. 21.

[22] C. O'BRIEN, *"Hand-to-Mouth" Citizenship: Decision Time for the UK Supreme Court on the Substance of Zambrano Rights, EU Citizenship and Equal Treatment*, in *Journal of Social Welfare and Family Law*, 2016, p. 229 *et seq.*

[23] Court of Justice, judgement of 2 March 2010, case C-135/08, *Rottmann* [GC].

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

[25] A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations*, cit., p. 50 *et seq.*

[26] F. FONTANELLI, *The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights*, in *Columbia Journal of European Law*, 2014, p. 193 *et seq.*

[27] *Ibid.*, p. 193.

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

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

General principles of EU law are also invoked when "implementing Union law", in view of the fact that almost all Charter rights have been previously recognised as general principles.[34] Unlike the Charter, however, due to their hybrid nature, the scope of application of general principles is not as restricted.[35] According to AG Bot in his Opinion in *Scattolon*, the restrictive scope of application defined for the Charter was not intended to restrict the scope of application of the fundamental rights recognised as general principles of EU

[29] Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC]; European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures* – Study by E. Spaventa, Brussels: European Union, 2016, PE 556.930, www.europarl.europa.eu.

[30] European Parliament, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights*, cit., p. 10.

[31] F. Fontanelli, *The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights*, cit., p. 200.

[32] European Parliament Resolution P8_TA(2016)0021 of 21 January 2016 on the activities of the Committee of Petitions 2014, para. 24.

[33] European Parliament Resolution P7_TA(2014)0173 of 27 February 2014 on the situation of fundamental rights in the European Union (2012), para. 15.

[34] M.J. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously*, in *Legal Issues of Economic Integration*, 2012, p. 287.

[35] K. Lenaerts, J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, in *Common Market Law Review*, 2010, p. 1640; T. Tridimas, *Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions*, in U. Bernitz, X. Groussot, F. Schulyok (eds), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn: Wolters Kluwer, 2013; Court of Justice, judgment of 13 July 1989, case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*.

law,[36] which can still be invoked where the Charter cannot. Therefore, in terms of the scope of application of the respective instruments, it is argued that a constructivist understanding of EU citizenship can more effectively overcome its restrictions compared to the Charter, demonstrating its greater potential for safeguarding citizens' rights.[37]

III. The modern protection of fundamental rights

To cope with the financial crisis and safeguard financial stability in the euro area,[38] new mechanisms were adopted,[39] including the permanent ESM, which was established as an international, intergovernmental Treaty (ESMT)[40] concluded and ratified by the Member States outside the EU legal order. Accordingly, Art. 136, para. 3, TFEU states that the mechanism is activated if indispensable to safeguard the stability of the euro area as a whole, subject to strict conditionality,[41] which is agreed under the relevant memoranda of understanding (MoUs). As a way to alleviate budgetary concerns, conditionality is based on austerity and includes reductions in public spending, cuts in wages and increases in tax revenues.[42] Although necessary for the mechanism to work,[43] the conditionality imposed was repeatedly challenged for fundamental rights infringements.[44] Due to the diversified legal establishment and the use of the financial assistance mechanisms, the judicial challenges have proven arduous,[45] while the current protection system has been largely ineffective in protecting EU citizens' rights.

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

[37] D. Kochenov, *A Real European Citizenship*, cit., p. 61.

[38] K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014; European Commission, *Quarterly Report on the Euro Area*, in *Economic and Financial Affairs*, 2015, p. 28; Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European financial stabilisation mechanism; Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union of 10 May 2010, Council Document 9614/10 (whereby the governments agreed to provide financial assistance through a Special Purpose Vehicle).

[39] P.M. Rodriguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, in *European Constitutional Law Review*, 2016, p. 270.

[40] Recitals 1 and 5of the Treaty Establishing the European Stability Mechanism (ESM).

[41] View of AG Kokott delivered on 26 October 2012, case C-370/12, *Pringle*, paras 142-143; P. Craig, *Pringle and the Nature of Legal Reasoning*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 208 *et seq*.

[42] S. Theodoropoulou, A. Watt, *Withdrawal Symptoms: An Assessment of the Austerity Packages in Europe*, in *European Trade Union Institute Working Papers*, no. 2, 2011, p. 11 *et seq*.

[43] H. Gilliams, *Stress Testing the Regulator: Review of State Aid to Financial Institutions After the Collapse of Lehman*, in *European Law Review*, 2011, p. 5 *et seq*.; H.R.B. Avalos, *Moral Hazard in the Euro-Zone*, in *Munich Personal RePEc Archive Papers*, no. 61103, 2012, p. 2 *et seq*.; Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, paras 69 and 111.

[44] Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* – Issue Paper by N. Lusiani, I. Saiz, 2014, book.coe.int.

[45] C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 331.

The Court has repeatedly referred to the Charter in its rulings, only to conclude in most cases that it cannot be invoked due to a lack of connection with EU law. Therefore, leaving aside the level of protection which could actually have been offered by the Charter, the Court's persistent preference for interpreting Art. 51, para. 1, in the narrowest way possible when in fact a connection with EU law could be identified, has led EU citizens to a state of deadlock in such actions. This is primarily the case in claims against the Member States, which are under a duty to implement the agreed conditionality into national laws, in order to restore stability and return to sustainable growth.[46] The Court, in *Pringle*[47] and later in *Sindicatos dos Bancarios*,[48] ruled that the provisions of the Charter do not apply to the implementation of the MoUs for the provision of stability support under the ESM since the Member States are not implementing Union law within the meaning of Art. 51, para. 1, of the Charter.[49] The *Pringle* ruling had raised intense debate, since the ESMT indicates that the EU framework should be observed by the ESM members, especially "the economic governance rules" set out in the TFEU,[50] while previous rulings and principles allowed more room for a connecting link with EU law.[51]

Further reluctance was manifested in *Sindicato Nacional*,[52] where the Court narrowly ruled that it had no jurisdiction to determine the request for a preliminary ruling since no link with EU law was found.[53] In contrast, although the Portuguese Government seemed to "have gone further than its commitments in the MoU",[54] the national legislation also makes express reference to the Council Decision on granting financial assistance, thus at least a remote link between the national measure with EU law was evident. The Court of Justice was straightforwardly asked about the validity and interpretation of specific provisions implemented in national law in *Florescu*, where it had for the first time indicated that since the MoU is an act of the EU institutions, it must be regarded as implementing

[46] European Stability Mechanism, The Republic of Cyprus, Central Bank of Cyprus, *Financial Assistance Facility Agreement between European Stability Mechanism and The Republic of Cyprus as the Beneficiary Member State and Central Bank of Cyprus as Central Bank*, www.esm.europa.eu.

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

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

[49] F.J. Mena Parras, *The European Stability Mechanism Through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, in *European Law Review*, 2013, p. 850 *et seq.*; *Pringle*, cit., para. 180.

[50] G. Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case – Law as the Continuation of Politics by Other Means*, in *European Law Review*, 2014, p. 240; A. Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism*, in *Cambridge Law Journal*, 2013, p. 237.

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

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

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

[54] C. Barnard, *The Charter in Time of Crisis: A Case Study of Dismissal*, in N. Countouris, M. Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge: Cambridge University Press, 2013, p. 262.

that law according to Art. 51, para. 1, despite the amount of discretion they have in deciding the implementing measures.[55] As a whole, the Charter failed to protect EU citizens' rights completely during the financial crisis, primarily because the unstable status of the restriction under Art. 51, para. 1, allowed the CJEU to treat claims against Member States as purely internal,[56] even when a remote connection with EU law existed. This approach largely deprived citizens of the ability to proceed in such litigation to the factual assessment of the disputed measures and possible remedies.

The Charter has been more successfully invoked against the acts of the EU institutions tasked with negotiating the MoUs and overseeing the austerity plan.[57] In her view in *Pringle*, AG Kokott emphasised that the Commission remains a Union institution and is bound by the full extent of EU law, even when acting within the framework of the ESM.[58] Accordingly, the Court in *Ledra Advertising Ltd* stated that the Commission retains within the framework of the ESMT, its role as guardian of the Treaties and should refrain from signing an MoU whose consistency with EU law and the Charter is doubtful.[59]

In contrast, fundamental rights as general principles of EU law have rarely been used and only recently with any positive effect. Specifically, *Associação Sindical dos Juízes Portugueses*[60] questioned the compatibility of austerity measures imposed on the judiciary with the principle of judicial independence. The Court clearly sought to overcome the legal barrier of the Charter by invoking the principle of effective judicial protection under Art. 19, para. 1, TEU, since according to the Court, its material scope goes beyond that of Art. 47 of the Charter. Although this is a beneficial development for fundamental rights, it is another demonstration of the Charter's weaknesses, forcing the Court to resort to concepts from the pre-constitutionalisation years, where the protection of rights solely depended on general principles. In contrast to the minimal application of the Charter and the general principles, EU citizenship has not played any substantive role in the austerity measures case law. This is primarily due to the limited list of rights attached to it, rendering it irrelevant in such cases, which are grounded in al-

[55] Court of Justice, judgment of 13 July 2013, case C-258/14, *Florescu and Others* [GC], para. 34.

[56] C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Review*, 2015, p. 400.

[57] Art. 13, para. 3, of the ESM Treaty.

[58] View of AG Kokott, *Pringle*, cit., para. 176; European Parliament, Opinion of the Committee on Constitutional Affairs for the Committee on Economic and Monetary Affairs on the enquiry report on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, 11 February 2014, www.europarl.europa.eu, para. 11.

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

[60] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses* [GC].

leged fundamental rights' infringements, thus demoting citizenship from being "the fundamental status of Union citizens".[61]

The limited applicability of these legal instruments left many wondering how fundamental rights can be among the foundational values of a constitutionalised Union if their use can be limited more easily than it can be invoked. It has also resulted in a gap in effective judicial protection, because of the limited routes available to access justice, the reluctance of the Courts to support those seeking to minimise the impact of the austerity measures and finally because the Court's rulings were largely based on reasons unconnected with law, but rather with politics.[62] The reluctance of the Court is arguably based on the nature of the claims under dispute, which include complex economic situations and can have substantial impact on national democracy.[63] The Court has therefore demonstrated a preference for "evading" performing legal assessment, rather than embarking on judicial activism, so as to avoid the hostile reaction which would ensue. A disparity in the pursuit of Union objectives is also demonstrated, namely that the Court seems more willing now to act to address the current rule of law crisis and protect the democratic judicial processes at the national and European level[64] than it did during the financial crisis. That interest in assessing new routes to equally safeguard citizens' rights and Union's objectives has been prompted, such as the use of EU citizenship in novel areas using the recent "substance of the rights" doctrine.

IV. The Court's "substance of the rights" doctrine

To tackle the limitations of EU law described above effectively, a broader scope of application of fundamental rights is needed, using a "living instrument" with transformative qualities, such as the concept of EU citizenship, and the "substance of the rights" doctrine. *Rottmann*,[65] in particular, has been correctly described as the foundation which paved the way towards the emancipation of EU citizenship from the limits inherent in

[61] *Grzelczyk*, cit., para. 31.

[62] J. Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, in *German Law Journal*, 2013, p. 180 *et seq.*; R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis*, in *Common Market Law Review*, 2017, p. 1123 *et seq.*; D. Ghailani, *Violations of Fundamental Rights: Collateral Damage of the Eurozone Crisis*, in B. Vanhercke, D. Natali, D. Bouget (eds), *Social Policy in the European Union: State of Play 2016*, Brussels: ETUI, 2017, p. 158 *et seq.*

[63] H. Kriesi, *The Political Consequences of the Financial and Economic Crisis in Europe: Electoral Punishment and Popular Protest*, in *Swiss Political Science Review*, 2012, p. 519 *et seq.*; M. Funke, M. Schularick, C. Trebesch, *Going to Extremes: Politics After Financial Crises 1870-2014*, in *European Economic Review*, 2016, p. 230.

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

[65] *Rottmann* [GC], cit.

its free movement origins.[66] The Court indicated the importance of having due regard to EU law when exercising national powers within the sphere of nationality,[67] and specifically ruling that where an EU citizen is addressed by a decision withdrawing naturalisation, which causes him to lose the status and the rights conferred by Art. 20 TFEU, this falls, by reason of its nature and its consequences, within the ambit of EU law.[68] The citizenship-specific rights which a person would lose are thus emphasised, rather than the general human rights imperative, which indicates a substantial increase in the effect of EU citizenship on national citizenship.[69]

The *Ruiz Zambrano* case offered further insights into this development and extended the idea that Member States and the EU should leave the substantive core of rights under EU citizenship intact.[70] In answering the question of whether Art. 20 TFEU has an autonomous character and serves as a sufficient connection with EU law, the Court of Justice developed a jurisdictional test, whereby national measures are precluded if depriving EU citizens of the genuine enjoyment of the substance of EU citizenship rights.[71] Consequently, third-country nationals obtain a derived right to reside in their children's Member State of nationality under Art. 20 TFEU when the factual conditions of *Ruiz Zambrano* are met.[72] This ruling constitutes one of the most inspiring of the last decade, primarily due to it marking a departure from the traditional cross-border concept, as the Court interpreted Art. 20 TFEU as a sufficient link in itself,[73] consequently extending the scope of application of EU law. Secondly, because the prohibition against a violation of the substance of rights has been applied as a self-standing EU test,[74] while it had *hitherto* been applied within the context of the proportionality test. Despite the potentially enormous implications of the doctrine, it has been characterised as frustratingly opaque,[75] since little clarity was provided with regards to the circumstances under which it can be invoked.

Subsequent case law provided further clarity, which can boil down to two major conclusions on the conditions for triggering the recently developed doctrine. Firstly, it is

[66] K. Lenaerts, *EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach*, in *International Comparative Jurisprudence*, 2015, p. 2.

[67] *Rottmann* [GC], cit., para. 41.

[68] *Ibid.*, para. 42.

[69] J. Shaw, *Setting the Scene: The Rottmann Case Introduced*, in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in National Law?*, in *EUI Working Papers Robert Schuman Centre for Advanced Studies (RSCAS)*, no. 62, 2011, p. 4.

[70] *Ruiz Zambrano* [GC], cit.

[71] *Ibid.*, para. 44.

[72] *Ibid.*, para. 45.

[73] H. van Eijken, S.A. de Vries, *A New Route into the Promised Land?*, cit., p. 711.

[74] M. van den Brink, *The Origins and the Potential Federalising Effects of the Substance of Rights Test*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 90 *et seq.*

[75] A. Lansbergen, N. Miller, *European Citizenship Rights in Internal Situations: An Ambiguous Revolution*, in *European Constitutional Law Review*, 2011, p. 290 *et seq.*

evident that not every limitation of a right will trigger the doctrine but only its deprivation. In particular, the Court clarified in *McCarthy*[76] that Art. 21 TFEU is "applicable to situations that have the effect of depriving [a Union citizen] of the genuine enjoyment of the substance of the rights" under EU citizenship or of "impeding the exercise of his right of free movement and residence" within the Member States.[77] The use of the doctrine does not thus depend on an EU citizens' age but rather upon the seriousness of the restraint to the substance of the rights normally conferred. Therefore, a distinction is made whereby the "impeding effect" refers to the traditional line of case law requiring a cross-border link, without requiring the national measures to cause the loss of the status of Union citizens in practice.[78] If no cross-border situation occurs, only a deprivation of the substance of the rights will trigger EU law,[79] requiring the national measure to create more than a "serious inconvenience".

Moreover, in *Dereci*,[80] the Court indicated that the "deprivation" of the substance of the rights refers to situations in which the Union citizen not only has to leave the territory of the Member State but the Union territory as a whole.[81] The strict approach was confirmed in *Iida*,[82] where the Court recalled that "purely hypothetical prospects of exercising the right of freedom of movement" and of that right being obstructed[83] do not establish a sufficient link with EU law. This stricter approach[84] emphasised the need to determine whether there is a relationship of dependency with the child's primary carer,[85] while a major part underlying the Court's reasoning was clearly based on the respect for the division and balance of competences as enshrined in Art. 5 TEU. The Court of Justice affirmed in *Rendón Marín* that the prohibition under Art. 20 TFEU, only applies in "very specific" situations, while this derived right cannot be refused when the effectiveness of EU citizenship is to be disregarded.[86] Therefore, in the Court's view, any possible limitations on the substance of citizenship rights undermine its effectiveness.[87] A *de facto* loss of a Union citizenship right is thus required, which rightly reduces the con-

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

[77] *Ibid.*, para. 56.

[78] K. Lenaerts, *"Civis europaeus sum": From the Cross-border Link to the Status of Citizen of the Union*, in *Online Journal on Free Movement of Workers within the European Union*, 2011, p. 8 *et seq.*

[79] *McCarthy*, cit., para. 56.

[80] Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci and Others* [GC].

[81] *Ibid.*, para. 66.

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

[83] *Ibid.*, para. 77.

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

[85] T. Royston, C. O'Brien, *Breathing and Not-incarcerated, Estranged Fathers Do Not Automatically Cancel Out Mothers' Zambrano Rights*, in *Journal of Social Security Law*, 2017, p. 63.

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

[87] P.J. Neuvonen, *EU Citizenship and Its "Very Specific" Essence: Rendón Marín and CS*, in *Common Market Law Review*, 2017, p. 1205 *et seq.*

sequences of the test without being too intrusive.[88] Although it is believed that fundamental rights should not be ruled out based on a narrow reading of the Treaties,[89] the doctrine should be applied only when EU citizenship rights are deprived and cannot be remedied at the national level, to keep the test within the limits of an acceptable federal and legal balance within the EU.

The second conclusion of the analysis concerns the argument that the "*inter alia* clause" under Art. 20, para. 2, TFEU suggests that citizens can enjoy further rights, beyond those expressly stated therein, not only through the procedure enshrined under Art. 25 TFEU but also through the judicial incorporation of unwritten rights.[90] Following the recent judicial developments, the list has indeed been expanded to include new rights, contrary to the allegation of *McCarthy* that the approach put forward in *Ruiz Zambrano* was only applicable to the "rights listed in Art. 20, para. 2, TFEU".[91] This consideration is arguably rather unexpected and inaccurate since the recent series of case law has protected EU citizens' rights not expressly listed in Art. 20, para. 2, TFEU, such as the right against forced removal from the EU's territory or even the ability to benefit from equality in a wholly internal situation outside the scope of EU law.[92] It is therefore argued that the extent of Union citizenship rights is much broader than what is defined in a textual sense.[93]

V. The way forward: taking the "substance of the rights" doctrine a step further

The establishment of a link between the jurisprudential doctrines of EU citizenship and EU fundamental rights would arguably overcome the deficiencies identified in protecting EU citizens' rights. It also constitutes the "next logical step" to EU citizenship's evolution, since, throughout the integration process, the reinforcement of the protection of fundamental rights and the empowerment of EU citizenship have been two closely connected phenomena.[94] Over the years, various attempts to strengthen this link have

[88] See further: C. Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, in *European Law Review*, 2006, p. 690; A. Wiesbrock, *Disentangling the "Union Citizenship Puzzle"? The McCarthy Case*, in *European Law Review*, 2012, p. 861; S. Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison*, in *European Law Review*, 2014, p. 464.

[89] D. Kochenov, *On Tiles and Pillars*, cit., p. 10.

[90] *Ibid.*, p. 25 *et seq.*

[91] K. Lenaerts, *"Civis europaeus sum"*, cit., p. 9.

[92] Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC], para. 61; L.M. Besselink, *Annotation of Spain v UK, Eman en Sevinger, and ECtHR Case Seviger and Eman v The Netherlands*, in *Common Market Law Review*, 2008, p. 787.

[93] D. Kochenov, *On Tiles and Pillars*, cit., p. 26 *et seq.*

[94] S. Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads*, cit., p. 470; M. van den Brink, *The Origins and the Potential Federalising Effects of the Substance of Rights Test*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 95 *et seq.*; A. von Bogdandy, *Reverse Solange – Pro-*

been endeavoured, yet none has been successful, including the idea of extending the application of EU fundamental rights to mobile citizens,[95] the equation of the "scope of EU law" to Union competences regardless of whether they have been exercised or not[96] and the so-called "reverse" *Solange* proposal.[97]

The starting point for the proposed way forward is that beyond the scope of Art. 51, para. 1, of the Charter, fundamental rights issues are left to national laws and Courts. The recent doctrine, however, allowed some room for EU intervention, if an internal violation amounts to detaching Union citizenship from its substantive sense.[98] The proposal brings the classic doctrine a step further, by proposing a three-step jurisdictional test which will allow EU fundamental rights, beyond the ones mentioned under the list, to be used in exceptional wholly internal situations, through a combined dynamic reading of Art. 2 TEU, the general principles of EU law and Art. 20 TFEU.

V.1. Delimiting the proposal in accordance with Art. 2 TEU

Broadening the scope of application of fundamental rights cannot be achieved merely by extending the list of EU citizenship rights already falling within the sphere of the "substance of the rights" doctrine. It is therefore necessary to focus on cases which require EU intervention by delimiting the scope of application of the proposal to the essential core of rights, which represents the untouchable core or minimum circle of fundamental rights common to the Member States, which cannot be diminished or breached without the right in question losing its value either for the right holder or for society as a whole.[99] This idea is elaborated on the basis of Art. 2 TEU,[100] and Member States remain autonomous in fundamental rights and the rule of law, as long as it can be presumed that they safeguard the essence of these values.

The *Article* strongly supports that the "*inter alia* clause" under the non-exhaustive list of Art. 20, para. 2, TFEU should be interpreted as including the Union's foundational values, which also work as general legal standards of protection for EU citizens. In order for these to be used, they must be narrowed down to the essence of their content, which shares a similar rationale with the term "substance" in the doctrine. Although Art. 2 TEU works as a legal standard of assessment, it cannot be interpreted as meaning

tecting the Essence of Fundamental Rights against EU Member States, in *Common Market Law Review*, 2012, p. 489.

[95] Opinion of AG Jacobs delivered on 9 December 1992, case C-168/91, *Konstantinidis*, para. 46.

[96] Opinion of AG Sharpston, *Ruiz Zambrano*, cit., paras 163-176.

[97] A. von Bogdandy, *Reverse Solange*, cit., p. 490.

[98] *Ibid*.

[99] J. Rivers, *Proportionality and Variable Intensity of Review*, in *The Cambridge Law Journal*, 2006, p. 176 *et seq.*; M. Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, in *European Constitutional Law Review*, 2018, p. 340 *et seq*.

[100] European Council Conclusions of 21-22 June 1993, *Conclusions of the Presidency*.

that the Member States are fully bound by the entire fundamental rights *acquis*, since this is expressly prevented by the Charter and the Treaty itself.[101] On the contrary, it aims at safeguarding the essentials which are "common to the Member States",[102] covering long-standing national traditions[103] used by several constitutional courts and infringements of certain rights which cannot be justified in accordance with the CJEU's case law.[104] In *Tele2 Sverige*,[105] the CJEU ruled that the right to freedom of expression (Art. 11, of the Charter), constitutes one of the EU's foundational values under Art. 2 TEU and it is an essential foundation of a pluralist democratic society.[106]

The right to effective judicial protection also falls under Art. 2 TEU, not only because it constitutes a component of the "rule of law", but also because it is undoubtedly connected to the "respect for human rights". Relatively early in the case law, the Court insisted that the Union is based on the rule of law and has built up in its case law a catalogue of elements inherent to the rule of law within the meaning of Art. 2 TEU,[107] including the principle of separation of powers,[108] the principle of effective judicial protection[109] and effective application of EU law.[110] Consequently, a violation of the rule of law principle under Art. 2 TEU would likely aggravate a fundamental rights infringement, undermine the basic foundations of the EU legal order and the substantive meaning of Union citizenship.[111] Infringements of this right, amounting in their extent and seriousness to the total inexistence of the fundamental right's essence, cannot be adequately

[101] Art. 51, para. 1, of the Charter and Art. 6 TEU.

[102] A. VON BOGDANDY, *Reverse Solange*, cit., p. 500.

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

[104] A. VON BOGDANDY, *Reverse Solange*, cit., p. 491.

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

[106] Y. NAKANISHI, *The EU's Rule of Law and the Judicial Protection of Rights*, in *Hitotsubashi Journal of Law and Politics*, 2018, p. 5.

[107] The word "rule of law" was enshrined in Art. 6 TEU by the Treaty of Amsterdam 1997.

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

[109] Court of Justice: judgment of 28 March 2017, case, *Rosneft* [GC]; judgment of 6 October 2015, case C-362/14, *Schrems* [GC].

[110] M. BRKAN, *The Concept of Essence of Fundamental Rights in the EU Legal Order*, cit., p. 340 *et seq.*; Y. NAKANISHI, *The EU's Rule of Law and the Judicial Protection of Rights*, cit., p. 11; Court of Justice: judgment of 20 November 2017, case C-441/17, *Commission v. Poland* [GC]; *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 31.

[111] Opinion of AG Poiares Maduro delivered on 12 September 2007, case C-380/05, *Centro Europa 7*, para. 22. Guidance can be drawn from the interpretation given to the criterion of a "serious and persistent breach" under Art. 7, para. 2, TEU.

remedied within a Member State but rather at the Union level.[112] However, the use of Art. 2 TEU in the proposal, does not aim to establish its infringement but is rather used as a safety valve towards including only the "essentials" within Art. 20, para. 2.

V.2. Another use of rights

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

As a result of this divergence in interpretations of Art. 51, para. 1, the test's wording is not entirely unambiguous.[113] The question is thus to what extent the Court of Justice could interpret the scope of the Charter so as to fall within the "substance of the rights" doctrine. On the one hand, if the "implementation" concept is adopted according to *Åkerberg Fransson*,[114] the Charter can be considered applicable in situations "falling within the scope of EU law" and be invoked in relation to the "substance of the rights" doctrine.[115] On the contrary, if the Court cleaves to its narrow interpretation, this does not necessarily prevent the application of EU fundamental rights in purely internal situations,[116] depending on the extent to which the narrow scope of the Charter can restrain the scope of those general principles as well.[117] The prevailing view in this *Article* is that the scope of application of the Charter is narrower than that of general principles of EU law and the narrow scope of the former cannot affect that of the latter.

After the pragmatic Opinion of AG Bot in *Scattolon*,[118] the Court in *Associação Sindical dos Juízes Portugueses* clarified that Art. 19, para. 1, TEU can be applied in full, even if the Charter does not apply, in a far-reaching demonstration of the Court's judicial activism in favour of European integration.[119] It is therefore safe to say that at least in the case of effective judicial protection, general principles of EU law have a broader scope of application than the Charter rights, with the latter not affecting the former's

[112] A. von Bogdandy, *Reverse Solange*, cit., p. 501.

[113] According to the Explanations relating to the Charter of Fundamental Rights (2007) the Charter "is only binding of the Member States when they act in the scope of Union law".

[114] *Åkerberg Fransson* [GC], cit.

[115] M.J. van den Brink, *EU Citizenship and EU Fundamental Rights*, cit., p. 282.

[116] *Ibid.*, p. 287.

[117] Editorial Comments, *The Scope of Application of the General Principles of Union Law: An Ever Expanding Union*, in *Common Market Law Review*, 2010, p. 1590.

[118] Opinion of AG Bot, *Scattolon*, cit., para. 120.

[119] *Commission v. Poland* [GC]; *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 29.

application. Accordingly, the argument put forward by AG Mengozzi that the Charter prevents the inclusion of EU fundamental rights in the "substance of the rights" doctrine is not entirely correct[120] or at least is not the only possible explanation. That being the case, and due to the complexity of the Charter's scope, fundamental rights as general principles are more likely to be found eligible to be included in the "substance of the rights" doctrine as part of the new jurisdictional test.

V.3. The paradigm of effective judicial protection

A link between fundamental rights as general principles of EU law and the "substance of the rights" doctrine is accordingly attainable, provided that the relevant principle of EU law is "essential" under Art. 2 TEU and its scope of application is broader than that of Art. 20 TFEU. Although this possibility is arguably achievable for several principles, that of effective judicial protection is the most suitable for examination, since it has been a vulnerable and constantly violated right during the recent financial crisis, and recent judicial developments have substantially added to its significance.[121]

The concept of "effective judicial protection" is dual-faced, occasionally referred to by the Courts as a self-standing "principle"[122] of EU law or as a "fundamental right" under the Charter.[123] It *inter alia* entrusts the responsibility to ensure judicial review in the EU legal order both to the Court of Justice and to the national courts and tribunals.[124] As discussed above, the Court made clear in *Associação Sindical dos Juízes Portugueses* that the scope of application of Art. 19 TEU is broader than that of Art. 47 of the Charter.[125] Through a particularly interesting legal reasoning, the Court built on "operationalising" Art. 2 TEU, by stating that Art. 19 TEU, "gives concrete expression to the value of the rule of law".[126] Without offering any explanation on the applicability of the Charter, the Court overcame the barrier in Art. 51, para. 1, and exclusively relied on Art. 19, para. 1, TEU, merely by requiring the existence of a virtual link between the relevant national

[120] Opinion of AG Mengozzi delivered on 29 September 2011, case C-256/11, *Dereci and Others*, paras 37-39.

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

[122] Court of Justice: judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 39; judgment of 1 April 2004, case C-263/02 P, *Commission v. Jégo-Quéré*, para. 29; judgment of 16 July 2009, case C-12/08, *Mono Car Styling*, para. 46.

[123] Court of Justice, judgment of 29 January 2009, case C-275/06, *Promusicae* [GC], para. 62; D. Leczykiewicz, *"Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?*, in *European Law Review*, 2010, p. 330.

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

[125] *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 32.

[126] *Ibid.*, paras 29-38.

measures and EU law and thus enabled natural and legal persons to challenge a broader set of national measures using this route.[127] This ruling has created a national legal obligation to safeguard judicial independence based on a combined reading of Arts 2, 4, para. 3, and Art. 19, para. 1, TEU, regardless of whether the situation falls within the scope of EU law. The judgment has far-reaching consequences for effective judicial protection since the Court went beyond the minimum effective necessity of the national remedies needed to ensure the application of EU law and gave the green light to proceed with the proposed jurisdictional test.[128]

The new approach towards Art. 19 TEU is believed to have a great resemblance with the "substance of the rights" doctrine, since both were developed by the Court of Justice as the main actor, through the exercise of judicial activism. Moreover, they aimed to overcome the barrier created by the restricting provision of the Charter's scope, while at the same time, both resulted in the enhancement of citizens' rights protection. There are however significant dissimilarities between them, namely that the "substance of the rights" doctrine constitutes a tool for claiming EU legal jurisdiction, which is only triggered when a deprivation of the genuine enjoyment of the substance of the rights under Art. 20 TFEU occurs.[129] It can thus be characterised as a moderately invasive approach, which must be used as a last resort to preserve the effectiveness of EU law. In contrast, the development of Art. 19, para. 1, TEU[130] constitutes a new general obligation, regardless of whether the matter falls within the scope of EU law. It is, therefore, more invasive, since it essentially created a federal standard of review for the principle of judicial independence that can now be directly invoked before national courts, demonstrating that the Court of Justice does not hesitate to issue courageous decisions to secure EU law.[131]

This article proposes a practical tool for claiming jurisdiction under EU law, rather than a general obligation, to enable the review of national breaches of the rule of law occurring outside the areas covered by the EU's *acquis*. Beyond the scope of the Charter, applicants challenging austerity measures have not been able to successfully invoke EU fundamental rights, although numerous assistance packages were clearly granted through EU-established mechanisms, unless the "substance of the rights" doctrine was triggered and the matter was brought within the scope of EU law. According to the current proposal, if an infringed right whose substance had been deprived by a national

[127] *Ibid.*, paras 27-29; L. PECH, S. PLATON, *Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juízes Portugueses*, in *EU Law Analysis*, 13 March 2018, eulawanalysis.blogspot.com.

[128] L. PECH, S. PLATON, *Rule of Law Backsliding in the EU*, cit.

[129] *Ruiz Zambrano* [GC], cit., para. 44.

[130] *Associação Sindical dos Juízes Portugueses* [GC], cit.

[131] M. TABOROWSKI, *CJEU Opens the Door for the Commission to Reconsider Charges Against Poland*, in *Verfassungsblog*, 13 March 2018,verfassungsblog.de.

measure was not expressed within the list of Art. 20, para. 2, the *inter alia* clause applies, suggesting that citizens can also enjoy the protection of other rights.[132] The delimitation of the "eligible" rights is best achieved using Art. 2 TEU, without aiming to establish its infringement, but it is rather used as a boundaries-indicator. Subsequently, the scope of application of the respective Charter right or general principle is assessed to determine its compatibility with the doctrine.

VI. Concluding remarks

Recent judicial developments, including the "substance of the rights" doctrine, have built on the constitutional perspective of EU citizenship,[133] by *inter alia* proving that the list of rights the Treaties express is not exhaustive, but can rather incorporate "unwritten" rights.[134] More importantly, they have granted further opportunities for reinforcing EU fundamental rights protection, such as the proposed expansion of the "substance of the rights" doctrine towards including the principle of effective judicial protection, when a deprivation of the "substance of the rights" under the principle of effective judicial protection occurs. Nevertheless, strong objections against such a proposal can be raised. The proposed expansion of the doctrine can easily be perceived as a threat to the system of allocation of competences. However, no such contradiction occurs, because Art. 2 TEU is employed as a safety valve, confining the expansion of the proposal with the requirement for a deprivation of the substance of the rights, which safeguards national identities, provided that the foundations and the effectiveness of EU law are not eroded.

Moreover, conflicts with other Treaty provisions can emerge, including with Art. 25, para. 2, TFEU which allegedly prevents the desired judicial incorporation of fundamental rights into citizenship status. However, this does not constitute an absolute obstacle to judicial incorporation, since the procedural limitations are read as applying to the legislature only,[135] thus ensuring the constitutional legitimacy of a judicial incorporation. The use of Art. 2 TEU could also raise arguments that the "values on which the Union is built" are illusory in a number of respects.[136] Although an *acquis* on values would give it more weight, the increasing use of the provision in the Court's case law proves the op-

[132] See P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, cit., p. 980 *et seq.*; J.L. da Cruz Vilaça, A. Silveira, *The European Federalisation Process and the Dynamics of Fundamental Rights*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 133 *et seq.*

[133] K. Hailbronner, D. Thym, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, in *Common Market Law Review*, 2011, p. 1253.

[134] D. Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon*, in *International and Comparative Law Quarterly*, 2013, p. 100.

[135] D. Düsterhaus, *EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 643 *et seq.*

[136] D. Kochenov, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, in *Polish Yearbook of International Law*, 2013, p. 150 *et seq.*

posite.[137] Moreover, no conflict with Art. 7 TEU can arise since the proposal is not intending to turn Art. 2 TEU into black-letter law or establish its violation, but rather to "operationalise" it, by shaping the essence of the values expressed therein, which also constitute basic rights to be enjoyed by EU citizens.[138]

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

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

[138] D. Kochenov, *On Policing Article 2 TEU Compliance*, cit., p. 160.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE EUROPEAN CITIZENS' INITIATIVE IN LIGHT OF THE EUROPEAN DEBT CRISIS: A GATEWAY BETWEEN INTERNATIONAL LAW AND THE EU LEGAL SYSTEM

ANTONIO IANNÌ*

TABLE OF CONTENTS: I. Sovereign default: the same old story. – II. The European debt crisis: a first timid step towards a possible solution. – III. The European Citizens' Initiatives: an introductory overview. – IV. The *Anagnostakis* case. – V. Final remarks.

ABSTRACT: This *Article* first briefly examines the attempt made by both Member States and EU institutions to administer financial assistance to countries experiencing economic difficulties. The analysis will consider the legal and other experience of the "state rescue funds": notably the European Stability Mechanism (ESM). The *Article* especially analyses the *Pringle* judgment (Court of Justice, judgment of 27 November 2012, case C-370/12) offering an essential conceptual toolbox, useful to develop a better understanding of the Court of Justice's current interpretation of the "no bail-out clause" (Art. 125 TFEU), and more generally an overview of the Court's doctrine on sovereign insolvency. Following this line of research, the second part focuses on the judgment of the General Court of the European Union in the case *Anagnostakis v. Commission* (judgment of 30 September 2015, case T-450/12). Mr Alexios Anagnostakis − a Greek citizen − proposed the initiative "One million signatures for a Europe of solidarity" to the European Commission. The initiative sought "to establish in EU fundamental law the principle of the "state of necessity"; when the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable". In September 2012 the European Commission, pursuant to Art. 4, para. 2, let. b), of Regulation 211/2011, refused to register the proposal, based on a lack of competence. Mr Anagnostakis then brought an action of annulment before the General Court. Considering the *Anagnostakis* case, the *Article* finally suggests a new role for the EU judges, strictly connected to the right of initiative and the sovereign default issue.

KEYWORDS: sovereign insolvency – ESM – *Pringle* – *Anagnostakis* – ECI – state of necessity.

* Ph.D. in Comparative Law, Ca' Foscari University of Venice, antonio.ianni@unive.it.

I. Sovereign default: the same old story

In his book *The Economic Consequences of the Peace* − published after his resignation as British delegate to the Peace Conference of Paris − the economist John Maynard Keynes wrote: "The war has ended with everyone owing everyone else immense sums of money [...]. A general bonfire is so great a necessity that unless we can make of it an orderly and good tempered affair in which no serious injustice is done to anyone, it will, when it comes at last, grow into a conflagration that may destroy much else as well".[1]

In other words, Keynes suggested a restructuring mechanism for managing the debt crisis that had been provoked by the First World War. As is well known, the Keynes' report was rejected and the consequences of the peace (and the Peace Conference) were dramatic.

To illustrate some of the dominant trends in the contemporary debate, both political and legal, which are closely related to Keynes' proposal in a strict sense, we must begin from a definition of "sovereign default". In this regard, Gaillard affirmed:

> "States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as '*failed States*' or '*Etats sans gouvernement*'. [On the contrary] a '*sovereign default*' is defined as a state's failure to fulfil its financial obligations; such default can be viewed as a breach in the terms of the covenant between the lender and the borrowing state".[2]

The latter definition − which is the only appropriate one within the current analysis − is applicable to most default situations: it includes financial obligations between a state and both its private (e.g. banks) and public creditors (e.g. other states and international financial organisations).

In the first case (private creditors), the problems linked to an eventual breach of contract can be addressed through private international law (especially on the basis of "conflict of laws" reasoning);[3] in the case of relationships between states and between a state and other subjects of international law (e.g. international financial organisations), conflicts can instead be resolved according to the basic principles of the "law of treaties" (mainly the 1969 Vienna Convention, and the exceptions to the *pacta sunt servanda* principle).[4]

[1] J.M. Keynes, *The Economic Consequences of the Peace*, London: Macmillan and Co., 1919, p. 262.

[2] N. Gaillard, *When Sovereigns Go Bankrupt: A Study on Sovereign Risk*, Cham: Springer, 2014, p. 2.

[3] See, e.g., P. Franzina, *Sovereign Bond and the Conflict of Laws: A European Perspective*, in P. Nappi (ed.), *Studi in onore di Luigi Costato*, Vol. 2, Napoli: Jovene, 2014, p. 513 *et seq*.

[4] See C. Jochnick, *The Legal Case For Debt Repudiation*, in C. Jochnick, F.A. Preston (eds), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, Oxford: Oxford University Press, 2006, pp. 149-150.

However, the specific sets of rules attributed to these two aspects are rarely able to cover every sovereign default situation. Indeed, despite the fact that sovereign debt crises have been recurrent events over the past centuries, almost nothing has been done − within international law (especially the conventional one) − to manage with any degree of seriousness a "sovereign bankruptcy". History has shown us how deep the contradiction between social and factual reality and their consideration by the modern legal system can be.

In short, recent circumstances (notably the Argentine and the Greek defaults) have certainly revealed that the lack of global and/or regional mechanisms for orderly sovereign insolvency significantly compromises the debtors' and the creditors' interests.[5] This absence is the result of the intrinsic impossibility of an effective international legislator (in other words, a singular superior authority) and of the conventional *laissez-faire* approach to the international order (both economic and legal). The alternative to a general regime to regulate sovereign default, the "voluntary model", is typically presented as a pragmatic choice, resulting from the application of the criterion of efficiency, especially by those who would deny the former option.[6] For example, this criterion is the core standard for all proposals which exclusively suggest using special contractual clauses in sovereign bonds to implement (*ex-ante*) or control (*ex-post*) certain aspects of debt obligations, such as particular remedies against violations of their terms.[7]

It would appear obvious, however, that a purely voluntary approach cannot take into account all possible eventualities.[8] As one of the many examples, this model does not consider the heterogeneity of creditors (consumers and institutional investors, private and public claims), and it cannot be applied in those cases where the agreement is not a contract but a treaty between states or between a state and an international organisation. This problem is emphasised by the fact that, as anticipated above, sovereign default has proved to be a frequent phenomenon in both Western and non-Western economies, even if we only consider the nineteenth and twentieth centuries.[9] We cannot continue to respond to a phenomenon which has recurred for such a long period using a case-by-case method, which is what the voluntary approach boils down to.

[5] See M. Damill, R. Frenkel, M. Rapetti, *The Argentinean Debt: History, Default, and Restructuring*, in B. Herman, J.A. Ocampo, S. Spiegel (eds), *Overcoming Developing Country Debt Crises*, Oxford: Oxford University Press, 2010, p. 179 *et seq.*; see also M. Megliani, *Restructuring Greek Debt: Alternative Routes*, in *Legal Issues of Economic Integration*, 2017, p. 111 *et seq*.

[6] See S.L. Schwarcz, *Idiot's Guide to Sovereign Debt Restructuring*, in *Emory Law Journal*, 2004, p. 1189 *et seq*.

[7] See, e.g., S. Lanau, The *Contractual Approach to Sovereign Debt Restructuring*, in *Bank of England – Working Paper*, no. 409, 2011. It is a rather old approach: see F. Meili, *Die Staatsbankrott und die Moderne Rechtswissenschaft*, Berlin: Puttkammer und Mühlbrecht, 1895.

[8] See A. Bardozzetti, D. Dottori, *Collective Action Clauses: How Do They Affect Sovereign Bond Yields?*, in *Journal of International Economics*, 2014, p. 286 *et seq*.

[9] See F. Sturzenegger, J. Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises*, Cambridge MA: MIT Press, 2006, p. 3 *et seq*.

There are, therefore, sufficient factual reasons convincingly to support legal arguments in favour of the development of an autonomous international, supranational or transnational legal regime.[10]

II. The European debt crisis: a first timid step towards a possible solution

On the basis of the recurring elements observed from history and applying the "institutional approach" (in other words, suggesting an international convention on sovereign insolvency), some restructuring models were originally proposed in the framework of the International Monetary Fund (IMF).[11]

The involvement of the IMF in state insolvency can be explained in two ways: *a*) over the last century the IMF has consolidated both theoretical and practical know-how, especially concerning balances of payment crises (Art. 5 of the IMF Agreement); and *b*) starting with the Mexican default of 1982, the IMF has intervened in cases of public default with both its financial and technical assistance, thereby expanding − through a customary technique − its areas of intervention.[12] Nevertheless, by continuing to argue in favour of a mechanism introduced by general and/or regional treaties, some scholars have developed quite original legal instruments and architectures, which in contrast exclude IMF involvement.[13]

Despite the presence of numerous and advanced proposals, the inability of the international community to agree on an essential structure has contributed to the continuation of the *status quo*, where public default is not regulated as a unitary, albeit complex, phenomenon but is left to the contractual power of each creditor to negotiate a hypothetical default properly in advance. As Silard correctly synthesised: "There are many explanations as to why the debt crisis developed [...] yet the fact remains that the debt crisis can be seen in retrospect as a crisis, not only of international finance, but also of the international legal system that was waiting to occur".[14]

A partial paradigm shift was realised during the early stages of the Eurozone crisis. The crisis, even though it was mainly caused by exogenous factors, has enormously improved the debate on EU economic governance, which until that point had been weak, to

[10] See, in particular, C.G. Paulus, *Should Politics be Replaced by a Legal Proceeding?*, in C.G. Paulus (ed), *A Debt Restructuring Mechanism for Sovereigns. Do We Need a Legal Procedure?*, London: Bloomsbury Publishing, 2014, p. 191 *et seq*.

[11] See M. Megliani, *Sovereign Debt: Genesis, Restructuring, Litigation*, Cham: Springer, 2015, p. 570 *et seq*.

[12] See B. Fritz-Krockow, P. Ramlogan, *International Monetary Fund Handbook: Its Functions, Policies, and Operations*, Washington DC: IMF Publications, 2007, p. 27 *et seq*.

[13] See H. Schier, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective*, Leiden, Boston: Martinus Nijhoff, 2007.

[14] S.A. Silard, *International Law and the Conditions for Order in International Finance: Lessons of the Debt Crisis*, in *The International Lawyer*, 1989, p. 964.

say the least, despite the fact that the EU economic and monetary policy competences had undergone the most radical changes over recent decades compared to other areas.[15]

The governance reform effort began in 2010, but the first amendment of the Treaties was enacted in 2011: using a simplified procedure, the European Council (Decision 2011/199/EU) modified Art. 136 TFEU and introduced a new paragraph (the third). The new rule affirmed that "the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". The modification was justified on the basis of two different kinds of reason: *a*) the new paragraph allowed for the creation of a regional and monetary-oriented restructuring mechanism; and *b*) the third paragraph formalised within EU law the "policy of conditionality", a practice which had begun in the 1980s.

The origin and the development of the "policy of conditionality" (or "conditionalities") is strictly connected to Art. 5, para. 3, let. a), of the IMF Agreement:[16] "The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund". As noted by Megliani:

> "Towards the end of the 1980s, the policy of conditionality broadened in scope so as to encompass structural reforms to be implemented by the countries drawing on resources. In this respect, it is important to stress that, unlike the Articles of Agreement of the IMF do not establish a clear prohibition on interference in the domestic sphere of member States, with the result that conditionality may lawfully affect the choices of political economy in these countries". [17]

This IMF doctrine was thoroughly tested in the context of the 1982 Mexican default, and conditionalities were included in the IMF order from that moment on, specifically through a series of executive decisions which modified the Bretton Woods IMF Agreement.

That said, the attempt made by the EU institutions to assist countries experiencing economic difficulties financially was inspired by IMF practice, and this attempt finds its final expression in the European Stability Mechanism (ESM).[18]

The ESM was juridically created by emulating the Washington Monetary Fund:[19] it is founded by a special international agreement signed on 2 February 2012 by the mem-

[15] See M.J. DEDMAN, *The Origins and Development of the European Union 1945-2008: A History of European Integration*, London, New York: Routledge, 2010, p. 82 *et seq*.

[16] See M. GUITIÁN, *Conditionality: Past, Present, Future*, in *IMF Staff Papers*, no. 4, 1995, p. 792 *et seq*.

[17] See M. MEGLIANI, *Sovereign Debt*, cit., p. 131.

[18] See A. IANNÌ, *L'insolvenza sovrana come fenomeno di mutazione giuridica imposta. Le politiche di "condizionalità"*, in *Diritto Pubblico Comparato ed Europeo*, 2016, p. 735 *et seq*.

bers of the currency union, which is formally separated from the European Treaties. In other words, the ESM Treaty can be considered as a clear example of the "intergovernmental method" and therefore a slowdown of the "federalist" integration process.

In any case, like the IMF: *a*) the ESM institution is an international public subject with legal personality based in Luxembourg; *b*) voting power depends on each members' *quota*, which is determined by the capital transferred from each Member State to the general common fund; and *c*) access to financial assistance depends on a programme negotiated between the State-debtor and an administrative organ of the ESM institution ("Board of Governors").

As a further proof of the close relationship with the IMF, it is sufficient to recall the first paragraph of Art. 12 of the ESM Treaty, which is explicitly dedicated to conditionality: "If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions".

In addition, it can be noted that the similarities between the IMF and the ESM were implicitly expressed by the Court of Justice in the *Pringle* case.[20] As is well known, the case invited the Court to examine the compatibility of the ESM Treaty with EU law, especially with regard to the so-called "no bail-out clause" (Art. 125 TFEU).[21]

With respect to the compatibility of the mechanism with Art. 125 TFEU, the Court argued that: "Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy" .[22] The system rests on the conditionality mechanism, resulting from this provision and the ESM's practice. The Court considered conditionality the element which ensures the compatibility between EU primary law and the new mechanism (particularly as regards its "economic governance").

The 2012 decision opens itself to several criticisms which are briefly exposed below. First, the argument that the Court in *Pringle* limited itself to providing a strictly literal interpretation of the Treaties must be rejected: for instance, even if the Court connected the conditionality criterion to Art. 125 TFEU, it must be noted that the text of the article does not mention this criterion as a requirement for granting financial assistance.

[19] See, in particular, E. DE LHONEUX, C.A. VASSILOPOULOS, *The European Stability Mechanism before the Court of Justice of the European Union: Comments on the Pringle Case*, Cham: Springer, 2014, p. 35.

[20] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[21] E. DE LHONEUX, C.A. VASSILOPOULOS, *The European Stability Mechanism before the Court of Justice of the European Union*, cit., pp. 1-8.

[22] *Pringle*, cit., para. 137.

Moreover, when focusing on the comparison between the IMF and ESM and analysing certain questions that the judgment addressed, it can be observed that the Court's interpretation of: *a*) Art. 136 TFEU "confirms that Member States have the power to establish a stability mechanism. [...] That amendment does not confer any new competence on the Union";[23] and *b*) Art. 125 TFEU implies a strict ban and at most "does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy".[24]

Therefore, according to the Court, the ESM can be considered as a special instrument established outside EU law, exclusively reserved to the States parties, and strongly dependent on the principle of conditionality.

It is certainly possible to agree with the Court's reconstruction from a certain perspective: the ESM cannot be considered as a general restructuring mechanism. Indeed, the Treaty does not explicitly include: *a*) a set of rules for how to solve conflicts between debtors and creditors and among the creditors themselves (e.g. norms about the ranking and priority of creditors); *b*) a set of rules for all jurisdictional features (e.g. is the Court of Justice competent in cases concerning the assisted state and its private creditors?).[25]

At the same time, still analysing the *Pringle* case, some doubts remain about the interpretation of Art. 125 TFEU. A literal interpretation of this article does not permit recognition of any references to conditionality and consequentially, it does not seem correct to exclude completely – as the Court did – a system founded on different principles from conditionality (e.g. solidarity, mutual aid or the best interests of the population).[26]

As argued by some scholars,[27] the Court has created conditionality as a new *super*-principle of EU constitutional law, introduced in part at least by the Court applying a variant of the teleological approach:[28] in *Pringle* the Court ruled with only respect for the financial stability of the Eurozone in mind, excluding other relevant interests, factors and implications. The Court thus seems intent to mask some of its own decisions behind interpretative practices: decisions which, although they cannot properly be described as *political* decisions, can still be described as well-defined *policies*[29] (in particu-

[23] *Ibid.*, paras 72-73.

[24] *Ibid.*, para. 137.

[25] See C.G. PAULUS, I. TIRADO, *Sweet and Lowdown: A 'Resolvency' Process and the Eurozone's Crisis Management Framework*, in *Law and Economics Yearly Review*, 2013, p. 504 *et seq*.

[26] See A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 121 *et seq*.

[27] See F. LOSURDO, *Lo stato sociale condizionato*, Torino: Giappichelli, 2016, pp. 55-61.

[28] See P. CRAIG, *Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 3 *et seq.*

[29] See M. DAWSON, *The Political Face of Judicial Activism: Europe's Law-Politics Imbalance*, in M. DAWSON, E. MUIR, B. DE WITTE (eds), *Judicial Activism at the European Court of Justice*, Cheltenham: Edward

lar, market-oriented policies).[30] The Court's doctrine is clearly defined: it was meant to equalise sovereign and commercial debt[31] – which is both economically and legally hazardous – as subsequently demonstrated by the evolution of the Eurozone crisis. The bankruptcy of a Member State cannot be compared to business insolvency, including because it can impact on the stability of EU integration.

III. The European Citizens' Initiatives: an introductory overview

Bearing *Pringle* in mind, we will now focus on the judgment of the General Court of the European Union in the case of *Anagnostakis v. Commission*[32] – since both judgments consider the possibility of a jurisdiction to handle state insolvency within the EU law – starting from the general features of the "European Citizens' Initiative" (ECI) which played a key role in this case.

As is probably well known, the ECI was introduced during the drafting of the Lisbon Treaty to provide a new instrument for democratic participation through which every European citizen possesses the right to seek legislative reform of secondary EU law.

All initiatives are addressed to the European Commission: "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[33]

Even before the adoption of the new Art. 11 TEU,[34] on 7 May 2009 the European Parliament adopted a resolution "requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the

Elgar, 2013, p. 11 *et seq*. For observations on the difference between politics and policies in judicial decision making, see, e.g., B.W. Joondeph, *The Many Meanings of Politics in Judicial Decision Making*, in *University of Missouri-Kansas City Law Review*, 2008, p. 347 *et seq*.

[30] See in this regard, *Pringle*, cit., para. 135, and G. Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 635 *et seq*.

[31] For a critical account of this view, see A. Somma, *Biopolitics of Transnational Private Law – Sovereign Debt Crisis, Market Order and Human Rights*, in *German Law Journal*, 2012, p. 1568 *et seq*.

[32] General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*.

[33] Art. 11, para. 4, TEU. See e.g., M.S. Ferro, *Popular Legislative Initiative in the EU: Alea Iacta Est*, in *Yearbook of European Law*, 2007, p. 355 *et seq*.

[34] See J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 133 *et seq*.

citizens' initiative",[35] and on 11 November the same year, the Commission issued a Green Paper on this point.[36]

The Commission, quite enthusiastically, described the new instrument as a tool "to reinforce the democratic fabric of the European Union", as well as one of the most innovative steps introduced by the Lisbon reform process.[37]

The outcome of the combined development of the guidelines provided within the Resolution and the Green Paper was the adoption of Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative. The solution laid out in the Regulation is a hybrid between the more traditional referendum-based mechanisms and more proactive popular initiative instruments.[38]

Citizens' initiatives must be supported by at least one million eligible signatories from at least a quarter of all the Member States,[39] meaning that the quantitative threshold for support is high, and its qualitative aspect is that this high number must be diverse among the Member States.[40]

The procedure for successfully submitting an initiative is divided into five steps: *1*) formation of the body promoting the initiative; *2*) registration of the proposed initiative; *3*) collection of statements of support; *4*) verification and certification by Member States of the statements of support; and *5*) submission of a citizens' initiative to the Commission.

The promoters of the initiative must form a committee of at least seven persons who are residents of at least seven different Member States,[41] and each committee can designate a representative who acts as its interlocutor with the institutions ("the contact person").

Once a committee is formed, the proposal is transmitted to the Commission, but it is not necessary for the proposed initiative to have the form of a legislative act at this stage. It is however required that the proposed initiative clearly defines its subject matter and its objectives.[42]

Once the proposed initiative is registered with the Commission, the latter must verify that the following conditions are met:[43] *a*) "the citizens' committee has been formed

[35] European Parliament Resolution P6_TA(2009)0389 of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative.

[36] Commission, *Green Paper on a European Citizens' Initiative*, COM(2009) 622 final.

[37] *Ibid.*, p. 3.

[38] See G. Bordino (ed.), *A New Right for Democracy and Development in Europe: The European Citizens' Initiative (ECI)*, Brussels: Peter Lang, 2015.

[39] Arts 6 and 7 of Regulation 211/2011, cit.

[40] See M. Dougan, *What Are We to Make of the Citizens' Initiative?*, in *Common Market Law Review*, 2011, p. 1807 *et seq*.

[41] Art. 3 of Regulation 211/2011, cit.

[42] *Ibid.*, Art. 4.

[43] *Ibid.*, Art. 4.

and the contact persons have been designated"; and *b*) "the proposed citizens initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties".[44] If the Commission considers that these conditions are met, the proposed initiative is *officially* registered and made public. From that moment, at least one million valid statements of support must be submitted within 12 months.[45]

Once the term for the collection of the statements of support has expired and if the requirements are met, the initiative is *finally* submitted to the Commission: at this stage, the organisers have the option to explain in detail the content of the initiative either before the Commission directly or in the context of a public hearing before the European Parliament.[46] In this context, the European Commission may express its political considerations as well as its evaluations on the legality of the proposed initiative. The Commission must also identify the actions needed: for example, it might indicate which secondary act is the most appropriate to achieve the initiative's objective (e.g. a directive).

A formal interpretation of the provisions clearly suggests that the Commission has no duty to convert a proposed initiative into a legislative act. On this point, the Regulation provides that: "Where the Commission receives a citizens' initiative [...] within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action".[47] In this regard, the majority of scholars agree that "[t]he decision as to whether and how follow up an initiative is a matter of discretion and political opportunity for the Commission. It is not likely to be reviewed by the European Court".[48]

In other words, the Commission has the power to end a proposed initiative procedure when it exceeds the Commission's competences, but it does not have this power if it only considers it more convenient to legislate by ordinary procedure than to continue with a citizens' initiative: if it refrained from action for this reason, the Commission would violate Regulation 211/2011 and could be sanctioned by the CJEU.[49]

[44] *Ibid.*, Art. 4, para. 2, let. b).

[45] *Ibid.*, Art. 5, para. 5.

[46] *Ibid.*, Arts 10 and 11.

[47] *Ibid.*, Art. 10, para. 1, let. c).

[48] C. Raffenne, *The European Citizens' Initiative: The Influence of Anglo-American Governance Ideology on Recent EU Institutional Reforms*, in E. Avril, J.N. Neem (eds), *Democracy, Participation and Contestation: Civil Society, Governance and the Future of Liberal Democracy*, London, New York: Routledge, 2015, p. 158. For a general overview, see N. Vogiatzis, *Between Discretion and Control: Reflections on the Institutional Position of the Commission within the European Citizens' Initiative Process*, in *European Law Journal*, 2017, p. 250 *et seq*.

[49] See J. Organ, *Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals*, in *European Constitutional Law Review*, 2014, p. 422 *et seq*.

In light of the above, the citizens' initiative instrument can be described as an example of "weak co-governance", which is typical of the European architecture.[50]

IV. The *Anagnostakis* case

On 13 July 2012, the Greek citizen Alexios Anagnostakis, an activist campaigning against the European mechanisms employed during the Hellenic crisis, promoted a citizens' initiative entitled "One million signatures for a Europe of solidarity" for the introduction in EU law of the "principle of the 'state of necessity'", arguing that "when the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable".[51]

However, in a Decision adopted on 6 September 2012, the Commission refused to register the proposed initiative "on the ground that the ECI manifestly fell outside the scope of its powers to submit a proposal for the adoption of a legal act of the Union for the purpose of implementing the Treaties".[52]

Mr Anagnostakis appealed the Commission's decision before the General Court requesting: *a*) for the Decision to be annulled; and *b*) an order requiring the Commission to register the contested initiative.[53] In support of his claims, the applicant alleged "infringement of Art. 122, para. 1, TFEU, of Art. 122, para. 2, TFEU, of Art. 136, para. 1, let. b), TFEU and of rules of international law".[54]

Before proceeding with consideration of the Court's reasoning, it is appropriate to recall the first two paragraphs of Art. 122 TFEU which provide:

> "1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
> 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken".

[50] See A. Somma, *Soft Law sed Law. Diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti*, in *Rivista ritica del Diritto Privato*, 2008, p. 437 *et seq*.

[51] Commission, European Citizens' Initiative, Official Register, *One million signatures for a Europe of solidarity*, ec.europa.eu.

[52] *Anagnostakis v. Commission*, cit., para. 4.

[53] *Ibid*., para. 6.

[54] *Ibid*., para. 10.

The first paragraph of Art. 136 TFEU establishes that: "In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro".

In this respect, it must not be forgotten that the first two paragraphs of Art. 122 TFEU seem to establish a *solidarity principle* that could offer the grounds for an exceptional departure from the general ban on government bail-out established by Art. 125 TFEU (the "no bail-out" clause). Despite the lack of academic consensus on this point,[55] it can be noted that the fact that the Treaty refers to the economic necessity somehow recalls the idea of "state of necessity" in traditional international law.[56] Such a view is especially corroborated by the reference to "exceptional occurrences" beyond the control of the state found in Art. 122, para. 2, which could be considered as a common element shared by Art. 122 and some international rules. In this latter regard, it may be here recalled Art. 25 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts, in which has been provided that "necessity may not be invoked by a State as a ground for precluding wrongfulness if [...] the State has contributed to the situation of necessity".

However, from this argument it is not possible to infer that Art. 122 of the Treaty, by implicitly applying the concept of state necessity in international law, would have provided a general clause according to which the state of ("economic") necessity is a possible ground for legally justifying a condition of state default.

Firstly, if one agreed on the existence of this (hypothetical) general clause, it would neutralise the core set of systems found in the Treaties according to which the financial assistance must always be considered *exceptional*: in other words, such a clause would neutralise Art. 122 itself.

Secondly, the logic of Art. 122 is not to legitimise the unilateral writing off of debt by the Commission, but rather to allow the Commission to trigger action from the Council to grant *extraordinary* and absolutely *temporary* support to the applicant state, which seems deeply distant from the durable financial crisis that normally occurs during a default.

On 30 September 2015, the General Court therefore rejected Mr Anagnostakis's application for the following reasons: on the basis of Art. 122, para. 1 the General Court found that the rule

[55] See K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, New York: Cambridge University Press, 2014, p. 139.

[56] See R. Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, in *Yale Human Rights and Development Journal*, 2000, p. 1 *et seq*.

> "indicates that such measures must be founded on assistance between the Member States. That being so, Article 122(1)TFEU cannot, in any event, constitute an appropriate legal basis for the adoption in EU legislation of the principle of a state of necessity, as conceived by the applicant, in accordance with which a Member State would be entitled unilaterally to decide not to repay all or part of its debt because it is confronted with severe financing problems".[57]

Moving to the second paragraph of the same article, the General Court held that:

> "It has already been held that Article 122(2) TFEU enables the Union to grant *ad hoc* financial assistance to a Member State, subject to certain conditions. It cannot, on the other hand, justify the introduction into the legislation of a mechanism for the abandonment of debt, such as the applicant proposes, if for no other reason than because such a mechanism would be general and permanent (see, to that effect, judgment in *Pringle*)".[58]

In other words, the General Court confirmed the groundlessness of a comparison between the exceptional measures provided by Art. 122 and the economic necessity.

Furthermore, the introduction of the economic necessity into the European legal framework by way of a citizens' initiative would entail the possibility for all Member States to reduce their debts against their public and private debtors. On this point, the Court clarified that:

> "Even if [...] the principle of the state of necessity, as conceived by the applicant, could be classified as financial assistance within the meaning of that provision, the adoption of that principle could not be regarded as a measure of assistance granted by the Union under that provision, in particular because it would cover not only debts owed by the Member States to the Union, but also debts owed by the Member States to other natural or legal persons, both public and private, and that situation is clearly not addressed by Article 122 TFEU".[59]

At the same time, the Court affirmed that

> "there is nothing to support the conclusion, and nor has the applicant in any way demonstrated that the adoption of the principle of the state of necessity, which would authorize a Member State unilaterally to decide to write off its public debt, would serve the objective of coordinating budgetary discipline or fall within the scope of the economic policy guidelines which the Council is entitled to draw up in order to ensure the proper functioning of economic and monetary union".[60]

[57] *Anagnostakis v. Commission*, cit., paras 42-43.
[58] *Ibid.*, para. 48.
[59] *Ibid.*, para. 49.
[60] *Ibid.*, para. 57.

Alongside the Court's reasoning, it is also worth noting that if the Greek initiative had been accepted, its outcome would have been incompatible with Regulation 211/2011 because it would have gone beyond merely applying the Treaties as is required by Art. 2, para. 1, and Art. 4, para. 2, of the Regulation.

If the General Court had decided the case differently, it would have also raised the question of the effects of a judgment of the Court on agreements between states and private actors. Would the Court have the power to interfere in an agreement by declaring it or part of it void? The answer to this hypothetical question is still lacking, but it will not be possible to avoid it for much longer, due to the proposal for the establishment of a European Monetary Fund.[61]

Nevertheless, some commentators have pointed out that Art. 48 TEU (amendment procedure) grants the Commission the option of submitting a proposal for amendment of the Treaties to the Council: one possible line of reasoning would, therefore, be to recognise a citizens' initiative as a possible ground for the Commission to trigger the amendment procedure in order to ensure the successful conclusion of a citizens' initiative procedure.[62] However, the Commission has already expressly and correctly rejected such reasoning: "in accordance with the Treaty, citizens' initiatives can only concern matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[63]

Going back to the judgment, it is interesting to note that the General Court did not recognise the principle of economic necessity at the EU level nor did it acknowledge its (gradual) affirmation at the international law level.[64] More detailed argument from the General Court for such reasoning would have been valuable considering the increasing importance of the role played by regional courts in testing the effectiveness of international customary law.[65]

The General Court's interest in this point was merely to circumscribe the Commission's prerogatives with respect citizens' initiative and therefore its judgment concludes as follows:

> "Even if there is a rule of international law which enshrines the principle of the state of necessity, in accordance with which a Member State would be authorized to not repay its

[61] See *infra*, section V.

[62] See M. Mezzanotte, *La democrazia diretta nei trattati dell'Unione Europea*, Padova: Cedam, 2015, p. 109 *et seq*.

[63] Commission, European Citizens' Initiative, Official Register, ec.europa.eu.

[64] For a possible definition of "economic necessity", see A.O. Sykes, *Economic "Necessity" in International Law*, in *American Journal of International Law*, 2015, p. 296 *et seq.*

[65] See J. Wouters, D. Van Eeckhoutte, *Giving Effect to Customary International Law Through European Community Law*, in *K.U. Leuven Institute for International Law, Working Paper*, no. 25, 2002; see also E. Cannizzaro, *Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza "Intertanko"*, in *Il Diritto dell'Unione Europea*, 2008, p. 645 *et seq*.

> sovereign debt in exceptional circumstances, the mere existence of such a principle of international law would not suffice, in any event, as a basis for a legislative initiative on the Commission's part, since there is there is no conferral of powers to that effect in the Treaties, as is clear from an examination of the various Treaty provisions to which the applicant refers in the present case".[66]

On this point, it must not be forgotten that for matters falling outside its competence, the Commission can rely on Art. 352, para. 1, TFEU, which provides that:

> "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

The article does not preclude the Commission's proposal to be founded upon a citizens' initiative. However, Declaration no. 51 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon clarifies the scope of application of Art. 352 TFEU providing that "the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union",[67] thereby excluding the policies related to the economic and monetary union (Art. 3, para 4, TEU) and therefore Mr Anagnostakis's initiative. At the same time, however, it is also true that declarations are not binding instruments but rather a tool for interpreting the Treaties.[68] In other words, and from a systematic perspective, there is *therefore* no legal impediment to the Commission's invocation of Art. 352.[69]

Mr Anagnostakis appealed the General Court's judgment rejecting his complaint before the Court of Justice.[70] In his appeal, he added two fresh considerations to those already expressed before of the General Court.

He argued that there was an analogous relationship between his initiative and the "odious debt" doctrine, arguing that "the measure sought, non-payment of the abhorrent

[66] *Anagnostakis v. Commission*, cit., para. 65.

[67] Declaration on Article 352 of the Treaty on the Functioning of the European Union, eur-lex.europa.eu.

[68] See J.-C. PIRIS, *The Lisbon Treaty*, cit., p. 65.

[69] In this sense, see e.g., M. MEZZANOTTE, *La democrazia diretta nei trattati dell'Unione Europea*, cit., p. 115.

[70] Appeal brought on 13 November 2015 by Alexios Anagnostakis against the judgment delivered on 30 September 2015 by the General Court (First Chamber) in Case T-450/12 *Anagnostakis v. Commission*.

debt, is designed exclusively to strengthen the budgetary discipline of the Member States and to ensure the proper functioning of economic and monetary union (Art. 136, para 1, TFEU)".[71] Mr Anagnostakis argued against the General Court's view that Art. 136, para. 1, TFEU has no binding effect. He contended that the principle of economic necessity can be applied in case of a debt which is not only conspicuous but also illegitimate according to the odious debt doctrine. The argument is however a daring one in that the doctrine of odious debt is not considered a proper *legal device* in general international law.[72]

A similar analogy to the odious debt doctrine was not drawn in relation to Art. 122 TFEU. The appeal here was limited to reaffirming that Art. 122 alone should be the basis for inferring from the Treaty the existence of the principle of economic necessity in the Treaties as an expression of the *solidarity* principle between Member States.[73]

The most effective reasoning in the appeal was perhaps the following: "International law and the principles of international law constitute sources of law for the European Union. As such they are directly incorporated into and applied in EU law, without more. The Commission has a right of proposal with regard to the application of the foregoing principles of higher-ranking law, even without specific provision in the Treaties should it be considered that the latter is lacking".[74] The assumption behind this reasoning is that the EU has a duty to comply with the rules of international law and therefore the Commission can apply the principle of economic necessity even without a specific competence being provided by the Treaties in this sense because it would simply be applying at the regional level a rule in force at the international level.[75] In this respect, when commenting on recent Court of Justice case law some scholars have pointed out that "there is a broad willingness to take customary international law into account for considering the limits of State or EC jurisdiction and powers, for providing rules of interpretation and for the purpose of filling certain gaps in the internal legal order".[76]

On 7 March 2017, AG Mengozzi presented his Opinion, nevertheless confirming the ruling of the General Court.[77]

He argued that:

[71] Appeal brought on 13 November 2015 by Alexios Anagnostakis, cit., para. 2, let. b).

[72] See R. Howse, *The Concept of Odious Debt in Public International Law*, in *United Nations Conference on Trade and Development Discussion Papers*, no. 185, 2007; see also C.G. Paulus, *The Evolution of the Concept of Odious Debts*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2008, p. 391 *et seq*.

[73] Appeal brought on 13 November 2015 by Alexios Anagnostakis, cit., para. 2, let. c).

[74] *Ibid*., para. 2, let. e).

[75] See F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milano: Giuffrè, 2008, p. 168 *et seq*.

[76] J. Wouters, D. Van Eeckhoutte, *Giving Effect to Customary International Law Through European Community Law*, cit., p. 44.

[77] Opinion of AG Mengozzi delivered on 7 March 2017, case C-589/15 P, *Anagnostakis v. Commission*.

> "The introduction of a mechanism by which a Member State decided unilaterally not to repay its debt cannot therefore be classified under the appropriate measures implemented pursuant to Article 122(1) TFEU, a fortiori where those measures are supposed to be driven by a spirit of solidarity. In addition, such measures are necessarily *ad hoc*, whereas the proposed ECI, as is rightly noted by the General Court, envisages the establishment of a general and permanent mechanism which would continue to be available to Member States if they were to encounter severe difficulties".[78]

Moreover, since the concerns are related to *financial* obligations which often have negative repercussions on the relations between a state and its creditors, Art. 122 TFEU – as interpreted by the General Court – should not be applied:

> "Furthermore, even assuming that the establishment of a principle of the state of necessity constitutes a form of financial assistance covered by the notion of 'appropriate measures' for the purposes of Article 122(1) TFEU, the judgment in *Pringle*, delivered by the Full Court, would seem to have clearly precluded recourse to that article in the case of a Member State experiencing financing problems. The Court thus ruled, more generally, that the subject matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. [...] If the proposed ECI is to be interpreted as seeking to introduce a mechanism by which a Member State decides unilaterally not to repay its debt with regard to the Union, this cannot be regarded as 'financial assistance' granted by the Union to the Member State concerned within the meaning of Article 122(2) TFEU".[79]

As for Art. 136 TFEU, the Advocate General disputed that economic necessity could be beneficial as a systemic measure. On the contrary, the Advocate General maintained that "it is uncertain that the economic health of other Member States, and thus of economic and monetary union, is not affected if those Member States held that non-repaid debt".[80]

In his conclusions, AG Mengozzi contests any possibility for the Commission to intervene in areas in which it does not have competences *specifically* granted to it by the Treaties: "It is indeed the founding treaties on which the Union is built – and they alone – which are capable of forming the basis for the Commission's power to propose an act. It follows from the application of the principle of conferral of powers as defined above that that institution cannot derive any power from the existence in international law of a possible principle of the state of necessity".[81]

[78] *Ibid.*, para. 42.
[79] *Ibid.*, paras 42-43.
[80] *Ibid.*, para. 55.
[81] *Ibid*, para. 62.

This approach might be considered too inflexible, but it still reflects the jurisprudence of the Court of Justice, at least with respect to the citizens' initiative. It is not surprising therefore that the Court completely confirmed the decision of the General Court.[82]

V. Final Remarks

The Court of Justice's decision confirmed a strict dualist approach, without bringing any innovative considerations into its judgment, and therefore almost cast it the role of guarantor of the fundamental principles of the European legal order – a typical function of constitutional courts. The conclusion is therefore twofold.

First, the General Court will protect the core principles of the EU as though they were constitutional, even in an exceptional case such as *Anagnostakis*. It does so by adopting a sort of "counter-limits approach" to defending the conditionality principle and the no bail-out clause.

Second, this reticent approach towards international (economic) law – which includes sovereign insolvency law as well[83] – only seems appropriate with respect to the matters which do *not directly* impinge on EU law. However, it must be noted that – quoting David Foster Wallace – *the water is changing*: within the contemporary context, sovereign bankruptcy is an unavoidable issue even for the EU legal order.[84]

The Eurozone crisis has caused a shift within both the institutional and the legal paradigm in this area. Only three months after the Court of Justice's judgment, the Commission drafted its proposal for the establishment of a European Monetary Fund (substituting the ESM).[85] This proposal allows the Court to judge – even indirectly – sovereign default situations. Unless the intention is to solve this kind of cases only through the provisions of the Treaties, these occurrences will need to be dealt with by employing those few principles of international (economic) law which – according to some scholars – already exist on sovereign solvency.[86]

[82] Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Anagnostakis v. Commission* [GC]. See, in particular, M. Inglese, *European Citizens' Initiatives, Greek Debt and Court of Justice: The Final Chapter*, in *European Papers*, Vol. 3, 2018, No 1, www.europeanpapers.eu, p. 375 *et seq*.

[83] See e.g., M. Herdegen, *Principles of International Economic Law*, Oxford: Oxford University Press, 2016, p. 540 *et seq*.

[84] See E. Mostacci, *La sindrome di Francoforte: crisi del debito, "costituzione finanziaria europea" e torsioni del costituzionalismo democratico*, in *Politica del diritto*, 2013, p. 481 *et seq*.; G. Majone, *From Regulatory State to a Democratic Default*, in *Journal of Common Market Studies*, 2014, p. 1216 *et seq*.; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 15 *et seq*.; F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, Oxford: Oxford University Press, 2016, p. 151 *et seq*.

[85] Commission Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final.

[86] See e.g., A. Reinisch, C. Binder, *Debts and State of Necessity*, in J.P. Bohoslavsky, J.L. Černič (eds), *Making Sovereign Financing and Human Rights Work*, Oxford: Hart, 2014, p. 115 *et seq*.

In other words, and especially regarding this issue, the Court of Justice's dualist approach is no longer sustainable:

> "On the one hand, the ECJ borrowed monistic arguments in order to establish the 'autonomy' of the EU legal order, unifying the legal order of its Member States with the legal system of the EU. On the other hand, the ECJ [...], facing foreign law, which is possibly dangerous for the EU legal order, prefers a dualistic argument separating its own from external legal systems. This provokes the question as to whether this 'Janus Face' can be justified".[87]

After all, something similar has already happened in the past: the principle of *good faith* – both a general principle of law and a general principle of international (economic) law – can be considered a quite significant example of this.

In 1997 the then Court of First Instance – in a judgment which is often quoted in the literature as one of the most important steps towards the general consolidation of this principle – affirmed that: "the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice and is therefore binding on the Community".[88] Thanks also to this brief – and *monist-oriented* – statement/ruling (a sort of game of mirrors between an international judge and a European one),[89] good faith has become an increasingly important pillar of international (economic) law,[90] even for the legal management of the sovereign debt crisis (e.g. the duty to protect creditors' *legitimate expectations* circumscribes the limits of possible contractual changes or renegotiations).[91]

To conclude, reasoning from the case analysed above, a new kind of role can be suggested for the EU judges, even strictly connected to the right of initiative. Despite the "legal irregularity" of some proposals submitted through the citizens' initiative, and while rejecting those which are totally absurd and unreasonable, EU tribunals could still

[87] L. KIRCHMAIR, *The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law*, in *Göttingen Journal of International Law*, 2012, p. 685 *et seq.*; see also J. WOUTERS, J. ODERMATT, T. RAMOPOULOS, *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford: Hart, 2014, p. 249 *et seq*.

[88] Court of First Instance, judgment of 22 January 1997, case T-115/94, *Opel Austria v. Council*, para. 90.

[89] See e.g., R. UERPMANN-WITTZACK, *The Constitutional Role of International Law*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford: Hart, Munich: Beck, 2009, pp. 135, 137 *et seq.*

[90] See e.g., A.R. ZIEGLER, J. BAUMGARTNER, *Good Faith as a General Principle of (International) Law*, in A.D. MITCHELL, M. SORNARAJAH, T. VOON (eds), *Good Faith and International Economic Law*, Oxford: Oxford University Press, 2015, pp. 9, 17 *et seq*.

[91] See in particular, M. GOLDMANN, *Putting Your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, in *Yale Journal of International Law*, 2016, p. 117 *et seq*.

rule on the general "principles" expressed in these initiatives: either by directly affirming what the general principles are or through *obiter dicta*.[92]

Again, considering the Anagnostakis proposal, one of the main interests expressed by the initiative is to achieve the general affirmation of the principle of necessity even with respect to financial agreements (both private and public). From this perspective, EU judges, working on the relationship between regional and international law, can contribute to the development of the international customary law[93] – including the principle supported by the Anagnostakis initiative – and can in any event provide an answer to the "social" needs expressed by certain initiatives, even considering the possibility of a future reform to introduce a form of EU sovereign insolvency mechanism (starting from the EMF).

Once again, it must be noted that if this legislative project is realized, the Court will have to manage several disputes related to – among the many – the Member States' financial assistance from the new so-called EMF. However, it is neither reasonable nor feasible to think that the Court will be able to judge these new disputes only through the actual content of the Treaties (as well as the secondary law), which says almost nothing on the point. This means that the Court of Justice will initially need to apply the only existing rules on the matter, which are nothing else than the economic international law. On the point, it may be appropriate to reconsidering the "dualistic" approach so far adopted by the Court: the *Anagnostakis* case (as well as the *Pringle* case) has been a missed opportunity in this direction.

In other words, by considering both debt and default as physiological phenomena,[94] the present work finally suggests that (even) an EU sovereign insolvency mechanism must imply a balanced evaluation of all the public and private interests at stake, with the specific purpose of designing an equitable *juridical* governance system,[95] which should involve all the EU institutions, and, for the arguments already developed, the Court of Justice above all.

[92] See R. Badinter, S. Breyer (eds), *Judges in Contemporary Democracy: An International Conversation*, New York: New York University Press, 2004, p. 175 *et seq*.

[93] See A. Giannelli, *Customary International Law in the European Union*, in E. Cannizzaro, P. Palchetti, R.A. Wessel (eds), *International Law as Law of the European Union*, Leiden, Boston: Martinus Nijhoff, 2011, p. 93 *et seq*.

[94] See the considerations set out above in section I.

[95] See A. Somma, *Il diritto privato europeo e il suo quadro costituzionale di riferimento nel prisma dell'economia del debito*, in *Contratto e impresa*, 2016, p. 123 *et seq*. In this sense it is possible to broadly speak of "decommodification" of the European integration: see D. Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 3 *et seq*.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE "*DANO* EVOLUTION": ASSESSING LEGAL INTEGRATION AND ACCESS TO SOCIAL BENEFITS FOR EU CITIZENS

DANIEL CARTER* AND MORITZ JESSE**

ABSTRACT: Much attention has been given to recent decisions in the field of EU citizenship, such as *Dano* and *Alimanovic* (Court of Justice: judgment of 11 November 2014, case C-333/13, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*; judgment of 15 September 2015, case C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*). It is often claimed that the Court of Justice has undermined the value of Union citizenship in order to quell the rising tide against immigration and the free movement of persons within the EU. This *Article* will depart from this commonly held view, by claiming that rather than being a revolutionary act, the Court's decision in *Dano* is merely the logical evolution of the case law on Union citizenship after the adoption of Directive 2004/38. The Court treats Directive 2004/38 as a closed system and will only accept residence fulfilling the conditions mentioned in the Directive as legal residence. The consequences of this evolution are Janus-faced: whilst some Union citizens lose out from the current approach, a strict reliance is beneficial to other categories of Union citizens. An exclusive focus on the Directive can be problematic due to the lack of individualised proportionality assessments, as well as an increasing range of social benefits that can be subjected to residence tests. However, the Court is merely accepting the political choices made by the EU legislature, and thus any criticism of the legal situation of EU citizens under Directive 2004/38 may be better placed against the EU legislature, rather than the judiciary.

* PhD Fellow of EU Law, Leiden Law School, d.w.carter@law.leidenuniv.nl.
** Associate Professor of EU Law, Leiden Law School, m.jesse@law.leidenuniv.nl.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/266

KEYWORDS: EU citizenship – legal residence – social assistance – integration – *Dano* – Directive 2004/38.

I. INTRODUCTION

When it comes to welfare entitlement, defining the precise scope of Union citizenship has always been controversial. The decisions of the Court of Justice come under intense scrutiny, with opinion inevitably divided over the role in which the EU judiciary should play in developing the value and rights associated with Union citizenship. Most recently, the "*Dano* Quartet" has caused a stir, as this line of cases illustrates an apparent shift in the approach of the Court and the ultimate outcomes for applicants.[1] There are a number of explanations as to why this shift has occurred. The most common is that the Court has largely abandoned its traditional stance of protecting EU citizens and furthering the value of Union citizenship by interpreting the law away from its market-based confines,[2] and that through its decisions the Court is reacting to the current *Zeitgeist* by attempting to help quell the nationalist tide sweeping across Europe.[3] Alternatively, rather than the Court changing, it is the "inputs" it receives, i.e. the "deserving" nature of the applicants in question, which have led to controversial decisions such as *Dano* and *Alimanovic*.[4]

However, this *Article* will put forward a different, more orthodox reading of the Court's case law concerning the legal integration of EU citizens and their access to social benefits. As others have suggested, either explicitly or implicitly,[5] it will be claimed that

[1] This is defined as the series of cases concerning "special non-contributory cash benefits", which runs through Court of Justice: judgment of 19 September 2013, case C-140/12, *Brey*; judgment of 11 November 2014, case C-333/13, *Dano*; judgment of 15 September 2015, case C-67/14, *Alimanovic*; judgment of 25 February 2016, case C-299/14, *García-Nieto and Others*.

[2] N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom*, in *Common Market Law Review*, 2017, p. 209 *et seq.*; E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 204 *et seq*.

[3] U. ŠADL, S. SANKARI, *Why Did the Citizenship Jurisprudence Change?*, in D. THYM (ed.), *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU*, Oxford, Portland: Hart, 2017, p. 91 *et seq.*, p. 109; C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain*, cit.

[4] G. DAVIES, *Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication*, in *Journal of European Public Policy*, 2018, p. 1442 *et seq.*

[5] See, amongst others, M. VAN DEN BRINK, *The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?*, in R. BAUBÖCK (ed.), *Debating European Citizenship*, Cham: Springer, 2019, p. 133 *et seq.*; K. LENAERTS, *European Union Citizenship, National Welfare Systems and Social Solidarity*, in *Jurisprudencija*, 2011, p. 397 *et seq.*; D. THYM, *The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development*, in D. THYM (ed.), *Questioning EU Citizenship*, cit.; N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit.; G. DAVIES, *Has the Court Changed, or Have the Cases?*, cit.

rather than engaging in a "swift dismantling project" of the Union citizenship *acquis*,[6] *Dano* and *Alimanovic* are not the revolutionary cases that they are sometimes asserted to be. Instead, the developments both before and after *Dano* can be attributed to a natural evolution of the case law following the introduction of Directive 2004/38. In this respect, it will be argued that the alleged "patchwork" of citizenship case law is less patchy and more coherent than commonly assumed.[7] In doing so, it will test the hypothesis that, in fact, the reasoning and outcomes of the decisions, despite some minor details, are on the whole convincing.[8] In other words, setting aside the fractious normative and political arguments surrounding the cases, it will be claimed that legal developments can be explained as mostly logical and predictable evolution of the law. This "evolution" can be best explained as "interpretation cessat in claris", and conforms to the standard method of legal reasoning used by the Court, which dictates that so long as the wording of a legal text is clear, there is no reason to search for a more purposive or teleological meaning beyond its ordinary understanding, as is the case with the adoption and interpretation of Directive 2004/38.[9]

This evolution of the law will be laid out in five stages, in which the Court defined the legal position of economically inactive EU citizens, as well as their residence rights and ability to access social benefits. In this respect, it will be asserted that the key turning point in the case law was in fact the *Förster* case in 2008.[10] It was then that the Court first shifted from a qualitative approach, based on a teleological understanding of the concept of Union citizenship under the Treaty provisions, and using concepts such as "genuine" or "real" links, and "certain level(s) of integration", to a much more quantitative approach, based on a formalistic, textual interpretation of the definitions and conditions for social entitlements and legal residence contained in Directive 2004/38. Despite one or two exceptions, this approach was gradually consolidated in other cases, such as *Ziółkowski* and later *Dano*.[11] The decisions taken by the Court are of course always embedded in a complex mixture of legal and non-legal factors, which all have likely contributed to the Court's

[6] C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 210.

[7] C. O'Brien, *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford, Portland: Hart, 2017, p. 35.

[8] U. Neergaard, *Europe and the Welfare State – Friends, Foes, or ...?*, in *Yearbook of European Law*, 2016, p. 377.

[9] K. Lenaerts, J.A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *EUI AEL Working Papers*, no. 9, 2013, p. 7.

[10] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster*. For example, see the difference between G. Davies, *Has the Court Changed, or Have the Cases?*, cit., and A. Hoogenboom, *CJEU Case Law on EU Citizenship: Normatively Consistent? Unlikely! A Response to Davies "Has the Court Changed, or Have the Cases?"*, in *EU Law Analysis*, 13 November 2018, eulawanalysis.blogspot.com.

[11] Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziółkowski and Szeja*; *Dano*, cit.

attitude and approach.[12] However, it will be shown that the *Dano* judgment can be seen as a product of rather conventional evolution of case law after the adoption of Directive 2004/38, rather than a full-on departure from the pre-existing *acquis*.[13]

The *Article* will then move on to discuss some of the consequences arising from the Court's formalistic interpretation of Directive 2004/38. For EU citizens, the Court's approach is Janus-faced. On the one hand, the inherent privilege for economically active individuals within the Directive will lead to a more precarious position for EU citizens already existing at the margins of society, who can lose protection and even legal residence. The other side of the coin is increased rights for other individuals, such as family members, permanent residents and same-sex spouses, who can benefit from the Directive. The exclusive focus on the Directive is also problematic due to the lack of individualised proportionality tests and automatic tests of legal residence, as well as the ever-broadening scope of social assistance and the range of social benefits that can be subjected to residence tests. It will be concluded that despite the problems associated with a strict interpretation of the Directive, particular for certain groups of EU citizens, it has to be acknowledged that the Court is merely accepting the political choices made by the EU legislature, and by applying such rules as laid down in secondary legislation, the Court is sticking to its standard method of legal reasoning. As such, any criticism of the legal situation of EU citizens under Directive 2004/38, which is often valid and justified, may be better placed against the EU legislature rather than the judiciary.

II. A five-step evolution: integration, lawful residence and social benefits

The following section will briefly explain how legal residence and in particular access to social benefits for economically inactive EU citizens, which range from job-seeker allowances, minimum subsistence fees, to student maintenance grants, has developed over time. In five steps, it will be shown that the *Dano* and *Alimanovic* decisions should not be seen as surprising or even revolutionary decisions but rather as a product of a logical and legally coherent progression of the law following the adoption of Directive 2004/38.

II.1. Step 1: the early cases

Accessing a Member State's "circle of solidarity" has never been open-ended or unconditional for economically inactive EU citizens.[14] Traditionally, workers, the self-employed

[12] G. Davies, *Has the Court Changed, or Have the Cases?*, cit., p. 1443; U. Šadl, S. Sankari, *Why Did the Citizenship Jurisprudence Change?*, cit.

[13] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 907; D. Schiek, *Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus Via Two Forms of Transnational Solidarity*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 360-361.

and their family members were awarded equal treatment not only with regard to accessing employment and working conditions in the strict sense but also with regard to all other social advantages enjoyed by domestic workers and Member State nationals,[15] including accessing all manner of social benefits. Other categories of individuals moving throughout the EU were not granted such far-reaching equal treatment rights.[16] Following the introduction of EU citizenship in the Treaty of Maastricht, academic discussion was divided about its precise nature in this regard, and it took a while before the Court stepped into this discussion in the 1990s with a series of judgments which defined the value of EU citizenship.[17]

In *Martínez Sala*, the Court held that a Spanish national residing lawfully in Germany for over 20 years could not be denied equal treatment with regard to social (security) benefits, in the form of a child benefit,[18] solely because her residence permit granted on the basis of national law had expired and she was yet to receive a new one. In this seminal case, the Court first linked the freedom of EU citizens to move and reside throughout the Union with the principle of equal treatment.[19] The decision excited many commentators about the prospect of equal treatment being extended beyond the realms of economic activity and to arise solely on the basis of residence.[20] At first,

[14] H. VERSCHUEREN, *Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?*, in *Common Market Law Review*, 2015, p. 364.

[15] Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; see R. PLENDER, *Citizenship and Immigration*, in *European Law Business Review*, 2005, pp. 566-567.

[16] This was the case even after the adoption of the "Residency Directives": Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence; Directive 68/360/EEC of the Council of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students; see D. KOSTAKOPOULOU, *Nested "Old" and "New" Citizenships in the European Union: Bringing Out the Complexity*, in *Columbia Journal of European Law*, 1998, pp. 389, 404-405.

[17] For example, see J. SHAW, *The Many Pasts and Futures of Citizenship in the EU*, in *European Law Review*, 1997, p. 554 *et seq.*; J.H.H. WEILER, *European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order*, in *Political Studies*, 1996, p. 517 *et seq.*; D. KOSTAKOPOULOU, *Towards a Theory of Constructive Citizenship in Europe*, in *Journal of Political Philosophy*, 1996, p. 337 *et seq*.

[18] Defined as a family benefit under Art. 1, para. u, let. i), of Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; see also Court of Justice, judgment of 12 May 1998, case C-85/96, *Martínez Sala v. Freistaat Bayern*, para. 24.

[19] Art. 8, para. 2, TEC (now Arts 20 and 21 TFEU) and Art. 6 TEC (now Art. 18 TFEU) respectively.

[20] J. SHAW, *A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union*, in M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Portland: Hart, 2010, p. 356 *et seq.*; see also C. CLOSA, *The Concept of Citizenship in the Treaty of the European Union*, in *Common Market Law Review*, 1992, p. 1137 *et seq.*; C. VINCENZI, *European Citizenship and Free Movement Rights in the United Kingdom*, in *Public Law*, 1995, p. 259 *et seq.*; E. MEEHAN, *Citizenship and the European Community*, in *Political Quarterly*, 1993, p. 172 *et seq*.

this seemed attainable, as the scope of Union citizenship and the link between any kind of legal residence and equal treatment was extended further in the cases of *Baumbast* and *Trojani*.

In *Baumbast*, even though no social benefit was at stake, the Court found a national measure rejecting a right of residence for Mr Baumbast's Colombian wife disproportionate, even though he arguably failed to meet the conditions laid down in the Residency Directive 90/364. His health insurance did not cover *all* risks, as was technically required by this predecessor to Directive 2004/38.[21] The Court held that he could, nevertheless, rely directly on Art. 18 of the Treaty establishing the European Community (TEC), now Art. 21 TFEU, to obtain a right to reside and consequently equal treatment.[22] *Baumbast* showed that Directive 90/364, a Directive adopted *before* EU citizenship was introduced into the EC Treaty, did not limit the wider application of Art. 18 TEC to persons who arguably had no right of residence under secondary legislation.

The Court developed this line of argument further in *Trojani*, where a Frenchman residing in Belgium and working for the Salvation Army in return for "pocket money", food, and shelter was denied access to the Belgian "minimex" social assistance benefit. In its decision, the Court outlined three situations in which an application for social assistance must be granted. The first is if they can be classified as a worker and are engaged in "genuine" economic activity. The second is if the individual has resided in the host-Member State for a "period of time" (*à la Martínez Sala*). *Trojani* added a third situation, where the individual was in possession of a residence permit granted on the basis of *national* law. This was held to be enough to demonstrate lawful residence also from the perspective of EU law, with all the benefits that that status entails. This again demonstrated that a right of residence could be established outside the conditions under applicable secondary legislation. As shall be seen, this far-reaching approach that blurs the distinction between national and EU-based residence is now obsolete in the wake of Directive 2004/38.

Even during this period in which cases were mostly decided in favour of the applicants, the Court, nonetheless, reiterated the ability of Member States to protect their welfare system from unreasonable burdens posed by EU citizens. In *Baumbast*, the Court emphasised that whilst the preamble to Directive 90/364 stated that individuals must not become an unreasonable burden on the host Member State, this was not the case with either Mr Baumbast or the members of his family.[23] In *Trojani*, the Court again emphasised that the right to move and reside is not unconditional and can be limited to ensure the EU citizen has "sufficient resources to avoid becoming a burden on

[21] Art. 1 of Directive 90/364/EEC, cit.

[22] Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R*; see C. TIMMERMANS, *Martínez Sala and Baumbast Revisited*, in M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law*, cit., pp. 345-355.

[23] *Baumbast and R*, cit., paras 90-92.

the social assistance system",[24] even if Mr Trojani's specific situation was not considered.[25] These formative cases emphasised the independent legal value of Union citizenship by linking what is now Art. 21 TFEU directly with the right to equal treatment under Art. 18 TFEU. National residence status was also linked with equal treatment, with primary law seemingly trumping both EU secondary legislation, which at the time proceeded the introduction of Union citizenship, as well as national legislation, with any restriction having to be judged in the light of proportionality.[26]

II.2. Step 2: the reign of vague legal formulas

The next wave of cases that reached the Court before the adoption of Directive 2004/38 concerned a variety of categories of social benefits ranging from student loans to unemployment benefits. Whilst the legal environments which governed the access to these benefits were quite different, the Court dealt with this variety of social benefits in a surprisingly similar fashion. In *Grzelczyk* and *Bidar*, two cases which concerned the rights of students in accessing minimum subsistence benefits and student financing,[27] the Court developed a complicated formula to test when individuals can access equal rights regarding access to social benefits and when such access can be denied. On paper, these formulas recognised the legitimate interest of Member States to protect the financial sustainability of their welfare systems. However, in practice they strengthened the position of individual applicants *vis-à-vis* the State, again arguably circumventing conditions contained in applicable secondary legislation. It should be noted that in the case of students, Directive 93/96 was adopted shortly before the Treaty of Maastricht entered into force in November 1993 and is slightly different from the situation in stage 1 where the relevant secondary law was adopted clearly before Maastricht.

Grzelczyk concerned a French student in Belgium claiming minimum subsistence assistance in the final year of his studies. Art. 1 of Directive 93/96 stated that students must assure national authorities that they were in possession of sufficient resources to avoid becoming a burden on the host-state's social assistance system, whilst Art. 4 further stated that students would have a right of residence so long as these conditions were met. Despite this, the Court held that denying a right of residence could never be the "automatic consequence" of a mere request of social assistance,[28] and that the Member State in question must demonstrate "a degree of financial solidarity" with the migrant, assuming the difficulties are temporary and the individual does not become an "unreasonable" bur-

[24] Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani*, para. 33.

[25] *Ibid.*, paras 32-33.

[26] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit.

[27] Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*; judgment of 15 March 2005, case C-209/03, *Bidar*.

[28] *Grzelczyk*, cit., para. 43.

den on the public finances of the host state.[29] In doing so, the Court introduced a subtle distinction between burdens that could be considered "reasonable" and those so "*un*reasonable" as to break this bond of financial solidarity between the host-state and the migrant student,[30] even if Belgium could in theory still revoke or refuse to renew Mr Grzelcyk's residence permit.[31] However, the decision gave no real indication as to how to define the terms "unreasonable burden", "automatic consequences" and "temporary problems". This was not helpful to national administrators and created a constant threat as denying such an application for social assistance benefits who claim to be hit by temporary financial difficulties could be subsequently found to breach the bonds financial solidarity, as it would not constitute an *unreasonable* burden in the particular case.

In *Bidar*, the Court reiterated that a "genuine link" between the applicant and the host society which could expressed through a "sufficient level" of integration, which would allow economically inactive students to access student financing in the host state. The UK rule, which required three years' residence to establish such a link was held, in principle, to be legal.[32] However, it was too restrictive as it made it impossible for nationals of other Member States to demonstrate "integration" in any way *other* than three years' residence.[33] Assessing Mr Bidar's situation, the Court found that as he had undergone a significant portion of his secondary education in the UK, a "genuine link" with British society could be established.[34] Like in *Grzelczyk*, the Court did not define the terminology used. Authorities only knew that *1*) three years' residence was *not* suitable as an exclusive category for determining a "sufficient degree of integration"; and that *2*) such a sufficient degree of integration existed after undergoing a significant portion of secondary education in the host State. Member States could theoretically protect their social assistance systems from unreasonable burdens by denying claims from individuals with an insufficient links to the host societies. However, the vague formula provided by the Court always meant that they faced an elevated risk of violating EU law.[35] A similar formula was constructed in the context of jobseekers' allowances under the free movement of workers, without any of the terminology being concretely defined. In *Collins*, the Court held that a period of working in the UK for 15 years *before* a claim for a jobseeker's allowance was lodged was too distant to establish a "sufficiently close connection" with the UK's labour market. However, a "genuine link" between the

[29] *Ibid.*, para. 44.

[30] D. Kostakopoulou, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq.*; C. O'Brien, *United in Adversity*, cit.

[31] *Grzelczyk*, cit., paras 42-43.

[32] *Bidar*, cit., para. 52.

[33] *Ibid.*, para. 61.

[34] *Ibid.*, paras 60-62.

[35] N. Nic Shuibhne, *What I tell You Three Times Is True: Lawful Residence and Equal Treatment After Dano*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 920.

jobseeker and the employment market could be established through a "reasonable period" of residence within which the candidate "genuinely" sought work.[36] This would oblige the Member State to grant social benefits "intended to facilitate access to employment in the labour market".[37]

The Court has intermittently used such an approach after the adoption of Directive 2004/38, with the most recent example being *Brey*, decided in 2013.[38] It is argued here that this case is more of an outliner inspired by the older purposive approach of the Court. The case concerned yet another form of social benefit, this time a pension supplement, however, the Court used the same vague formula to determine its accessibility. Austria rejected the claim of a retired German couple, stating that that they did not have legal residence under Directive 2004/38 due to their insufficient income. In its judgment, the Third Chamber of the Court emphasised the link between Art. 7 of Directive 2004/38 and the requirement not to rely on welfare benefits in the country of residence. However, it also stated the common *dictum* that an "automatic" denial of social assistance based on the presumption of insufficient resources is not permitted. Instead, the Member State in question must assess on a case-by-case basis whether an individual places an unreasonable burden on the welfare system of the state as a whole, by reference to the personal circumstances of the individual, and must comply with the principle of proportionality.[39] This, therefore, required national authorities to assess every single claim, even during the first three months of residence where Directive 2004/38 rules out social assistance,[40] against the impact such granting would have on the financial stability of the national welfare system overall. The formula put a heavy burden on the Member States and authorities while handing a significant advantage to individual applicants, and presupposed assessments that many (decentralized) administrations in charge of granting social benefits will find impossible to perform in practice.[41] *Brey* was rendered by the Third Chamber of the Court in the year 2013 and seems out of place compared to subsequent developments.[42] By 2014 the Grand Chamber of the Court had already moved on and adjusted its approach not only in *Da-*

[36] Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*, para. 69.

[37] *Ibid.*, para. 63.

[38] P. MINDERHOUD, S. MANTU, *Back to the Roots? No Access to Social Assistance for Union Citizens Who Are Economically Inactive*, in D. THYM (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford, Portland: Hart, 2017, pp. 197-198.

[39] *Brey*, cit., paras 63-64.

[40] Art. 6 of Directive 2004/38/EC of the European Parliament and 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.

[41] N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit.; C. O'BRIEN, *United in Adversity*, cit., p. 49; see also C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 216.

[42] *Brey*, cit.

no but also in *Förster* and *Ziółkowski*.[43] This suggests that *Brey* is the "swansong" of the Court's old qualitative approach, sang solely by the Third Chamber, rather than a signal of continuity of the orthodox approach.[44]

II.3. Step 3: the *Förster* judgment as a turning point

Directive 2004/38 had the purpose of unifying the fragmented legal landscape consisting of several Directives and Regulations for various groups of EU citizens into one coherent piece of legislation.[45] Furthermore, it sought to codify case law interpreting the rights of EU citizens, which was mostly interpreting Treaty provisions directly. At the same time, it must also be seen as the expression of the EU legislator fulfilling its role under Arts 20 and 21 TFEU to adopt secondary legislation providing for the enjoyment, but also for the limitation and conditions of free movement rights, as opposed to pre-existing Directives. It was adopted specifically on the Union citizenship and equal treatment bases, giving further effect to these primary law rights. We argue here that the Court of Justice effectively took the adoption of Directive 2004/38 as an opportunity to review and adjust its case law. This is akin to what happened in the first step described above, albeit the mirror image of the early cases of the Court, when the Court took the introduction of Union citizenship as an occasion to re-define its approach to free movement in the light of newly established Treaty provisions. The first opportunity the Court had to do this reversal was the *Förster* case rendered in 2008, although the facts of the case took place prior to the adoption and transposition of Directive 2004/38.[46]

Jacqueline Förster was a German national who had studied in Amsterdam. Because she was working, she was able to claim Dutch study benefits as she was an EU worker and therefore entitled to all "social advantages" under Art. 7, para. 2, of Regulation 1612/68. However, during a regular check at a later stage of her studies the Dutch authorities discovered that Ms Förster was not employed for a short period of time and asked her to repay the benefits she received during these months. Relying on the *Bidar* case, Ms Förster argued that she had a sufficient degree of integration and genuine links with the Netherlands and could not be obliged to repay the benefits received. The case seemed an appropriate opportunity to merge the elements of allowing for access to social benefits because of a "certain degree of integration" known from *Bidar* with the elements of tem-

[43] *Ziółkowski and Szeja*, cit.; *Förster*, cit.

[44] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., pp. 892, 905-907; D. Schiek, *Perspectives on Social Citizenship in the EU*, cit., pp. 360-361.

[45] As stated in the Directive, it amends Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[46] For more information on the case see O. Golynker, *Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep, Judgment of the Court (Grand Chamber) of 18 November 2008, Not Yet Reported*, in *Common Market Law Review*, 2009, p. 2021 *et seq*.

poral financial solidarity known from *Grzelczyk*.[47] However, this did not happen. Instead, the Court dramatically changed the substance of the "certain degree of integration" test to access the welfare system of the host-Member State as an economically inactive student, while the very wording of the test used by the Court stated exactly the same. In *Bidar*, three years' residence was just *one* indicator allowed to consider if a genuine link existed. In *Förster*, the Court accepted the Dutch rule defining five years' legal residence as *the only way* of proving a sufficient degree of integration. This condition was by itself held proportionate to the legitimate aim of guaranteeing a genuine link.[48]

In its reasoning, the Court signalled the importance of permanent residence under Art. 16, para. 1, of Directive 2004/38, which also requires five years of legal and continuous residence, even though the Directive was not applicable to the facts of the case.[49] It is remarkable that the Court was able to shift from a qualitative to a quantitative test that assumes a sufficient level of integration only after five year's residence without changing one word in how the reasoning is formulated.[50] Rather, by linking it to the Directive, it was the entire meaning of the concepts that changed. The decision meant in practice that students needed to either be economically active or have permanent residence status under Art. 16, para. 1, of the Directive before they were entitled to student grants and loans. This decision by the Court immediately created more legal certainty and made things much easier for national administrators. It also signalled to Member States that a strict word-for-word transposition of the Directive including restrictions to access public benefits for students would not be struck down by the Court on the basis of primary EU law and earlier decisions such as *Bidar*. The rules as contained in the Directive, particularly those relating to permanent residence and student financing were a key part of the political compromise leading to the Directive's adoption.[51] As later case law has shown, this promise was lived-up to by the Court.

II.4. Step 4: *Ziółkowski* and the (new) dominance of Directive 2004/38

The next step in our evolution was *Ziółkowski*, decided in 2011 and which concerned the nature of the newly established permanent residence status under the Directive.[52]

[47] On this issue, see M. Jesse, *The Legal Value of "Integration" in European Law*, in *European Law Journal*, 2011, p. 174 *et seq.*; S. O'Leary, *Equal Treatment and EU Citizens: A New Chapter on Cross-border Educational Mobility and Access to Student Financial Assistance*, in *European Law Review*, 2009, p. 612 *et seq.*; see also A. Hoogenboom, *CJEU Case Law on EU Citizenship*, cit.

[48] *Förster*, cit., paras 52-54.

[49] *Ibid.*, para. 55.

[50] M. Jesse, *The Legal Value of "Integration" in European Law*, cit.; S. O'Leary, *Equal Treatment and EU Citizens*, cit., p. 622.

[51] See M. Jesse, *Joined Cases C-424/10, Tomasz Ziółkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgement of the Court of Justice (Grand Chamber) of 21 December 2011, nyr.*, in *Common Market Law Review*, 2012, p. 2003 *et seq*.

[52] *Ziółkowski and Szeja*, cit.

In particular, it threw light on the issue of which forms of residence gives access to permanent residence rights under Art. 16, para. 1, and whether the qualifying residence period of five years could have started before Directive 2004/38 had entered into force and transposed by Member States, or even before the EU citizen's Member State of origin joined the EU. The Court had already established previously in *Lassal* that residence completed "in accordance with earlier European Union law instruments" should be considered when determining whether there has been five years residence under Art. 16, para. 1.[53] However, *Ziółkowski* concerned the relationship between Art. 16, para. 1, permanent residence and residence on the basis of *national* humanitarian law, even though the applicants were economically inactive and did not have sufficient resources under Art. 7. In his Opinion, the Advocate General cited the Court's reasoning in *Dias*,[54] which stated that permanent residence under Directive 2004/38 was, above all, a tool to assist with the integration of EU citizens in the host Member State. In his Opinion, this meant that length of residence on the basis of national law as well as EU law should be considered, as well as taking into account other "qualitative factors".[55]

However, the Court continued on the path of a more textual, formalistic interpretation of the Directive. Instead of accepting at all types of legal residence under EU *and* national law, the Court held that the definition of "legal" and "continuous" residence for five years under Art. 16, para. 1, of the Directive must be interpreted autonomously from national law. There is, after all, no reference to national law in Arts 7 or 16, para. 1, of Directive 2004/38. Hence only residence in conformity with Art. 7 of the Directive can lead to permanent residences status under Art. 16, para. 1. This includes, however, periods of residence in compliance with the conditions mentioned in Art. 7 before the entry into force of the Directive and even before the accession of new Member States.[56] In *Ziółkowski*, the applicants could not prove that they had sufficient resources in the five-year period before requesting permanent residence, hence their residence did not comply with the conditions of Art. 7 of the Directive and permanent residence under Art. 16, para. 1, could not be established.

Neither the Advocate General nor the Court mentioned the *Förster* judgment in *Ziółkowski*. Others have, therefore, marked *Ziółkowski* and not *Förster* as the turning point from a *rights-opening* to a *rights-closing approach* only.[57] Yet, it is our claim that

[53] Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*, para. 40.

[54] Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64; Opinion of AG Bot delivered on 14 September 2011, joined cases C-424/10 and C-425/10, *Ziółkowski and Szeja*, para. 53.

[55] Opinion of AG Bot, *Ziółkowski and Szeja*, cit., paras 53-54.

[56] *Ziółkowski and Szeja*, cit., para. 63; see also M. JESSE, *Joined Cases C-424/10, Tomasz Ziółkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgement of the Court of Justice (Grand Chamber) of 21 December 2011, nyr.*, cit.

[57] U. ŠADL, S. SANKARI, *Why Did the Citizenship Jurisprudence Change?*, cit., p. 91 *et seq.*; N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 917.

both cases form a continuum. The absence of *Förster* in *Ziółkowski* may be because the subject matter in each case was different, or because, at least officially, the Directive did not yet apply in *Förster*. Whilst *Förster* dealt with student grants, it did touch upon permanent residence under Directive 2004/38 indirectly as five years of legal residence was the *only* way under Dutch law to show the required "degree of integration". However, the seeds sowed in *Förster* in 2008 fell on fertile ground in *Ziółkowski*, which confirmed the closed system to define the conditions for legal residence and resulting equal treatment exclusively on Directive 2004/38. After these two judgments the Directive emerged as the only frame within which the Court establishes legality of residence of EU citizens. In *Förster*, this link was more indirect, by validating Dutch law which transposed the Directive.[58] In both cases, however, only the Directive and the choices made by the EU legislator therein were looked at to determine the status of the applicant in a distinct departure from the above mentioned pre-*Förster* jurisprudence on Union citizenship.

II.5. Step 5: *Dano*, *Alimanovic* and beyond: the inevitable and logical next step?

Our final step is the *Dano* case and subsequent decisions of the Court. In *Dano*, the Court allowed Germany to refuse social minimum assistance benefits for an unemployed Romanian mother, because she did not meet the conditions for legal residence in Art. 7 Directive 2004/38. She was neither a worker nor did she have sufficient resources at her disposal. Therefore, she could not rely on the right to equal treatment under Art. 24, para. 1.[59] Simply put, *Dano* confirmed that individuals cannot claim equal treatment under Art. 24 unless they have a right to reside under Art. 7 of Directive 2004/38, at least within the first five years of their residence in the host Member State.[60] As in *Ziółkowski*¸ the Court assessed legal residence and equal treatment rights exclusively within the framework created by Directive 2004/38. It declined to consider any potential quantitative or qualitative factors or "links" between Ms Dano and Germany outside of the Directive.

It is our contention that after *Förster* and *Ziółkowski*, the judgment in *Dano* was inevitable. If Union citizens, after *Ziółkowski*, need to comply with the conditions laid down in Art. 7 of Directive 2004/38 in order to obtain long-term residence status under Art. 16, pa-

[58] In *Förster*, cit., para. 55, the Court explicitly discusses permanent residence in the context of Art. 24, para. 2, of the Directive: "Directive 2004/38 [...] provides in Article 24(2) that, in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families (i.e. students) the host Member State is not obliged to grant maintenance assistance for studies, including vocational training, consisting in student grants or student loans, to students who have not acquired the right of permanent residence".

[59] *Dano*, cit., para. 82.

[60] D. Thym, *When Union Citizens Turn into Illegal Migrants: The Dano Case*, in *European Law Review*, 2015, p. 249 *et seq.*; N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit.

ra. 1, then it stands to reason that they must comply with the conditions of Art. 7 *during* the initial five-year period of residence if they wish to claim equal treatment and social benefits under the same legal instrument. Separate concepts of legal residence for the purposes of Arts 6, 7, 16, para. 1, and/or 24, of Directive 2004/38 would be detrimental to legal certainty and coherence, which the Directive was meant to introduce. Put in simple terms, after *Förster*, *Ziółkowski*, and *Dano*, access to permanent residence, legal residence and equal treatment, including access to social benefits for economically inactive EU citizens, depends entirely on the *same* form of legal residence under Directive 2004/38. Primary EU law effectively plays no more role in this regard.

The Court followed the same logic in 2015 in *Alimanovic*.[61] The case concerned a Swedish mother and her daughters, who returned to Germany in 2010 after some years' absence. They worked intermittently for 11 months before they lodged an application for social minimum subsistence benefits.[62] The question was whether, as jobseekers who were formerly employed years ago and for 11 months just prior to their application, they should retain the status of worker, or be treated as jobseekers. Against the advice of AG Wathelet,[63] the Court upheld the link made in *Dano* between residence in conformity with Art. 7 and equal treatment under Art. 24, para. 1, of the Citizens' Directive. As in *Dano* and *Ziółkowski*, their residence and equal treatment rights were assessed under the Directive only, with primary EU law playing no role. The Court then proceeded to apply the rules on retaining worker status as laid down in the Directive. According to Art. 7, para. 3, let. c), of Directive 2004/38, Union citizens retain the status of worker for a minimum of six months, after employment of less than 12 months. Hence Ms Alimanovic and her daughter could not retain worker status for longer than six months. Whilst they still could reside as a jobseeker under Art. 14, para. 4, let. b), the express derogation in Art. 24, para. 2, allowed Germany to deny them social assistance. Whilst not decisive in the case itself, the Court also established a new test for determining what is an "unreasonable" burden under the Directive. It moved away from a duty to establish that each individual claim of social security benefits would amount to an unreasonable burden, and instead held that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[64]

The final case of the *Dano* "Quartet" is *Garcia-Nieto*.[65] The case concerned two Spanish nationals that moved to Germany in 2012. The couple were neither married nor in a civil partnership but did have a child together. The mother moved in April 2012 with their

[61] *Alimanovic*, cit.

[62] See also the excellent summary by N. Nic Shuibhne, *What I Tell You Three Times Is True*, cit., pp. 911-913.

[63] Opinion of AG Wathelet delivered on 26 March 2015, case C-67/14, *Alimanovic*, paras 99-109.

[64] *Alimanovic*, cit., para. 62.

[65] *García-Nieto and Others*, cit.

common child in order to work, whilst the father moved in June of the same year with his child from a previous relationship. After arriving in Germany, the father applied for a minimum subsistence social assistance under the German Social Law, i.e. the *Hartz-4* benefit under the German Social Code II (SGB II), the same social benefits as in *Dano*, from July until September. His claim was denied because he had not been residing in Germany for longer than three months.[66] The Court held that the father and son were not entitled to this social assistance benefit as Art. 24 of Directive 2004/38 contained an explicit derogation whereby the host Member State is not obliged to grant social assistance during the first three months of residence.[67] The Court emphasized, as did the Advocate General,[68] that this limitation according to Recital 10 of the Directive seeks to maintain the "financial equilibrium of the social assistance systems of the Member States".[69] The Court also makes a link with the system of retention of worker status in *Alimanovic*, asserting that Directive 2004/38 approach by confirming that the German rule excluding such persons from social assistance claims guarantees a "significant level of legal certainty and transparency [...] while complying with the principle of proportionality".[70] The Court here also confirms the new approach taken in *Alimanovic* to determining what is an unreasonable burden.[71]

II.6. The relationship between primary and secondary law

After describing the evolution of case law throughout the above mentioned five steps, it is necessary to reflect on the changing legal framework for EU citizenship during this period. The Court has had to define the temporal and constitutional relationship between pre-existing secondary EU law,[72] the provisions on Union citizenship,[73] as well as Directive 2004/38. The introduction of EU citizenship in 1993 did not immediately lead to a revision of pre-existing secondary law by the EU legislator. As such, it was not until 2004 that the full range of rights and conditions applicable to EU citizens was codified. Beforehand, the Court was required to "fill out" the Treaty provisions on EU citizenship and define their precise relationship with secondary pre-existing secondary legislation in its *acquis*,[74] as has been shown above in steps 1 and 2. The Court did not overrule

[66] It should also be noted that the mother and common child were entitled to such benefits due to the mother's economic activity, however, the father and son were not seen as "family members" deriving rights under the Directive.

[67] *García-Nieto and Others*, cit., para. 44.

[68] Opinion of AG Wathelet delivered on 4 June 2015, case C-299/14, *García-Nieto and Others*, para. 70.

[69] *García-Nieto and Others*, cit., para. 45.

[70] *Ibid.*, para. 49.

[71] *Ibid.*, para. 50.

[72] In particular, the Residency Directives 90/364/EEC, 68/360/EEC and 93/96/EEC, cit.

[73] See *supra*, steps 1 and 2.

[74] K. Lenaerts, J.A. Gutiérrez-Fons, *To Say What the Law of the EU Is*, cit., p. 25.

existing secondary law or bluntly ignore it. Instead, it merely adopted its case law to a new legal situation after the introduction of the primary law rights contained in the provisions on EU citizenship through a teleological interpretation of the law.[75] What happened in steps 3, 4, and 5 (see *supra*) with and after the *Förster* and *Ziółkowski* cases is the mirror image to this development. Directive 2004/38 was adopted on a host of legal bases, *inter alia* Art. 18 TEC (now Art. 21 TFEU) and concerns the rights and obligations of all EU citizens. The Directive codified parts of the Court's case law and also introduced new ideas and wishes of the EU legislator, such as those of permanent residence status and a specific provision on equal treatment.[76] Such notions are absent from the pre-existing Directives as well as the primary law provisions on Union citizenship.[77] Directive 2004/38 is therefore much clearer in defining the precise status and rights, including equal treatment rights, of *all* European migrants, which were the result of the Union's (albeit imperfect) democratic decision making process,[78] at least when compared to the loose combination of primary law rights combined with pre-existing secondary legislation. From this perspective, it is logical that the new legal situation after the adoption of Directive 2004/38 would influence the evolution of the case law. Just like after the introduction of Union citizenship, a new legal environment was created, and the Court took note and adjusted its approach accordingly, shifting towards a more formal, strict reliance on the wording of the Directive.

This is not a radical departure from the Court's traditional approach to legal reasoning but rather its explicit, albeit largely theoretical, approach.[79] This is based on the "classic" textual, contextual and purposive approach applied by other national courts.[80] This suggests that, assuming the ordinary meaning of the text is clear, the Court need not develop further contextual or teleological interpretations of the law. That being said, the Court of Justice is not always consistent in the weight or ranking it gives to textual or purposive interpretations, and whether it has relied purely on the wording of the text in question, or primarily purposive criteria.[81] However, the Court broadly applies the same reasoning as other courts, and contrary to what some commentators suggest, evidence from its case law suggests that it does focus most heavily on textual argu-

[75] See for example, T. NOWAK, *The Rights of EU Citizens: A Legal-Historical Analysis*, in J. VAN DER HARST, G. HOOGERS, G. VOERMAN (eds), *European Citizenship in Perspective: History, Politics and Law*, Cheltenham: Edward Elgar, 2018, p. 62 *et seq*.

[76] Art. 16, para. 1, and Recital 17 of Directive 2004/38, cit.; Art. 24 of Directive 2004/38, cit.

[77] With the exception of the Revised Student Residency Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

[78] M. VAN DEN BRINK, *The Court and the Legislators*, cit., p. 134.

[79] K. LENAERTS, J.A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is*, cit.

[80] G. BECK, *The Legal Reasoning of the Court of Justice of the EU,* Oxford, Portland: Hart, 2012, p. 281.

[81] *Ibid*., pp. 280-283.

ments when deciding cases, a trend which has increased significantly in recent years.[82] The Court's approach must therefore be seen as part of this overall trend.

A strict literal interpretation of the law is not unproblematic. It ignores the context and real-life consequences of individual cases, as well as the social or historical circumstances behind the adoption of the text, including the weight given to multiple purposes associated with it, and the context in which the applicable word or phrase is placed. As such, a level of purpose is inherent when interpreting any legal rule.[83] In fact, even in *Dano* the Court felt the need to look at the purpose of Art. 7 of the Directive, which is intended to prevent persons from becoming an unreasonable burden.[84] This is suggested to deviate from other situations in which the Court has considered the purpose of Directive 2004/38.[85] However, to stray too far away from the ordinary meaning of the Directive's rules would effectively ignore its adoption entirely and could create a situation where no social benefits could ever be denied from EU migrants.[86] It would also run counter to the principles of legal certainty and inter-institutional balance enshrined in Art. 13, para. 2, TEU.[87] It sometimes seems that the Court is criticised simply for giving meaning to Directive 2004/38. For example, it is suggested that the Court has contributed towards the more widespread and sustained recent shift from a "predominantly rights-opening to predominantly rights-curbing assessments of citizenship rights".[88] This is expanded upon by Niamh Nic Shuibhne in more detail: "the Court poured the content of the primary right to equal treatment into a statement in secondary law. That method turns the standard approach to conditions and limits on its head – the latter no longer temper equal treatment rights; they constitute the rights".[89] Under this perspective, the Directive is brought up to "constitutional level", and yet the Court does not apply a constitutional level review because it fails to review the legitimacy of legislative acts *vis-à-vis* the Treaty and wider general principles. As such, it is no longer clear that individuals residing on the basis of national law, but not EU law, will be able to benefit from equal treatment rights outside the Directive. In simple terms, the criticism is that the Court seems to have abandoned its case law based on primary EU law because of provisions found in secondary EU law, i.e. Directive 2004/38, an inferior source of law to the Treaties.[90]

[82] *Ibid.*, pp. 285-287.

[83] P. SCHLAG, *On Textualist and Purposivist Interpretation (Challenges and Problems)*, in T. PERIŠIN, S. RODIN (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, Oxford, Portland: Hart, 2018, pp. 19, 24-27.

[84] *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, cit., para. 71.

[85] D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2015, p. 25.

[86] M. VAN DEN BRINK, *The Court and the Legislators*, cit., p. 134.

[87] K. LENAERTS, J.A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is*, cit., p. 7.

[88] N. Nic SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 902.

[89] *Ibid.*, pp. 909-910.

[90] *Ibid.*, p. 915; C. O'BRIEN, *United in Adversity*, cit.

The problem with such criticism is that the primary EU law itself explicitly mentions that Union citizens can only exercise their rights "in accordance with the conditions and *limits* defined by the Treaties and *by the measures adopted thereunder*".[91] Free movement rights are "subject to the *limitations* and conditions laid down in the Treaties *and by the measures adopted to give them effect*".[92] Both Arts 20, 21, TFEU suggest that the Directive merely fulfils its constitutional role laid down in the Treaties in defining the conditions and limitations under which EU citizens can move. This is different to the pre-existing secondary legislation which did not "give effect" to such primary rights. In other words, within the clear mandate given to the EU legislator in the Treaties, and on the basis of all legal bases related to the free movement of persons, the Directive comprehensively covers residency and equal treatment rights, as well as the limits thereof for all groups of EU citizens moving to another Member State. It is therefore the explicit objective of the Directive to codify and harmonise the precise conditions for the enjoyments of free-movement rights of all EU citizens as laid down in the Treaties. The Directive effectively sets a floor of minimum standards that the Member States must abide by, e.g. providing for six months' retained worker status after a period of less than 12 months employment,[93] but will allow the Member States discretion to go beyond this once they meet these minimum conditions.[94] Crucially, however, Member States cannot be forced to do so based on case law preceding the Directive. A different approach in the line of cases starting with *Förster* and ending with the above mentioned "*Dano*-quartet" based on earlier case law would have meant that the Court would have gone against the exact wording of Directive 2004/38, which has to be seen as the expression of the EU legislator based on a firm mandate in the Treaties.[95] It would be strange for the Court to act as if this did not exist by relying on case law from the preceding era. If this was the standard of judicial review in the future, the room of manoeuvre for the EU legislator would be significantly limited. Bearing these legal facts in mind, it seems unfair to solely criticise the Court for applying the law of the land in the form of Directive 2004/38, albeit strictly, rather than the EU legislator for adopting the Directive in its current form.

[91] Art. 20 TFEU, last sentence (ex. Art. 17 TEC).

[92] Art. 21 TFEU (ex. Art. 18 TEC).

[93] See Art. 7, para. 3, of Directive 2004/38, cit.; as was at issue in *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, cit. See also C. O'Brien, E. Spaventa, J. De Coninck, *The Concept of Worker Under Article 45 TFEU and Certain Non-Standard Forms of Employment*, Comparative Report for the European Commission, 2015, ec.europa.eu.

[94] See Art. 37 of Directive 2004/38, cit., which explicitly states that it shall not affect any laws, regulations or administrative provisions "which would be more favourable to the persons covered by this Directive".

[95] D. Thym, *The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development*, in D. Thym (ed.), *Questioning EU Citizenship*, cit.; M. van den Brink, *The Court and the Legislators*, cit.

II.7. Evolution, not revolution

The five-step evolution of the case law leaves Union citizens in the following position: *First*, access to equal treatment, including social benefits and access to permanent residence depend on legal residence. *Second*, legal residence is exclusively determined with reference to Directive 2004/38. In other words, without legal residence under Art. 7 of Directive 2004/38, with very limited exceptions,[96] neither equal treatment nor permanent residence can be successfully claimed. *Third*, the *Dano* "revolution" was an example of a quite ordinary evolution of judicial interpretation. This evolution began with the *Förster* judgment, when the Court first started to assess the legal situation of applicants exclusively within the system created by Directive 2004/38 itself, and continued with *Ziółkowski*, *Dano*, *Alimanovic* and other subsequent cases. The Court clearly no longer considers that it its role is to create teleological concepts such as "genuine links" or "sufficient degrees of integration" to determine the rights of applicants directly under the Treaties. Instead, all that is required is a strict reliance on the normal meaning of the wording contained in Directive 2004/38. From this perspective, the decisive and exclusive reference to Directive 2004/38 has contributed to legal certainty and is judicially coherent and, in fact, the comparative lack of attention in the recent discussion on the *Ziółkowski* and *Förster* cases, at least when compared to *Dano*, is surprising.[97]

Whilst interesting for academic debate and providing a lot of room for manoeuvre for lawyers, the vague formulas described in step 2 above were next to useless in daily administrative practice. As Nic Shuibhne notes, "case-by-case assessments are far from perfect, especially from the perspectives of legal certainty and workability".[98] They give very little guidance as to precisely *when* a claim can be denied.[99] This makes it difficult for authorities to know exactly when they can legally deny a claim to protect integrity of the national welfare system, something that was always permissible, at least in theory, according to the Court.[100] As the Court has explained, the shift in approach was indeed to create a more legally certain system. In *Alimanovic* and *Garcia-Nieto*, the Court asserts that the German rule at hand enables those concerned to know "without any ambiguity, what their rights and obligations are", and as such guarantees "a significant level of legal cer-

[96] A notable exception being Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*, where the Court held that a women could retain the status of worker after leaving work due to the "physical constraints of the late stages of pregnancy" as long as she returns to work within "a reasonable period".

[97] See on the development of case law and the importance of this judgment, U. Šadl, S. Sankari, *Why Did the Citizenship Jurisprudence Change?*, cit., pp. 91-109.

[98] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 913.

[99] S.K. Schmidt, *Extending Citizenship Rights and Losing It All: Brexit and the Perils of Over-Constitutionalization*, in D. Thym (ed.), *Questioning EU Citizenship*, cit., pp. 19, 23.

[100] *Grzelczyk*, cit., paras 42-43; see also U. Šadl, S. Sankari, *Why Did the Citizenship Jurisprudence Change?*, cit., p. 98.

tainty and transparency in the context of the award of social assistance".[101] The idea is that creating strict identifiable rules, rather than vague formulas is beneficial for national administrators and applicants alike, as everyone knows where they stand. Member State legislators are also reassured since the *Förster* case, as mentioned above, that if they comply with the words of the Directive, their implementation and decisions taken based on it will not be second-guessed by the Court of Justice as they were in the past.

From this perspective, one way in which the *Dano* decision is "revolutionary" is that it constitutes a reversal of the system as it was previously understood, whereby Member States would engage on the "thorny path" of granting social benefits but then subsequently expelling EU citizens that become a burden on the social system of the host-Member State. Instead, Member States may now withhold equal treatment from "any category" of European citizens making use of their free movement rights.[102] This is a valid critique, and indeed this *Article* will discuss in the following section some of the implications of the Court's reasoning in terms of determining when an individual has sufficient resources and/or is an unreasonable burden. However, it should initially be emphasised that in *Dano* it was already established in the facts of the case that the applicant did not have a right to reside under the Directive.[103] As such, the Court was merely called upon to ask whether these individuals should be entitled to rely on the principle of equal treatment under Art. 24. The Directive is clear that this provision is only available to those citizens "residing on the basis of this Directive". Moreover, unlike Art. 6 residence which should not be lost "as long as they do not become an unreasonable burden", Art. 7 residence is only valid "as long as they meet the conditions set out therein".[104] This approach would also conform with the analysis of whether individuals meet the conditions for permanent residence under Art. 16, para. 1. Lastly, it has to be questioned whether being able to make a claim for social assistance but having the possibility of it being rejected without losing a right to reside is really a worse situation for the individual in question, rather than automatically being entitled to social assistance only to subsequently find that granting this has resulted in their residence status being rescinded entirely and an expulsion order made against them?

[101] *Alimanovic*, cit., para. 61; *García-Nieto and Others*, cit., para. 49.
[102] D. SCHIEK, *Perspectives on Social Citizenship in the EU*, cit., p. 361.
[103] *Dano*, cit., para. 44.
[104] See Art. 14 of Directive 2004/38, cit., on the Retention of a Right of Residence.

III. Beyond step no. 5 – the consequences of the Court's case law

III.1. The marginalization of the precariat and the Janus-faced approach of the Court

The five-step evolution explained above is for the most part judicially coherent and the increase in legal certainty can be seen as a positive development. Yet, there are certain consequences that are problematic. It cannot be emphasised enough that a direct consequence is the potential exclusion from legal residence and equal treatment of various vulnerable groups of EU citizens. A system that focusses almost exclusively on legal stay under Art. 7 of Directive 2004/38 will inherently have the same built-in bias for economically active and wealthier individuals as the Directive itself. Economically active individuals, as the original actors on the common and then internal market, have always had a privileged position over economically inactive EU citizens.[105] This differentiation is deeply ingrained in EU free movement rights and leads to situations where EU law distinguishes between the "good" or "deserving" citizen, on the one hand, and the "bad" or "undeserving" ones, on the other hand.[106] This means that the Directive falls short of being a tool for *positive* citizenship, or *receptive* solidarity, which argues that in order to achieve equality and fully realise social citizenship individuals, particular more vulnerable groups of persons, require positive rights such as welfare entitlement.[107] Instead, the conditional nature of Directive 2004/38 results in the potential exclusion from protection of those EU citizens who, in fact, would need protection the most. This arguably goes against the very idea of "citizenship" as a philosophical concept and the creation of "equality" between all fellow-citizens as one of its central tenets. EU citizenship, as Dimitry Kochenov writes, "virtually never protects the weak and the needy" based on their human needs alone. As such, it does not empower but merely informs the "dogmatic ideal of a good market citizen".[108] In a cruel irony, EU citizenship rights become available only for those "who do not need them and only when they do not need them".[109] This becomes even more problematic as, as other scholars have rightly pointed out, EU citizens falling foul of such strict conditionality will most likely be minority groups; women and disabled persons;[110] and low-pay, marginal workers.[111] In other words, those

[105] See N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*; C. O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq*.

[106] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 928.

[107] D. Schiek, *Perspectives on Social Citizenship in the EU*, cit., p. 349.

[108] D. Kochenov, *The Citizenship of Personal Circumstances in Europe*, in D. Thym (ed.), *Questioning EU Citizenship*, cit., p. 51.

[109] P. Minderhoud, S. Mantu, *Back to the Roots?*, cit., p. 207.

[110] C. O'Brien, *United in Adversity*, cit., pp. 92-102.

already on the margins of society are stigmatised even more as "undeserving" and stand to lose out most in terms of residence and equal treatment rights.

In practice, this doctrinally defensible stance may not just lead to the granting or denial of a social benefit but can result in unlawful residence and even social exclusion. This is particularly so because those who do not meet the requirements laid down in Directive 2004/38 will not only be denied equality, as regards access to social benefits, but can be held to fall outside the scope of EU law entirely if their social benefit claim is denied because their residence is deemed illegal under Art. 7 of Directive 2004/38. In some cases, these individuals will become "tolerated" citizens,[112] who are not or cannot be expelled but whose legal status is, nevertheless, technically irregular. They may form a class of "illegal migrants, living unlawfully in other Member States without equal treatment guarantees".[113] This EU *Lumpenproletariat*[114] has no right to residence and equal treatment, and even no rights under the Charter of Fundamental Rights of the European Union (Charter) as they fall outside the scope of application of EU law,[115] a (non-)status so far unknown in EU law.

That being said, the denial of equal rights to access social assistance and problematic rights of residence to EU citizens who have never worked, have no intention to work and have no independent funds at their disposal, as in *Dano*, is quite normal.[116] Furthermore, criticism that the EU is a "rich person's club" that only benefits the affluent few over the many is hardly a novel critique and omits the fact that the freedoms enjoyed by all EU citizens on the internal market go far beyond anything available in other legal regimes. Such developments do not signal that the Court has "abandoned" EU citizens, as is suggested.[117] In fact, the exclusive focus on Directive 2004/38 by the Court has a Janus-face. Whilst *Dano* and *Alimanovic* can be seen as, on balance, *reducing* the rights available to EU citizens, there are other cases wherein a strict application of the Directive actually leads to an *increase* of rights for EU citizens. For example, in *Metock*,[118] differentiations between family reunification and family formation, which were allowed under the pre-Directive *Akrich* case,[119] were ruled out by the CJEU because such differentiations would not re-appear in Directive 2004/38. The EU legislator

[111] C. O'Brien, E. Spaventa, J. De Coninck, *The Concept of Worker Under Article 45 TFEU and Certain Non-Standard Forms of Employment*, cit.; C. O'Brien, *United in Adversity*, cit., pp. 149-159.

[112] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., pp. 926-927.

[113] D. Thym, *When Union Citizens Turn into Illegal Migrants*, cit.

[114] D. Schiek, *Perspectives on Social Citizenship in the EU*, cit., p. 360.

[115] As the Court made explicit in *Dano*, cit., paras 89-91; See N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., pp. 914-915.

[116] G. Davies, *Has the Court Changed, or Have the Cases?*, cit. See also on this issue N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, cit.

[117] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 936.

[118] Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others*.

[119] Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich*.

refrained from codifying the *Akrich* rule in Directive 2004/38 and, therefore, Member States were prohibited from applying it. Whilst *Metock* is mostly seen as a decision which fits with the classic paradigm of cases in which the CJEU gradually *strengthens* the rights of EU citizens,[120] such analysis overlooks the decisive and exclusive dominance the Court awarded to rules and conditions contained in Directive 2004/38 in its judgment, particularly emphasizing the choices made by the EU legislator.

Another case which fits into this line is the recent case of *Coman*. This decision was widely applauded for recognising the rights of same-sex spouses, married in a Member State allowing for same-sex marriages, to travel and reside with their partner throughout the EU, including return to the home state.[121] The Court reasons that Directive 2004/38, which applies in analogy in situations or return to the home state,[122] would allow the Member States leeway as regards the recognition of "registered partnerships" entered into in other Member States only. The recognition of these are "subject to national law". However, no such reference to national law is made in the Directive as regards the term "spouse". The Court in *Coman* focussed solely on the wording of Art. 2 of Directive 2004/38, finding that Member States cannot rely on national legislation as regards the recognition of a marriage entered into in another Member State.[123] The analogous and strict application of Directive 2004/38 is also beneficial for "returning citizens" who since its adoption have found that their conditions of entry "should not, in principle, be more strict than those provided for by Directive 2004/38".[124]

The fact that the *Metock* and *Coman* cases are simultaneously characterised as "rights-enhancing" judgments, while *Förster*, *Ziółkowski*, *Dano* and *Alimanovic* are seen as diminishing rights, but all, nevertheless, share Directive 2004/38 as the exclusive frame-

[120] P. Minderhoud, S. Mantu, *Back to the Roots?*, cit., p. 192; see also N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 989.

[121] Court of Justice: judgment of 5 June 2018, case C-673/16, *Coman and Others*, para. 25; judgment of 12 March 2014, case C-456/12, *O.*, paras 50 and 61.

[122] This builds upon the "*Singh* principle", which states that EU rights "cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse [...] when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law", Court of Justice, judgment of 7 July 1992, case C-370/90, *The Queen / Immigration Appeal Tribunal e Surinder Singh, ex parte Secretary of State for the Home Department*, para. 23; see also *O.*, cit.

[123] *Coman and Others*, cit., para. 36. Thereafter the Court looks at potential justifications of a restriction to free movement of persons and holds them all to be inapplicable.

[124] See in this regard, *O.*, cit., paras 50 and 61, with reference to *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., para. 20: "He would in particular be deterred from doing so [exercise his free movement rights] if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State"; Court of Justice: judgment of 14 November 2017, case C-165/16, *Lounes*, paras 60-61; judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others*, para. 55; judgment of 12 July 2018, case C-89/17, *Banger*, para. 35.

work within which the Court establishes legal residence and integration, shows the Janus-faced results of the evolution of Court's case law. On the one hand, access to rights is made stricter with reference to legal residence under Directive 2003/38 exclusively, while on the other hand, the reach of rights obtained when residence is legal under the Directive is increased. The Court is, in fact, building a legally certain and coherent system of assessing legal residence and access to rights for EU citizens based on the provisions of Directive 2004/38 alone, even if its application means some EU citizens lose out.

III.2. Automatic findings of illegality and the demise of individual proportionality assessments

The Court's approach to interpreting Directive 2004/38 has been criticised for denying applicants individual proportionality assessments in their cases. This is particularly so when determining whether the burden placed by that specific EU citizen is "reasonable" or "unreasonable".[125] In this regard, the Court has completely departed from its individualistic test last used in *Brey*,[126] which was held to be "unworkable" and redundant.[127] Instead, it has opted for a more "systemic" test in *Alimanovic*,[128] which asserts that that a single applicant for welfare benefits could "scarcely be described as an 'unreasonable burden', however, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[129] In doing so, it has been claimed that the status of individual assessments is "radically downgraded",[130] and that proportionality/individual assessments have not been "set to work" as was the case in earlier cases.[131] Charlotte O'Brien is strongest in her criticism claiming that the Court uses "a sledgehammer to crack an already cracked nut",[132] by deciding the cases without any regard given to sufficient resources or applying proportionality "at any stage" in either *Dano* or *Alimanovic*.[133]

It is true that in both *Dano* and *Alimanovic* there was a distinct lack of individual assessment as to the position of the applicants at hand. However, in *Dano* the Court was merely determining whether those already deemed to be without sufficient resources, as the referring court had already established, could under the Directive rely on the principle of equal treatment to claim social assistance.[134] In this situation, the Court did emphasise

[125] As the Court formulated in *Grzelczyk*, cit., and other cases; see C. O'Brien, *United in Adversity*, cit.

[126] See, *supra*, section II.2.

[127] C. O'Brien, *United in Adversity*, cit., p. 49; see also C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 216.

[128] To use the terminology as applied by D. Thym, *The Elusive Limits of Solidarity*, cit.

[129] *Alimanovic*, cit., para. 62.

[130] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 913.

[131] G. Davies, *Has the Court Changed, or Have the Cases?*, cit., p. 1445.

[132] C. O'Brien, *United in Adversity*, cit., p. 49.

[133] *Ibid.*, pp. 51 and 55.

[134] *Dano*, cit., para. 44.

that her the financial situation should be specifically examined without taking into account the benefit claimed.[135] The Court did not, however, feel the need to consider the reasonableness of Ms Dano's burden. This omission is strange especially as Ms Dano is a stark example of an individual that is not entitled to social assistance or residence rights under EU law,[136] as she only entered Germany to obtain social assistance despite the fact she did not have sufficient resources to claim a right of residence.[137]

In *Alimanovic*, again, the Court did not assess the individual situation of the applicants, and nor did it test the German rule against the principle of proportionality after finding that it was in conformity with the wording of the Directive 2004/38. This approach differs indeed from earlier cases, such as *Baumbast*, which was decided under Art. 18 EC (now Art. 21 TFEU) and outside the scope of Directive 90/364. Back then, the Court held that any limitations to that Treaty right must be in accordance with the general principle of proportionality.[138] In *Alimanovic*, however, the legal situation under Art. 45 TFEU received little attention.[139] The Court held that the Directive itself established a system which considers various factors, guarantees a significant level of legal certainty and complies with the principle of proportionality.[140] Whilst it is not clear just how many "various factors" Directive 2004/38 actually considers,[141] the comparison between *Alimanovic* and *Baumbast* is not entirely appropriate. As explained above and unlike Directive 90/364, Directive 2004/38 has as its legal bases both Arts 45 and 18 TFEU, and sets minimum standards on EU citizens' rights including retaining worker status, which the Member States cannot go below. A literal interpretation and application of this Directive should not be seen as disproportionate in the context outlined above.[142] As such, the Court's decision to apply the standards and conditions codified by the EU legislator based on several legal bases in Directive 2004/38 is a coherent interpretation of the rules in force. The message for the Member State remains the same since the *Förster* decision: a word-by-word implementation of the Directive will not be second guessed by the Court.

That is not to say that the lack of individual proportionality assessments is unproblematic. It carries the danger of endorsing, albeit tacitly, national systems which employ circular arguments permitting authorities to either block economically inactive EU citizens from obtaining certain social benefits, or at least allowing said authorities to sys-

[135] *Ibid.*, para. 80.

[136] G. Davies, *Has the Court Changed, or Have the Cases?*, cit., p. 1454.

[137] *Dano*, cit., para. 78.

[138] C. O'Brien, *United in Adversity*, cit., pp. 42-43.

[139] *Ibid.*, p. 51.

[140] *Alimanovic*, cit., para. 61.

[141] Art. 7, para. 3, of Directive 2004/38, cit., the Article that decided *Alimanovic*, is being based almost exclusively on time spent in genuine employment.

[142] See, *supra*, section II.6.

tematically check individuals' residence status upon their application for social assistance. Every application for social benefits might, in such a situation, automatically lead to an assessment of legal residence of the applicant under Directive 2004/38, which in turn might lead to a finding of "illegal residence" under the Directive.[143] As Daniel Thym notes, the *Dano* decision can be understood as meaning that "any recourse to social assistance pre-empts legal residence status", as is the case in Germany.[144] Indeed, without any kind of assessment of individual circumstances, the mere application for social assistance is potentially enough to exclude their eligibility for such benefits as this by itself demonstrates their lack of resources.[145] Moreover, whilst Ms Dano was denied a SGB II (Jobseeker) benefit as she was not actively looking for work and only entered Germany in order to claim social assistance benefits, *Alimanovic* also concerned SGB II (Jobseeker) benefits, and yet the applicants who *were* actively seeking employment were again denied such benefits due to the exception contained in Art. 24, para. 2, of Directive 2004/38. This reasoning means that SGB II (Jobseekers) benefits are seemingly inaccessible to all economically inactive EU citizens.[146]

Another clear example of this circular reasoning can be seen in *Commission v. UK*,[147] which concerned the legality of the UK's "habitual residence test", that effectively imposes a right-to-reside test based on Art. 7 Directive 2004/38 upon claimants before granting Child Benefit and Child Tax Credit social benefits. The Commission claimed this *legal* test was not permitted under Art. 11, para. 3, let. c), of Regulation 883/2004, which imposed solely a *factual* test of residence. However, the Court found that Regulation 883/2004 does not harmonise the conditions for granting social security benefits, and that the UK right-to-reside test was an "integral part" of the eligibility criteria for these social benefits, which is outside the scope of the Regulation.[148] Part of the Commission's complaint was that by checking individuals' residence status upon application for the benefits in question, this constituted "systematic checking" of individuals residence status, prohibited under Art. 14, para. 2, of Directive 2004/38. However, the Court disagreed with this.[149] The decision has been criticised strongly by O'Brien, who claims that the UK procedures essentially mean that no economically inactive EEA migrant, who is applying for social benefits, can ever have a right to reside, because "any benefit application is deemed to dissolve any claim to self-sufficiency".[150] In other words, the mere

[143] D. Thym, *The Elusive Limits of Solidarity*, cit.

[144] *Ibid.*, p. 42.

[145] Although, it should be emphasized that whilst Ms Dano was excluded from social assistance benefits, she continued (before and after the decision) to receive Child Benefit (social security) for her son, which was unaffected by her social assistance claim.

[146] See C. O'Brien, *United in Adversity*, cit., pp. 53-56.

[147] Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

[148] *Ibid.*, para. 69. See also C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 221.

[149] *Commission v. United Kingdom*, cit., para. 84.

[150] C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 212.

application for social benefits results in a finding that the EU citizen in question does not have a right-to-reside under Art. 7 of Directive 2004/38. Furthermore, "there is no starting presumption of lawful residence, or starting position of citizenship-based eligibility that is then limited and in some cases checked".[151] In fact, the individual's status is checked purely *because* they apply for such a benefit, meaning in effect there is actually a presumption of *illegality*. Given that a rejection of the social benefit results in the individual being outside the scope of application of the EU free movement rules,[152] the UK system is likely to have a chilling effect on social benefit claims by economically inactive EU citizens, disproportionality affecting some of the most vulnerable persons in society.

III.3. The ever increasing scope of "social assistance" under Directive 2004/38

The formalised approach of the Court and the new status of the Directive has also impacted upon the range of social benefits that can be subjected to a right-to-reside test on the basis of Art. 7 of Directive 2004/38. Directive 2004/38 itself only refers to "social assistance", with "social security" benefits being coordinated by Regulation 883/2004 and its predecessors. Given that the 2004 Regulation as opposed to earlier versions, which only applied to workers, also applies to "the new category of *non-active* persons",[153] it was considered that Regulation 883/2004 would apply to anyone subject to the legislation of one or more Member States, regardless of economic activity.[154] The Regulation was considered to be triggered by a *factual* test of residence, rather than a *legal* test of lawful residence.[155]

The cases of *Brey*, *Dano*, *Alimanovic* and *Garcia-Nieto* all concerned "special non-contributory cash benefits". Whilst not classified as "social security" in the strict sense, these benefits are included under Art. 70 of Regulation 883/2004, and are suggested to have the nature of both social security and social assistance.[156] In these cases the Court rejected the European Commission's initial argument that social assistance, and conse-

[151] *Ibid.*

[152] See D. Thym, *The Elusive Limits of Solidarity*, cit., p. 21.

[153] Recital 42 of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; See C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 222.

[154] Art. 2 of Regulation 883/2004, cit.; see also Art. 11 of Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems; see also International Labour Organization, International Labour Office, *Coordination of Social Security Systems in the European Union: An Explanatory Report on EC Regulation No 883/2004 and Its Implementing Regulation No 987/2009*, 2010, www.ilo.org, p. 7.

[155] H. Verschueren, *Free Movement or Benefit Tourism: The Unreasonable Burden of Brey*, in *European Journal of Migration*, 2013, p. 147 *et seq*.

[156] See Opinion of AG Wahl, delivered on 29 May 2013, case C-140/12, *Brey*, para. 48.

quently right-to-reside tests on the basis of Directive 2004/38, could only be applied to social benefits not mentioned in Regulation 883/2004 and therefore outside its scope of application.[157] Rather, it held that social assistance should have its own definition under EU law and that special non-contributory cash benefits met this definition.[158] In the aforementioned *Commission v. United Kingdom* case, the Court was confronted with the application of a right-to-reside test to Child Benefit and Child Tax Credits. These were clearly not special non-contributory cash benefits,[159] but rather fell under Chapter 8 of Regulation 883/2004 on Family Benefits and "must be regarded as social security benefits".[160] However, the Court still held that there is "nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to (a right to reside test)".[161] According to the Court, the applicants failed to fulfil the conditions of entitlement of the benefit. The Court's reasoning suggests that potentially any social benefit, so long as it has *some characteristics* of social assistance, such as being taxpayer funded or non-contributory in nature, can be subjected to a right-to-reside on the basis of Art. 7 of Directive 2004/38, regardless of the benefit's classification under Regulation 883/2004.[162]

The application of Art. 7 criteria to social security benefits has been criticised for undermining the political compromise at the heart of both pieces of legislation adopted in 2004, as well as the differentiation between the two types of social benefits that flow from it.[163] Furthermore, in *Commission v. United Kingdom* the Court relies upon para. 83 of *Dano* and para. 44 of *Brey* to come to this conclusion. However, both cases concern special non-contributory cash benefits, which are a special category within Regulation 883/2004. The Court ignores the differentiation of benefits within the Regulation and applied them as if there was one general rule applicable to all social benefits. As a result, the conflation of the two legal instruments makes the equal treatment provision in Art. 4 of Regulation 883/2004 almost redundant.[164] At the same time, the Court has made relying on the equality clause in Art. 24 of Directive 2004/38 difficult in cases involving applications for social security benefits for inactive EU citizens regardless of the status of the benefit in question under Regulation 883/2004. Potentially *all* applications for social benefits can be subjected to a right-to-reside test, with all problems attached to the circular application of such tests outlined in the previous section.

[157] See *Brey*, cit., para. 48.

[158] *Ibid.*, paras 58-59.

[159] Indeed, the original complaint included special non-contributory cash benefits but these were removed following the *Brey* and *Dano* decisions. See *Commission v. United Kingdom*, cit., para. 27.

[160] *Commission v. United Kingdom*, cit., para. 60.

[161] *Ibid.*, para. 68.

[162] *Ibid.*, para. 51. See also C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 220.

[163] H. Verschueren, *Free Movement or Benefit Tourism*, cit., pp. 159-165; see also C. O'Brien, *The ECJ Sacrifices EU Citizenship in Vain*, cit.

[164] C. O'Brien, *United in Adversity*, cit., p. 51.

IV. Conclusion

Contrary to what is sometimes claimed, this *Article* has made the argument that the Court is not working to "advantage the few, excluding the many".[165] Recognising that the Court is caught between a "rock and a (very) hard place",[166] and unable to please everybody, it has been shown that at least for the most part the Court's reasoning is logical and judicially coherent. The development of legal residence and accessing social benefits has developed from the initial introduction of secondary legislation, to the establishment of Union citizenship, and the adoption and interpretation of Directive 2004/38 through five major steps. Where this *Article* departs from much other scholarly opinion is by asserting that, in fact, the major factor in the Court's evolving approach is the adoption and subsequent implementation, application and interpretation of Directive 2004/38. In this respect, the Court is merely following its traditional method of interpreting EU rules by sticking to a formal, textual interpretation of the law following the adoption of secondary legislation. Criticism that the Court is re-establishing the dichotomy between economically active and inactive individuals often misses the point that these differences are clearly manifest in Directive 2004/38, which also adds categories of citizens who benefit from equal treatment without economic activity, such as persons with sufficient means and permanent residents. The Directive has been interpreted to create a closed system for the definition of legal residence whereby, with very limited exceptions, only residence that is considered lawful under the Directive itself will be accepted by the Court. Only legal residence as defined by the Directive can lead to permanent residence, as stated in *Ziółkowski*, and only such legal residence gives access to equal treatment with Member State nationals, as can be seen in *Dano* and *Alimanovic*. Yet, this exclusive reference to the Directive can also be beneficial for other groups of EU citizens, as for example the *Metock* and *Coman* cases have shown.

The reliance on Directive 2004/38 has changed the dynamics of law governing EU citizenship. First, as has been shown, the Court is building a coherent and simplified approach to rights enjoyed by EU citizens based on a strict interpretation of Directive 2004/38. This will increase legal certainty for applicants and national authorities involved in decision making. *Second*, by following the wording of the Directive and accepting literal implementations of the Directive by the Member States since the *Förster* case, the Court has achieved two things. It has assured Member States that their implementation of the Directive, if true to its wording, is safe from being second guessed by the Court on grounds of primary law. Member States can always provide more rights than prescribed by the Directive, however, they will not be forced to do so. In addition, the Court has taken itself out of the line of fire in the sensitive political discussions about access to social benefits for (economically inactive) EU citizens. It may be that the Court

[165] E. Spaventa, *Earned Citizenship*, cit., p. 223.
[166] N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., p. 916.

is suffering from "a certain degree of 'citizenship exhaustion" and has "put the brakes on a liberal interpretation of free movement rights".[167] After decades of acting as the motor for European integration in the field of EU citizenship, the Court might reasonably now believe that its job is done and that further developments have to be driven by all political actors in the new governance structures created by the Treaty of Lisbon.[168] Moreover, it could be argued that the Court does not see the core of Union citizenship in residence and access to social welfare of economically inactive citizens, but in "constitutional principles" such as "the protection of fundamental rights, the development of democracy, and the Rule of Law".[169] Notwithstanding a poor attempt at playing politics by intervening in the Brexit debate by releasing the *Commission v. United Kingdom* judgment one week before the referendum,[170] the Court seems much less willing to "legislate" in this area in addition to the European legislator. Instead, it persistently defers back to the words approved by Council and Parliament in Directive 2004/38. When compared to other issues connected to citizenship, such as the need to preserve the legal position and ensure the continuity of rights for the four million UK nationals and EU citizens potentially affected by Brexit,[171] cases concerning social assistance claims by economically inactive citizens can seem marginal. Furthermore, the fully justified criticism of the law as it stands may be more wisely directed at the EU legislator, and future improvements to the precarious situation of Union citizens should be expected foremost from amendments and/or revisions to Directive 2004/38, as opposed to expecting developments to arise solely from the Court.

[167] D. SARMIENTO, E. SHARPSTON, *European Citizenship and Its New Union: Time to Move on?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 229.

[168] *Ibid.*, pp. 230 and 241.

[169] *Ibid.*, p. 227.

[170] C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain*, cit., p. 209.

[171] See Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman and Others*, para. 64.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

DISTINGUISHING BETWEEN USE AND ABUSE OF EU FREE MOVEMENT LAW: EVALUATING USE OF THE "EUROPE-ROUTE" FOR FAMILY REUNIFICATION TO OVERCOME REVERSE DISCRIMINATION

HESTER KROEZE*

ABSTRACT: Equality is a fundamental principle of EU law but protection of the Member States' competence to regulate their own nationals' legal position, anchored in the division of competences, may cause inequality among citizens. Reverse discrimination occurs when EU citizens who reside in their own Member State and are in a purely internal situation are subject to the law of this Member State, while EU citizens who fall within the scope of EU law through the use of free movement rights benefit from more lenient EU rules. Both equality among EU Member States and the division of competences are important principles of EU constitutionalism. Proposed remedies should, therefore, fit within the constitutional system of the EU. In its case-law, the Court makes EU citizenship rights more accessible and empowers EU citizens to change the legal regime that applies to them by moving across a border. This case-law opens up a possibility to circumvent national immigration law. This *Article* inquires whether the use of EU law for this purpose should be considered to be abuse of law. In addition, it discusses the role of the European Convention on Human Rights in the protection of families, when EU law does not apply. The first part of the *Article* discusses the constitutional background in which reverse discrimination and family reunification are situated. The second part studies the concept of abuse of law in the context of EU citizenship and the question when family reunification on the basis of EU law can be classified as such, as well as the implications thereof.

* PhD Researcher, Ghent European Law Institute of Ghent University (Jean Monnet Centre of Excellence), hester.kroeze@ugent.be. The Author likes to thank Dimitry Kochenov, Alina Tryfonidou, Peter Van Elsuwege, and Michaela McCown for their comments on earlier versions of this *Article*.

KEYWORDS: family reunification – reverse discrimination – abuse of law – Europe-route – EU citizenship – division of competences.

I. INTRODUCTION

The Maastricht Treaty in 1992 marked "a new stage in the process of creating an ever closer union among the peoples of Europe".[1] Before 1992, European integration was built upon economic premises, which translated into the four fundamental freedoms of goods, persons, services and capital.[2] Rights that were given to individuals were aimed at realizing the economic goals that were part of the EEC's design.[3] The right to family reunification for workers, for instance, was granted to facilitate their integration into the host Member State and to further the economic purpose of their movement.[4] Therefore, it was only available to those who move to or reside in a Member State of which they are not a national.[5] The Maastricht Treaty was proclaimed to broaden the sphere of European cooperation by establishing the EU, and introduced EU citizenship.[6]

The introduction of EU citizenship by the Maastricht Treaty is taken as a starting point for this *Article*, which departs from the premise that one of the qualities that citizenship confers is equality before the law.[7] It is shown, however, that equality before

[1] Art. A of the 1992 Treaty on European Union (Maastricht Treaty). It is debated whether the Maastricht promise has realized its full potential. See e.g. D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance?*, in *European Law Review*, 2012, p. 369.

[2] Now Arts 30, 34, 45, 49, 56 and 63 TFEU. C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2013. Despite its economic premises, the European Economic Community (EEC) was a political project that was meant to further peace and welfare after the Second World War. An economic approach was chosen, however, because political integration was not feasible, and the original plan to establish a European Political Community and/or a European Defence Community was rejected by the French Parliament. R. KOOPMANS, P. STATHAM (eds), *The Making of a European Public Sphere: Media Discourse and Political Contention*, Cambridge: Cambridge University Press, 2010, p. 16 *et seq*.

[3] First the EEC, later the Economic Community (EC), and now the European Union. A. TRYFONIDOU, *Reverse Discrimination in EC Law*, Alphen aan den Rijn: Kluwer Law International, 2009, p. 5 *et seq.*; J. CROON-GESTEFELD, *Reconceptualising European Equality Law: A Comparative Institutional Analysis*, London: Bloomsbury Publishing, 2017, p. 4.

[4] C. BERNERI, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens*, London: Bloomsbury Publishing, 2017, p. 8; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, Cambridge: Intersentia, 2014, p. 30.

[5] Now: Art. 3 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.

[6] Among other institutional changes, such as the introduction of new policy areas by the Maastricht Treaty.

[7] D. KOCHENOV, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, in *Jean Monnet Working Paper*, no. 8, 2010, p. 12 *et seq.*; D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denom-*

the law collides with another constitutional principle of EU law. The principle of conferral implies that some competences are conferred to the EU and others are retained by the Member States.[8] This means that the legal position of citizens differs, depending on whether they are subject to national or European rules. This differentiation may cause inequality.[9] Because of its unique position at the intersection of free movement, immigration policy, fundamental rights, limited Union competence, and political controversy, family reunification is one of the areas of the law in which this differentiation occurs.[10] Family reunification in the EU is defined as the situation in which a third-country national family member of a resident of one of the Member States acquires a residence title to reside with the resident who is already legally in the EU.[11] The resident can either be a third-country national or an EU citizen. This *Article* only examines family reunification between third-country nationals and EU citizens. The legal regime for family reunification between third-country nationals who are legally residing in the EU and their third-country national family members is not discussed.[12]

Directive 2004/38 regulates the right of EU citizens *and* their family members to move and reside freely within the territory of the Member States. EU citizens who move to or reside in a Member State of which they are not a national benefit from its protection, which includes the possibility for family reunification under very lenient conditions.[13] Family reunification between third-country nationals and EU citizens who do not move to or reside in a Member State of which they are not a national is regulated by the Member State of which the EU citizens is a national. Some Member States impose requirements for family reunification for their own nationals that are far stricter than the

inator, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 1 *et seq.*, pp. 5, 9; G. DE BÚRCA, *The Role of Equality in European Community Law*, in A. DASHWOOD, S. O'LEARY (eds), *The Principle of Equal Treatment in EC Law*, London: Sweet & Maxwell, 1997, p. 16; T.H. MARSHALL, *Citizenship and Social Class*, London: Pluto Press, 1992.

[8] Art. 4, para. 1, and Art. 5, paras 1-2, TEU and Arts 2-6 TFEU.

[9] S. GARBEN, I. GOVAERE, *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future*, in S. GARBEN, I. GOVAERE (eds), *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future*, Oxford: Hart, 2017, p. 3 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 6.

[10] J. FAULL, *Prohibition of Abuse of Law: A New General Principle of EU Law*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law. A New General Principle of EU Law?*, Oxford: Hart, 2011, p. 291 *et seq.*, especially p. 293.

[11] The term "third-country national" refers to anyone who does not have the nationality of one of the Member States.

[12] Third-country national residents in the EU can rely on Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

[13] When an EU citizen resides in a Member State in compliance with Directive 2004/38, his family members can join him without the need to fulfill any conditions, except for the obligation to have health insurance. See Art. 7 of Directive 2004/38, cit.

requirements EU law imposes on EU citizens who exercise their free movements rights.[14] This phenomenon is called reverse discrimination.[15]

When a national of a Member State cannot comply with the strict conditions for family reunification in national law, EU law allows to circumvent these national rules by moving to another Member State. He will then fall within the more lenient regime for family reunification that is provided by EU law. Case-law of the Court of Justice provides, moreover, that upon return to the home Member State of the EU citizen (in a return situation), his family members retain their residence rights. The only condition to retain these rights is that residence in the host Member State must have been genuine. If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[16] The ability to

[14] See U. NEERGAARD, C. JACQUESON, N. HOLST-CHRISTENSEN (eds), *Union Citizenship: Development Impact and Challenges. The XXVI FIDE Congress in Copenhagen*, Copenhagen: DJØF Publishing, 2014, fide2014.eu; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 120 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union: A Recurring Balancing Act*, Cambridge: Intersentia, 2017, p. 4 *et seq.*, 39 *et seq.*; C. BERNERI, *Family Reunification in the EU*, cit., p. 7.

[15] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 13 *et seq.*, p. 117 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 3 *et seq.*; G. DAVIES, *Nationality Discrimination in the European Internal Market*, Alphen aan den Rijn: Kluwer Law International, 2003; M. POIARES MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in C. KILPATRICK, T. NOVITZ, P. SKIDMORE (eds), *The Future of European Remedies*, London: Bloomsbury Publishing, 2000; P. VAN ELSUWEGE, D. KOCHENOV, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, in *Legal Issues of Economic Integration*, 2008, p. 43 *et seq.*; D. HANF, *Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, in *Maastricht Journal of European and Comparative Law*, 2011, p. 29 *et seq.*; H. OOSTEROM-STAPLES, *To What Extent Has Reverse Discrimination Been Reversed?*, in *European Journal of Migration and Law*, 2012, p. 151 *et seq.*; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, in E. GUILD, C.G. ROTAECHE, D. KOSTAKOPOULOU (eds), *The Reconceptualization of European Union Citizenship*, Leiden, Boston: Martinus Nijhoff Publishers, 2014, p. 169 *et seq.*; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, in *Irish Jurist*, pp. 13-46; E. SPAVENTA, *Seeing the Wood Despite the Trees, On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2009, p. 13; C. COSTELLO, *Citizenship of the Union: Above Abuse?*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. 321 *et seq.*

[16] Court of Justice: judgment of 7 July 1992, case C-370/90, *Singh*; judgment of 23 September 2003, case C-109/01, *Akrich*; judgment of 11 December 2007, case C-291/05, *Eind* [GC]; judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC]; judgment of 12 March 2014, case C-456/12, *O. and B.* [GC], paras 51-61; judgment of 5 June 2018, case C-673/16, *Coman and Others* [GC], paras 24, 40, 51-53; judgment of 12 July 2018, case C-89/17, *Banger*; P. WATSON, *Free Movement of Workers – A One Way Ticket? Case C-370/90 The Queen v. Immigation Appeal Tribunal and Surinder Singh*, in *Industrial Law Journal*, 1993, p. 68 *et seq.*; J. BIERBACH, *Court of Justice of the European Communities. The Return of the Member State National and the Destiny of the European Citizen. Grand Chamber Decision of 11 December 2007, Case C-291/05. Minister Voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, in *European Constitutional Law Review*, 2008, p. 344 *et seq.*; J. BIERBACH, *European Citizens' Third-Country Family Members and Community Law*, in *European Constitutional Law Review*, 2008, p. 344 *et seq.*; C. COSTELLO, *Metock: Free*

circumvent national legislation on family reunification by acquiring residence rights in another Member State and then return with them without intervention of national law[17] is called the "Europe-route".[18] The availability of the Europe-route empowers EU citizens to change the legal regime that applies to them and thereby partly remedies the inequality that exists between EU citizens that benefit from EU law and those who do not. Thereby it could offer a form of reconciliation for reverse discrimination. At the same time, however, the availability of the Europe-route curtails the competence of the Member States to regulate the position of their own nationals.[19] To prevent express circumvention of applicable national immigration law through use of the Europe-route, Member States have the possibility to classify the use of EU rights as abuse of law and refuse or withdraw the residence rights EU citizens' family members derive thereof.[20] At the same time, the legitimate concern of Member States to avoid circumvention of their national laws can be contrasted with the individual's wish to live together with his family, which is protected by human rights law. The European Convention of Human Rights

Movement and "Normal Family Life" in the Union, in *Common Market Law Review*, 2009, p. 587 *et seq.*; N. CAMBIEN, *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, in *Columbia Journal of European Law*, 2009, p. 321 *et seq.*; E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G*, in *Common Market Law Review*, 2015, p. 753 *et seq.*; H. VAN EIJKEN, *De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten*, in *Nederlands Tijdschrift voor Europees Recht*, 2014, p. 319 *et seq*.

[17] J. FAULL, *Prohibition of Abuse of Law*, cit., p. 291 *et seq.*, especially p. 293; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq.*; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, cit., p. 169 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*. Circumvention of EU law may also be relevant when national law does not allow for gay marriage. In *Coman and Others* [GC], cit., the Court decided that gay marriage and the pertaining rights that are obtained in another Member State can also be brought back to the home Member State, thereby evading the impossibility of gay marriage that exists in some Member States. See: A. TRYFONIDOU, *Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment*, in *European Law Blog*, 19 June 2018, europeanlawblog.eu; B. SAFRADIN, H. KROEZE, *Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest*, in *Nederlands Tijdschrift voor Europees Recht*, 2019, forthcoming. A precondition that is set to bring rights back home is that residence in the host Member State has been genuine. See *O. and B.* [GC] cit., paras 51-61 and *Coman and Others* [GC], cit., paras 24, 40, 51-53.

[18] Member States did not receive this decrease in their competence with open arms, and a discourse arose about "closing the Europe-route". In this discourse it is suggested that (purposeful) circumvention of national family reunification rules by temporarily moving to another Member States to fall within the application of the more lenient EU law on family reunification should be a ground to refuse the rights that are pursued. Most notably in the Netherlands. See Parliamentary Document 29 700, Amendment of the Immigration Law 2000 with regard to the integration requirement, no. 31: Letter from the Minister for Immigration and Integration to the Parliament, zoek.officielebekendmakingen.nl. Also see: C. COSTELLO, *Metock*, cit., p. 587 *et seq*.

[19] And it makes less favorable treatment of nationals who cannot bring themselves within the scope of EU law even more pronounced. See the argument below.

[20] Art. 35 of Directive 2004/38, cit.; *Singh*, cit., para. 24, see *infra*; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive: A Commentary*, Oxford: Oxford University Press, 2014, p. 296 *et seq*.

protects the right to family life and the right to marry. These rights are not absolute and do not impose "a general obligation [...] to respect the choice by married couples of the country of their matrimonial residence or to authorise family reunification on its territory".[21] Yet, since the beginning of the 21st century, the European Court of Human Rights demonstrated a "readiness to extend the protective reach of Article 8 [of the European Convention on Human Rights (ECHR)] in the field of immigration".[22] In light of this paradigm of protection of the family, it is uncomfortable in itself that the EU legal system is so fragmented that EU citizens are in need of circumventing their national laws to be together with their loved ones in the first place.[23] A tension exists between the citizen's right to love,[24] and the Member State's "right to control the entry of non-nationals into its territory".[25] In addition, abuse of law is defined as a situation in which the conditions to acquire a right are formally fulfilled, but despite thereof the right is refused because the conduct that led to conferral of the right does not meet the purpose for which the right was conferred.[26] Refusing those rights by asserting that they were abused may be contrary to the principle of legal certainty.[27] In the interest of legal certainty, and in the interest of the individual's right to love and live with his family, it is, therefore, necessary to carefully delineate the scope of application of abuse of law in the context of EU fami-

[21] European Court of Human Rights: judgment of 28 May 1985, nos 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 68; judgment of 31 January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107.

[22] D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, in *International & Comparative Law Quarterly*, 2008, p. 87 *et seq*., p. 111; e.g. European Court of Human Rights: judgment of 21 December 2001, no. 31465/96, *Sen v. the Netherlands*; judgment of 1 December 2005, no. 60665/00, *Tuquabo-Tekle et al v. the Netherlands*.

[23] Much can be said about this perspective. One insight is that EU law is an institute of exclusion, because it only privileges the "good citizens" who add to the establishment of the internal market. D. KOCHENOV, *On Tiles and Pillars*, cit., pp. 59-62; L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 178 *et seq*.; E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 220 *et seq*.; C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, London: Bloomsbury Publishing, 2017. Also see: S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 371 *et seq*.

[24] A.M. D'AOUST, *Love as Project of (Im)Mobility: Love, Sovereignty and Governmentality in Marriage Migration Management Practices*, in *Global Society*, 2014, p. 317 *et seq*.; K.L. KARST, *The Freedom of Intimate Association*, in *The Yale Law Journal*, 1980, p. 624 *et seq*.

[25] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

[26] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. 296. See *infra*.

[27] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq*., especially p. 296; M. POIARES MADURO, *Foreword*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. vii.

ly reunification, which is the main purpose of this *Article*. The outcome of this research is also important for Member States, because by determining the width of the scope of EU law, the remaining discretionary competence that is left to the Member States also becomes clearer.[28] When abuse of law is given a broad interpretation, Member States can more easily rely on it and have more leeway in enforcing their national rules at the expense of limiting the rights that derive from EU law. Conversely, when abuse of law is given a narrow interpretation, it is more difficult for Member States to rely on it and is more difficult to take away EU rights. A broad interpretation of abuse of law thus favours Member States' interests in protecting their competence to regulate the legal position of their nationals, and a narrow interpretation favours the effectiveness of EU law, and the individual's right to love and live with his family.

This research addresses abuse of EU law in the context of family reunification between a third-country national and an EU citizen to acquire a residence right. Two types of possible abuse are considered, the conclusion of marriages of convenience and the circumvention of national law through use of the Europe-route. Both types of conduct are aimed at bringing a case of immigration or family reunification within the scope of EU law to benefit from a more lenient immigration/family reunification regime. Social welfare tourism as a form of abuse of free movement law is excluded from the analysis, with the exception of those cases that are conducive to understanding the concept of abuse of law in the context of family reunification.[29]

The possibility for Member States to refuse a residence right in cases of abuse of EU law is laid down in Art. 3 of Directive 2004/38. Aside from abuse of rights, this provision mentions fraud as a reason to refuse, terminate or withdraw rights. It is, therefore, relevant to explain the distinction between fraud and abuse of law, before proceeding to the analysis of abuse of law in itself. Abuse of law or abuse of rights[30] refers to "an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules".[31] Fraud, on the other hand, "may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of res-

[28] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 7.

[29] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*, especially p. 300 *et seq.*; S.A. MANTU, P.E. MINDERHOUD, *Exploring the Limits of Social Solidarity. Welfare Tourism and EU Citizenship*, in *UNIO – EU Law Journal*, 2016, p. 4 *et seq*.

[30] Abuse of law and abuse of rights are used interchangeable in this *Article*.

[31] Communication COM(2009) 313 final of 2 July 2009 from the Commission on the application of Directive 2004/38, p. 15, point 4.1.2; Court of Justice: judgment of 14 December 2000, case C-110/99, *Emsland-Stärke*, para. 52 *et seq.*; judgment of 9 March 1999, case C-212/97, *Centros*, para. 25.

idence".[32] Therefore, the difference between fraud and abuse is that in case of abuse, the conditions for acquiring a right *are* fulfilled, whilst in the case of fraud, information is falsified to make it seem like they are fulfilled when they *are not*. This *Article* only deals with abuse of law and not with fraud.

The first part of the *Article* will introduce the legal and political context in which reverse discrimination, in the context of family reunification and abuse, as an instrument to nullify resulting rights, operates. Particular attention will be given to the federalist-citizenship contraposition that is apparent in the EU constitutional struggle and mitigated by the introduction of the concept of abuse of law. This part will also explore the role of the ECHR as a complementary source of protection when situations fall outside the scope of EU law. The second part of this *Article* addresses the Member States' concern about circumvention of their national immigration laws. To deal with this circumvention, they may classify the use of free movement rights as abuse of EU law and refuse or withdraw residence rights that are derived thereof. Doing so, however, may compromise legal certainty. The second part of the *Article* is, therefore, devoted to identifying the delineation of the scope of application of abuse of law in a family reunification context. In doing so, the *Article* inquires what the concept means, how it is applied and understood, and what it means for judicial protection of European citizens and for legal certainty. In the last section, ultimately, the distinction between abuse of law and non-compliance with the applicable conditions for family reunification is elaborated upon. The importance of the research is to add to the understanding of abuse of law in a family reunification context and to inquire about its implications for legal certainty and judicial protection in the EU. Additionally, the research aims to position the theme of reverse discrimination in a broader constitutional context.

II. Reverse discrimination: colliding constitutional principles in EU law

It can be deduced from the text of the Treaties,[33] and many sources of secondary law, that European law-makers in the past and in the present have attached great importance to equality in EU law.[34] In fact, it is considered to be "one of the fundamental values people throughout Europe can agree upon" as a result of a "longstanding tradi-

[32] Communication COM(2009) 313, cit., p. 15, point 4.1.1; Court of Justice: judgment of 5 June 1997, case C-285/95, *Kol v. Land Berlin*, para. 29; judgment of 27 September 2001, case C-63/99, *Gloszczuk*, para. 75; K.S. Ziegler, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*, especially p. 296.

[33] E.g. Art. 2 TEU; Art. 18 TFEU; Title III on Equality, Charter of Fundamental Rights of the European Union (Charter).

[34] J. Croon-Gestefeld, *Reconceptualising European Equality Law*, cit., p. 1 *et seq.*; A. Tryfonidou, *Reverse Discrimination in EC Law*, cit., pp. 162-166.

tion of egalitarian discourse [...] on the old continent".[35] "As a consequence, European equality law opens up a space in which European citizens feel included in the broader integration project".[36] Citizenship as the manifestation of equality may, however, collide with other constitutional principles of the EU, which as an international organization goes further than merely intergovernmental cooperation and very much resembles a federalist entity.[37] Upholding the federal balance requires a compromise between the need of the EU to have sufficient competences to achieve the common goals for which it was established, and preserving the sovereignty of its Member States.[38] The competences of the EU are, therefore, limited by the principle of conferral, which is translated into the division of competences.[39] Through this principle, the EU is shaped into a type of multi-level governance system, which pursues an optimal allocation of regulatory competences. Allocation of these competences is directed by the principle of subsidiarity, which means that competences are exercised at the level of government that is best positioned to regulate a specific issue. The EU may only intervene if it is able to act more effectively than the Member States at their respective national or local levels.[40]

Contrary to the notion of equal citizenship, the division of competences implies the possibility of unequal treatment among citizens, because the rules that are applicable to an individual may vary according to the level of governance where the competence to regulate the situation rests. The attachment of European decision-makers to equality does not preclude differentiation, since "the simple fact that we may agree that equality takes up a prominent place in European law tells us little about its functioning or how we should evaluate its application".[41] Its functioning seems to be limited to the protection of equality within a legal regime – either in the EU or in a Member State – without real consideration for the differences that exist between these legal regimes. Thus, a tension exists between equal citizenship and the division of competences. In the EU this

[35] J. Croon-Gestefeld, *Reconceptualising European Equality Law*, cit., p. 3.

[36] *Ibid.*, p. 1 *et seq.* (citations on p. 3).

[37] D. Kochenov, *On Tiles and Pillars*, cit., p. 1 *et seq.*, especially pp. 16-35; N. Nic Shuibhne, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 147 *et seq.*, especially p. 148; T.D. Zweifel, *Democratic Deficit?: Institutions and Regulation in the European Union, Switzerland, and the United States in Comparative Perspective*, Oxford: Lexington Books, 2002; A. Menon, M. Schain, *Comparative Federalism: The European Union and the United States in Comparative Perspective*, Oxford: Oxford University Press, 2006; K. Lenaerts, *Federalism: Essential Concepts in Evolution*, in *Fordham International Law Journal*, 1997, p. 746 *et seq.*

[38] N. Nic Shuibhne, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 147 *et seq.*, especially p. 149; K. Lenaerts, *Federalism*, cit., p. 746 *et seq.*, especially p. 775.

[39] Arts 4, para. 1, and 5, paras. 1-2, TEU, Arts 2-6 TFEU.

[40] Art. 5, para. 3, TEU; Protocol no. 2 on the application of the principles of subsidiarity and proportionality; R. Schütze, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?*, in *The Cambridge Law Journal*, 2009, pp. 525-536.

[41] J. Croon-Gestefeld, *Reconceptualising European Equality Law*, cit., p. 2.

tension is particularly noticeable when EU citizens who reside in their own Member State and do not fall within the scope of EU law enjoy less protection than those who reside in a Member State of which they are not a national. The occurrence of this inequality causes the reverse discrimination, which was mentioned in the introduction.[42] "Reverse" means that the group that is being discriminated against is an unexpected group, which is treated less favourably in comparison with another group which normally would receive the inferior treatment.[43] More specifically, it is normally expected that "insiders" enjoy more privileges than "outsiders", but when citizens are reversely discriminated, the opposite situation exists.[44]

Reverse discrimination occurs

> "due to the fact that, in order to further the Community's central aim of establishing a common market, [EU] law [...] grants rights to [persons] that fall within its scope by virtue of their contribution to the construction of the internal market, that are more generous or flexible than those that are provided by national laws to persons [...] that are deemed to fall within the scope of application of national law, as a result of the application of the purely internal rule. [...] Accordingly, there may be a difference in treatment".[45]

In other words, because the EU originated from an economic rationale, the Union's competence only extends to the legal position of EU citizens who move between Member States, because they contribute to the establishment of the internal market.[46] Pure-

[42] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 13-18; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 3-10; G. DAVIES, *Nationality Discrimination in the European Internal Market*, cit.; M. POIARES MADURO, *The Scope of European Remedies*, cit.; P. VAN ELSUWEGE, D. KOCHENOV, *On the Limits of Judicial Intervention*, cit.; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations*, cit.; D. HANF, *Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, cit.; H. OOSTEROM-STAPLES, *To What Extent Has Reverse Discrimination Been Reversed?*, cit.; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, cit.; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit.; E. SPAVENTA, *Seeing the Wood Despite the Trees*, cit.; C. COSTELLO, *Citizenship of the Union*, cit.

[43] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 3, 14; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 3.

[44] J.H. CARENS, *The Ethics of Immigration*, Oxford: Oxford University Press, 2013, p. 185 *et seq*.

[45] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 14.

[46] *Ibid*., p. 7, 129 *et seq*., p. 166; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 69-70; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law: We the Burden?*, London: Bloomsbury Publishing, 2016, p. 15 *et seq*.; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597, especially p. 1614; C. DAUTRICOURT, S. THOMAS, *Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope?*, in *European Law Review*, 2009, pp. 454, 436; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p. 13 *et seq*.; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On*, in *Common Market Law Review*, 2002, p. 731. An exception to this economic rationale for conferring family reunification rights seems to have emerged in the *Ruiz Zambrano* case-law, in which a residence right was granted to the Colombian parents of Belgian children by virtue of them being an EU citizen and enjoying the right to reside, rather than contributing to the economic objectives of the internal market. To discuss these rights falls

ly internal situations, which are confined in all relevant aspects to a single Member States, on the other hand, fall outside the scope of EU law.[47]

The purpose of introducing the right to family reunification as an ancillary to free movement rights was to facilitate the movement that would contribute to the establishment of the internal market. Not being able to bring one's family was considered to be an obstacle to move, and removing that obstacle by facilitating family reunification was expected to increase the chance that workers and self-employed would go abroad. Moreover, it was thought that being able to enjoy family life in the host country would diminish the need to retain strong ties to the home Member State, which would stimulate integration in the host Member State and, again, facilitate free movement.[48] Nationals who resided in their own Member State, on the other hand, did not contribute to the establishment of the internal market. They were thus not protected by EU law and not eligible for the family reunification rights guaranteed by EU free movement law. Additionally, it was assumed they did not need EU law protection to secure their right to reside and work, because by virtue of their national citizenship they already enjoy those rights indiscriminately.[49] The rights that were provided to them by national law did not always, however, include a right to family reunification that was comparable to the equivalent right in EU law. As a result, when the national legislation that applies to these citizens offers other or less rights than EU law does, they are reversely discriminated in

outside the scope of this *Article*, however, which focuses only on the applicability and analogous applicability of Directive 2004/38, after exercising free movement rights. For reliance on these rights the requirement to make use of free movement rights has persisted. Also see infra, footnote 58.

[47] Art. 3, para. 1, of Directive 2004/38, cit.; case-law e.g., Court of Justice: judgment of 7 February 1979, case 115/78, *Knoors v. Staatssecretaris van Economische Zaken*, para. 24; judgment of 28 March 1979, case 175/78, *The Queen v. Saunders*, para. 11; judgment of 27 October 1982, joined cases 35 and 36/82, *Morson and Jhanjan*, para. 18; judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Uecker and Jacquet v. Land Nordrhein-Westfalen*, para. 16; *O. and B.* [GC], cit., para. 36; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 7-10, 42-44, 49-50; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 5-6, 19, 21-26, 69-70; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 49; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p. 13 *et seq.*; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule*, cit., p. 731.

[48] C. BERNERI, *Family Reunification in the EU*, cit., p. 8; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 30; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 96 *et seq.*; Recitals 18, 23-24 of the Preamble of Directive 2004/38, cit.

[49] Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras 28-29; *O. and B.* [GC], cit., para. 42; Art. 3 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto.

comparison with nationals from other Member States who do benefit from EU law for the purpose of family reunification.[50]

In general, Member States do not "want to discriminate against their own nationals", but reverse discrimination occurs "because [Union] law obliges States to treat nationals of other Member States in a way which – by reasons of their own policies and aims – they did not originally intend to treat their own nationals".[51] Thus, when national legislation infringes EU free movement law, it must only be set aside for EU citizens who, by virtue of their movement to another Member State, fall within the scope of EU law. Nationals of the concerned Member State who did not make use of free movement rights, on the other hand, fall outside the protection of EU law, so to them the national legislation continues to apply and as a result they are reversely discriminated. "Reverse discrimination is [thus] a side effect of the limited scope of application of EU law".[52] In other cases, reverse discrimination may be "a deliberate choice of the national legislator to (continue to) apply stricter conditions to purely internal situations in order to pursue their own national policy".[53] For family reunification, this deliberate choice is made by several of the Member States, including Belgium and the Netherlands.[54]

The viability of continuing to uphold the economic premises on which the EU was built and to continue to allow the existence of reverse discrimination can be questioned, of course, and if the EU does not start to prioritize the inclusion of its citizens more than it does now, its legitimacy may be seriously undermined.[55] At the same time, the EU Treaties provide constitutional protection to EU citizenship and the principle of equality, as well as to the division of competences. Reconciliation of these principles should, therefore, take place within the boundaries of those Treaties, within the EU's constitutional system. In exploring possible reconciliation, some scholars have examined whether reverse discrimination should fall within the scope of Art. 18 TFEU, which

[50] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 7; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 69 *et seq.*; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 15 *et seq.*; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1597 *et seq.*, especially p. 1614.

[51] M. POIARES MADURO, *The Scope of European Remedies*, cit., p. 127; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 4.

[52] V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 42.

[53] *Ibid.*, pp. 4-5. In some cases, Member States may introduce stricter requirements to advantage their own nationals (i.e. requiring stricter qualifications of specific professionals as a quality guarantee) but this is not the case in family reunification law.

[54] *Ibid.*

[55] E.g. D. KOCHENOV, *Citizenship Without Respect*, cit.; D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2008, p. 169; D. KOSTAKOPOULOU, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq.*; D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *The Modern Law Review*, 2005, p. 233 *et seq.*; T. KOSTAKOPOULOU, D. KOSTAKOPOULOU, *Citizenship, Identity, and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press, 2001; C. O'BRIEN, *Unity in Adversity*, cit.

prohibits discrimination on the grounds of nationality.[56] The Court of Justice rejected this possibility, however, because the difference in treatment did not constitute "an obstacle to the construction of the internal market".[57]

An alternative option for reconciliation could be that reverse discrimination can exist within reasonable boundaries of equality. These reasonable boundaries are not to be considered as fixed limits to reverse discrimination that should be enforced by the EU or its Member States, but as a balancing exercise that mitigates some of the inequality that is caused by the system without defying the division of competences. In this way, a solution could be found in finding "a way around" reverse discrimination and become more equal, so to say. For family reunification rights, the Court seems to have adopted such an approach in its case-law.[58] It did so, for instance, by making the enti-

[56] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 18 *et seq.*; Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*, paras 123-150; E. SPAVENTA, *From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution*, in *Common Market Law Review*, 2004, p. 743 *et seq.*, especially p. 771; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq.*, especially p. 204; E. SPAVENTA, *Seeing the Wood Despite the Trees?*, cit., pp. 13-45; J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., pp. 16-19; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci*, in *European Law Review*, 2012, p. 176 *et seq.*, especially p. 188 *et seq*.

[57] Court of Justice: judgment of 18 February 1987, case 98/86, *Ministére public v. Mathot*, paras 7-8; judgment of 15 January 1986, case 44/84, *Hurd v. Jones*, paras 54-56; judgment of 23 October 1986, case 355/85, *Driancourt v. Cognet*, paras 10-11; judgment of 16 June 1994, case C-132/93, *Steen v. Deutsche Bundespost*; judgment of 29 January 2004, case C-253/01, *Krüger*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 18 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 25 *et seq.*; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 16 *et seq.*; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States*, cit., p. 188 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq*. The restricted applicability of Art. 18 TFEU is also mentioned in the provision itself, which limits its applicability to those cases that fall "within the scope of the Treaties". See: P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 18 *et seq*.

[58] Here I only discuss family reunification rights on the basis of Art. 21 TFEU and Directive 2004/38, cit. Family reunification rights derived from Art. 20 TFEU pursuant to the *Ruiz Zambrano* line of case-law is left out of the analysis. *Ruiz Zambrano* concerned a purely internal situation which was brought within the scope of EU law, because expulsion of the Colombian parents would force their Belgian children to leave the territory of the EU (in order to follow the parents), which would deprive them of the genuine enjoyment of the substance of the rights they enjoy by virtue of their citizenship. In literature it has been discussed extensively whether and to what extent the Art. 20 TFEU case-law could remedy the lack of protection for EU citizens who reside in their own Member State and have never made use of free movement law. E.g. D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., discusses among other issues the question to what extent this line of case-law has added to give true meaning to European citizenship through a critical lens. Other examples of relevant sources are: K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office National de l'Emploi*, in *Common Market Law Review*, 2011, p. 1253 *et seq.*; P. VAN ELSUWEGE, *Shifting the Boundaries-European Union Citizenship and the Scope of Application of EU Law-Case No. C-34/09, Gerardo Ruiz Zambrano v. Office National de l'Emploi*, in *Legal Issues of Economic Integration*, 2011, p. 263 *et seq.*; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States*, cit., p. 176 *et seq.*; P. VAN ELSUWEGE, D. KOCHENOV, *On*

tlement to the status of a worker dependent on a communitarian concept of being a worker instead, which ruled out the relevance of national interpretations.[59] Expanding the scope of the freedom of workers also expanded the scope of potential beneficiaries to the family reunification rights that are attached to the status of a worker. Similarly, the Court has always refused to introduce a fixed income requirement for family reunification. Instead, sufficient resources are assessed on a case-by-case basis.[60] Additionally, and most important for this *Article* is the earlier mentioned line of case-law which entails that when an EU citizen who has made use of the free movement of persons rights returns to his home Member State, the situation is no longer considered purely internal and is brought within the scope of Union law. The benefit that stems from continuing to fall within the scope of EU law is that EU citizens' family members who acquired a residence right in the host state can retain those rights when they return to the home Member State of their EU family member. The only condition to retain these rights is that residence in the host Member State must have been genuine.[61] If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[62] The case-law is motivated by the same economic discourse on which European integration was built,

the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*; H. VAN EIJKEN, S. DE VRIES, *A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano*, in *European Law Review*, 2011, p. 704 *et seq.*; D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, 2013, pp. 502-516; D. KOCHENOV, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 55 *et seq.*; H.H.C. KROEZE, *The Substance of Rights – New Pieces of the Ruiz Zambrano Puzzle*, in *European Law Review*, 2019, forthcoming.

[59] Court of Justice: judgment of 3 July 1986, case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, para. 21; judgment of 23 March 1983, case 53/81, *Levin v. Staatssecretaris van Justitie*, para. 23; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*; C. BARNARD, *The Substantive Law of the EU*, cit., p. 240.

[60] Art. 7, para. 1, let. b), of Directive 2004/38, cit.; Court of Justice: judgment of 10 April 2008, case C-398/06, *Commission v. Netherlands*; judgment of 19 September 2013, case C-140/12, *Brey*; P.E. MINDERHOUD, *Sufficient Resources and Residence Rights Under Directive 2004/38*, in *Nijmegen Migration Law Working Papers Series*, no. 3, 2015.

[61] *O. and B.* [GC], cit., paras 51-61; *Coman and Others* [GC], cit., paras 24, 40, 51-53.

[62] *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind* [GC], cit.; *Metock and Others* [GC], cit.; *O. and B.* [GC], cit.; *Coman and Others* [GC], cit.; *Banger*, cit.; P. WATSON, *Free Movement of Workers – A One Way Ticket? Case C-370/90. The Queen v Immigration Appeal Tribunal and Surinder Singh*, in *Industrial Law Journal*, 1993, p. 68 *et seq.*; J. BIERBACH, *Court of Justice of the European Communities*, cit., p. 344 *et seq.*; J. BIERBACH, *European Citizens' Third-country Family Members and Community Law*, cit., p. 344 *et seq.*; C. COSTELLO, *Metock*, cit.; N. CAMBIEN, *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, cit., p. 321 *et seq.*; E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers*, cit., p. 753 *et seq.*; H. VAN EIJKEN, *De zaken S. en G. & O. en B.*, in *Nederlands Tijdschrift voor Europees Recht*, 2014, p. 319 *et seq*.

and in essence, entails that effectively exercising economic freedoms also implies the possibility to rely on EU law upon return to the home Member State. Safeguarding the effectiveness of EU law is critical because otherwise an individual could be deterred from using his rights in the first place.[63]

The case-law of the Court empowers individual citizens to bring themselves within the scope of EU law and benefit from more lenient rules applicable to family reunification, and can, thus, be considered as a form of reconciliation for those who are reversely discriminated. At the same time, this reconciliation requires movement to another Member State which can be unaffordable (due to finances or language barriers), in particular, because residence in the host state must be genuine before rights can be retained in the home Member State.[64] This means that EU citizenship and the pertaining family reunification rights are reserved for the privileged "good" citizens who can afford to move and thus contribute to the internal market.[65] Another issue that is revealed when the scope of EU law is enhanced, is that it becomes increasingly difficult to justify why some citizens are still not included.[66] It is acknowledged that the approximation of legal regimes and the empowerment of citizens is limited and compromised by these liabilities but it may be as much as is feasible within the constitutional limitations of EU law. Further remedies to reverse discrimination should then come from the legislator and ultimately from the Member States.[67] They should take their responsibility in the EU as a co-legislator in the Council of Ministers or – when the EU lacks the competence to do so – outside the EU by resolving reverse discrimination on the basis of national law. Some of the Member States such as France, Italy and Austria, indeed, assumed this responsibility when their respective national courts decided that the principle of equality, that is protected by their own constitution, prohibits reverse discrimination.[68] This approach has led to the extended application of EU law to those situations, on the basis of national law. The solution does not eliminate

[63] *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., paras 19-20; *Akrich*, cit., paras 53-54; *Eind* [GC], cit., paras 35-36; *Metock and Others* [GC], cit., paras 64, 89-92; *O. and B.* [GC], cit., paras 46, 52-54; *Coman and Others* [GC], cit., para. 24; *Banger*, cit., para. 28; for a closer look upon the rationale of this doctrine, see the Opinion of AG Bobek delivered on 10 April 2018, case C-89/17, *Rozanne Banger*, paras 27-47; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 10-13, 41, 96-106, 114-118; G. DAVIES, *Nationality Discrimination in the European Internal Market*, cit., p. 119 *et seq.*; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1612.

[64] *O. and B.* [GC], cit., paras 51-61; *Coman and Others* [GC], cit., paras 24, 40, 51-53.

[65] D. KOCHENOV, *On Tiles and Pillars*, cit., pp. 59-62; L. AZOULAI, *Transfiguring European Citizenship*, cit., p. 178 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 220 *et seq.*; C. O'BRIEN, *Unity in Adversity*, cit.

[66] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 116 *et seq.*; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule*, cit., p. 731 *et seq.*; N. NIC SHUIBHNE, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, in P. BEAUMONT, C. LYONS, N. WALKER (eds), *Convergence and Divergence in European Public Law*, Oxford: Hart Publishing, 2002, pp. 177, 192.

[67] For instance on the basis of Art. 79 TFEU.

[68] A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 121-123.

the purely internal rule but it does eliminate reverse discrimination. It is called "voluntary adoption", "spontaneous harmonization" or "renvoi".[69]

Another component of the protection of the family that mustn't be forgotten, lastly, is the protection of Art. 8 ECHR. The Court of Justice recalled in its case-law that if EU law does not provide entitlement to a residence right "regard must be had to respect for family life under Article 8" of the ECHR.[70] As was mentioned in the introduction, the protection of family life does not give an entitlement to choose the country of matrimonial residence.[71] Quite the opposite, the ECHR is intentionally silent on matters of immigration. Admission to a Member State can, therefore, only be examined "through the effects of state measures on other human rights of the foreigners concerned".[72] In addition, the Member States are awarded a margin of appreciation in their decision-making. As a result, the European Court of Human Rights only examines whether the decision was reasonable, and does not go into the choices of national policy, which are made by the Member States.[73] Nevertheless, the Court shows a readiness to "correct intolerable outcomes in individual cases",[74] which gives an alternative prospect to those who do not and cannot benefit from EU law for the purpose of family reunification.[75]

III. Abuse of EU law – definition and background

Since 1974, the concept of law abuse is part of EU law.[76] Its coming into being was inspired by the use of the concept in some of the Member States, even though, not all

[69] *Ibid.*, p. 123.

[70] *Akrich*, cit., para. 58; a few years later it mentioned in *Metock and Others* [GC], cit., para. 79, that even though reverse discrimination does not fall within the scope of EU law, the Member States are all parties to the ECHR. In more recent cases such as *O. and B.* [GC], cit., *Coman and Others* [GC], cit., and *Banger*, cit. the Court has neglected to refer to the ECHR but this does not mean that its complementarity ceased to exist.

[71] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

[72] D. Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 103.

[73] *Ibid.* p. 103 *et seq.*; P. Van Elsuwege, D. Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*, especially p. 461 *et seq*.

[74] D. Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 107.

[75] P. Van Elsuwege, S. Adam, *EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 443-467, especially p. 460 *et seq*.

[76] Either as a general principle or as a "principle of construction" but, in any case, the Court of Justice takes recourse to the principle in its case-law, e.g. Court of Justice, judgment of 3 December 1974, case 33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*; R. De La Feria, S. Vogenauer, *Prohibition of Abuse of Law*, cit.; R. De La Feria, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax*, in *Common Market Law Review*, 2008, p. 395 *et seq.*, especially p. 436.

Member States are familiar with it in the same way.[77] As was mentioned above, abuse of law was introduced to resolve some of the tension between the effective use of EU law and judicial protection of those who use it while maintaining the preservation of the Member States' competence to regulate internal situations. This helps to distinguish between genuine use of EU law within the limits that are set by the Court of Justice and use of EU law that is meant to circumvent national law, which is, therefore, not a genuine use of EU rights. Member States' reliance on abuse of law thus protects the division of competences in a sensitive area of law. Nevertheless, applying abuse of law in an EU context also causes the restriction of EU rights. Therefore, invoking abuse of law is dependent on the scope of interpretation of abuse of law that is given by the Court of Justice. When EU rights are constructed and interpreted extensively by the Court, it is more difficult for the Member States to invoke abuse of law, even when their national laws are being circumvented. When these rights are more narrowly defined by the Court, it is easier to invoke abuse of law to restrict rights that go beyond their original purpose.[78] In other words, the broader the interpretation of EU free movement law, the less discretion there is to rely on abuse of law for the Member States and *vice versa*.[79]

This sensitivity is reflected in the development of the principle of abuse in EU law. In the course of the relevant case-law on abuse of law, a paradigm-shift can be observed from the *essential purpose* towards the *sole purpose* doctrine. The first doctrine entails that when the *essential reason* to invoke Union law does not tally with its purpose, this is classified as abuse of law, regardless of whether an additional legitimate purpose – which was not the essential purpose – for invoking the law can be found. Abuse of law is easily assumed.[80] The sole purpose doctrine, on the other hand, entails that abuse of law can *only* be ascertained when there is *no other objective* distinguishable but the circumvention of national law.[81] In that understanding of abuse of law, the mere fact that a person consciously places himself in a situation through which a certain right can be obtained does not in itself constitute sufficient basis to assume that there is an abuse of law.[82] This doctrine is based on the notion that as long as a right is invoked in a genuine

[77] And those who do use the principle show considerable differences in the scope with which they apply it. R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 395.

[78] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 297.

[79] *Ibid.*

[80] Court of Justice, judgment of 21 June 1988, case 39/86, *Lair v. Universität Hannover*; F. VANISTENDAEL, *Cadbury Schweppes and Abuse from an EU Tax Law Perspective*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., pp. 295-314; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit.; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq*.

[81] Court of Justice, judgment of 21 February 2006, case C-255/02, *Halifax and Others* [GC]; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit.; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq*.

[82] *Centros*, cit., para. 27.

and effective manner, there can be no abuse.[83] Thus here, the scope of the concept's applicability is narrow.

The Court first introduced the concept of abuse of law in 1974 in *Van Binsbergen*. The case concerned a Dutch lawyer who wanted to circumvent the professional rules of conduct that were applicable to him in the Netherlands by establishing himself in Belgium. Dutch law provided, however, that legal representatives should reside in the Netherlands. Van Binsbergen argued that this rule was contrary to the freedom to provide services. The Court of Justice did not follow this argument and ruled that "[a] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory [...] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state".[84] The formulation of the Court in *Van Binsbergen* seemed to award a broad discretion to the Member States, by implying that all circumvention of national rules could be contested and give reason to restrict the individual's rights.[85]

Van Binsbergen was followed by the so-called "Greek Challenge" cases. These cases concerned the reliance of shareholders of Greek public limited liability companies on Directive 77/91/EEC on the protection of their rights in the context of alterations in the capital of the company. The Greek government classified these claims as abuse of EU law, and the national courts asked for clarification from the Court of Justice. The Court of Justice considered that, despite the right of the Member States to combat abuse of law, reliance on this concept should not undermine the effectiveness and uniformity of EU law.[86] Hence, the discretionary competence to apply abuse of law was restricted and the concept started to obtain a communitarian meaning. In *Centros*, the Court further restricted the Member States' discretion to invoke abuse of law. The case concerned Danish entrepreneurs who established their company in the United Kingdom with the sole aim of avoiding Danish law on minimum capital.[87] When the company wanted to open a branch in Denmark, the Danish authorities refused access to the Danish market, because according to them the company had abused EU law on freedom of establishment. The Court decided differently and considered that the mere fact that a person consciously places himself in a situation through which a certain right can be obtained,

[83] *Levin v. Staatssecretaris van Justitie*, cit.; Court of Justice, judgment of 12 September 2006, case C-196/04, *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC].

[84] *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit., para. 13; R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 399 *et seq.*; A. Tryfonidou, *Reverse Discrimination in EC Law*, cit., p. 54 *et seq*.

[85] R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 403 *et seq*.

[86] Court of Justice: judgment of 12 March 1996, case C-441/93, *Patifis and Others*, para. 68; judgment of 12 May 1998, case C-367/96, *Kefalas and Others*, paras 22-28; judgment of 23 March 2000, C-373/97, *Diamantis*, paras 34-39; R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 404.

[87] R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq*.

does not in itself constitute an abuse of law. The right to choose the Member State with the least restrictive company law to establish a company is "inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".[88] Similarly to *Van Binsbergen*, the company in *Centros* had made use of a U-turn construction to circumvent national law. Because the Court allowed this, it follows from its judgment that circumvention of national law does not always qualify as abuse of law.[89] Where *Van Binsbergen* was an example of the essential purpose doctrine, with *Centros* the Court started to move towards a sole purpose doctrine.

It also follows from *Centros* that a distinction is made between use and abuse of EU law. Use of EU law cannot lead to restriction of rights, whilst abuse can. The question arose how it is possible to distinguish between use and abuse of rights. The Court answered this question in *Emsland-Stärke*, which can be used to determine whether a case can be classified as abuse of law. Like the earlier cases, *Emsland-Stärke* concerned a U-turn construction. The company exported a potato-based product from Germany to Switzerland for which it received an export refund. After the export, they immediately returned the products to Germany and sold them there. The question was whether this practice was abuse of EU law, which could justify the denial of the export refund. The Court considered: "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it".[90] By introducing this two-component test to assess possible abuse of law, the Court strongly restricted the discretionary competence of the Member State to decide on the lawfulness of the use of EU law and gave the concept of abuse a communitarian meaning.[91] *Emsland-Stärke* was broadly discussed. The subjective element of the test was contested because of the difficulty to determine subjective intentions, and the question was asked whether *Emsland-Stärke* could be transposed to other fields of EU law.[92] The Court responded to these questions and criticism in *Halifax*.[93] This case concerned a

[88] *Centros*, cit., para. 27; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq*.

[89] R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq*.

[90] *Emsland-Stärke*, cit., para. 52. Up until today the test is repeated in cases such as Court of Justice: judgment of 22 December 2010, case C-303/08, *Bozkurt*, para. 47; judgment of 16 October 2012, case C-364/10, *Hungary v. Slovakia* [GC], para. 58; *O. and B.* [GC], cit., para. 58; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 408 *et seq*.

[91] F. VANISTENDAEL, *Cadbury Schweppes and Abuse from an EU Tax Law Perspective*, cit., p. 295 *et seq.*; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 408 *et seq*.

[92] D. WEBER, *Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, Emsland-Stärke*, in *Legal Issues of Economic Integration*, 2004, p. 43 *et seq*.

[93] *Halifax and Others* [GC], cit.; R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., pp. xv-xvi; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 421 *et seq.*; A. LENAERTS, *The*

banking company whose financial services were tax-exempted. Accordingly, when the company established new call-centres, Halifax could only recover 5 per cent of the Value Added Tax (VAT) paid on the construction works. By developing a system of a series of transactions involving different companies of the Halifax group, it was, nevertheless, able to recover effectively the full amount of VAT. The question in this case was whether reliance on the right to deduct VAT, when the transactions on which the right was based were solely effected for that particular purpose, would be an abuse of rights. By applying the *Emsland-Stärke* test to the area of VAT, it was understood that the two-components test would become the standardized test for abuse of law.[94] Furthermore, *Halifax* seemed to respond to the criticism about the subjective element of the test by objectifying it. The Court considered: "An abusive practice will be found to exist where [...] it is apparent from a number of objective factors, such as the purely artificial nature of the transactions and the links between operators involved in the scheme, that the essential aim of those transactions concerned was to obtain a tax advantage".[95]

In *Cadbury Schweppes*, the Court extended the scope of application of the *Emsland-Stärke* test, again, to the field of corporate taxation. The case was similar to *Centros* and concerned a UK based company that exercised an economic activity on the Irish market. To counter tax-avoidance, the UK had established a tax on the income from Ireland, which was disputed before the Court of Justice. The Court reiterated the doctrine it had developed until then. It considered that nationals of a Member State are not supposed to "improperly circumvent national legislation" or "improperly or fraudulently take advantage of provisions of Community law". Yet, the establishment of a branch in another Member State "for the purpose of benefitting from the favourable tax regime [...] does not in itself constitute abuse".[96] The freedom of establishment may, thus, only be restricted to prevent "wholly artificial arrangements", equated with abuse.[97] To establish the existence of a "wholly artificial arrangement", the *Emsland-Stärke* test should be applied.[98] *Cadbury Schweppes* can be understood as another step of the Court from the essential purpose towards the sole purpose doctrine. This is because the existence of a purpose aside from constructing a "wholly artificial" situation to benefit from EU rights precludes classification as abuse of law. The existence of such an additional purpose, which legitimizes the use of EU law, is recognized when the objec-

General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law, in *European Review of Private Law*, 2010, p. 1121 *et seq*.

[94] *Halifax and Others* [GC], cit.; A. LENAERTS, *The General Principle of the Prohibition of Abuse of Rights*, cit., p. 1121 *et seq*.; R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., pp. xv-xvi; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 421 *et seq*.

[95] *Halifax and Others* [GC], cit., paras 74, 75, 81; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 422.

[96] *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit., paras 35-37.

[97] *Ibid*., para. 57.

[98] *Ibid*., paras 64-65; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 425 *et seq*.

tive of free movement rights has been achieved and reflected in economic reality.[99] "'[P]lanning without abuse' is a legitimate activity, [and] is reminiscent of the idea of 'legitimate circumvention' expressed both in *Centros*, and in the post-*Centros* decisions on establishment", as long as the rights are effectively exercised.[100]

IV. Abuse in the context of family reunification rights

In comparison with abuse of law in the context of tax law and free movement of services, abuse of law in the context of free movement of persons is a bit of an oddity. Scholars tend to either observe the "full rejection of the impact of the concept of abuse of law within the field of free movement of workers and citizenship"[101] or its reduction to a "merely verbal acceptance as a legal principle" in free movement law.[102] The first case in which this became apparent was *Lair.*[103] The question was whether a short period of being a worker was sufficient to be eligible for student assistance in the host-state on the basis of non-discrimination in comparison with the population of that State. German law provided that a worker would only be eligible after a period of five years of employment. The Court considered that

> "[i]n so far as [...] the three Member States [...] are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question".[104]

In the field of free movement, the Court, thus, relied on the sole purpose doctrine *avant la lettre*, about a decade before it was further developed in *Centros* and subsequent case-law.

This dichotomy between free movement of persons and the other freedoms is not unique[105] and it is often defended on the basis that human beings should, indeed, be treated differently than economic transactions.[106] Nevertheless, even in the context of

[99] *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit., paras 64-65; R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 427.

[100] R. De La Feria, *Prohibition of Abuse of (Community) Law*, cit., p. 423 *et seq*.

[101] R. De La Feria, *Introducing the Principle of Prohibition of Abuse of Law*, cit., p. xviii.

[102] K.S. Ziegler, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 306.

[103] *Lair v. Universität Hannover*, cit.

[104] *Ibid.*, para. 43.

[105] J. Snell, *And then There Were Two: Products and Citizens in Community Law*, in T. Tridimas, P. Nebbia (eds), *European Union Law for the Twenty-first Century: Volume II*, Oxford: Hart Publishing, 2004.

[106] R. De La Feria, *Introducing the Principle of Prohibition of Abuse of Law*, cit., p. xix.; Opinion of AG Jacobs delivered on 8 March 1989, case 344/87, *Bettray v. Staatssecretaris van Justitie*, paras 28-19, refer-

free movement rights, the Court does not preclude the existence of abuse and the discretion of the Member State to take measures against it. On the contrary, it has repeatedly confirmed that Member States are allowed to take measures to prevent possible abuse. The question remains, however, how such a situation can be distinguished from a genuine use of free movement rights. To answer this question, the text of Directive 2004/38 and the pertaining Communication on its application, that is issued by the Commission, are further examined, as well as the case-law of the Court of Justice.

Art. 35 of Directive 2004/38 holds that "Member States may adopt the necessary measures to refuse, terminate, or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience".[107] One type of abuse of EU law is already mentioned in the provision, namely the attainment of a residence right on the basis of a marriage of convenience.[108] The wording of Art. 35 implies, however, that potentially other unspecified usages of the Directive could also be classified as abuse. The legislator thereby created an – additional – open possibility for the limitation of rights, which leaves a legislative gap.[109] The question that is answered here is whether the U-turn construction to acquire a residence right for a family member, by relying on EU law and thereby circumventing national law, also constitutes such an abuse of law or not.

V. The case-law of the Court of Justice on family reunification law abuse

The first case of the Court of Justice on abuse of law, in the context of family reunification, was *Surinder Singh*.[110] In this case, the Court recognized the possibility that relying on family reunification rules, in the context of free movement, can constitute abuse of law and that Member States can act against it. It considered: "the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".[111] The Court did not yet, however, specify

ring to recital 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community.

[107] E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 297 *et seq*.

[108] *Akrich*, cit., para. 57.

[109] P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 63; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq*.

[110] *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit. This case took place before Directive 2004/38 was adopted. Hence, there was no general legislative provision for abuse yet. It may even be perceived that Art. 35 of Directive 2004/38, cit., is a codification of this aspect of *Surinder Singh*. E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 298; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*.

[111] *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., para. 24; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 101.

what types of behaviour could constitute such abuse. Instead, the Court *created* the possibility for the use of EU law to circumvent national family reunification rules, by establishing that once a family member acquires a residence right in the host state, where an EU citizen resides, he is able to retain these rights upon return to the home state of the EU citizen, which was discussed above. Years later, the *Surinder Singh* exception to the purely internal situation was confirmed in *Akrich*, *Eind*, *Metock* and in *O. and B.* and continues to be applicable law.[112] How does the possibility to apply this U-turn construction in the field of family reunification relate to the general doctrine on abuse of law? Can it be considered to be abuse of law, and if yes, under which circumstances?[113]

Akrich was a first test-case in the context of free movement and family reunification and involved a British-Moroccan couple who applied the U-turn construction to legalize the residence status of the Moroccan spouse. To achieve this, the couple moved to Ireland where the British spouse took up a temporary job, entitling the Moroccan partner to a residence right. When they wanted to return to the UK, they admitted that the only reason they moved to Ireland was to acquire a residence right for the Moroccan spouse on the basis of EU law. The Court considered that when an EU citizen "pursues or wishes to pursue an *effective and genuine activity*"[114], this cannot constitute an abuse within the meaning of the *Surinder Singh* judgment. "If there is a genuine exercise of an economic activity as defined by the Court of Justice, its preconditions cannot at the same time be created artificially".[115] Moreover, for the evaluation of the nature of the activity that is pursued, "the motives [...] are of no account [...] nor are [they] relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national".[116] The Court, thus, seemed to deviate from the two-step abuse of law test

[112] *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind* [GC], cit.; *Metock and Others* [GC], cit.; *O. and B.* [GC], cit.; *Coman and Others* [GC], cit.; *Banger*, cit.; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 58 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 101-114; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 103-106.

[113] It must also be noted that Art. 35, on abuse, was not in the original legislative proposal of the Commission and was added by the Council in a later stage of the negotiations (Council Common Position (EC) 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, statement of reasons on Art. 35). Although the Court had identified the issue of abuse before, it appears that its assertion by the Council was mainly symbolic, as a manifestation of their sovereignty, and they had not thought through which cases aside from marriages of convenience could constitute abuse. It is, thus, logical that this question arose later. E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 297 *et seq*.

[114] *Akrich*, cit., para. 55 (emphasis added).

[115] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 305 *et seq*.

[116] *Akrich*, cit. paras 55-56; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., pp. 59, 298; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 102.

that was formulated in *Emsland-Stärke* because, in *Akrich*, the subjective element of this test had become inoperative.[117] At the same time, the subjective element of the test was hollowed in *Halifax* and would be hollowed even further in *Cadbury Schweppes*, a couple of years after *Akrich*. Did the Court in *Akrich* deviate from its standing practice by completely excluding the relevance of motive to establish abuse of law in the context of free movement law? Or should the Court's leniency in this case be attributed to the general development of the EU's case law on abuse of law, in which the subjective element of the two-step abuse test from *Emsland-Stärke* was declining anyway?

It followed from *Akrich* that the use of free movement law to acquire the rights that are attached to it cannot be qualified as abuse, as long as the use of these rights is effective and genuine. This criterion is derived from the case-law on free movement of workers, which is laid down in Art. 45 TFEU. In *Lawrie-Blum*, the Court reiterated that the concept of a "worker" should have a communitarian meaning to avoid discrepancies in interpretation among the Member States. One of the criteria to qualify as a worker under EU law is that the provided services are effective and genuine and rewarded with a remuneration.[118] When the exercise of free movement rights is effective and genuine, there cannot be an abuse of EU law.[119] By defining a broad scope for free movement law, the Member States do not have much leeway to invoke abuse of law to annul the rights that are attached to having the status of a worker in EU law.[120] The circumvention of national law is permitted, provided that the use of EU law is genuine and effective. The Court did not clarify, however, under what circumstances the use of free movement right is genuine and effective, and when it is not.

The shift in the Court's approach is in line with the development of its case-law more generally. The focus on genuine use of EU law is understandable in the light of the principle of effectiveness, which precludes easy derogation from EU law by the Member States. A narrow construction of abuse of law fits these principles because otherwise, Member States could rely on abuse of law to undermine EU law. The increasing role of fundamental rights protection in the EU is also reflected in the Court's case-law. A narrow understanding of abuse of law benefits certainty about their rights and future. Maybe that is why the Court first relied on a sole purpose approach to abuse of law in the context of free movement and family reunification law.

[117] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 305 *et seq*.

[118] *Lawrie-Blum v. Land Baden-Württemberg*, cit., para. 21; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 300 *et seq*.; C. BARNARD, *The Substantive Law of the EU*, cit., p. 240.

[119] *Levin v. Staatssecretaris van Justitie*, cit., para. 23; *Akrich*, cit., para. 55; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 300 *et seq*.; C. BARNARD, *The Substantive Law of the EU*, cit. p. 241. The question is raised, however, how the Court came up with the criterion of *a genuine use of EU law*, considering that it does not appear anywhere in the Treaties or in Directive 2004/38, see: N. NIC SHUIBHNE, *The "Constitutional Weight" of Adjectives*, in *European Law Review*, 2014, p. 153 *et seq*., especially p. 154.

[120] K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 297.

VI. The Commission Communication with guidelines for the implementation of Directive 2004/38

A few years after the adoption of Directive 2004/38, the European Commission undertook an investigation into the implementation of the Directive in the Member States, which showed that uniformity was lacking and that much ambiguity still existed about the obligations it imposes.[121] To remedy the faulty implementation, the European Commission drafted its guidelines "for better transposition and application of Directive 2004/38".[122]

The Communication recites the general principle that "Community law cannot be relied on in case of abuse".[123] Nevertheless,

> "[EU] law promotes the mobility of EU citizens and protects those who have made use of it. There is no abuse where EU citizens and their family members obtain a right of residence under [EU] law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State".[124]

The sole purpose doctrine which the Court developed in *Akrich* and subsequent case-law is clearly recognizable.

The Communication continues with a description of what behaviour could constitute abuse of law. Pursuant to the text of Art. 35 of Directive 2004/38, it starts with the definition of marriages of convenience. "Recital 28 defines marriages of convenience for the purpose of the Directive as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise".[125] Nevertheless, when the marriage is genuine, it "cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage".[126] Neither is the quality of the relationship decisive for the application of Art. 35. Analogously, other relationships that came into being "for the sole purpose of enjoying the right of free movement and residence" can be the subject of national measures to combat abuse, such as a (registered) partnership of convenience or the adoption or recognition of a child with the sole purpose to rely on the free

[121] Report of 10 December 2008 from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

[122] Communication COM(2009) 313 final, cit.; E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive*, cit., p. 299 *et seq*.

[123] *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit.; *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Centros*, cit.

[124] Communication COM(2009) 313 final, cit., p. 15.

[125] *Ibid.*, p. 15.

[126] *Ibid.*

movement legislation to acquire a residence right.[127] On the other hand, the Commission recalls that "[m]easures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality".[128]

Subsequently, a set of indicative criteria is given that can be used to determine whether there is an abuse of EU law. Among these are the duration of the relationship, whether the spouses share a common language, their knowledge about each other, the existence of long-term commitments such as concluding a mortgage and cohabitation – although it follows from the Court's case-law that cohabitation is not a requirement to qualify for a residence right on the basis of family reunification.[129] Member States must give due attention to all circumstances of the individual case and may not base a decision on one single element of the situation.[130] The Commission omits to support these instructions with reference to case-law. Nevertheless, several elements are recognizable. The instructions are clearly based on the sole purpose doctrine that is developed by the Court.[131] The genuine nature of the marriage is decisive, regardless of whether it brings any advantage to the spouses. The unimportance of the quality of the relationship for the classification of abuse, furthermore, follows from the case-law in *Diatta* and *Ogieriakhi*.[132] The amplification to other relationships of convenience, on the other hand, seems to be an addition by the Commission itself. In 2014, the Commission renewed the instructions on the consequences of marriages of convenience in the "Handbook on addressing the issue of alleged marriages of convenience between EU

[127] J. VERHELLEN, *Schijnerkenningen: Internationale Families Opnieuw in de Schijnwerpers*, in *Tijdschrift voor Internationaal Privaatrecht*, 2016, p. 89 *et seq*.

[128] Communication COM(2009) 313 final, cit., p. 15.

[129] Court of Justice: judgment of 13 February 1985, case 267/83, *Diatta v. Land Berlin*, para. 15; judgment of 10 July 2014, case C-244/13, *Ogieriakhi*, para. 37.

[130] Communication COM(2009) 313 final, cit., p. 16 *et seq*.; *McCarthy*, cit.

[131] Applying the sole-purpose approach also corresponds with the rights that are laid down in the Family Reunification Directive 2003/86 which is applicable to family members of third-country nationals legally residing in the EU. Art. 16, para, 2, let. b), gives Member States the possibility to reject, withdraw, or refuse residence to a family member, when the marriage was "contracted for *the sole purpose* of enabling the person concerned to enter or reside in a Member State" (emphasis added). According to the Court in *Metock and Others* [GC], cit. it would be paradoxical if Directive 2004/38 would not minimally offer the same protection as Directive 2003/86. In this light it makes sense to assume that if a residence right derived from Directive 2003/86 is only annulled when the marriage that brought about that entitlement was concluded for the sole purpose of acquiring a residence title, the same rule can be applied to residence rights derived from Directive 2004/38. Following this logic, these residence rights can only be annulled when the marriage that brought about this entitlement was concluded for that sole purpose. Even though, remarkably, Art. 35 of Directive 2004/38 itself does not provide a definition of a marriage of convenience.

[132] *Diatta v. Land Berlin*, cit., para. 15; *Ogieriakhi*, cit., para. 37.

citizens and non-EU nationals in the context of EU law on free movement of EU citizens". This handbook mostly contains the same principles and instructions which were included in the Commission Communication of 2009.[133]

In addition, according to the Commission,

> "[a]buse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under [EU] law. The defining characteristics of the line between genuine and abusive use of [EU] law should be based on the assessment of whether the exercise of [EU] rights in a Member State from which the EU citizens and their family member(s) return was genuine and effective".[134]

Once again, the codification of the Court's case-law in *Akrich*, *Levin*, and *Lawrie-Blum*, which were discussed in the above, is apparent, as well as the applicability of the sole purpose approach to abuse in family reunification law. Genuine use of EU rights can never constitute abuse of law, regardless of the purpose for which the rights are used. If a planned circumvention of national immigration law is realized through such genuine use of EU rights, the circumvention is legitimate.

The assessment of whether the use of EU law is genuine and effective "can only be made on a case-by-case basis" and can be carried out on the basis of another set of criteria provided by the Commission Communication. Previous unsuccessful attempts to acquire residence for a third-country spouse under national law can be taken into account, as well as efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment and acquiring a job. Also here, due attention must be paid to all the relevant circumstances and a decision may not be based on one single element of the case.[135] Moreover, "[i]t cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State [...] [and] [t]he mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse".[136]

Lastly, the Communication mentions that "the Directive must be interpreted and applied in accordance with fundamental rights [...] as guaranteed in the European Con-

[133] Communication COM(2014) 604 of 26 September 2014 from the Commission to the European Parliament and the Council on helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.

[134] Communication COM(2009) 313 final, cit., p. 17-18.

[135] *Ibid.*, p. 18-19.

[136] *Ibid.*, p. 18, with reference to *Centros*, cit., para. 27.

vention of Human Rights (ECHR) and as reflected in the EU Charter of Fundamental Rights".[137] And that investigations into alleged abuse situations "must be carried out in accordance with fundamental rights, in particular with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR (Articles 7 and 9 of the EU Charter)".[138] In the light of this obligation and the interest of the families involved to live together with their loved ones, it is sequacious that abuse of law is interpreted narrowly and in accordance with the sole purpose approach.[139] Families thus enjoy more certainty about their rights and about their future.

VII. The follow-up

In the years after *Akrich* and the publiction of the Commission Communication, the Court of Justice was relatively silent on the doctrine of abuse of law in the context of family reunification,[140] until 2014, when *O. and B.* was handed down.[141] In this case, the Court reiterated its abuse of law doctrine and considered:

> "[T]he scope of Union law cannot be extended to cover abuses […]. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it".[142]

The Court, thus, re-established the *Emsland-Stärke* test to determine whether there is an abuse of law but also reiterated that there can only be abuse when the conditions under which a right is obtained are wholly artificial, which followed from *Cadbury Schweppes*.[143]

In addition, *O. and B.* clarified the condition that residence in the host Member State must have been effective and genuine before rights can be retained in a return situation. Effective and genuine exercise of EU rights requires:

> "to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State […]. [A] Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State […]. […] Residence in the host Member State pursuant to and in conformity with the con-

[137] *Ibid.*, p. 3; *Metock and Others* [GC], cit., para. 79.
[138] Communication COM(2009) 313 final, cit., p. 17.
[139] See *supra*.
[140] E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive*, cit., p. 60 *et seq*.
[141] *O. and B.* [GC], cit.; V. Verbist, *Reverse Discrimination in the European Union*, cit., p. 108 *et seq*.
[142] *O. and B.* [GC], cit.; para. 58 with reference to *Emsland-Stärke*, cit., para. 52; *Bozkurt*, cit., para. 47; *Hungary v. Slovakia* [GC], cit., para. 58.
[143] *Emsland-Stärke*, cit.; *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit.

> ditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State".[144]

A difference is made between short-term travel and long-term settling in the host Member State in accordance with Art. 7 of Directive 2004/38. This provision determines that "[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they" qualify as a worker, self-employed, economically not active with sufficient resources or as a student. The text of this provision seems to imply that Art. 7 can only be applicable after a minimum of three months of residence. *O. and B.* was, therefore, understood as the introduction of a requirement of a three months residence in the host-state, before a family member's residence right can be retained upon return to the home Member State of the EU citizen.[145] The interpretation also means that the genuineness of the exercise of free movement rights is made dependent on a set period of three months of residence. However, is it sensible to link duration of residence with its genuineness in itself? And – if it is installed anyway – how can a minimum period of residence be determined for the use of rights to be genuine, without being inevitably arbitrary in posing this condition? "Why can a Union citizen who has lived for 3.5 months in another Member State, in which he met his partner be joined by her when he returns to this Member State of origin and why is this not possible for the Union citizen who visits another Member State for a period of many consecutive years?".[146] It seems hard to accept that the period of residence is decisive in itself for residence to be genuine, rather than being one of the relevant criteria to decide so.[147]

This *Article* proposes a different interpretation of *O. and B.* Art. 6 of Directive 2004/38 provides the right to visit any Member State for up to three months, without the need to fulfil any conditions to exercise that right. Art. 7 of Directive 2004/38 provides the right to reside in another Member State for a period of longer than three months when certain criteria are fulfilled. Accordingly, *when* an EU citizen wishes to have a right to reside in the territory of another Member States for a period of longer than three months, he must comply with the criteria in Art. 7. That does not mean that an individual cannot rely on Art. 7 and reside in a Member State in accordance with the criteria in that provision before those three months elapse. Any other conclusion would

[144] *O. and B.* [GC], cit., paras 52-53.

[145] E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 303; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 110 *et seq.*; H. VAN EIJKEN, *De zaken S. en G. & O. en B.*, cit., p. 322 *et seq.*; N. CAMBIEN, *Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens?*, in *European Law Blog*, 11 April 2014, europeanlawblog.eu

[146] V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 112.

[147] Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-456/12 and C-457/12, *O. and B. and S. and G.*, para. 111.

imply that exercising the rights derived from Art. 6 for three months is a precondition to rely on Art. 7 and to register at the municipality of residence. This is not the case. Such a condition is not included in Directive 2004/38 and would also be very difficult to enforce. As a result, it is already possible from the first day of arrival to register as a resident in accordance with Art. 7 of Directive 2004/38. Does that mean that the Court's judgment can be interpreted as applying from the day that the requirements of Art. 7 are fulfilled, which in theory could even be after a single day of residence in the host state? Accepting this view would imply that even one day of residence in conformity with Art. 7 could already be sufficient to derive family reunification rights in the host Member State and upon return in the home Member State of the EU citizen.[148] Additionally, a family who resides in the host Member State for much longer than three months without complying with the conditions in Art. 7 of Directive 2004/38 would be deprived of the protection of the directive in the host state and after return in the EU citizen's home Member State.[149]

Considering the Court's wording, however, ultimately the duration of residence is not decisive to derive family reunification rights but whether residence in the host state is "such as to create or strengthen family life in that Member State", which should be assessed on a case-by-case basis. Three months of residence in the host Member State in accordance with the conditions in Art. 7 of Directive 2004/38 could then be used as a presumption of having created or strengthened family life, rather than as a precondition. This interpretation is in line with the Court's wording in *O. and B.*, in which it considered that "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive [...] *goes hand in hand* with creating and strengthening family life in that Member State".[150] Thus, creation and strengthening of family life is presumed when there is a three months residence that is in conformity with Art. 7 of Directive 2004/38, but this does not exclude the possibility that a period of less than three months could also create or strengthen family life, provided that the residence is still exercised in conformity with Art. 7 of the Directive. This approach would allow for real case-by-case assessment of the use of rights, which, aside from the duration of residence, could take other parameters into account including cohabitation, intensity of the contact and the duration of the relationship. Residence for more than three months would not automatically lead to the retention of residence rights but would need to be complemented with other evidence that family life was created or strengthened. In addition, residence for less than three months would not automatically lead to the denial of the retention of

[148] Although such a claim would give difficulty in regard of proving the existence of that right in compliance with the set conditions.

[149] E. Spaventa, *Family Rights for Circular Migrants and Frontier Workers*, cit., p. 769 *et seq*.

[150] *O. and B.* [GC], cit., para. 53 (emphasis added).

residence rights but would need to be compensated with other evidence that family life was created or strengthened to be entitled to those rights.

VIII. Abuse *v.* non-applicability of EU law

Considering the abuse of law doctrine and the case-law of the Court in the field of family reunification, the question arises how abuse of law can be distinguished from the lack of fulfilment for the conditions of a right.[151] In *O. and B.*, the Court reiterated the Member States' competence to combat abuse of law but it did not link abuse of law to the non-fulfilment of the criterion to have created or strengthened family life in the host Member State. Rather, it formulated a condition for the possibility to rely on Directive 2004/38 by analogy for family reunification after return to the home Member State. When this condition is not fulfilled, it is not a matter of abuse but a matter of non-compliance with the conditions for family reunification, on the basis of EU law upon return to the home Member State. When the conditions for family reunification are not fulfilled, there is no entitlement to a right, so there cannot be an abuse of rights either. And *mutatis mutandis*, when the conditions for family reunification are fulfilled, there is a right to family reunification which cannot be considered to be abuse, even if national law was circumvented.[152]

There is a difference between marriages of convenience and the Europe-route. When national law is circumvented, it depends on the circumstances of the case whether it can be classified as abuse or not. When a marriage of convenience is discovered, it is always abuse.[153] Even then, however, the question about the distinction between non-applicability and abuse can be raised. Since the rights that are granted by Directive 2004/38 are declaratory, it could be argued that the annulment of a marriage means that there was never a family relationship.[154] In that case, the conditions for family reunification were never fulfilled and the residence right never existed. Consequently, the marriage would not be considered to be abuse of law, but Directive 2004/38 would simply not be applicable, which positions the withdrawal or termination of a residence right that results from the discovery of a marriage of convenience outside the scope of EU law altogether. The mere existence of Art. 35 of Directive 2004/38 opposes this view, because it provides that the termination or withdrawal of a residence right due to the discovery of a marriage of convenience should take place in accordance with the safeguards the directive provides for. It is suggested that the conclusion of a marriage of

[151] K.S. Ziegler, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 296; E. Spaventa, *Comments on Abuse of Law and the Free Movement of Workers*, in R. De La Feria, S. Vogenauer (eds), *Prohibition of Abuse of Law*, cit., pp. 315-320; E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive*, cit., p. 310.

[152] Communication COM(2009) 313 final, cit., p. 15.

[153] *Akrich*, cit.; *McCarthy*, cit.

[154] Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*.

convenience and the pursuant – faulty – recognition of a residence right precludes the existence of this right *ex tunc* but still brings the situation within the scope of Directive 2004/38. The national measures to withdraw the residence right should, therefore, be taken in accordance with Art. 35 of the Directive.[155] This means that safeguards of proportionality should be applied,[156] which are not applicable if the withdrawal of a residence right would fall outside the scope of the Directive altogether.[157] In that case, the only safeguard that would still be available for the third-country national who lost his residence right is found in general international law, most notably in Art. 8 ECHR. As was mentioned earlier, the *de facto* protection of residence by Art. 8 ECHR is limited because its basic premise is very different than under EU law. Art. 8 ECHR departs from the authority of the Member States to decide on the entry of non-nationals into their territory.[158] Only when there are strong social and family ties in the Member State of residence non-admission or expulsion breaches the immigrant's right to family life.[159] To determine whether this is the case, a balance must be struck between the interest of the State and the interest of the individual. Still, as was shown in this *Article*, Art. 8 ECHR may provide a safety net for residence for those who fall outside the scope of EU law.[160]

A similar approach can be taken when an EU citizen and his family member want to rely on Directive 2004/38 in a return situation but fail to comply with the criterion of creating or strengthening family life in the host Member State before their return. If the

[155] This reading of Directive 2004/38 corresponds with the rights that are laid down in Directive 2003/86, which is applicable to family members of third-country nationals legally residing in the EU. In accordance with Art. 17 of Directive 2003/86, residence rights can only be rejected, withdrawn or refused when due account is taken of the personal circumstances of the person concerned and a proportionality assessment is carried out. Directive 2004/38 should minimally offer the same protection as Directive 2003/86 (*Metock and Others* [GC], cit., para. 69). Thus, withdrawal of a residence right that was conferred upon the third-country national through concluding a marriage of convenience, should be subject to the procedural safeguards in Directive 2004/38 as well.

[156] Arts 30-31 of Directive 2004/38., cit

[157] A distinction is made between non-existence of a right and non-applicability of the Directive, and national authorities may struggle with the distinction. In Belgium, for instance, there is a divergence in responses to the discovery of a marriage of convenience. Some decisions place the withdrawal of residence rights derived from Directive 2004/38 outside the scope of the Directive and the implementing law (Vreemdelingenwet), while other decisions do apply the safeguards in the law that implements the Directive. See H. KROEZE, *De Link Tussen Familierecht en Europees Migratierecht: De Route van de Vernietiging van een Schijnhuwelijk naar de Intrekking van Verblijfsrecht*, in *Tijdschrift voor Vreemdelingenrecht*, no. 3, 2018, p. 243.

[158] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

[159] E.g., *Sen v. the Netherlands*, cit.; *Tuquabo-Tekle et al v. the Netherlands*, cit.

[160] E.g., *Jeunesse v. The Netherlands*, cit.; D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 87 *et seq.*; P. VAN ELSUWEGE, S. ADAM, *EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification*, cit., pp. 443-467; H.H.C. KROEZE, *The Substance of Rights*, cit.

criteria in *O. and B.* are considered to be a threshold for the applicability of EU law, non-compliance with those criteria results in non-applicability of EU law. Classifying reliance on the case-law of the Court in *Surinder Singh* and *O. and B.*, when the condition to create or strengthen family life is not fulfilled, as a form of abuse of law, on the other hand, triggers the applicability of Art. 35 of Directive 2004/38. In that case, the refusal of a residence right must be proportionate and must observe the procedural requirements in the Directive.[161] Hence, it seems in the interest of the involved families in cases of marriages of convenience and in return situations to apply the concept of abuse, rather than conclude that Directive 2004/38 is not applicable. Because if Directive 2004/38 is not applicable, the implication is that a situation is purely internal to the Member State and falls outside the scope of EU law. As was explained above, in that case only Art. 8 ECHR is left to provide protection and safeguards against expulsion or non-admission, but to qualify for residence under this provision is a high threshold. When a situation is qualified as abuse of rights, on the other hand, it comes within the scope of EU law and is, therefore, no longer a purely internal situation. As a result, safeguards derived from EU law are applicable before a residence right can be refused or withdrawn, for the better of the families involved.

IX. Concluding remarks

The beginning of this *Article* problematized the tension between the principle of equality and the division of competences in the EU. Equality is an ideal to strive for that is anchored in the EU Treaties but is contrasted with the preservation of Member States' sovereignty. This tension is particularly prevalent in family reunification. The EU is competent to regulate family reunification for EU citizens who make use of their free movement rights, while those who do not use their free movement rights fall under the competence of the Member States. Member States often impose stricter requirements for family reunification than the EU, whereby they reversely discriminate their own nationals, insofar as they did not use free movement rights. The existence of reverse discrimination is counter intuitive and if the EU and its Member States do not take up the responsibility to remedy this inequality it may seriously undermine the EU's legitimacy. In the meantime, however, this *Article* explored another partial remedy to reverse discrimination within the constitutional limits of the EU.

In its case-law, the Court of Justice decided that residence rights for a family member of an EU citizen, who made use of free movement rights, can be retained after return to the home Member State of the EU citizen, provided that the exercise of those rights was effective and genuine. This means that an EU citizen can circumvent national family reunification law by temporarily moving to another Member State and then re-

[161] Arts 30-31 of Directive 2004/38, cit.

turn with residence rights for his family member. This possibility empowers EU citizens who face reverse discrimination to escape from it. It remains a liability that only EU citizens who are already empowered can benefit from this route which requires financial investment and knowledgeability, but at the same time, this solution stays within the constitutional limits of EU law. Member States may want to act, however, against circumvention of their national laws. Therefore, they have the possibility to classify circumvention of national law as an abuse of rights, which legitimizes the refusal or withdrawal of residence rights. At the same time, relying on abuse of law undermines legal certainty and the certainty for families about whether they are able to live with their loved ones. Especially, because it is uncomfortable in itself that it is needed to use or abuse free movement rights to live together as a family. For these reasons, the construction of the scope of abuse of law is very important. A broad scope of abuse of law gives way to frequent intervention by the Member States to protect themselves from circumvention of their national law. A narrow scope of abuse of law, on the other hand, limits the scope of application by the Member States and offers more protection to the rights of citizens. In the case-law of the Court, a movement can be observed, from a broad essential purpose construction of abuse of law, towards a narrower sole purpose construction of abuse of law. The shift in the general abuse of law doctrine is even stronger in the field of family reunification, where the impact of abuse of law is almost fully rejected and reduced to a merely verbal legal principle. The crucial criteria for a legitimate use of EU law that was formulated in cases such as *Akrich*, *O. and B.*, and *Coman* is that use of EU rights is effective and genuine. More concretely, to retain residence rights upon return to the home Member State of the EU citizen, residence in the host Member State must be such as to have created or strengthened family life. Following the Court's decision in *O. and B.*, a new interpretation of this criterion was suggested. It was proposed to adopt a presumption of having created or strengthened family life when residence in the host Member State had a duration of more than three months in accordance with Art. 7 of Directive 2004/38, rather than making the three months a fixed condition to retain a residence right. Periods of residence less than three months, in accordance with Art. 7 of Directive 2004/38, would then not automatically lead to the refusal of a residence right in the home Member State upon return but require additional evidence of having created or strengthened family life.

The focus on genuine use of EU law and the impact of the movement on family life is quite understandable. Considering the importance the Court attached to the principle of effectiveness in EU law, it is unsurprising that it does not easily allow for derogation by the Member States through invoking abuse of law. In addition, it is in line with the increasing role of fundamental rights protection, provided by the ECHR and by the Charter, in the EU legal order that protection of the family is prioritized over protecting the enforcement of national migration law. That may also be the reason why the Court,

first, shifted towards the sole purpose doctrine in the context of free movement rights, several years before it did so in other fields of EU law.

Although the protection of the family by EU law is commended, constructing the scope of abuse of law too narrowly could also backfire. The decisions of the Court in its most recent case-law could suggest that there is no more place for abuse of law, and non-compliance with the conditions to retain residence rights upon return to the home Member State of the EU citizen simply results in non-applicability of EU law. That interpretation would, however, reduce a return situation in which the requirement of genuine residence is not fulfilled to a purely internal situation, without any protection provided by EU law. Possibly, protection by the ECHR could offer solace, but this protection is less extensive than the protection by EU law. Classifying non-compliance with the conditions for reliance on EU law in a return situation as abuse of rights, on the other hand, would bring the situation within the scope of EU law and requires that procedural safeguards provided by the directive are observed. Thus, arguably, a narrow construction of abuse of law benefits EU citizens and their family members, because it provides certainty about their rights and future, but when the requirements for a right are not fulfilled they are better off when it is qualified as abuse than when EU law is considered not to be applicable. Although this conclusion is counterintuitive, it may even be a better solution from the perspective of reconciling the principle of equality and the principle of the division of competences in EU law. More people would fall within the scope of EU law, and even if their behaviour is qualified as abuse, their safeguards against deprivation of the rights they obtained are more equal than they would have been outside the scope of EU law.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE RIGHT TO PARTICIPATE IN THE EUROPEAN ELECTIONS AND THE VERTICAL DIVISION OF COMPETENCES IN THE EUROPEAN UNION

SÉBASTIEN PLATON*

ABSTRACT: Although EU Law provides that Member States have to organise European elections at universal direct suffrage, there is no explicit provision in EU law granting Union citizens the right to vote and to stand as a candidate for these elections. This right was discovered only recently by the CJEU. It has a broad scope of application *vis-à-vis* Member States, since it is applicable to national electoral legislation, including in purely internal situations. All this combined has the potential of blurring the distribution of powers between the European Union and the Member States in the field of election law.

KEYWORDS: right to participate in the European elections – Charter of Fundamental Rights of the European Union – federalism – EU citizens' rights – scope of EU law – vertical distribution of powers.

* Professor of Public Law, University of Bordeaux, sebastien.platon@u-bordeaux.fr. The Author would like to thank the two anonymous reporters of the *European papers* and Dimitry Kochenov for their feedback. The usual disclaimer applies.

I. Introduction

The second part of the book *EU Citizenship and Federalism. The Role of Rights* edited by D. Kochenov,[1] around which this collection of *Articles* was assembled, is dedicated to the impact of EU citizenship rights on the vertical division of powers in the EU. In this part, F. Fabbrini addresses the question of the political rights of EU citizens in general and analyses them in the context of EU federalism.[2] I would like to address, more particularly, the right to participate in European elections and how the recent case law on the subject may impact the distribution of competences between the European Union and the Member States.

As Fabbrini notes, "[t]he concept of citizenship has been, since its modern reinvention, connected to the idea of political rights".[3] This also applies to the European Union. EU citizenship is far from being a complete transnational status allowing each EU citizen to participate in all the national, regional and local elections in the country where they reside, and therefore "stands in sharp contrast to the situation in the US, where the Citizenship Clause of the Fourteenth Amendment grants US citizens the citizenship of the state in which they reside".[4] However, when EU citizenship was officially created in 1992,[5] it came, for the first time, with an incipient *status activus*.

The right to vote and to run for the European elections predates *de facto* the creation of Union citizenship with the Maastricht Treaty in 1992, since the Members of European Parliament have been elected by direct universal suffrage since 1976.[6] However, the 1976 Act does not use the language of rights ("elections shall be by direct universal suffrage and shall be free and secret"). By contrast, Arts 20, para. 2, and 22 TFEU provide that citizens of the EU enjoy, among others, the right to vote and to stand as candidates in elections of the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State. Therefore, the Maastricht Treaty

[1] D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017.

[2] F. Fabbrini, *The Political Side of EU Citizenship in the Context of EU Federalism*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 271 *et seq*.

[3] *Ibid*.

[4] J. Shaw, *EU Citizenship and Political Rights in an Evolving European Union*, in *Fordham Law Review*, 2007, p. 2549 *et seq.*

[5] Several authors argue that citizenship already existed in substance, if not in texts, before the Maastricht Treaty. See for example E. Olsen, *The Origins of European Citizenship in the First Two Decades of European Integration*, in *Journal of European Public Policy*, 2008, pp. 40-42, and C. Closa, *The Concept of Union Citizenship in the Treaty on European Union*, in *Common Market Law Review*, 1992, p. 1137 *et seq.*

[6] See the Act concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to the Decision 76/787/ECSC, EEC, Euratom of the 20 September 1976 of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (hereinafter, the 1976 Act).

constitutionalised the political rights of EU Citizens, which as such was a novelty. In any case, the right for EU citizens to participate in the municipal elections of the Member State where they reside was undeniably something new in 1992. These new rights, therefore, constitute major improvements for the rights of Union citizens.[7]

In 2009, when the Charter of Fundamental Rights of the European Union (Charter) came into force, these two citizenship political rights became fundamental rights, enshrined in Arts 39 and 40. There is, however, a difference between the right to participate in municipal elections and the right to participate in European elections. Interestingly enough, the Court found that Art. 39 of the Charter, not only contains a right to national treatment as regards European elections (just like Art. 40 contains a right to national treatment as regards municipal elections), but also an enforceable right to participate in European elections (II). Furthermore, this right has a broad scope of application *vis-à-vis* Member States, since it is applicable to national electoral legislation, including in purely internal situations (III). All this combined has the potential of blurring the distribution of powers between the EU and the Member States in the field of election law (IV). Having explored these issues, I will then briefly offer a conclusion (V).

II. An enforceable right to participate in European elections

Art. 39 of the Charter contains not only, in its first paragraph, the right of EU citizens to vote and to stand as a candidate in elections of the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State – which is also enshrined in Art. 20, para. 2, let. b), and Art. 22, para. 2, TFEU – but also, in its second paragraph, the more general principle according to which members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot, which mirrors Art. 14, para. 3, TEU and Art. 1, para. 3, of the 1976 Act, concerning the election of the members of the European Parliament by direct universal suffrage.

The first paragraph is a "simple" right to national treatment. This is notably apparent from the wording of Art. 20, para. 2, let. b), and Art. 22, para. 2, TFEU and Art. 39, para. 1, of the Charter, which all state that every citizen of the Union has the right to vote and to stand as a candidate in elections of the European Parliament in the Member State in which he or she resides, "under the same conditions as nationals of that State". This interpretation is confirmed by the case law of the Court of Justice, which said in *Eman and Sevinger*[8] and in *Spain v. United Kingdom*[9] that Art. 19, para. 2, of the Treaty establishing the European Community (EC), now Art. 22, para. 2, TFEU, was confined to applying the principle of non-discrimination on grounds of nationality to the right to

[7] See J. Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge: Cambridge University Press, 2007.

[8] Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger*, para. 53.

[9] Court of Justice, judgment of 12 September 2006, case C-145/04, *Spain v. United Kingdom*, para. 66.

vote and stand for European elections. In this respect, it is similar to the right to participate in municipal elections, enshrined in Arts 20, para. 2, let. b) and 22, para. 1, TFEU and Art. 40 of the Charter.

The national treatment aspect of the political rights of EU citizens is consistent with the concept of citizenship and strongly connected with the requirement of equality between citizens.[10] It has a strong normative potential to justify the abolition of all the remaining discriminations, limitations and inconsistencies affecting the political rights of EU citizens residing in other Member States.[11] However, it only means that EU citizens can be treated *as badly* as the nationals of their State of residence as regards the European elections. It does not grant EU citizens, including nationals, an active right to participate in these elections, nor does it guarantee any minimum standard of treatment.

Despite the major breakthrough that was the decision to elect members of the European Parliament at universal suffrage in terms of democracy and citizenship, EU legal texts are, surprisingly, rather limited as regards both the existence of a proper individual right of EU citizens to participate in the European elections and the standards applicable thereto. All they say is that the members of the European Parliament shall be elected by direct universal suffrage (since 1976)[12] and that the elections shall be "free and secret" (since 2002).[13] These conditions are now also part of EU primary law, in Art. 14, para. 3, TFEU and Art. 39, para. 2, of the Charter, which both provide that the members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

It is clear that these provisions create a legal *obligation* for Member States to organise European elections under the prescribed conditions. However, before the *Delvigne* ruling in 2015,[14] it was not clear whether such vague provisions could be seen as granting a real and enforceable *right* to individuals. In 2006, the Court of Justice still considered, in *Eman and Sevinger*, that the provisions of (then) Part Two of the Treaty on the European Communities relating to citizenship of the EU did not confer on citizens of the EU an unconditional right to vote and to stand as a candidate in elections of the European Parliament.[15] It is true that the circumstances of this case were specific since it was about the right to participate in European elections in the Dutch island of Aruba. Aruba is one the overseas countries and territories[16] which, according to Art. 198 *et seq.* TFEU, are not territorially part of the EU but are associated with it. Therefore, finding

[10] See H. Lardy, *The Political Rights of Union Citizenship*, in *European Public Law*, 1996, p. 611 *et seq.*, and p. 622.

[11] F. Fabbrini, *The Political Side of EU Citizenship in the Context of EU Federalism*, cit., p. 283.

[12] Art. 1 of the 1976 Act.

[13] Art. 1, para. 2, Decision 2002/772/EC of the Council of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, cit.

[14] Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne*.

[15] *Eman and Sevinger*, cit., para 52.

[16] See Annex II to TEU and TFEU.

the existence of a right to participate in European elections would not have been very useful for this case since it could not have been assumed that this right was applicable in Aruba. However, the statement of the Court regarding the absence, in general, of an individual right to participate in European elections under EU law contrasts with the opinion of AG Tizzano in this case and in *Spain v. United Kingdom*. In his opinion, AG Tizzano clearly stated that he believed that EU citizens did have a right to vote in European elections under EU Law.[17] By contrast, the existence of an individual right to vote, under EU Law, for citizens of the EU, in European elections has been explicitly denied by certain national courts, notably the Supreme Court of the United Kingdom.[18]

It was only in *Delvigne* that the Court of Justice explicitly found that such a right existed under EU law. The case was about a French national who had lost his civic rights due to his conviction for a serious crime with a 12-year prison sentence. Now a free man, Mr Delvigne went to challenge the decision of the competent administrative body to remove him from the electoral roll of the municipality where he resided. The local court referred the matter to the Court of Justice. It found that the fact that Mr Delvigne had been deprived of the right to vote under national legislation was a limitation of his right to participate in the European elections implicitly guaranteed by Art. 39, para. 2, of the Charter. However, the Court also found that this limitation *1*) was provided for by law, *2*) respected the essence of the right to vote referred to in Art. 39, para. 2, of the Charter and *3*) was proportionate.

Despite the fact that the Court found, in this case, that there was no violation of EU law, which has disappointed some commentators,[19] this ruling is noteworthy for the statement that Art. 39, para. 2, of the Charter "constitutes the expression in the Charter of the right of Union citizens to vote in elections of the European Parliament", confirming J. Shaw's analysis that "we have moved from the sole site of contestation of these rights being within and across the European political institutions and the Member States to a situation where courts are likely to be increasingly involved in deliberating about the scope and nature of those rights".[20]

In this finding, the Court was probably inspired by the case law of the European Court of Human Rights on Protocol no. 1 relating to Art. 3 of the European Convention on Human Rights. According to this provision, "[t]he High Contracting Parties undertake

[17] Opinion of AG Tizzano delivered on 6 April 2006, cases C-145/04 and C-300/04, *Spain v. United Kingdom* and *Eman and Sevinger*, paras 67-71.

[18] UK Supreme Court, judgment of 16 October 2013, *R (on the application of Chester) v. Secretary of State for Justice & McGeoch (AP) v. The Lord President of the Council and another (Scotland)*, [2013] UKSC 63.

[19] H. VAN EIJKEN, J.W. VAN ROSSEM, *Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?*, in *European Constitutional Law Review*, 2016, p. 114 *et seq.*, and p. 878.

[20] J. SHAW, *The Political Representation of Europe's Citizens: Developments*, in *European Constitutional Law Review*, 2008, p. 162 *et seq.*, pp. 183-184.

to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". This wording seems not to result in individual rights and freedoms but solely obligations between parties.[21] In the 1970s, however, the European Commission of Human Rights began to interpret this provision as creating "certain individual rights, such as the right to vote and the right to stand for election".[22] The Court adopted the same view in *Mathieu-Mohin and Clerfayt v. Belgium*[23] and, since then, consistently considers that this provision enshrines an individual right to free elections, under the conditions laid down in this provision.

The Court of Justice also used the text called "explanations relating to the Charter". This text was originally prepared under the authority of the Praesidium of the Convention, which drafted the Charter of Fundamental Rights of the European Union. According to the third subparagraph of Art. 6, para. 1, TEU and Art. 52, para. 7, of the Charter, this text must be given due regard for interpreting the Charter. It is however unlikely that this reference was decisive, since the explanations only state, in a very general way, that Art. 39, para. 2, takes over the basic principles of the electoral system in a democratic State.

It has also been considered by commentators of the ruling[24] that this interpretation may have been prompted by a semantic change brought by the Lisbon Treaty. Whereas Art. 189 EC used to state that the European Parliament consisted of representatives of the *peoples of the States* brought together in the Community, Arts 10, para. 2 and 14, para. 2, TEU now both say that the members of the European Parliament represent the *citizens* of the Union. This disintermediation between the citizens and the European Parliament has also been noted by AG Cruz Villalon in his opinion on the case.[25]

Be that as it may, the (objective) principle according to which the members of the European Parliament must be elected by direct universal suffrage in a free and secret ballot has been turned into a (subjective) right of EU citizens to vote in European elections. It has also been given a broad scope of application *vis-à-vis* Member States.

[21] See D.J. Harris, E. Bates, M. O'Boyle, C. Warbrick, C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2009, p. 712.

[22] European Commission of Human Rights, decision of 10 May 1979, no. 8612/79, *Alliance des Belges v. Belgium*.

[23] European Court of Human Rights, judgment of 2 March 1987, no. 9267/81, *Mathieu-Mohin and Clerfayt v. Belgium*.

[24] H. van Eijken, J.W. van Rossem, *Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament*, cit., p. 118; S. Coutts, *Delvigne: A Multi-Levelled Political Citizenship*, in *European Law Review*, 2017, pp. 867-877.

[25] See Opinion of AG Cruz Villalón delivered on 4 June 2015, case C-650/13, *Delvigne*, para. 100.

III. The broad scope of application of the right to participate in European elections *vis-à-vis* Member States

The scope of the right to participate in European elections as regards Member States benefits from its dual nature. As a citizenship right, it applies to Member States even in situations where the link with EU law is weak (III.1). As a fundamental right, it can apply regardless of any cross-border element (III.2).

III.1. A right applicable to Member States

According to Art. 51, para. 1, of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. The Court of Justice has broadly interpreted this provision in the past, especially in *Åkerberg Fransson* in which the Court said that "since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter".[26] However, in the same decision, the Court added that even such a broad interpretation has its limits: "where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction"[27]. Later judgments of the Court, for example, *Torralbo Marcos*[28] and *Siragusa*,[29] demonstrate that the Court can be quite strict when defining the limits of the material scope of the Charter as regards the Member States.

However, when it comes to the right to participate in European elections, the Court has proven to be quite bold about the scope of the Charter. In *Delvigne*, the Court found the Charter applicable to the case despite the fact that the relevant French criminal legislation had clearly not been adopted in order to give effect to any specific EU provision. The situation can, *mutatis mutandis*, be compared with the *Siragusa* case.[30] In *Siragusa*, the Court refused to consider that an order requiring Mr Siragusa to dismantle work carried out in breach of a law protecting the cultural heritage and the landscape fell within the scope of EU law. The Court admitted that there was a connection between such proceedings and EU environmental law since protecting the landscape – the aim of the national legislation in question – is an aspect of protecting the environment. Yet, the Court insisted that "it should be borne in mind that the concept of

[26] Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*, para. 21.
[27] *Ibid.*, para. 22.
[28] Court of Justice, judgment of 27 March 2014, case C-265/13, *Torralbo Marcos*.
[29] Court of Justice, judgment of 6 March 2014, case C-206/13, *Siragusa*.
[30] *Ibid.*

'implementing Union law', as referred to in Art. 51 Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other".[31] Then the Court stated that, in order to determine whether national legislation involves the implementation of EU law for the purposes of Art. 51 Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.

It could have, therefore, been argued in *Delvigne* that French criminal law only indirectly affected the right to vote and to stand as a candidate in the European elections. Furthermore, as the Court notices in para. 29 of *Delvigne*, "Art. 8 [of the] 1976 Act provides that, subject to the provisions of that Act, the electoral procedure is to be governed in each Member State by its national provisions", which could have broken the connection with EU Law. Let us also remember that in *Spain v. United Kingdom*, the Court stated that "the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State", allowing them to grant that right to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.[32] Yet, in *Delvigne*, the Court decided that the case fell within the scope of the Charter and, therefore, under its jurisdiction.

This solution, I believe, reveals the ambiguous nature of EU citizens' rights *as* fundamental rights. The doctrine of fundamental rights in EC law was developed by the Court of Justice in the 70s, following pressure by several national constitutional courts (especially German and Italian), to protect individuals' rights against the institutions of the (then) European Communities. These rights address mainly the institutions. Therefore, in the EU legal system, fundamental rights only apply to the States when they are acting as "agents" of the EU. The Charter does not *primarily* address the Member States, it only binds them in an *incidental* manner – even though the Court adopted a broad view of the applicability of the Charter to the States in the *Åkerberg Fransson* judgment. As regards the Member States, the EU standards of Human Rights are *functional*, not *federal*.

This is not, and this has never been, the way EU citizens' rights operate. Since the Maastricht Treaty, they have been intentionally designed to be enjoyed by EU citizens in their relations with the Member States. Member States are, therefore, the *primary* addressees of the EU citizens' rights, whether they are laid down in the Treaties or in the Charter. This is true for all of them, even the right to vote and to stand as a candidate at elections to the European Parliament since these elections are organised by the Member

[31] *Ibid.*, para. 24.
[32] *Spain v. United Kingdom*, cit., para. 78.

States. This right, and all the other rights of the EU citizens, have been designed primarily to impose specific obligations on the Member States as regards these EU citizens.

It is worth mentioning that this reasoning does not apply to all the citizens' rights in the Charter. Title V of the Charter, "Citizens' rights", is quite misleading – at least in the English language.[33] It gives the impression that it contains only EU citizens' rights (i.e. rights reserved for EU citizens) whereas, in fact, it contains rights related to citizenship as a broad concept, i.e. rights of action for individuals and legal persons in their relation with the EU. It does contain EU citizens' rights, reserved for EU citizens and primarily addressed to the Member States. These rights are the right to vote and to stand as a candidate in elections to the European Parliament (Art. 39); the right to vote and to stand as a candidate at municipal elections (Art. 40); the freedom of movement and of residence (Art. 45) and the right to diplomatic and consular protection (Art. 46). However, it also contains rights enjoyed not only by EU citizens but more broadly by every individual or legal person, sometimes on the condition that they reside or have a registered office in a Member State. These rights are the right to good administration (Art. 41); the right of access to documents (Art. 42); the right to refer to the European Ombudsman cases of maladministration (Art. 43) and the right to petition the European Parliament (Art. 44). Unlike EU citizens' rights, these "non-EU-citizens-only rights" are explicitly addressed either to all the institutions, bodies, offices and agencies of the Union or to one of them (the European Ombudsman – Art. 43; the European Parliament – Art. 44). We could, therefore, say that in fact, these "non-EU-citizens-only rights" are less likely than any other right in the Charter to apply to Member States. The Court of Justice clearly said, for example, in *Cicala*[34] and *YS and Others*,[35] that the right to good administration protected under Art. 41 could not be used as such against a Member State – even though it also said in *M.*[36] (see especially the ambiguous wording of para. 84, "that provision is of general application") and more clearly in *N.*[37] that this Article reflects a general principle of EU law, which applies to Member States within the scope of EU law. It is also hard to imagine how the right of access to documents of the Union, the right to refer to the European Ombudsman cases of maladministration or the right to petition the European Parliament could apply to Member States, except if somehow a national authority were to interfere with one of these rights being exercised.

Since it is in their essential nature to be applicable primarily to the Member States, it is not surprising that the fundamental rights of the citizens are more easily applicable to Member States than the other fundamental rights protected under EU law. From a technical point of view, this broad applicability is facilitated by the fact that the rights of the

[33] In French for example, Title V of the Charter is called "Citizenship", which is probably less misleading.
[34] Court of Justice, judgment of 21 December 2011, case C-482/10, *Cicala*, para. 28.
[35] Court of Justice, judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *YS and Others*, para. 67.
[36] Court of Justice, judgment of 22 November 2012, case C-277/11, *M.*
[37] Court of Justice, judgment of 8 May 2014, case C-604/12, *N.*, paras 49-50.

citizens in the Charter mirror provisions contained in other sources of EU law. For example, in *Delvigne*, the Court demonstrated the link between the situation in question and EU law by saying that the French legislation must be considered as an implementation of Art. 14, para. 3, TEU ("the members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot") and Art. 1, para. 3, of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage ("elections shall be by direct universal suffrage and shall be free and secret"). In short, the Court used the EU provisions, which are the material source of the relevant provision of the Charter, to declare the Charter applicable, making the limitation of the scope of application of the Charter to the Member States laid down in Art. 51, para. 1, *de facto* almost irrelevant for these specific rights.

III.2. A right applicable in purely internal situations

EU citizens' rights (understood *senso strictu* as the rights enjoyed only, under EU law, by the citizens of the EU) usually require a "cross-border" situation in order to apply. The freedom of movement and of residence applies only, in principle, to EU citizens who have crossed or want to cross an internal border of the EU. The diplomatic and consular protection only applies to EU citizens in their relations with Member States other than those of which they are nationals. The right to vote and to stand as a candidate at municipal elections is, in fact, a specific expression of the right to national treatment. Therefore, it only applies to non-national EU citizens.[38] The same applies, in theory, to the right to vote and to stand as a candidate at European elections.

In *Spain v. United Kingdom*,[39] the Court stated at para. 66 that Art. 19, para. 2, EC (now Art. 22, para. 2, TFEU), "implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country". However, this seems to be, at best, a mere passing reference. Furthermore, the broader context of this statement gives further indication that the Court may not have meant exactly what it seems to have said. More precisely, it said that Art. 19, para. 2, EC, "*like Art. 19, para. 1, EC relating to the right of Union citizens to vote and to stand as a candidate at municipal elections*, *implies* that nationals of a Member State have the right to vote and to stand as a candidate in their own country and *requires* the Member States to accord those rights to citizens of the Union residing in their territory" (emphasis added). The use of two different verbs ("implies"/"requires") and the reference to the right to participate in municipal elections (a "mere" right to national treatment) seem to indicate that the existence of a right for Member States nationals to vote and to stand as a candidate in their own country is not an *obligation* under EU law but merely a *precondition* for the exercise of the right to national treatment. Without such a pre-existing right to participate in European elections for na-

[38] Court of Justice, order of the of 26 March 2009, case C-535/08, *Pignataro*, para. 17.
[39] *Spain v. United Kingdom*, cit., para. 66.

tionals *under national law*, the right to be treated like the nationals would make no sense. It does not, necessarily, mean that this right is by itself protected *under EU law*.

In *Eman and Sevinger*, the Court of Justice considered that a difference of treatment *between nationals*, as regards the European elections, fell within the scope of EU law.[40] The national law in question was a Dutch law disenfranchising Dutch nationals residing in the Dutch overseas territory of Aruba from EU Parliamentary elections, whereas Dutch nationals residing in a non-member country could still vote and stand as a candidate in elections to the European Parliament held in the Netherlands. In this case, the Court found that the Dutch government had not sufficiently demonstrated that the difference in treatment observed between Dutch nationals residing in a non-member country and those residing in the Netherlands Antilles or Aruba was objectively justified as regards the principle of equal treatment. In short, the Court found a breach of equality *between Dutch nationals*, with no consideration of free movement within the EU. However, in this case, the infringed principle was not the right to vote and to stand as a candidate in European elections itself but the general principle of equality, as a general principle of EC law.[41] The Court only used the right to vote and to stand as a candidate in European elections in order to "link" the situation with EC law, making the general principle of equality, as protected under EC law, applicable to the case. All in all, the right to participate in European elections seemed to be reserved to mobile citizens, or at least citizens who do not enjoy the nationality of the Member State they live in.

It was not, therefore, before the *Delvigne* ruling in 2015, again, that the Court applied the right to vote and to stand as a candidate in elections itself to a purely internal situation. The main case, as mentioned before, was about a French national complaining that French legislation prevented him from participating in the European elections in France. There was no border-crossing or multinational element whatsoever.

The application of EU citizens' rights in a purely internal situation is not unprecedented. In *Rottmann*,[42] the Court held that a Member State shall observe the principle of proportionality when deciding whether to withdraw its nationality from one of its nationals, especially when such a decision would deprive this citizen of his/her EU citizenship. In *Ruiz Zambrano*,[43] the Court held that a Member State could not deprive an EU citizen – even one of its own nationals – of "the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen". In this case, Belgium could therefore not refuse a non-EU national who had dependent minor children, who were Belgians and therefore EU citizens, a right of residence in Belgium, nor refuse to grant a work permit to that non-EU national. In doing so, Belgium would have forced this non-

[40] *Eman and Sevinger*, cit., para. 57 *et seq*.
[41] *Ibid.*
[42] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*.
[43] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*.

EU national to leave the EU territory with his children, depriving them of "the genuine enjoyment of the substance" of the right to stay on the territory of any Member State.

However, these solutions are exceptional and apply only in extreme circumstances. In particular, the Court made it clear in its post-*Ruiz Zambrano* case law that the *Ruiz Zambrano* solution could only apply exceptionally, even more so, when the EU citizen whose third-country national family member is threatened with deportation is not a child.[44] By contrast, it is rather striking that the right to participate in European elections can apply in a purely internal situation even where there are no extreme and particular circumstances "amounting to a *de facto* loss of one of the rights attaching to that status".[45]

Could this reasoning apply to the other EU citizens' electoral right; the right to vote and to stand as a candidate at municipal elections? It would seem quite unlikely since, as mentioned above, this right is, in fact, a specific and rather limited[46] expression of the right to national treatment with no direct universal suffrage clause, unlike Art. 39 of the Charter. However, the *Ruiz Zambrano* precedent could possibly open a door here. Let us imagine for example that, in a Member State, the restrictions to the right to vote and to stand as a candidate in local elections are excessive but non-discriminatory (i.e. they apply also to national citizens). In such a case, the right to national treatment is irrelevant, because the issue is not about discrimination. However, would it be possible to say, in such a case, using the *Ruiz Zambrano* test, that EU citizens are deprived of "the genuine enjoyment of the substance" of the right to vote and to stand as a candidate at municipal elections? Arguably, this is a far-fetched reasoning, and in any case, it could only apply in extreme circumstances, just like the *Ruiz Zambrano* solution. Moreover, in most cases, restrictions of the right to vote and to stand as a candidate would not only apply to municipal elections but to all elections – including the European elections. The situation could, therefore, be dealt with using the *Delvigne* precedent, without any need for a *Ruiz Zambrano*-like reasoning. However, in the (rather unlikely) case of a restriction to local elections that would not apply to European elections, a *Ruiz Zambrano*-like reasoning could give more substance to the political status of the EU citizens, giving them not only a right to political inclusion in other Member States (limited to local and European elections) but also a minimum right to political participation in other Member States.

[44] Court of Justice, judgment of 8 May 2018, case C-82/16, *K.A. and Others*.

[45] K. LENAERTS, J.A. GUTIÉRREZ-FONS, *Epilogue on EU Citizenship: Hopes and Fears*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 751 *et seq.*, and p. 766.

[46] Exceptions to the right of national treatment are laid down in several provisions of Directive 94/80/EC of the Council of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, notably Arts 5, para. 3, and 5, para. 4.

IV. The right to participate in European elections, a potential disruptor of the distribution of powers between the European Union and Member States

The disruption caused by the right to participate in European elections in the distribution of powers between the EU and the Member States results from its existence and also from its legal potential, as could be developed by the Court of Justice in future cases.

IV.1. A new citizenship right?

According to Art. 25, para. 2, TFEU, only the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Art. 20, para. 2, TFEU, subject to the approval of the Member States in accordance with their respective constitutional requirements. Incorporating new citizenship rights by means of judicial interpretation "would be in clear violation of Art. 25 TFEU".[47] In doing so, the Court would therefore not only encroach on the horizontal allocation of powers between EU institutions, trespassing the remit of the Council, but also on the vertical allocation of powers between the EU and the Member States, who are to approve such an addition according to their respective constitutional requirements. Yet, it is clear that, in *Delvigne*, the Court created a new right, and that this right is reserved, under EU law, to Union citizens.[48]

It could be considered that this right was implicitly protected in Art. 20, para. 2, let. b), TFEU and, therefore, also in Art. 22, para. 2, TFEU. If it was the case, the right to participate in European elections, *as enshrined in Arts 20, para. 2, let. b), and 22, para. 2, TFEU*, would, therefore, have always contained not only a right to national treatment but also an active and enforceable right to participate in European elections, unlike the right to participate in municipal elections contains. However, this does not sit well with the finding of the Court in *Eman and Sevigner*[49] and *Spain v. United Kingdom*[50] that Art. 19, para. 2, EC, currently Art. 22, para. 2, TFEU, was confined to applying the principle of non-discrimination on grounds of nationality to the right to vote and stand for election.

Can we consider *Delvigne* to be an overruling of *Eman and Sevigner* and *Spain v. United Kingdom*? Such an overruling could be justified by new legal circumstances that occurred since these previous rulings, namely the entry into force of the Charter. One could argue that, by linking together, in the same Article of the Charter, the right to national treatment and the requirement for direct universal suffrage in a free and secret ballot, the Member States of the EU, as sovereign Masters of the Treaties, have implicitly amended the content of the former Art. 19, para. 2, EC (now Art. 22, para. 2, TFEU). In

[47] K. Lenaerts, J.A. Gutiérrez-Fons, *Epilogue on EU Citizenship: Hopes and Fears*, cit., p. 780.
[48] See *Delvigne*, cit., para. 44.
[49] *Eman and Sevigner*, cit., para. 53.
[50] *Spain v. United Kingdom*, cit., para. 66.

this respect, one must remember that, according to Art. 52, para. 2, of the Charter, "rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties". If we consider that this provision "links" the substance of the provisions of the Charter, which have their source in the Treaties, with the provisions that they mirror, the incorporation of a new substance in a right laid down in the Charter may also affect the substance of the equivalent right in the Treaties. In this interpretation, the Court has not created a new right in 2015. Instead, the Member States have implicitly amended the content of Art. 19, para. 2, EC in 2009.

This is, however, a very far-fetched and acrobatic interpretation. It is difficult to construe Art. 52, para. 2, of the Charter as a "two-way" interpretation link. Instead, it seems more plausible that the drafters of the Charter meant this provision as a "one-way" interpretation guideline, in order to prevent the substance of the Charter from going beyond the substance of the provisions of the Treaties "cloned" in the Charter. One could argue that Art. 52, para. 2, was designed precisely to prevent rulings like *Delvigne*.

Another possibility is that the right to participate in European elections already existed *somewhere else* in EU law, other than in Art. 20, para. 2, TFEU. Art. 20, para. 2, does not list *all* the rights of EU citizens, as evidenced by the terms *inter alia* and also by the fact that one of the rights of EU citizens, the collective right to invite the Commission to submit a proposal for a legal act (the so-called "citizens' initiative"),[51] is not mentioned in Art. 20, para. 2. The right to participate in European elections could, therefore, be a new right added in Art. 39, para. 2, of the Charter. However, since Art. 39, para. 2, mirrors Art. 14, para. 3, TEU and Art. 1, para. 3, of the 1976 Act, and since the Court explicitly says that Art. 39, para. 2, of the Charter "constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament *in accordance with Article 14, para. 3, TEU and Article 1, para. 3, of the 1976 Act*" (emphasis added),[52] it could be argued that the EU citizens' right to participate in European elections is and *always was* located in these provisions. This interpretation would mean that the Court has not created a new right and, therefore, has not encroached upon the powers of the other institutions or of the Member States under Art. 25, para. 2, TFEU. However, even though this interpretation is much less far-fetched than the previous one, it is still quite formalistic. It assumes that the Court has merely discovered a right that was always there, even though it is unlikely that this was the intention of the drafters of the Treaties and, before that, of the 1976 Act. Furthermore, it is not perfectly consistent with *Spain v. United Kingdom* and *Eman and Sevinger*, in which the Court did not interpret the 1976 Act in such a way.

[51] Art. 11, para. 4, TEU.
[52] *Delvigne*, cit., para. 44.

Whichever interpretation we choose, it is, therefore, hard to construe the finding of the Court as not trespassing on the powers of the Council, the European Parliament and the Member States.

IV.2. A potential minimum EU standard for national election law

By recognising a real and enforceable right to vote in the European elections, *Delvigne* may have paved the way for the Court of Justice to have a greater control over limitations of civic rights imposed on Union citizens – as long as these limitations also affect their right to participate in the European elections. Furthermore, the Court will probably, on the basis of the requirement that the elections be "free and secret", be able to fully assess whether the Member States meet fundamental democratic standards, as laid down in the case law of the European Court of Human Rights, when organising the European elections – just as the European Court of Human Rights did itself in *Matthews v. United Kingdom*.[53] Since a lot of domestic rules which apply to the European elections also apply to the other domestic elections, the Court of Justice could, therefore, assess large portions of the electoral legislation of the Member States. The Court's assessment could include, not only the reasonableness of the restrictions of the right to vote based on criminal conviction (as was the case in *Delvigne*) but also on other grounds, like mental health,[54] and more broadly, the quality of the electoral regime, like the clarity of the electoral legislation,[55] the existence of an effective remedy for those who claim that they have been unlawfully deprived of their vote[56] or the rules governing the access to the media and the neutrality of State-owned media.[57] Even though the Court does not mention it explicitly in *Delvigne*, it would be surprising if its review did not encompass, not only the right to *vote*, but also the right to *run* as a candidate in European elections, even though it must be kept in mind that the European Court on Human Rights "accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility".[58]

If the Court of Justice can, indeed, decide on minimum standards applicable to national election laws (and this evolution has yet to be confirmed by the Court), this would affect the division of competences between the EU and the Member States as regards electoral rules. So far, the definition of electoral rules and standards falls mostly within

[53] European Court of Human Rights, judgment of 18 February 1999, no. 24833/94, *Matthews v. United Kingdom.*

[54] European Court of Human Rights, judgment of 20 May 2010, no. 38832/06, *Alajos Kiss v. Hungary.*

[55] European Court of Human Rights, judgment of 2 March 2010, no. 78039/01, *Grosaru v. Romania.*

[56] *Ibid.*

[57] European Court of Human Rights, judgment of 19 June 2012, no. 29400/05, *Communist Party of Russia and Others v. Russia.*

[58] European Court of Human Rights, judgment of 19 October 2004, no. 17707/02, *Melnitchenko v. Ukraine*, para. 57.

the remit of Member States, with the exception of the minimal requirements imposed by EU secondary law regarding European elections. However, if the Court can, indeed, develop a body of case-law-based standards, this body could constitute the core of an incipient electoral regime common to all the Member States of the EU.

Another question that could arise is whether the right to participate in European elections is an *exclusive* right of EU citizens. In *Eman and Sevinger*, the Court stated in para. 74 that "while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, *enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality*, subject to such exceptions as are expressly provided for [...], that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union" (emphasis added). This statement seems to explain the non-exclusive nature of citizenship rights by the fact that they are essentially rights to national treatment. The same conclusion can be drawn from para. 76, in which the Court says that:

> "while [Art. 19, para. 2, EC, now Art. 22, para. 2, TFEU] requires the Member States to accord those rights to citizens of the Union residing in their territory, *it does not follow* that a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election *to certain persons who have a close link with it without however being nationals of that State or another Member State*" (emphasis added)

The Court then went on to find that a Member State (in this case, the United Kingdom) could legally allow non-EU citizens (in this case, Commonwealth citizens) to participate in the European elections. It seems that the Court found that since the right to participate in the European elections was a "mere" right to national treatment, it was not *exclusively* reserved for EU citizens as long as it benefitted *at least* to them. However, if there is, indeed, an *active* right to participate in European elections, can it be inferred that this right is an *exclusive* right, aimed at creating a political European community? It is hard to tell, and it would be a considerable overturn of the previous case law, but if such was the case, this limitation would encroach the power normally reserved to Member States to determine the limits of their political franchise.

On a positive note, this could, to a certain extent, respond to the criticism that the fragmented electoral rights regime across the EU results in an uneven access to the franchise.[59] It could also create a minimum level playing field applicable to both manifestations of democracy in the EU multilevel system. According to Art. 10, para. 2, TFEU, "citizens are directly represented at Union level in the European Parliament" whereas "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically ac-

[59] F. Fabbrini, *The Political Side of EU Citizenship in the Context of EU Federalism*, cit., p. 279.

countable either to their national Parliaments, or to their citizens". Setting some minimum standards applicable to both European elections and national elections ensures a common fundamental grammar for these two *branches* of European democracy, under the common supervision of the Court of Justice.

It is also consistent with the fact that being a functional democracy is a condition for being a Member State of the EU, under the so-called "Copenhagen criteria". It is now well-known, in particular, as regards the "rule of law backsliding"[60] in several Member States,[61] that the EU is remarkably firm on candidate States complying with the standards of liberal democracy and the rule of law while lacking the means to enforce these very same standards *vis-à-vis* Member States. Reviewing whether national legislations meet the basic standards of democracy may contribute to the resorption of this so-called "Copenhagen dilemma",[62] especially when illiberal governments meddle with electoral law in order to remain in power. As an example, the Court could review the various infringements to the "one person, one vote" principle in Hungary, as well as the differences of treatment between different categories of citizens abroad depending on whether they are more or less likely to vote for the Prime Minister's ruling party, Fidesz.[63]

It is, however, likely that the standards discovered and enforced by the Court, as well as the intensity of its review on Member States' electoral systems, will be limited, due to the obligation of the EU to respect the national identities of the Member States, under Art. 4, para. 2, TEU. The concept of national identity, coined by the Maastricht Treaty and made more (but far from completely) precise by the Lisbon Treaty, includes each country's fundamental political and constitutional structures, for example, the status of the State as a Republic.[64] It may, therefore, also include the electoral legislation, as it is strongly connected with each country's fundamental constitutional and political choices. Tension is, therefore, likely to arise between, on the one hand, the necessity to ensure the effectiveness of European representative democracy, which according to Art. 10, para. 1, TFEU founds the functioning of the Union, and of Union citizens' participation to the election of

[60] L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq*. See also the concept of "constitutional capture" coined by J.-W. Müller about Hungary: J.-W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *European Law Journal*, 2015, pp. 141-142.

[61] Poland, in particular, is currently the object of both a political procedure under Art. 7, para. 1, TEU and infringement proceedings before the Court of Justice due to various measures undertaken by the current Polish Government with the apparent aim of curtailing the independence of the judiciary. On the 12th September 2018, the European Parliament has also activated the Art. 7, para. 1, TEU procedure against Hungary.

[62] As far as we can tell, this expression was coined by then Commissioner V. Reding during a debate at the European Parliament concerning the situation in Romania on the 12th September 2012 available at www.europarl.europa.eu.

[63] B. MAJTÉNYI, A. NAGY, P. KÁLLAI, *"Only Fidesz" – Minority Electoral Law in Hungary*, in *VerfassungsBlog*, 31 March 2018, verfassungsblog.de.

[64] Court of Justice, judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, para. 92.

the European co-legislature and, on the other hand, the sovereignty of Member States. This could be, for example, an argument against the exclusive nature of the right to participate in European elections (i.e. the thesis according to which this right should be reserved to EU citizens), at least in countries where the extension of suffrage to non-EU citizens is a part of their constitutional identity. This is probably the case with the United Kingdom since the Court stated in *Spain v. United Kingdom* that it is "for reasons connected to its constitutional traditions"[65] that the United Kingdom chose to grant the right to vote and to stand for election to Commonwealth citizens.

One must also consider the fact that the Court can only review and decide on standards applicable to national election laws insofar as the laws in question are applicable to European elections. A Member State could perfectly develop electoral rules that are strictly specific to the European elections. These specific rules are likely to be limited because it is not in the interest of the States to create complications in their electoral regimes. However, a State can, for example, decide that citizens have to be of a certain age to run as a candidate for European elections and for European elections only. If the Court was to find this age excessive, for example, this finding would not apply to other national elections. Member States could even be tempted to develop a body of law specific to the European elections in order to make sure that the review exercised by the Court, along with the standards it could develop, do not "contaminate" the rest of national electoral law. However, such a strategy would be likely to create major inconsistencies. Can we really imagine that a State would agree, for example, that persons with mental difficulties would be allowed to vote for the European elections but disenfranchised for every other election?

Certain questions, in particular, are likely to remain either beyond the reach of the Court or subject to self-restraint. This is typically the case of national rules concerning the disenfranchisement of nationals residing in other countries, notwithstanding the position of certain authors who consider these rules incompatible with EU citizens' free movement rights.[66] There are two possibilities here. First, it may be that the nationals of a Member State imposing such disenfranchisement rules reside in another Member State. In this case, the citizens in question might still be able to participate in the European elections in the host State, which means that even if their right to participate in elections *in their State of nationality* is compromised, their right to participate *in European elections* is not. Alternatively, the citizens in question may reside in a third country. Theoretically, in this case, the Court could review the national rules in question since, in this case, the citizens are effectively barred from the possibility to participate in

[65] *Spain v. United Kingdom*, cit., para. 79.

[66] See D. KOCHENOV, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?*, in *Maastricht Journal of European and Comparative Law*, 2009, p. 197 *et seq*.

European elections. However, it is likely that the Court would apply self-restraint in this case, for several reasons. First, EU secondary legislation explicitly protects national discretion on this matter.[67] Even though technically the right to participate in European elections prevails on secondary law, being enshrined in primary law, this might deter the Court from going against the explicit will of the EU legislature. Secondly, even the European Court of Human Rights applies self-restraint on this question, as evidenced by its *Shindler* ruling concerning the 15-year rule in the United Kingdom.[68] Surely, the Court of Justice is not bound by the interpretation of the European Court of Human Rights. It could be argued that the right to participate in European elections must be interpreted in its constitutional context and, notably, in the light of the importance of representative democracy in the EU, as expressed in Art. 10, para. 1, TFEU ("[t]he functioning of the Union shall be founded on representative democracy"). However, on this issue, the national identity clause, mentioned above, could play a role in the EU context similar to the national margin of appreciation in the case law of the European Court of Human Rights. One cannot completely rule out, however, the Court of Justice taking such a bold stance, should the question arise before it.

V. Conclusion

Political rights are an essential aspect of citizenship. Yet, when it comes to EU citizenship, the main focus is usually on transnational (horizontal) rights, like free movement and equal treatment, rather than on political (vertical) rights. However, after a period of "expansion" of citizens' transnational rights, during which the Court of Justice seemed to drift away from the "single-market-based" citizenship, the Court, in recent cases like *Dano*[69] and *Alimanovic*,[70] seems to have taken a more restrictive stance, in particular as regards the access of EU citizens to social benefits in the host Member State.[71] Could it be that, at the same time, political rights have taken an opposite trajectory and have been reinforced by the Court? The case law on political rights is too scarce to draw such a definitive conclusion. However, it is striking that the Court has adopted a bold view in *Delvigne* by discovering in the Charter an enforceable right for EU citizens to participate

[67] Art. 1, para. 2, Directive 93/109/EC of the Council of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals: "Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory".

[68] European Court of Human Rights, judgment of 7 May 2013, no. 19840/09, *Shindler v. United Kingdom*.

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

[70] Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic*.

[71] This phenomenon is one of the subjects of D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., around which the present collection of articles was assembled. See also D. Thym (ed.), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Camden: Hart, 2017.

in European elections. The Court did not go as far as some would have hoped since it did not find any violation of EU law in the case at stake. However, as some commentators have observed, it is a "classical strategy for landmark decisions" to show "restraint with regard to the outcome of the case" while scoring "an important point as a matter of legal principle".[72] Recognising an enforceable right to participate in European elections, applicable to national law regardless of its connection with EU law and of any cross-border element, has a real potential to rock the boat. In particular, I have argued that, merely by its existence, this judicially-recognised right encroaches on the power, reserved by the Treaties to Member States (*inter alia*), to recognise new citizenship rights. Furthermore, this right could potentially expand into a series of basic democratic standards, applicable to national election rules insofar as they also apply to European elections, with the Court of Justice having the power to review whether national election rules comply with these standards. This potential still needs to be realised and may be hindered by the Member States' claim to sovereignty. This is, however, an interesting development that deserves to be observed closely. Given the strong recognition of the democratic foundation of the EU in the Lisbon Treaty, and despite the consistently low turnout at the European elections, political rights could develop into another strong pillar for EU citizenship, alongside transnational/free-movement rights.

[72] H. VAN EIJKEN, J.W. VAN ROSSEM, *Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament*, cit., p. 130.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE SALE OF CONDITIONAL EU CITIZENSHIP: THE CYPRUS INVESTMENT PROGRAMME UNDER THE LENS OF EU LAW

SOFYA KUDRYASHOVA*

ABSTRACT: This *Article* focuses on the consequences of the acquisition of Cypriot citizenship through Cyprus's new Investment Programme, adopted in 2013. One of the criteria for the acquisition of citizenship is the investment of Euro two million in Cypriot banks, immovable property or companies which must be retained on Cypriot territory for at least three years. However, immovable residential property to a value of Euro 500,000 must be retained in Cyprus indefinitely or there is a risk of citizenship being revoked. These criteria raise concerns, particularly in light of EU law on citizenship and the free movement of capital. This *Article* analyses the possible violations of EU law in this context and argues against the conditional nature of the citizenship provided by the Programme, which results in violation of the free movement of capital and restricts the genuine enjoyment of the status of EU citizenship. Case law by the Court of Justice and academic literature analysing the right to the free movement of capital and revocation of citizenship in an EU context will be examined to determine the repercussions of the Cyprus Programme. This topic is extremely relevant today, as it sheds light on the developing nature of EU citizenship and the relationship between EU citizenship rights weighed against the national interests of the Member States.

KEYWORDS: investment migration – EU citizenship – revocation of citizenship – free movement of capital – non-discrimination – Cyprus Investment Programme.

* Corporate Administrator, PHC Tsangarides LLC, sof.kudryashova.5@gmail.com. I would like to express my gratitude to Professor Dimitry Kochenov for his guidance and encouragement throughout the entire process of writing this *Article*.

I. Introduction

The rise of investment migration has become subject to intense study worldwide. These schemes are characterised as an "exchange of national membership rights for immigrants' financial and human capital" and have been introduced worldwide with great success, especially in North and Latin America.[1] Despite facing criticism,[2] the increasing popularity of investment migration schemes has reached the EU, with Austria, Malta and the Republic of Cyprus (hereinafter "Cyprus" or "Republic") being leading Member States granting both national and EU citizenship to third-country nationals in exchange for financial contribution to their economies.[3] Cyprus, a member of the Union since 2004, introduced its Investment Programme in 2013, which was amended to its current form in 2018.[4] As the Programme is proving successful in attracting foreign investors,[5] the importance of ensuring its legality in light of EU law is indisputable. The strict territorial link to the institution of citizenship[6] as an attribute of state sovereignty[7] has been

[1] A. Gamlen, C. Kutarna, A. Monk, *Re-thinking Immigrant Investment Funds*, in *Investment Migration Working Papers*, no. 1, 2016, p. 1.

[2] A. Shachar, *Dangerous Liaisons: Money and Citizenship*, in R. Bauböck (ed.), *Debating Transformations of National Citizenship*, Berlin: Springer Verlag, 2018, pp. 9, 13-14; R. Barbulescu, *Global Mobility Corridors for the Ultra-rich. The Neoliberal Transformation of Citizenship*, in R. Bauböck (ed.), *Debating Transformations of National Citizenship*, cit., p. 29; A. Scherrer, E. Thirion, *Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU*, in *European Parliamentary Research Service*, 2018, pp. 20-25; H. Cooper, *MEPs Slam Cypriot Citizenship-for-Sale Scheme*, 19 September 2016, www.politico.eu; L. Mavelli, *Citizenship for Sale and the Neoliberal Political Economy of Belonging*, in *International Studies Quarterly*, 2018, pp. 1, 4-5; O. Parker, *Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes*, in *Journal of Common Market Studies*, 2016, pp. 332, 234-345, 338-340; S. Klirides, *Σχέδια προσέλκυσης επενδυτών μέσω της αγοράς γης οδηγούν σε τεχνητή αύξηση των τιμών των ακινήτων και συνεπώς σε δημιουργία υπεραξίας (Plans to Attract Investors Through the Land Market Lead to Artificially Rising Property Prices and the Creation of Overvaluation)*, in *Eurokerdos*, 5 August 2017, www.eurokerdos.com.

[3] K. Surak, *Global Citizenship 2.0: The Growth of Citizenship by Investment Programmes*, in *Investment Migration Working Papers*, no. 3, 2016, pp. 16-17, 21, 24-25; L. van der Baaren, H. Li, *Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal*, in *Investment Migration Working Papers*, no. 1, 2018, pp. 2-3; J. Džankić, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective*, in *EUI Working Papers*, no. 14, 2012, pp. 11-13; O. Parker, *Commercializing Citizenship in Crisis EU*, cit., p. 335.

[4] Proceedings of the Ministerial Meeting on 13 September 2016, Cyprus Investment Programme, on the basis of subsection 2 of Art. 111, para. A, of the Civil Registry Law 114(I)/2002 and "Cyprus Investment Programme" for family members of the naturalised investor according to the decision of the Council of Ministers, available at www.moi.gov.cy.

[5] S. Farolfi, L. Harding, S. Orphanides, *EU Citizenship for Sale as Russian Oligarch Buys Cypriot Passport*, in *The Guardian*, 2 March 2018, www.theguardian.com; P. Leptos, *Σχέδιο πολιτογράφησης μέσω επένδυσης: Σημαντικά τα οφέλη για την οικονομία (Scheme for Naturalisation Through Investment: Significant Benefits for the Economy)*, in *InBusinessNews*, 12 April 2018, inbusinessnews.reporter.com.cy.

[6] R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge MA: Harvard University Press, 1992, pp. 23-26.

loosened through the formation of polities beyond the state, with the emergence of the EU and the institution of Union citizenship[8] as prime examples. Attention must be paid to the potential legal issues originating from the criteria imposed on applicants and their aftermath under EU law, considering that Cyprus is obliged to respect and follow the rules of the *acquis*. The criteria imposed on applicants are to a certain extent similar to those of other investment migration programmes, a topic elaborated in the first section of this *Article*. However, two elements of the Programme are open to question: first, the requirement to retain residential property permanently in the Republic to preserve citizenship status and second, the threat of retroactive revocation of Cypriot and EU citizenship upon non-compliance with the criterion mentioned.

This *Article* analyses the legal implications of the acquisition of EU citizenship through the Cyprus Programme in light of EU law, particularly on the free movement of capital and citizenship. Accordingly, by focusing on the above-mentioned aspects, two principal questions will be addressed:

1) Does the requirement to permanently own residential property in Cyprus result in a violation of the free movement of capital under EU law?

2) Does the possibility of revocation of Cypriot nationality for non-compliance with the above-mentioned requirement violate EU citizenship case law?

To answer the first question, section II will focus on the origins of the freedom of movement of capital and on the constraints imposed on it by the Programme's requirements. Following a close examination of the case law of the CJEU the underlying presumption that economic objectives cannot justify restrictions on capital movements[9] will aid in the assessment of the legality of the Programme. Section III examines the second question; throughout its evolution in the case law of the CJEU and the work of legal scholars, Union citizenship has acquired a unique status which is not a mere extension of the Member States' nationalities.[10] The applicability of Union law in matters of citizenship is established in *Micheletti*,[11] and the material scope of Union citizenship was further expanded in *Rottmann*[12] and *Ruiz Zambrano*.[13] The evaluation of the legality of the Cyprus Investment Programme in light of EU citizenship case law will show that Cyprus cannot take measures which will undermine the rights attached to EU citizen-

[7] D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, pp. 169, 178.

[8] *Ibid.*, p. 181.

[9] Court of Justice, judgment of 4 June 2002, case C-367/98, *Commission v. Portugal*, para. 52.

[10] M. Szpunar, M.E. Blas López, *Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment*, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 111-112.

[11] Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*.

[12] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann* [GC].

[13] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC].

ship, nor should it impose conditions on its citizens in situations where the future prospect of exercising the said rights would be impossible.[14] In this regard, the status and the rights of the family members of the investor will also be taken into consideration and the *Rottmann* criteria will be applied by analogy to the Cyprus Investment Programme. Its examination in light of the above-mentioned will lead to conclusions suggesting an urgent need to amend its provisions and comply with Union law.

II. The unique case of the Cyprus Investment Programme

Before analysing the specific attributes of the Investment Programme introduced in Cyprus, it is important to set out the geopolitical conditions of the island in order to understand its relationship with the Union and the context in which the Programme will be analysed.

Following the Turkish military intervention in 1974 and the unrecognised declaration of independence of the Turkish Republic of the Northern Cyprus (hereafter "the TRNC") in 1983,[15] Cypriot membership of the EU was achieved in 2004, but the application of the *acquis communitaire* is suspended in the northern part of the island's territory, in accordance with Protocol 10 annexed to the Act of Accession.[16] The status of the TRNC is a unique case in the EU, very different to that enjoyed by the outermost regions[17] or overseas territories[18] of its other Member States, as the suspension of the

[14] D. Kochenov, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, pp. 55, 94, 96.

[15] J. Ker-Lindsay, *The Cyprus Problem: What Everyone Needs to Know*, Oxford: Oxford University Press, 2011, pp. 5-6.

[16] Protocol no. 10 on Cyprus of Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded 2003.

[17] In Outermost Regions (9) EU law applies according to Art. 355, para. 1, TFEU, under conditions laid down by the Council in Regulations such as Regulation (EC) 1447/2001 of the Council of 28 June 2001 amending Regulation (EC) 1260/1999 laying down general provisions on the structural funds, Regulation (EC) 1448/2001 of the Council of 28 June 2001 amending, as regards structural measures, Regulation (EEC) 3763/91 introducing specific measures in respect of certain agricultural products for the benefit of the French overseas departments and Regulation (EC) 1452/2001 of the Council of 28 June 2001 introducing specific measures for certain agricultural products for the French overseas departments, amending Directive 72/462/EEC and repealing Regulations (EEC) 525/77 and (EEC) No 3763/91 (Poseidom). See N. Skoutaris, *Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?*, in *Cambridge Yearbook of European Legal Studies*, 2017, pp. 287, 300; for more information on the status of Outermost Regions see I. Omarjee, *Specific Measures for the Outmost Regions After the Entry into Force of the Lisbon Treaty*, in D. Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, Alphen aan den Rijn: Kluwer Law International, 2011, pp. 121-136.

[18] These are territories where the applicability of EU law is governed by Part 4 TFEU and their corresponding association agreements. See N. Skoutaris, *Territorial Differentiation in EU Law*, cit., pp. 287, 301-

acquis in TRNC is a consequence of a military intervention.[19] It has been acknowledged that the area is under the effective control of Turkey[20] and as a consequence, a special regime has been established for the Turkish-Cypriot community residing in the north. The judgments of TRNC courts are not recognised or enforced in other Member States and *vice versa*,[21] and while the Union citizenship status of Turkish Cypriots and the rights it entails are uncontested, it remains in "hibernation"[22] as long as they reside in the TRNC because the protection of their rights there falls under the jurisdiction of Turkey.[23] To provide certain guarantees for the enjoyment of EU rights for such citizens, the Union adopted the Green Line Regulation on the administration of the rules concerning the crossing of the line dividing the island.[24] It is worth mentioning that the Green Line does not constitute a border in the EU[25] so the Green Line Regulation authorises Cyprus to impose checks on the crossing of persons, goods and services that originate or have as their destination the northern part.[26] Due to this state of affairs, the Investment Programme discussed in this *Article* is enforced only in the southern part of the territory of Cyprus as that is the only area of the island where the Cypriot government exercises effective control and where EU law is applied in its entirety.

The Investment Programme has been variously amended since its adoption in 2013 by the Cypriot Council of Ministers, before culminating in its current version in May 2018.[27] According to this Programme, any third-country national can acquire Cypriot citizenship if they meet certain economic criteria such as investment in real estate, land development and infrastructure projects, the purchase or establishment or participation in Cypriot companies or businesses, or investment in alternative investment funds or financial assets in Cypriot companies or organisations. The investment funds must

302. For more information on the status of the Overseas Territories see D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., pp. 47-50.

[19] N. SKOUTARIS, *The Cyprus Issue: The Four Freedoms in a Member State Under Siege*, Oxford: Hart, 2011, pp. 52-54.

[20] Art. 1 of the Protocol no. 10 on Cyprus; N. SKOUTARIS, *Differentiation in European Union Citizenship Law, The Cyprus Problem*, in K. INGLIS, A. OTT (eds), *The Constitution for Europe and an Enlarging Union: Union in Diversity?*, Groningen: Europa Law Publishing, 2005, pp. 172-173; European Court of Human Rights, judgment of 18 December 1996, no. 15318/89, *Titina Loizidou v. Turkey*, para. 56.

[21] Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[22] N. SKOUTARIS, *The Cyprus Issue*, cit., p. 65.

[23] *Ibid.*, pp. 55-56.

[24] Regulation (EC) 866/2004 of the Council of 29 April 2004 on a regime under Article 2 Protocol 10 to the Act of Accession; N. SKOUTARIS, *Differentiation in European Union Citizenship Law*, cit., pp. 171-172.

[25] Recital 7 of Regulation 866/2004, cit.; S. LAULHÉ SHAELOU, *The EU and Cyprus: Principles and Strategies of Full Integration*, Leiden: Martinus Nijhoff Publishers, 2010, p. 270.

[26] Titles II-IV of Regulation 866/2004, cit.; N. SKOUTARIS, *The Cyprus Issue*, cit., pp. 111-114.

[27] Cyprus Investment Programme, cit.

be at least Euro two million and must be retained in the Republic for a period of at least three years from the date of naturalisation.[28]

Additional obligations are imposed on the applicants, incorporated in the terms and conditions following the main economic criteria of the Programme. These include due diligence checks, the possession of a residence permit in Cyprus and most importantly with respect to this *Article*, residential property which the applicant must retain ownership of. Residence permits are granted to third-country nationals already living in the Republic in accordance with Regulation 1030/2002,[29] but for the purposes of acquiring Cypriot nationality through investment, an immigration permit is granted to applicants on the basis of Regulation 6(2) of the national Aliens and Immigration Law.[30] The criteria for the acquisition of an immigration permit are included in sections A and B of the Investment Programme,[31] in addition to requirements for a number of financial guarantees such as secure annual income and property title deeds.[32] According to the Programme, if naturalisation is declined or revoked, the immigration permit obtained for the purposes of naturalisation will also be nullified.[33] To complete the due diligence checks, applicants must possess clean criminal records and must not be included in the list of persons whose assets have been frozen within the EU as a result of sanctions, in accordance with Directive 2014/42.[34]

As for the purchase of permanent residential property, it should be worth at least Euro 500,000 (plus VAT) and must be retained in the Republic permanently.[35] Private ownership of indefinite duration of a residence in Cyprus is a crucial requirement for both admissibility and for the retention of Cypriot citizenship. The Programme clearly states that where periodic checks discover that any criterion or term and condition ceased to be complied with, naturalisation will be revoked. This is in accordance with Art. 54, para. 4, of the General Principles of the Administrative Law of Cyprus, which permits the revocation of any administrative decision in situations where the factual circumstances constituting the basis of the decision or which constituted the conditions

[28] *Ibid.*, pp. 1-2.

[29] Regulation (EC) 1030/2002 of the Council of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

[30] Second Revision of the Criteria for Granting an Immigration Permit within the Scope of the Expedited Procedure to Applicants who are Third-Country Nationals and Invest in Cyprus, 2016, available in English at www.moi.gov.cy.

[31] Cyprus Investment Programme, cit., p. 4.

[32] Second Revision of the Criteria for Granting an Immigration Permit within the Scope of the Expedited Procedure to Applicants who are Third-Country Nationals and Invest in Cyprus, cit., section 2.

[33] Cyprus Investment Programme, cit., p. 4.

[34] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

[35] Cyprus Investment Programme, cit., pp. 3-4.

for the issuance of that decision have changed.[36] In practice, resale of the property is allowed only when it is followed by the purchase of other residential property in the Republic for the applicant's personal use.

Therefore, this Programme provides the possibility of investing in Cyprus, while obliging the applicants to lock part of their investment within its borders, and as a result, obtain Union citizenship, the status of which is enduringly conditional upon the ongoing ownership of the investment. These two issues are crucial when examining the Programme in light of the right to the free movement of capital and EU citizenship law respectively, both of which will be analysed in the following sections.

III. Restrictions on free movement of capital

III.1. Capital movement, its restrictions and justifications

The internal market of the European Union is an area without internal frontiers, which ensures the free movement of goods, persons, services and capital.[37] Art. 63 TFEU sets out the prohibition on all restrictions on capital movement between the Member States and between the Union and third countries.[38] The lack of an exact definition of capital movement in the Treaties led to the adoption of Directive 88/361 which provides an explanatory Nomenclature in its first Annex.[39] The list provided for in the annex is not exhaustive, but offers an adequate explanation of the types of capital movement available.[40] Relevant to this *Article* are the definitions of *Direct Investment* and *Investment in Real Estate*, the meanings of which are provided in the explanatory notes.[41] Direct investment includes investments by all kinds of natural or commercial undertakings, which enable the establishment of lasting and direct links between the undertaking and the entrepreneur to which the capital is made available, in order to carry on an economic activity. Investment in real estate is the purchase of buildings and land for personal use.[42] These are wide definitions and must be interpreted accordingly.

The CJEU has been called upon to provide guidance to the Member States in numerous cases regarding the nature of restrictions prohibited by Art. 63 TFEU. The Court insists

[36] Art. 54, para. A, General Principles of Administrative Law 158(I)/1999.

[37] Art. 4, para. 3, TFEU.

[38] Art. 63 TFEU.

[39] Art. 1 para. 1, Annex I, of Directive 88/361/EEC of the Council of 24 July 1988 for the implementation of Article 67 of the Treaty; J.A. Usher, *The Evolution of Free Movement of Capital*, in *Fordham International Law Journal*, 2007, pp. 1533, 1537-1538.

[40] J.A. Usher, *The Evolution of Free Movement of Capital*, cit., pp. 1533, 1537-1538; G. Baber, *The Free Movement of Capital and Financial Services: An Exposition?*, Cambridge: Cambridge Scholars Publishing, 2014, p. 26.

[41] Directive 88/361/EEC, cit., explanatory notes.

[42] *Ibid*.

on a broad interpretation of the freedom and its possible restrictions,[43] since the proper functioning of the internal market relies on free capital movement in combination with the free movement of persons, goods and services.[44] The first identified restriction to the free movement of capital was discrimination between domestic and cross-border movement and between two cross-border movements.[45] However, to extend the protective nature of the freedom, the Court has broadened its scope so that it goes beyond the notion of non-discrimination. In *Commission v. France*, it ruled that the prohibition of restrictions of capital movement "goes beyond the mere elimination of unequal treatment"[46] and has reaffirmed the non-hindrance test[47] in *Commission v. Portugal*, where it established that a regulation which restricts the possibility for foreign investors to acquire shares in certain Portuguese undertakings is: "capable of impeding capital movements and dissuading individuals in other Member States from investing".[48]

Such a regulation may render the free movement of capital illusory and therefore violate Art. 63 TFEU. Other examples of the application of the non-hindrance test include a requirement for prior authorisation for the acquisition of a plot of land in order to demonstrate that the planned acquisition will not be used to establish a secondary residence in *Konle*,[49] and a requirement for the security of a mortgage debt which is payable in the currency of another Member State, to be registered in the national currency in *Trummer and Mayer*.[50]

Derogations to the free movement of capital are allowed if they fall under the reasons listed in Art. 65 TFEU,[51] otherwise, they must be justified on the basis of overriding public interests and objective reasons on grounds of public policy and public security within the meaning of the case law of the CJEU.[52] In principle, it is up to the Member States to "decide on the degree of protection under which they wish to afford to such legitimate inter-

[43] T. Horsley, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, in N. Nic Shuibhne, L.W. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Oxford: Oxford University Press, 2012, pp. 163-164.

[44] S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, Oxford: Oxford University Press, 2009, p. 128; M. Andenæs, T. Gütt, M. Pannier, *Free Movement of Capital and National Company Law*, in *European Business Law Review*, 2005, pp. 757-758.

[45] S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 130-131.

[46] Court of Justice, judgment of 4 June 2002, case C-483/99, *Commission v. France*, paras 40-41.

[47] A. De Luca, *New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty*, in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy*, Oxford: Oxford University Press, 2012, pp. 189-191; T. Horsley, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, cit., p. 164.

[48] *Commission v. Portugal*, cit., paras 9-12, 44-45.

[49] Court of Justice, judgment of 1 June 1999, case C-302/97, *Konle*, para. 39.

[50] Court of Justice, judgment of 16 March 1999, case C-222/97, *Trummer and Mayer*, para. 28.

[51] Art. 65 TFEU.

[52] *Klaus Konle v. Republik Österreich*, cit., para. 40; Court of Justice, judgment of 21 December 2011, case C-271/09, *Commission v. Poland*, para. 55.

ests" but they must do so within the limits of EU law, particularly by complying with the principle of proportionality.[53] The Court established in its case law on the free movement of goods[54] and services[55] that economic grounds cannot serve as a justification for derogations from the Member States' obligations.[56] As the scope of the Treaty provisions on the four fundamental freedoms has expanded and the *Gebhard* formula[57] has been applied consistently in case law relating not only to the freedom of establishment,[58] the prohibition of using pure economic justifications extends also to measures restricting the free movement of capital.[59] Accordingly, limitations on capital movements cannot be justified by the financial interests of Member States,[60] such as strengthening the structure of the market[61] or primary budgetary objectives.[62] One issue remains, however, which is the difficulty of obtaining a precise definition of what constitutes strictly economic interests.[63] As a result, the Court sometimes adopts an "avoidance strategy",[64] where it disregards the possible economic justifications of a measure and is satisfied by argumentation based on the general interest of the state.[65]

Understanding the basic principles which govern the freedom of capital movement in the context of this *Article* is paramount to reviewing the legality of the Cyprus Investment Programme adequately. Even though the freedom acquired a wide definition, the Court's methods in assessing measures breaching Art. 63 TFEU have now become uniform and systematic. Member States may not limit the ability or dissuade their citizens from liquidating or reallocating their investments without a legitimate reason. Most importantly, this reasoning should not be purely economic, despite the difficulty which exists in identifying wholly economic justifications.

[53] Court of Justice, judgment of 28 September 2006, joined cases C-282/04 and C-283/04, *Commission of the European Communities v. The Netherlands*, paras 32-33.

[54] Court of Justice, judgment of 9 December 1997, case C-265/95, *Commission v. France*, para. 62.

[55] Court of Justice, judgment of 5 June 1997, case C-398/95, *SETTG*, para. 23.

[56] *Commission v. Portugal*, cit., para. 52

[57] Court of Justice, judgment of 30 November 1995, case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 37.

[58] Court of Justice: judgment of 11 July 2002, case C-294/00, *Gräbner*, para. 39; judgment of 17 October 2002, case C-79/01, *Payroll and Others*, para. 28; E. SPAVENTA, *From Gebhard to Carpenter: Towards a (non-) Economic European Constitution*, in *Common Market Law Review*, 2004, pp. 473, 749-750.

[59] E. SPAVENTA, *From Gebhard to Carpenter*, cit., p. 751; Communication of 19 July 1997 from the Commission on Certain Legal Aspects Concerning Intra-EU Investment, para 9.

[60] T. HORSLEY, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, cit., p. 167.

[61] *Commission v. Portugal*, cit., para. 52.

[62] Court of Justice, judgment of 7 February 1984, case C-238/82, *Duphar*, para. 23.

[63] J. SNELL, *Economic Justification and the Role of the State*, in P. KOUTRAKOS, N. NIC SHUIBHNE, P. SYRPIS (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Oxford: Hart, 2016, pp. 16-17.

[64] *Ibid*.

[65] *Ibid*.; Court of Justice: judgment of 28 April 1998, case C-120/95, *Decker*, para. 39; judgment of 28 April 1998, case C-158/96, *Kohll*, para. 41.

III.2. Application of these principles to the *Cypriot* case

The Cyprus Investment Programme requires applicants to invest in private immovable property, part of which must be retained in the Republic indefinitely. This particular condition amounts to a *de facto* barrier to the right of free movement of capital in the form of real estate investments. Newly-naturalised Cypriots are prevented from exercising their right to move their investment freely, without any restrictions, limitations or unfair repercussions, such as the threat of revocation of their citizenship status. In this context, we cannot disregard the right to property, included in the European Convention on Human Rights (ECHR),[66] the Charter of Fundamental Rights of the European Union (Charter)[67] as well as the Cyprus Constitution.[68] The right to own and dispose of lawfully acquired possessions is an intrinsic element in all three articles and while limitations may be imposed, they must be made in the name of public interest and be regulated by law. As the focus of this section is the right to free movement of capital, an analysis of the restriction imposed by the duty to retain the property permanently and its possible justifications will proceed.

Firstly, I argue that the Programme lacks any guarantee for the equal treatment of domestic and cross-border capital movement. Citizens who naturalised through this Programme are able to move their investment only within the borders of Cyprus (apart from the northern part where the government does not exercise effective control); relocation of the investment to other Member States or sale of the property without the immediate purchase of a replacement will result in the revocation of citizenship. Such a requirement is not imposed on other Cypriots. Secondly, the obligation to retain ownership of residential property in the Republic forever – regardless the fact that it is part of the investment used for naturalisation – can be argued to constitute a violation of Art. 63 TFEU, if it is considered in light of the rulings in *Commission v. Belgium*[69] and *Commission v. Portugal*,[70] where the non-hindrance test was applied and the Court stated that where a measure has a deterrent or discouraging effect on individuals seeking to invest abroad, Art. 63 TFEU is breached. A similar conclusion can be drawn by looking at the judgment in *Verkooijen* where the applicant was restricted from investing in companies outside the Netherlands[71] as a result of a measure which does not grant

[66] Art. 1, Protocol no. 1, of ECHR.

[67] Art. 17, para 1, of the Charter.

[68] Art. 23 of the Constitution of the Republic of Cyprus.

[69] The case concerned a Belgian Royal Decree which prohibited Belgian residents from obtaining loans issued by German banks above the fixed rate. In its evaluation of the measure, the Court established that limitations on acquiring loans from other Member States, as well as making investments abroad, constitute violations of Art. 63 TFEU; Court of Justice, judgment of 26 September 2000, case C-478/98, *Commission v. Belgium*, paras 3 and 18.

[70] *Commission v. Portugal*, cit., paras 44-45.

[71] Court of Justice, judgment of 6 June 2000, case C-35/98, *Verkooijen*, paras 34-35.

tax exemptions to individuals who receive dividends on shares in foreign companies.[72] Such a restriction, according to the Court, dissuades individuals from investing their capital in other Member States,[73] a ruling that can be applied by analogy to the duty to retain ownership of residential property used for investment in exchange for citizenship. Allowing Member States to impose restrictions as such, creates the illusion of the freedom of movement of capital and creates problems with legal certainty and the uniform application of Union law.

Furthermore, by providing Union citizenship, the Programme makes it more attractive for third-country nationals to lock their investment in the Republic, which could gradually lead to the obstruction of free movement of capital to other Member States. Liberalisation of cross-border capital movement within the EU is an intrinsic feature of the internal market and it is essential for the attainment of the socioeconomic objectives of the Union.[74] Obstruction of the possibility of making the best use of this freedom affects the individuals whose Union rights are violated, but it also has detrimental effects on the economic prosperity of other Member States, which the Union aims to guarantee.[75] Despite the fact that the legal requirements for the acquisition of EU Citizenship through investment in Cyprus do not take the form of exchange authorisation or affect the general possibility of investment abroad, they could constitute an obstacle to the broadest possible liberalisation of the capital movement markets in the EU, as was established in the *Brugnoni* case.[76]

That said, the possible justifications which could validate the implementation of restrictive measures in the Republic and the derogation from its obligations towards the Union must be examined. The Programme was adopted to overcome the economic challenges the Republic was confronted with after the 2012 financial crisis and to attract foreign investment by encouraging natural persons with high incomes to establish themselves in the Republic.[77] These are the only explicit objectives found in the government's website and public statements, which I would argue can be considered purely economic motives. The consequences have been indeed positive: increased tax revenue and in-

[72] *Ibid.*, paras 6-11. Note that in this case it was established that the receipt of dividends from companies in other Member States is an "indissociable from a capital movement", see para. 29.

[73] *Ibid.*, para. 34.

[74] Art. 3, para. 1, TEU; S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 10-11; European Commission, National Institute of Economic and Social Research, *Capital Market Liberalisation, (summary)*, in *Single Market Review Series*, 1996.

[75] For an extensive analysis of the socioeconomic benefits of the free movement of capital see S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 19-24.

[76] Court of Justice, judgment of 24 June 1986, case C-157/85, *Brugnoni and Ruffinengo v. Cassa di Risparmio di Genova e Imperia*, para. 22.

[77] Cyprus Investment Programme, cit.; G. ANTONIOU, *Limits on Passports to Investors*, in *Philenews*, 8 October 2017, www.philenews.com.

creased investment in real estate, tourism and development.[78] Economic prosperity surely resonate with the interest of those individuals who can profit from the clear deficiencies of this Programme, which disadvantages others with respect to Union law. The Cypriot government aims to boost the national economy through this Programme and the restriction imposed on applicants would fall under the justification of establishing and maintaining lasting economic links between the investors naturalising and the Republic.

However, justifying such an obvious restriction on capital movement on the basis of economic prosperity would be rather difficult before the Court. As mentioned in the preceding passage, the Court is reluctant to allow justification of a restriction on strictly economic grounds.[79] Another approach would be to consider the principle of the general interest of the state as an overriding justification for restrictions of the freedom. However, previous cases in which the Court ruled on the general interest of a state, as opposed to focusing on purely economic justifications, such as *Decker*[80] and *Kohl*,[81] the justification used to restrict the free movement of goods and services respectively was to secure the financial balance of the social security systems of the Member States. In both cases, neither restriction was found to have any significant effect on the social security system of the Member States in question and the Court proceeded in examining alternative justifications.[82] I believe that a similar outcome would result from such an approach to justification during the examination of the conformity of the Cyprus Programme with Art. 63 TFEU. Alternatively, the Court would find the justifications used by the Cyprus government as strictly economic. Either way, requiring individuals to retain their investment in Cyprus indefinitely raises serious problems in view of the right of individuals to move their capital freely within the Union: such a limitation constitutes a violation of the Republic's obligations under the Treaties and surviving the judicial scrutiny of the Court can be difficult.

IV. Citizenship of the EU

IV.1. Investment migration schemes in the EU and the evolving nature of Union citizenship

Examining investment migration schemes in the framework of the EU legal order can be challenging, considering the unconventional character of EU citizenship and its effects

[78] M. Maurides, *Η πώληση διαβατηρίων είναι εργαλείο ανάπτυξης* in *η σημερινη*, 26 December 2017, www.sigmalive.com; A. Πολυκαρπου, *Ρώσοι και Άραβες επενδυτές κατέκλυσαν την Κύπρο*, in *offsite*, 29 June 2017, www.offsite.com.cy.

[79] J. Snell, *Economic Justification and the Role of the State*, cit.

[80] *Decker*, cit., para. 39.

[81] *Kohll*, cit., para. 41.

[82] *Decker*, cit., paras 40-41; *Kohll*, cit., paras 42-43.

on the complicated relationship between the supranational EU and national legal orders, ever since its recognition as the intended future fundamental status of Member States' nationals in 1992.[83] *Prima facie*, agreeing with Jo Shaw, there is no legal basis for EU-level opposition to these programmes,[84] because of the derivative nature of Union citizenship.[85] Nevertheless, different nationality laws have always raised concerns within the Union, as the result of granting the unifying EU citizenship status to third-country nationals would be the availability of EU rights such as freedom of movement, which ultimately affects all Member States.[86] In 2014 the European Parliament, while underlining its own lack of legal competences over this matter,[87] adopted a Resolution on EU Citizenship for sale in response to the Maltese Individual Investors Programme (hereafter the "IIP"), where it expressed its concerns at the development of investment migration in the EU and requested the Commission to examine their legality.[88]

Attention must also be drawn to the principle of recognition of other Member State nationalities, regardless of their mode of acquisition, developed in *Micheletti*.[89] Accordingly, Member States have to respect the EU citizenship status of nationals from other Member States as well as the nationality their own citizens.[90] This line of reasoning was previously indicated in *Auer*, where the Court ruled that: "There is no provision of the Treaty which [...] makes it possible to treat nationals of a Member State differently according to the time at which *or the manner in which they acquired the nationality of that State*".[91]

This is crucial to the development of investment migration and the concerns raised by Member States that such practices affect the entire Union. The CJEU's approach to the recognition of Member States' nationalities makes investment migration schemes perfectly legitimate: "investment Cypriots" – just as the "investment Maltese" – are full-fledged citizens of the EU. According to *Auer* and *Micheletti*, the mode of naturalisation is irrelevant to the validity and recognition of the EU citizenship status of an individual by other Member States and any distinction between groups of nationals of Member

[83] Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31; judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 82.

[84] J. SHAW, *Citizenship for Sale: Could and Should the EU Intervene?*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit. pp. 63-64.

[85] Art. 20 TFEU.

[86] D. KOCHENOV, *Ius Tractum of Many Faces*, cit., pp. 182-183.

[87] Recital 7 of European Parliament Resolution P7_TA(2014)0038 of 16 January 2014 on EU citizenship for sale.

[88] *Ibid.*, recitals 1 and 3.

[89] *Micheletti v. Delegación del Gobierno en Cantabria*, cit., para. 10; D. KOCHENOV, *Ius Tractum of Many Faces*, cit., p. 182.

[90] H.U. JESSURUN D'OLIVEIRA, *Case C-369/90 Mario Vicente Micheletti v. Delegación del Gobierno en Cantabria, Judgment of 7 July 1992*, in *Common Market Review*, 1993, pp. 623, 628.

[91] Court of Justice, judgment of 7 February 1979, case C-136/78, *Ministère Public v. Auer*, para. 28 (emphasis added).

States made in this regard shall be deemed unacceptable.[92] In addition, the argument proposed by the AG Poiares Maduro in *Rottmann*,[93] that mass naturalisations of third-country nationals could contradict the principle of sincere cooperation in Art. 4, para. 3, TEU[94] if not performed in consultation with other Member States,[95] seems inapplicable to the case of investment schemes, given that the number of naturalisations through investment remain low in the EU, especially compared with analogous situations, such as the large numbers of Latin Americans naturalised as Italians.[96] Even if these numbers were to grow in the future, we must consider that third-country nationals naturalising in any Member State through investment migration schemes are individuals of high net worth who would not impose an "unreasonable burden" on the social welfare systems of Member States if they were to decide to use their free movement rights according to the Citizenship Directive.[97] These individuals contribute to the functioning of the internal market and the objectives of European economic integration, making them valuable citizens in light of EU's internal market logic.[98]

The rights attached to the status of EU citizenship were initially manifested in activity within the internal market through the free movement rights,[99] which explains the Court's insistence on the requirement for cross-border movement to ascertain the ap-

[92] Art. 5, para. 2, of the 1997 European Convention on Nationality; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu , p. 1075 *et seq.*

[93] *Rottmann* [GC], cit.

[94] Art. 4, para. 3, TEU.

[95] Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottmann*, para. 30.

[96] D. KOCHENOV, *Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit., pp. 51-55; G. TINTORI, *The Transnational Political Practices of "Latin American Italians"*, in *International Organization for Migration: International Migration*, 2011, pp. 168, 172-173; K. SURAK, *Global Citizenship 2.0*, cit., p. 6.

[97] Art. 7, para 1, let. b), 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 amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance); A. HEINDLMAIER, M. BLAUBERGER, *Enter at Your Own Risk: Free Movement of EU Citizens in Practice*, in *West European Politics*, 2017, pp. 1198, 1200-1201; D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2015, pp. 17, 20.

[98] D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 36-39. D. KOCHENOV, *Interlegality – Citizenship – Intercitizenship*, in G. PALOMBELLA, J. KLABBERS (eds), *The Challenge of Interlegality*, Cambridge: Cambridge University Press, 2019.

[99] D. KOSTAKOPOLOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, pp. 233, 238-239; Z. YANASMAYAN, *European Citizenship: A Tool for Integration*, in S. CARRERA, K. GROENENDIJK, E. GUILD (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, London: Routledge, 2009, p. 68; E. SPAVENTA, *Earned Citizenship. Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., pp. 206-207.

plicability of Union law in citizenship cases.[100] The cross-border rationale continues to exist but is now broadened by the inclusion of potential cross-border movement and with added emphasis on individual rights through the expansion of the material and personal scope of Union citizenship through the case law of the CJEU.[101]

Rottmann[102] is of utmost importance in this respect. The Court for the first time provided a clarification of the principle "due regard to Community law", established in *Micheletti*.[103] Essentially, the ruling resulted in limiting the Member States' discretion in measures revolving around the grant and revocation of nationality by introducing the principle of proportionality to the decisions taken by national authorities:[104] this led to the reassessment of the interdependent relationship between national and EU citizenship.[105] Despite AG Poiares Maduro's suggestion that a cross-border element is a prerequisite to triggering the Court of Justice's involvement, the Court's approach to this case was different.[106] Accordingly, a situation in which an individual is faced with a decision withdrawing his naturalisation falls "by reason of its nature and its consequences within the ambit of EU law".[107] The Court's departure from the traditional requirement of cross-border movement indicates a shift of emphasis to the protection of the individual, who is placed in a situation where they lose the status conferred by Art. 20 TFEU and the rights attached to it.[108] By bringing Dr Rottmann's case within the scope of EU law, the Court effectively

[100] N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, pp. 1597, 1612.

[101] *Ibid.*, pp. 1612, 1613-1614; D. Kochenov, *A Real European Citizenship*, cit., pp. 59-60.

[102] *Rottmann* [GC], cit.

[103] In *Micheletti* the Court mentioned the principle "due regard to community law" but it was perceived as *obiter dictum* of the ruling; G.-R. de Groot, *Towards a European Nationality Law*, in *Electronic Journal of Comparative Law*, 2004; H.U. Jessurun d'Oliveira, *Case C-369/90 Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, Judgment of 7 July 1992*, cit., p. 634.

[104] *Rottmann* [GC], cit., para. 55.

[105] D.J. Mann, K.P. Purnhagen, *The Nature of Union Citizenship Between Autonomy and Dependency on (Member) State Citizenship – A Comparative Analysis of the Rottmann Ruling, or: How to Avoid a European Dred Scott Decision*, in *Wisconsin International Law Journal*, 2011, pp. 484, 491-493; J. Shaw, *Deprivation of Citizenship: Is There an Issue of EU Law?*, in R. Bauböck (ed.), *Debating Transformations of National Citizenship*, cit., pp. 236-238.

[106] Opinion of AG Poiares Maduro, *Rottmann*, cit., paras 10, 14 and 23; D. Kochenov, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet Reported*, in *Common Market Law Review*, 2010, pp. 1831, 1832-1833; D. Kostakopoulou, *The European Court of Justice, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions*, in H.-W. Micklitz, B. de Witte (eds), *The European Court of Justice and the Autonomy of the Member States*, Cambridge: Intersentia, 2012, pp. 198-199.

[107] *Rottmann* [GC], cit., para. 42; H. van Eijken, *European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals*, in *Utrecht Journal of International and European Law*, 2010, pp. 65, 68-69.

[108] D. Kochenov, *A Real European Citizenship*, cit., pp. 58-61; Art. 20 TFEU; *Rottmann* [GC], cit., para. 42.

expanded the *ratione materiae* of EU citizenship.[109] Accordingly, the need to exercise free movement rights is no longer the paramount requirement for the Court to intervene; the status of being a Union citizen and the rights associated with it have become sufficient foundation to engage EU law and determine any violations of it.[110]

Another critical case which builds on the *Rottmann* line of reasoning is *Ruiz Zambrano*.[111] This case dealt with the decision of the Belgian authorities to deprive the residency and working rights of Mr Ruiz Zambrano, a Colombian national and parent of two children born in Belgium.[112] The Court insisted on the applicability of the case under EU law, despite the absence of cross-border movement, because Mr Zambrano's children were Union citizens and would be deprived of "the genuine enjoyment of the substance of [their] rights"[113] if forced to move outside the territory of the Union.[114] Unfortunately, in the following case law, particularly *McCarthy*[115] and *Dereçi*,[116] the Court adopted a more restrictive approach to situations which potentially deprive individuals of the substance of their Union citizenship rights,[117] by qualifying the ruling in *Ruiz Zambrano* as an exceptional case.[118] Notwithstanding that, the formula of "substance of rights" established in *Ruiz Zambrano*, though uncertain, remains promising[119] and constitutes a stepping stone on the way to shaping the material scope of Union law by defending the future ability of individuals to enjoy their EU rights.[120]

[109] D. Kochenov, *A Real European Citizenship*, cit., pp. 64, 67-69.

[110] N. Cambien, *Case C-135/08 Janko Rottmann v. Freistaat Bayern*, in *Columbia Journal of European Law*, 2011, pp. 375, 383-384.

[111] *Ruiz Zambrano* [GC], cit.

[112] *Ibid.*, paras 14-16, 43-44.

[113] *Ibid.*, paras 40-44; A. Lansbergen, N. Miller, *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, in *European Constitutional Law Review*, 2011, pp. 287, 291.

[114] N. Nic Shuibhne, *(Some of) The Kids Are All Right*, in *Common Market Law Review*, 2012, pp. 349, 350-352; K. Hailbronner, D. Thym, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet Reported*, in *Common Market Law Review*, 2011, pp. 1253, 1255-1257.

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

[116] Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci and Others* [GC].

[117] *McCarthy*, cit., paras 46-47; *Dereci and Others* [GC], cit., paras 40, 74; E. Spaventa, *Earned Citizenship – Understanding Union Citizenship through Its Scope*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., pp. 212-213.

[118] *Dereci and Others* [GC], cit., para. 55; N. Nic Shuibhne, *Limits Rising, Duties Ascending: The Challenging Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, pp. 889, 901-902.

[119] S. Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, in *European Law Journal*, 2014, pp. 464, 474.

[120] D. Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?*, in *International and Comparative Law Quarterly*, 2013, pp. 97, 101.

The judgments in *Micheletti*, *Rottmann* and *Ruiz Zambrano* pave the way towards a better understanding of the relationship between national and Union citizenship.[121] With the expansion of the scope of EU citizenship *ratione materiae*, the requirement of cross-border movement is proven illogical[122] in a "Union without borders" and contrary to the spirit of European integration.[123] In the current context, three conclusions can be drawn which will provide guidance in the assessment of the Cyprus Programme. Firstly, Member State nationality must be recognised and respected by all Member States (including the Member State issuing the nationality),[124] regardless the mode of naturalisation. Secondly, even though the derivative nature of EU citizenship is uncontested, the need to preserve its unique status and protect the individuals' rights requires limitations on Member State competences in matters of citizenship, particularly when EU rights are undermined by a measure adopted at the national level. Thirdly, Member States should not impose restrictive conditions on their own citizens, the effects of which would be to render the future prospect of exercising their Union rights impossible.

IV.2. The Cyprus Investment Programme: revocation of Union citizenship, discrimination, family members and the right to leave

The adoption of investment migration schemes in Member States is not uncommon and, as has been established in the previous section, does not necessarily violate Union law. However, the Cyprus Investment Programme appears to be significantly different due to the requirement imposed on investors to retain ownership of residential property in the Republic for an unlimited period. This condition can cause future complications, as it places individuals who decide to sell their property in Cyprus or to relocate beyond the island's territory in a situation where their Cypriot nationality and EU citizenship will be revoked.[125] Attention must be paid to the conditional nature of the citizenship acquired through investment,[126] as it prompts several issues when viewed in

[121] D. Kochenov, *A Real European Citizenship*, cit., p. 86; K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, Leiden: Martinus Nijhoff Publishers, 2013, p. 124.

[122] D. Kochenov, *A Real European Citizenship*, cit., pp. 92-93.

[123] D. Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, in *Jean Monnet Working Paper*, no. 8/10, 2011, pp. 43-44.

[124] Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC], paras 56-58.

[125] Cyprus Investment Programme, cit., p. 1.

[126] "Conditional Citizenship" is not merely a Cypriot invention; the UK adopted a similar approach and according to the Immigration, Asylum and Nationality Act 2006, deprivation of citizenship constitutes a valid measure that can be taken by the Secretary of State of the Home Department in an attempt to "fight terrorists 'disguised' as UK citizens". The difference between the UK and Cyprus is that firstly, the conditionality of the British citizenship applies to all citizens, regardless whether they acquired their nationality by birth or through registration and naturalisation and secondly, this conditionality is activated when a citizen engages in terrorist activity; thus, the deprivation is seen as a form of a punitive measure

the light of EU citizenship law: the ability of Cyprus to revoke citizenship upon the exercise of rights protected by EU law and the consequences such measures would have on the investor's family.

The revocation of citizenship based on non-compliance with the conditions of the Cyprus Programme must be closely analysed in light of *Rottmann* and *Ruiz Zambrano*. In *Rottmann* the Court concluded that Member States must take decisions on the revocation of nationality having due regard to Community law and proceeded to delegate the proportionality test to the German court.[127] Empowering the national courts with the application of the principle of proportionality could undermine the principle of legal certainty for individuals and threaten the uniform application of Union law;[128] however, it can also be considered as an efficient method of allowing cooperation between the national courts of the Member States and the CJEU, once the latter establishes its jurisdiction and the potential breach of the substance of EU citizenship rights.[129] In *Rottmann* the national courts found that the revocation of Dr Rottmann's citizenship was proportionate because of his criminal history and the fact that it did not breach any international or EU law requirements.[130]

Notwithstanding the discretion Member States enjoy in nationality matters, national measures regarding the withdrawal of nationality must be legitimate and justifiable in light of EU law.[131] When comparing the argumentation and the outcome of *Rottmann* to the *Cypriot* case, fundamental differences must be pointed out. To begin with, the decision of an individual to exercise their Union rights and relocate their investment outside the territory of a Member State cannot be compared to the situation in *Rottmann*, where the applicant was found guilty of obtaining German nationality by deception.[132] Consequently, the revocation of nationality was considered legitimate in the name of protecting the solidarity between all the citizens of Germany. In the *Cypriot* case the

to protect national security. In Cyprus on the contrary, the conditional nature applies only to investor Cypriots who exercise their right to the free movement of capital by re-investing outside the Republic's territory. See S. MANTU, *"Terrorist" Citizens and the Human Right to Nationality*, in *Journal of Contemporary European Studies*, 2018, pp. 28, 32-33; S. LAVI, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, in *New Criminal Law Review: An International and Interdisciplinary Journal*, 2010, p. 404, 409-411; C. JOPPKE, *Terror and the Loss of Citizenship*, in *Citizenship Studies*, 2015, pp. 728, 733-734.

[127] *Rottmann* [GC], cit., paras 58-59.

[128] In *Rottmann*, before delegating the competence to the German court, the Court of Justice included some suggestions on how to assess proportionality which made the outcome of the German ruling more predictable, see *Rottmann* [GC], cit., para. 56; H. VAN EIJKEN, *European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of Their Nationals*, cit., 2010, pp. 65, 69.

[129] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, pp. 369, 386, 392-393.

[130] D. KOCHENOV, *A Real European Citizenship*, cit., pp. 78.

[131] *Rottmann* [GC], cit., para. 51; J. SHAW, *Deprivation of Citizenship*, cit., p. 235.

[132] *Rottmann* [GC], cit., para. 28.

withdrawal of Cypriot nationality from Cypriots who acquired citizenship through investment is a consequence of their decision to move their capital away from the territory of Cyprus, relying on Arts 26 and 36 TFEU. The revocation of Cypriot nationality for non-compliance with the condition to permanently own property in Cyprus is a restriction of the EU right to free movement of capital and the possibility of this measure being justified is very unlikely, as was established in the previous section: the restriction directly contradicts the very *raison d'être* of supranational law.

The measure also restricts the applicants' right to leave the territory of Cyprus and establish themselves in other Member States. Adam Łazowski argues that the right to exit is a *condition sine qua non* to the right to move and reside freely within the Union,[133] as it is implied in Art. 21 TFEU.[134] The right to exit is also established in Art. 4 of the Citizens' Directive[135] and was affirmed by the Court in *Jipa* and subsequent cases where individuals were prevented from leaving their Member State of nationality.[136] This right is compromised by the Investment Programme as it practically ties the applicants to the Republic, making the exercise of the right to move freely to other Member States unappealing. Even if this does not amount to a direct restriction to the right to leave, it is nonetheless incompatible with the objective to eliminate any obstacles to free movement within the EU, a prerequisite to the functioning of the internal market.[137]

Adopting a naturalisation programme on the basis of limiting the exercise of rights accorded by EU law seems to be contrary to the letter and the spirit of the Treaties as it interferes with the goal of gradual integration even if, paradoxically, it is presented under a pretext of enhancing economic integration, and is considered illogical, based on the judgment in *Lounes*.[138] Through the case law on citizenship, the Court established itself as the final arbitrator and protector of EU citizens through the activation of EU law when national measures result to the loss of the rights attached to the status of Union citizen-

[133] A. ŁAZOWSKI, *Darling You Are Not Going Anywhere: The Right to Exit and Restriction in EU Law*, in *European Law Review*, 2015, pp. 877, 888.

[134] Art. 21 TFEU.

[135] Art. 4 of Directive 2004/38/EC, cit.

[136] Court of Justice, judgment of 10 July 2008, case C-33/07, *Jipa*, para. 18; this line of reasoning continued in subsequent judgments, see Court of Justice, judgment of 17 November 2011, case C-430/10, *Gaydarov*, judgment of 17 November 2011, case C-434/10, *Aladzhov*.

[137] Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC], para. 68; G.-R. DE GROOT, A. SELING, *The Consequences of the Rottmann Judgment on Member States Autonomy. The Court's Avant-Gardism in Nationality Matters*, in J. SHAW (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in National Law?*, in *EUI Working Papers*, no. 62, 2011, p. 62.

[138] Court of Justice, judgment of 17 November 2017, case C-165/16, *Lounes* [GC], paras 56-58; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, cit.; D. KOCHENOV, *Ius Tractum of Many Faces*, cit., pp. 191-192.

ship[139] and as a result, decision-making and the adoption of policies such as the Cyprus Programme no longer fall under the sovereignty umbrella. Potential violations of the substance of Union citizenship can be manifested through restrictions to the exercise of one of the fundamental rights of the Treaties[140] and are amplified when a Member State's naturalisation process leads to the granting of Union citizenship status which is absurdly conditioned by a limitation of the rights it is associated with. The priority to enact measures which would result in relative economic prosperity should not overshadow the arbitrary effects of such measures on individuals' lives. The interests of other Member States must also not be ignored: using a measure such as the withdrawal of nationality if individuals decide to exercise their right to the free movement of capital is burdensome to say the least and contrary to the aim of achieving a functioning internal market within the EU.[141] Based on these findings, one must conclude that a measure withdrawing the naturalisation of an EU citizen on the basis of their exercising their right to the free movement of capital alongside their right to exit, cannot be considered legitimate.

In addition to the effects on the main investor, family members are also greatly affected by this Investment Programme. Cypriot and Union citizenship is granted initially to the main investor and subsequently can be acquired by their parents, spouse or partner and by their financially dependent adult children,[142] while their minor children naturalise in accordance with Art. 110, para. 3, of Civil Registry Law.[143] However, there is no mention of the circumstances under which the family members lose their nationality. The extent of their dependency on the investor's citizenship is unclear and their legal status is questionable if the citizenship of the former is revoked because of future non-compliance with the conditions of the Programme. Relying on the Citizens' Directive[144] would only be possible if the family moves to another Member State and satisfied the criteria of Art. 7, para. 1, and Art. 14, para. 2.[145] The predicament here is that, if the family wished to exercise the right to relocate within the Union by relying on the Directive, it

[139] K. LENAERTS, *Civis Europaeus Sum: From the Cross-border Link to the Status of Citizen of the Union*, in A. ROSAS, N. WAHL, P. LINDH, P. CARDONNEL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart, 2012, pp. 141-142.

[140] G.-R. DE GROOT, *Towards a European Nationality Law*, cit.

[141] Art. 26 TFEU; S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 10-11.

[142] Cyprus Investment Programme, cit., p. 1. For clarification, adult dependent children of the applicants are considered students under the age of 28 and children with severe physical or mental disability, see p. 2.

[143] Art. 110, para. 3, of Civil Registry Law 114(I)/2002 provides that minor children of a citizen of the Republic may acquire Cypriot nationality upon a request made to the Ministry of Internal Affairs.

[144] Arts 6 and 7 of Directive 2004/38/EC, cit.

[145] Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziołkowski and Szeja* [GC], paras 40-41; M. JESSE, *Joined Cases C-424/10, Tomasz Ziołkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, nyr.*, in *Common Market Law Review*, 2012, pp. 2003, 2008.

is very likely that the residential property forming part of their investment would be sold in Cyprus and at most, be reinvested in another Member State. This case, based on the wording of the Programme, would lead to the revocation of at least the main investor's citizenship, and most likely that of all family Members except for those minor children naturalised under the ordinary national naturalisation procedures noted above. Therefore, the possibility to acquire or retain residency rights and invoke the right to family reunification becomes ambiguous, as the beneficiaries of the Directive remain Union citizens and their family members.[146]

The Programme also fails to detail the effects of the loss of the Union citizenship of the main investor and their family on future generations. If the nationality of both parents is revoked in accordance with the Programme, their children, born in Cyprus and, therefore, Cypriot citizens *iure soli*, would be forced to leave the territory of the Union and thus be deprived of the substance of their Union rights analogously to the situation in *Ruiz Zambrano*.[147] An upcoming case that is of important relevance in this regard is *Tjebbes*,[148] where a question regarding the loss of nationality of minors as a consequence of the deprivation of the nationality of their parent was submitted to the Court. In his opinion, AG Mengozzi considered that the principle of uniform nationality within the same family should not be burdensome on the substantive rights and interests of minors, which must be recognised as being independent from those of their parents.[149] Depriving the status of Union citizenship of minors born in a Member State on the basis of an unjustified revocation of the nationality of their parents seems highly inappropriate and any justification based on economic grounds or the discretion accorded to Member States to govern their nationality laws would contradict the approach taken by the Court in *Ruiz Zambrano*.

Non-compliance with the requirement of retaining the invested residential property in the Republic will result in the withdrawal of the investor's Cypriot and EU citizenship and have a knock-on effect on any family members. The ambiguity of the Programme permits the strict interpretation of its provisions, which leads to the following conclusions: the investor and their family members acquire a very peculiar Union citizenship, the validity of which depends on limiting the rights accorded to all EU citizens and the revocation of which exposes the entire family to a regime with which fails to provide for legal remedies.

We must consider whether alternative, more appropriate measures could be taken to integrate newly naturalised investors and at the same time achieve the goal of economic prosperity and development. For instance, the Programme could require that the

[146] Art. 3 of Directive 2004/38/EC, cit.; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, cit., pp. 18-19; *Lounes* [GC], cit., para. 35.

[147] *Ruiz Zambrano* [GC], cit., paras 40-44.

[148] Court of Justice, case C-221/17, *Tjebbes and Others*, still pending.

[149] Opinion of AG Mengozzi delivered on 12 July 2018, case C-221/17, *Tjebbes and Others*, paras 122-125.

applicants contribute financially to the economy of the government similarly to the Maltese IIP, which despite facing criticism from the EU continues to operate successfully.[150] Analogous criteria are adopted in Antigua and Barbuda,[151] Dominica[152] and other Caribbean islands.[153] It is obvious that the main difference between the Cyprus Programme and other investment migration schemes is the conditional character of the citizenship granted to investors, since the requirement of withholding the residential property has no time limitation[154] and non-compliance results in the revocation of their nationality.[155] Imposing a reasonable time limit on the ownership of the residential property would not raise concerns in the domain of the free movement of capital.[156] The absolute prohibition from selling the residential property used as an investment for the purposes of naturalisation in the Republic contradicts the very essence of investment, which is conditioned on the prospect of future liquidity.[157] This peculiar requirement becomes even more superfluous, considering that investors are not obliged to reside in Cyprus after they have naturalised. As most of them prefer travelling back and forth for business purposes, the probability of building ghost cities of empty skyscrapers with luxury apartments persists, given that the value of properties has increased dramatically and is practically unattainable for the local population. Rather than focusing on how to prevent violations of EU law and altering the Programme so that the investment would be a truly valuable contribution to the Cyprus economy, the government has so far modified the amount of investment required in 2016,[158] imposed annual caps on naturalisations carried out each year and changed its name from "Naturalisation of Investors" to its current one, "Cyprus Investment Programme".[159]

Balancing the economic benefits of a measure, which has indeed succeeded in generating Euro 4.8 billion in investment as of March 2018,[160] with its adverse effects on individuals while taking into account the decision in *Ruiz Zambrano* and the possible

[150] K. Surak, *Global Citizenship 2.0*, cit., p. 25; Maltese Citizenship Act (CAP.188), Individual Investor Programme of the Republic of Malta Regulations, L.N. 47/2014, www.maltaimmigration.com.

[151] Antigua and Barbuda Citizenship by Investment (Amendment) Act of 31 May 2016.

[152] Commonwealth of Dominica, Citizenship by Investment (Amendment) Regulations 23/2017, www.dominicacitizenshipbyinvestment.com.

[153] U.P. Barzey, *4 Caribbean Citizenship by Investment Programs*, in *Caribbean & Co.*, 22 June 2015, www.caribbeanandco.com.

[154] Cyprus Investment Programme, cit., pp. 3-4.

[155] *Ibid.*, pp. 1-2.

[156] Limitations to the free movement of capital are allowed for a certain period of time, according to Art. 3, para 4, and Art. 6 of Directive 88/361/EEC, cit.

[157] UBS, *The Liquidity of Real Estate Investments: Investor Challenges During the Real Estate Cycle*, in *UBS White Paper*, May 2017, p. 5.

[158] Cyprus Investment Programme, cit.

[159] *Ibid*.

[160] S. Farolfi, L. Harding, S. Orphanides, *EU Citizenship for Sale as Russian Oligarch Buys Cypriot Passport*, in *The Guardian*, 2 March 2018, www.theguardian.com.

outcome in *Tjebbes*, could be a tough task. It is my view, however, that the nature of the Cypriot citizenship granted to investors and the limitations imposed on them demonstrates an unreasonable violation of the substance of Union citizenship, as established by the CJEU's jurisprudence.[161] With the evolution of a "new logic of citizenship",[162] the importance of Union law and principles shall not be underestimated by national authorities when exercising their competences in matters of naturalisation.

V. Conclusions

The legal analysis of the Cyprus Investment Programme in light of EU law on the free movement of capital and citizenship has proven that there is an immediate need for amendments and improvements, which will not only guarantee compliance with Union rules but also advance the benefits for the economy of Cyprus and possibly secure its continuation in the future.

With regards to the question whether the requirement of the Programme imposes restrictions to the free movement of capital, the case law of the Court of Justice demonstrates that, inasmuch as economic objectives cannot justify derogations from the obligation to prohibit measures that would result in a restriction to the freedom guaranteed in Art. 26 TFEU,[163] advancing the national economy through a stream of foreign investment, part of which must be kept indefinitely in Cyprus, violates Art. 63 TFEU.[164] Therefore, the Programme must be reformed and the requirement to maintain residential property in the Republic indefinitely must be altered with the introduction of time limitations or replaced with a more straightforward and outright criterion, such as financial contribution to the government not in the form of investment, similarly to the Maltese IIP.

As for the question of the possible violations of EU citizenship law, this *Article* finds that the requirements of the Cyprus Programme are dubious to say the least. The liberalisation of Union citizenship from its traditional establishment in the Treaties through the case law of the CJEU has played a detrimental role in the decisions Member States can take in matters regarding the grant and revocation of nationality. The judgments of *Rottmann, Ruiz Zambrano, Lounes* and *Tjebbes* guided the process of the evaluation of the Cyprus Programme and accordingly, the revocation of Cypriot nationality and EU citizenship as a result of non-compliance with the condition to retain the investment in the Republic forever is illegitimate and unjustifiable, as it leads to the revocation of Union citizenship based on the exercise of the rights it grants access to and leaves the investor's entire family unprotected and with no other alternative but to leave the territory of the Union.

[161] *Ruiz Zambrano* [GC], cit., paras 40-44.
[162] D. Kochenov, R. Plender, *EU Citizenship*, cit., p. 387.
[163] Art. 26, para. 2, TFEU.
[164] Art. 63 TFEU.

Naturalisation should be a transparent and just process, regardless of the financial status of individuals. As a Member of the EU, Cyprus is under an obligation to follow Union principles such as sincere cooperation and loyalty and is required to eliminate any unjustified obstacles to the free movement of capital. Current and future legislators and other public authorities adopting measures on matters of naturalisation and citizenship in general should remember that serving national economic interests should not restrict fundamental EU rights. The increasing significance of the supranational character of Union citizenship proves that compliance is not a mere formalistic obligation imposed on the Member States: the objectives of the Union[165] must be internalised and prioritised in every national policy of the Member States. Effective cooperation between national and EU authorities is the best way adequately to shape and preserve the essence of EU citizenship and define the extent to which EU institutions can intervene in the sovereign powers of the Member States. The Cyprus Programme is just one example of the discrepancies that emanate from the uncertainty and disparity in the CJEU's case law. Be that as it may, the Court is not solely to blame for the troubled development of EU citizenship; national authorities which continue to disregard the supranational character of the Union are accountable for the current state of affairs. Instead of contemplating methods to profit from systemic inadequacies, both legal orders must work together to prioritise individual rights, the protection of which both are pledged to guarantee.

[165] Art. 3 TEU.

Articles

Special Section – EU Citizenship in Times of Brexit

edited by Elise Muir *and* Nathan Cambien

Introduction

This Special Section of *European Papers* takes the process of Brexit and the challenges raised against the process of European integration in this context as an invitation to critically reflect on the current state of EU law. Brexit raises a multitude of highly complex issues. We have chosen to focus on a particularly symbolic one: the concept of EU citizenship.

According to settled case law, EU citizenship, which was introduced by the Maastricht Treaty, is intended to be the fundamental status of nationals of the Member States. EU citizenship epitomises the sense of belonging, the idea of an ever closer union. It builds on the pre-existing free movement of economic actors by adding free movement rights for non-economic actors, the right to equal treatment for all citizens and, to some extent, political rights.

EU citizenship also played a big role in the debate preceding the Brexit referendum. In fact, the rights enjoyed in the United Kingdom (UK) by EU citizens from other Member States sparked, amongst some UK voters, fears of benefit tourism and of unwanted migration from third countries, which would erode the national social security system and destabilise the national labour market. In February 2016, an attempt was made within the European Council at redefining the complex relationship between the UK and the EU, which focused to a large extent on citizenship-related issues. The European Council conclusions that were adopted that month stated, *inter alia*, that the references in the Treaties and their preambles to the process of creating "an ever closer union among the peoples of Europe" would not apply to the UK, and they proposed to amend the existing rules on EU citizens and their family members in order to make them somewhat more restrictive.[1]

However, the proposed settlement was rejected when, on June 23rd, 2016, a small majority of British votes was cast in favour of Brexit. On March 29th, 2017, the UK officially notified the European Council of its intention to withdraw from the EU, thereby triggering a two-year period of negotiations in accordance with Article 50 of the Lisbon Treaty. As far as the EU is concerned, it was immediately apparent from the guidelines for Brexit negotiations of the European Council and the negotiation directives of the

[1] European Council Conclusions of 18-19 February 2016, *A new settlement for the United Kingdom within the European Union*.

ISSN 2499-8249
doi: 10.15166/2499-8249/270

Council that EU citizenship was to play a central role in these negotiations. In fact, the Council and the Commission have repeatedly stated that one of the first priorities for the negotiations is to agree on guarantees to protect the rights of EU citizens, and their family members, that are affected by Brexit. At the same time, the UK has made it clear that it wants to limit the rights of EU citizens and their family members in the UK, in particular their right to free movements and residence.[2]

It is inevitable, therefore, that, in the context of the Brexit negotiations and process, the concept of EU citizenship was and continues to be deeply challenged. At the moment of the writing of this *Introduction*, discussions on Brexit are highly unstable. Nevertheless, beyond the actual Brexit negotiations, the debate pre-referendum and the discussions since then raise a number of fundamental questions that touch upon the three "prongs" of the concept of EU citizenship under EU law: the rights of EU citizens being economic migrants, the rights of EU citizens beyond employment and the political rights of EU citizens.

The aim of this Special Section is not to closely monitor the Brexit negotiations and process between the EU27 Member States and the UK from an academic perspective.[3] Instead, this Special Section, as well as the workshop on which it is based,[4] invites introspection. It is intended to explore the impact that Brexit and the debate it has triggered may have on the said three prongs of the concept of EU citizenship, in particular for the Member States remaining in the EU after Brexit. We use Brexit as an opportunity to assess the current state of EU law on citizenship and to shed light on emerging trends: How does the EU legal order (as defined by reference to the 27 remaining EU Member States) understand the concept of EU citizenship in the current context? Or in other words: what lessons can be learnt from the process of Brexit to date to steer reflections on EU citizenship in the years to come?

A first and central feature of the debates on the implication of Brexit on EU citizenship is that they illustrate how advanced and intricate the rules on free movement of persons have become, starting with the intimate relationship between EU citizenship and the free movement of economic actors. Although academic literature on EU citizenship often focuses on the rights of non-economic actors, the negotiations pre-referendum as well as the current perspectives of an actual Brexit have acted as a vivid

[2] See, e.g., UK Government, The Future Relationship between the United Kingdom and the European Union, White Paper, July 2018, assets.publishing.service.gov.uk.

[3] This is already done by a number of academics. See for instance S. Peers, *UK citizens as non-EU citizens in the EU after Brexit: applying the EU Directive on non-EU long-term residents*, in *EU Law Analysis*, 27 December 2018, eulawanalysis.blogspot.com.

[4] The workshop was held in Leuven on 30 March 2018. We are grateful to the KU Leuven, and the Institute for European Law in particular, for having hosted that event as well as to all participants for their valuable comments on earlier versions of the papers adjusted and compiled for the purpose of this Special Section.

reminder that the hard core of EU law on citizenship is to be found in the free movement of economic actors. Sacha Garben, in her *Article* on *European Higher Education in the Context of Brexit* provides a powerful account of the level of European integration in the field of higher education. Her contribution stresses both the very special position that the UK has played in the Bologna process and the great loss that could ensue if the free movement of students as well as EU funding could not benefit the UK anymore.

A second important point that emergences from the on-going debates is that the sophisticated web of rules on the integration of an area without frontiers for EU citizens remains contingent on politics and is therefore extremely fragile. This is precisely the point made by Anne-Pieter van der Mei in his *Article* on *EU citizenship and Loss of Member State Nationality*, in which he invites judicial restraint in a context that warrants important political decisions. Hence the importance of reflecting on the broader set of norms to which EU law on citizenship belongs, as Nathan Cambien invites us to do in his *Article* on *Residence Rights for EU Citizens and their Family Members after Brexit: Navigating the New Normal*. These rules, indeed, might act as a "safety net" for EU citizens and UK nationals after Brexit.

A third set of contributions seeks to draw lessons on how the sophisticated – yet vulnerable – legal framework for EU law on citizenship, as exposed by the Brexit negotiations, is currently evolving. These contributions call for further political engagement with the process of European integration. In her *Article* on *EU Citizenship, Access to 'Social Benefits' and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit*, Elise Muir sheds light on a (still hesitant) trend towards addressing legal questions on EU citizenship by reference to secondary law instead of primary law. The Author welcomes that trend, for it makes space for political debate on the outer boundaries of EU citizenship (such as the rights to social benefits or to move with third-country national family members), and argues that this is the best way of addressing tensions around the EU citizenship concept. The *Article* by Natassa Athanasiadou on *The European citizens' initiative in times of Brexit* analyses further recent efforts to stimulate political engagement with EU law, namely through the prism of the EU citizens' right to invite the Commission to legislate on certain matters. The *Article* welcomes the changes in the administrative practice of the Commission regarding the admissibility check for European citizens' initiatives, but at the same time calls for further respect for the principles of good administration and legal certainty.

A final set of *Articles* comes back to the hard core of EU law on citizenship which is to be found in the free movement of economic actors. These *Articles* are intimately related to the re-definition of our understanding of EU citizenship law in a "post-Brexit" context in that they illustrate the current approach to the process of economic integration through the free movement of persons in the EU27 and beyond. In their *Article* on *The Posting of Workers Directive revised: enhancing the protection of workers in the cross-border provision of services*, Piet Van Nuffel and Sofia Afanasjeva argue that the

EU legislature has in recent months significantly improved the balance between economic integration and the protection of domestic standards of social protection. Although the relevant institutions do not explicitly make that link, this could be related to broader policy developments resulting from the European Pillar of Social Rights, a political initiative that is to be most welcome.[5] As for Christa Tobler, her *Article* on the *Free movement of persons in the EU vs. in the EEA: Of effect-related homogeneity and a reversed Polydor principle* illustrates the intricate and dynamic link between free movement of economic, non-economic actors and the concept of EU citizenship as it emerges from recent European Free Trade Agreement Court (EFTA Court) rulings. It also highlights, in a complementary fashion to the *Article* by Elise Muir, the different uses of EU secondary and primary law on EU citizenship by the EFTA Court as well as the European Court of Justice depending on the broader legal context.

Elise Muir*
Nathan Cambien**

[5] See further C. KILPATRICK (eds), *The Displacement of Social Europe*, Special Section in *European Constitutional Law Review*, 2018, p. 62 *et seq.*

* Head of the Institute for European Law, KU Leuven, Visiting Professor, the College of Europe, elise.muir@kuleuven.be.

** Legal Secretary, CJEU, Assistant Professor, University of Antwerp, Senior Associated Research Fellow, Institute for European Law, University of Leuven, nathan.cambien@law.kuleuven.be.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

EUROPEAN HIGHER EDUCATION IN THE CONTEXT OF BREXIT

SACHA GARBEN*

ABSTRACT: The UK has been a main "winner" in European higher education. In the European Higher Education Area, the UK has successfully exported its higher education model to the other EU Member States and beyond, without conceding powers to the EU in that regard. It reaped the benefits of an enlarged higher education "market" on which its higher education institutions could successfully compete, at minimal administrative, political or other cost. Furthermore, in EU higher education law and policy, the UK has occupied an equally advantageous position. The UK has been very successful in obtaining EU research funding. This could potentially be linked to its brain-gain in being a major net importer of mobile EU students, researchers and academics. At the same time, because of its fee-paying model, this imported talent has come at a very low cost, as EU law on student mobility and diploma recognition has worked mainly to the benefit of the UK model by requiring equal treatment as regards tuition fees but not maintenance grants. This *Article* explores the impact that Brexit may have on European higher education and the UK's position within it, and *vice-versa*. It will argue that the UK's current strength in higher education may be one of its weak spots in the Brexit negotiations.

KEYWORDS: Brexit – EHEA – Bologna Process – ERA – student mobility – diploma recognition.

* Professor of EU Law at the College of Europe, Bruges, and on leave from the European Commission, sacha.garben@coleurope.eu. The views expressed in this *Article* are entirely personal and in no way reflect the official position of the European Commission. The Author wishes to thank the participants in the workshop on "EU citizenship in times of Brexit" at the University of Leuven on 30 March 2018 for their feedback on a previous draft of this *Article*, and in particular Christa Tobler for her very useful comments.

I. Introduction

It seems that for a long time, in European higher education at least, the United Kingdom (UK) *could* have its cake and eat it too. One of the four original architects of the European Higher Education Area (EHEA; which is the culmination of the 1998 intergovernmental Sorbonne Declaration and ensuing Bologna Process), the UK has successfully exported the main features of its higher education model to the other EU Member States and beyond, without having to concede any powers to the EU level in that regard, as the Bologna Process remains formally outside the EU's institutional and legal framework.[1] With the participating countries mainly converging to the UK system, embracing its Bachelor-Master-Doctorate degree structure as well as more implicitly its overall liberal, market-driven approach to higher education, the UK reaped all the benefits of an enlarged higher education "market" on which its higher education institutions could successfully compete, at minimal administrative, political or other cost.

Furthermore, in EU higher education law and policy, the UK has occupied an equally advantageous position. In the specific context of the EU's European Research Area (ERA), the UK's higher education sector has been very successful in obtaining EU research funding. This could potentially be linked to the fact that, as a major net importer of mobile EU students, researchers and academics – who flocked to the UK as a result of a combination of *inter alia* linguistics, the reputation of its universities and international outlook, as well as its open labour market – the UK has profited from a major brain-gain. At the same time, because of the UK's liberal, fee-paying model, this imported wealth and talent has come at a very low cost. This is because the EU's case law on student mobility and diploma recognition has worked mainly to the benefit of the UK model, where it requires equal treatment as regards tuition fees but not maintenance grants. Although the Court developed students' mobility rights already before the introduction of EU citizenship in the Treaty of Maastricht, it has since then relied on this "fundamental status" of Member State nationals to further strengthen its protective approach.[2] The (ideal-type) mobile student, with its youthful ambition and potential to develop a pan-European career, life and identify, is in many ways the embodiment of both the aspirational and instrumental aspects of EU citizenship.

What will be the impact of Brexit? While we shall leave concrete predictions to futurologists, this *Article* will reflect on the underlying dynamics in this area, from a legal and political point of view, and will thereby indicate the relevant "stakes" and "pressure points" which are likely to come to the fore in the Brexit negotiations in respect of the area of higher education. It will be argued that while the EHEA is independent from EU membership, and the UK will thus presumably remain party to it post-Brexit, a country's

[1] See for a general discussion S. Garben, *EU Higher Education Law – The Bologna Process and Harmonization by Stealth*, Alphen aan de Rijn: Kluwer Law International, 2014.

[2] See *ibid.*, ch. 4.

successful performance within the EHEA is deeply connected to (and dependent on) the EU's "hard" free movement rights deriving from EU citizenship and the internal market. In addition, in terms of the ERA, it is clear that UK universities stand a lot to lose if Brexit would bar them from obtaining EU research funding, making this an important bargaining chip for the EU, both within the negotiations and potentially as leverage for the UK's compliance with its obligations under any future relationship. As such, the UK's current strength in higher education is one of its weak spots in the Brexit negotiations.

Section II of the *Article* will set out the general elements of European higher education law and policy, section III will consider the current position of the UK in both this context, while section IV will explore the possible implications of, and for, Brexit. Section V concludes.

II. European higher education law and policy

Over the past two decades, a remarkable amount of Europeanization has occurred in higher education, an area that has traditionally been closely guarded by EU Member States as one of the remaining bastions of national identity and autonomy. This Europeanization has taken place, and continues to develop, in two main forums. The most fundamental European influence on national higher education systems has come from the intergovernmental Bologna Process, which has resulted in the so-called EHEA. The second source of Europeanization is the EU, which since the Maastricht Treaty possesses a direct competence in education in the form of (what is now, since the Lisbon Treaty) Art. 165 TFEU.

II.1. The Bologna Process and the EHEA

The Bologna Process was initiated in 1998, when at an international forum organized in connection with the celebration of the 800th anniversary of the Sorbonne University, the Ministers of education of France, Germany, Italy and the United Kingdom decided on a "Joint Declaration on harmonisation of the architecture of the European higher education system". It was open for the other Member States of the EU as well as for third countries to join. Belgium, Switzerland, Romania, Bulgaria and Denmark accepted and signed immediately. The Italian minister for education extended an invitation to fellow European ministers to a follow-up conference, taking place in Bologna the following year.[3] On this occasion, in June of 1999, 29 European countries agreed on a declaration that would fundamentally change the future of their higher education systems. From

[3] E. Hackl, *Towards a European Area of Higher Education: Change and Convergence in European Higher Education*, in *EUI Working Paper*, no. 9, 2001, p. 21.

this Bologna Declaration ensued the Bologna Process, which now includes 48 countries and the European Commission as "members".[4]

The Process is an on-going platform for policy-exchange and policy-making in higher education, organized around regular (bi- or triannual) ministerial conferences, which assess the progress made in reference to the various previously established Bologna policy objectives and which add new aims and elements. The original deadline of the Process was the creation of a European Area of Higher Education by 2010, but the Process has continued despite the EHEA's official launch in March 2010 during the Budapest-Vienna Ministerial Conference. While the Process has significantly branched out in terms of scope and objectives over the years, at its heart is still the structural "harmonisation"[5] of Europe's higher education systems, through the introduction of a common higher education system consisting in three (Bachelor-Master-Doctorate) cycles. The Bologna Declaration states that "access to the second cycle shall require successful completion of first cycle studies, lasting a minimum of three years. The degree awarded after the first cycle shall also be relevant to the European labour market as an appropriate level of qualification. The second cycle should lead to the master and/or doctorate degree as in many European countries". The main aim of this common system, and of the Bologna Process more generally, is to facilitate mobility in higher education and to improve the employability of graduates. The standardized degrees should be recognized in the participating countries, and to this end the Lisbon Recognition Convention of the Council of Europe[6] is integrated into the Process by making its ratification an explicit Bologna "requirement". As an extension of the common three-tier structure and commitment to diploma recognition, the Process has increasingly focused on quality assurance mechanisms and standards, within which "employability" plays an important role.

It should be stressed that the Sorbonne and Bologna Declarations and the ensuing Process are not legally binding. Both participation in the Process and the "implementa-

[4] All EU Member States, as well as Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Holy See, Iceland, Kazakhstan, Liechtenstein, Moldova, Montenegro, Norway, Russia, Switzerland, Macedonia, Serbia, Turkey and the Ukraine.

[5] The Sorbonne Declaration, which is seen as the basis for the Bologna Declaration and Process, carries the term "harmonisation" in its very title. However, in contrast with the Sorbonne Declaration, the Bologna Declaration carefully avoids the use of the word. In fact, the question whether the envisaged Bologna project constituted "harmonisation" is reported to have been a highly contentious issue that had to be resolved before the Declaration could be signed. There had already been discussion about the use of the term in the run-up to the conference. Most of the participating countries deemed the type of standardisation entailed by harmonisation to be undesirable in the field of higher education. Although the French minister Claude Allègre tried to convince his colleagues that "harmonisation" as used in the text of the Declaration was not to mean "standardisation" in its unwanted sense, the majority of participants preferred to stay on the safe side and leave out the term. See: T. KIRKWOOD-TUCKER, *Toward a European Model of Higher Education Processes, Problems, and Promises*, in *European Education*, 2004, p. 51 *et seq*.

[6] 1997 Convention on the Recognition of Qualifications concerning Higher Education in the European Region.

tion" of the Declarations and subsequent ministerial communiqués are entirely voluntary; they are "political artefacts"[7] that may be regarded as "public international soft law".[8] It should indeed also be underlined that the Bologna Process is formally separate from the EU and EU law. The European Commission is a "member" of Bologna alongside the participating counties, but the Process takes place outside the EU's institutional and legal framework. As we shall see in Section III, the UK has played an important role in ensuring that the Bologna Process would remain an intergovernmental, voluntary project, keeping the EU on the side-lines. But also a number of other EU Member States were (initially) eager to exclude the EU, perhaps as "retribution" for the EU's growing role in the area despite its initial lack of direct competence.[9]

I have argued elsewhere that the exclusion of the EU and the intergovernmental nature of the Bologna Process have led to a number of legitimacy problems, and that it would in fact have been better to adopt the Declaration as a binding measure within an EU context.[10] In any event, the activities undertaken in the context of Bologna overlap to an important extent with EU policies and initiatives, and its objectives are closely connected to an EU *corpus legis*. The Commission is heavily involved by means of funding and steering, and characterizes its contribution to the Process as part of the Lisbon/Europe 2020 Strategy.[11] The Bologna follow-up relies heavily on the EU presidency and the European Credit Transfer System (ECTS) has been transposed into the Bologna Process' Bachelor-Master system. Furthermore, since 2015, the EU offers a Student Loan Guarantee Facility, which provides partial guarantees to financial intermediaries in respect of loans granted to students undertaking a second-cycle degree, such as a Master's degree, which is neither their country of residence nor the country in which they obtained their qualification granting access to the Master's programme.[12] Once fully implemented,[13] this EU measure is of course an important support for the system and the goals of the Bologna Process. All of this makes the exact status of the Bologna Process obscure and means that in spite of the intentions of the (original) Bologna actors, the EHEA is deeply connected to the EU's institutional and legal framework, even if it remains formally separate from it.

[7] A. AMARAL, A. MAGALHAES, *Epidemiology and the Bologna Saga*, in *Higher Education*, 2004, p. 84.

[8] E. HACKL, *Towards a European Area of Higher Education*, cit., p. 28.

[9] For extensive discussion, see: S. GARBEN, *EU Higher Education Law*, cit.

[10] *Ibid.*; S. GARBEN, *The Bologna Process: From a European Law Perspective*, in *European Law Journal*, 2010, p. 186 *et seq.*

[11] Commission, *Realising the European Higher Education Area*, Contribution of the European Commission to the Berlin Conference of European Higher Education Ministers on 18-19 September 2003, enqa.eu.

[12] Regulation (EU) 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus+': the Union programme for education, training, youth and sport.

[13] Currently the scheme is being made available through banks and universities, with only limited coverage. See ec.europa.eu.

II.2. The EU and its higher education law and policy

As was just indicated, the EU features a range of laws and policies in the area of higher education, and this was already the case at the time of the Bologna Declaration's genesis. This may be to the surprise of some, considering that the 1957 Rome Treaty did not confer any specific powers for the development of a common educational policy. This absence however did not deter the European Court of Justice to expand its influence and to help establish a "Community law of education",[14] stating that "although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training".[15] Moreover, there was not a complete lack of explicit competence in educational matters. Art. 57 European Economic Community (EEC) Treaty (now Art. 53 TFEU) granted legislative powers for the mutual recognition of diplomas. Furthermore, the EEC Treaty also provided for competence in vocational training. It is in fact on this provision that the EU's initial education law was developed. In its consequential *Gravier* judgment, where the Court held that Member states cannot charge higher enrolment fees to non-national EU students, the Court interpreted vocational training to include an element of "general education".[16] Shortly afterwards, the Commission presented the Erasmus programme for student exchange[17] solely under Art. 128 European Community (EC) Treaty (now Art. 166 TFEU on vocational training),[18] and in a subsequent case, the Court largely upheld the Commission's wide interpretation of this provision so as to apply to university education.[19] Even if this discussion has been long superseded since the introduction of a specific legal basis for education in the Maastricht Treaty (the most recent incarna-

[14] B. de Witte (ed.), *European Community Law of Education*, Baden-Baden: Nomos, 1989.

[15] Court of Justice, judgment of 3 July 1974, case 9/74, *Casagrande v. Landeshauptstadt München*.

[16] Court of Justice, judgment of 13 February 1985, case 293/83, *Gravier*. Further developed in Court of Justice, judgment of 2 February 1988, case 24/86, *Blaizot v. University of Liege* clarifying that this could also include university education whenever it prepares students for an occupation.

[17] Commission Proposal for a Council Decision adopting Erasmus, COM(1985) 756. Erasmus establishes a European University Network, encouraging universities by means of financial incentives to set up student and teacher exchange agreements. It gives out grants to the participating students; covering the cost of linguistic preparation for the studies abroad, travel expenditure and compensation for the higher cost of living in the host state. Erasmus is very much a success story, in terms of numbers, outcomes and perception. See Commission, *Erasmus: Success Stories: Europe Creates Opportunities*, Office for Official Publications of the European Communities, 2007, www2.u-szeged.hu.

[18] L. Pépin, *The History of EU Cooperation in the Field of Education and Training: How Lifelong Learning Became a Strategic Objective*, in *European Journal of Education*, 2007, p. 124. K. Lenaerts, *Erasmus: Legal Basis and Implementation*, in B. de Witte (ed.), *European Community Law of Education*, cit., p. 116; J. Shaw, *Education and the Law in the European Community*, in *Journal of Law & Education*, 1992, p. 420.

[19] Court of Justice, judgment of 30 May 1989, case 242/87, *Commission v. Council*.

tion of the programme, ERASMUS+,[20] is based on both Arts 165 and 166 TFEU), this story remains interesting as it shows the dynamics behind the evolution of this area.

The Court's case law on student mobility has developed since the seminal *Gravier* judgment, making clear that EU citizens have the right to higher education in other EU Member States on the same terms as nationals, which does not only require equal treatment as regards access conditions and tuition fees, but in principle also as regards maintenance grants. In the *Bidar* case, the Court included student maintenance for the purposes of the application of the prohibition of discrimination as a matter of principle.[21] Remarkably, the Court used the Citizenship Directive 2004/38,[22] which provides in its recital 21 that it should be left to the host Member State to decide whether it will grant maintenance assistance for studies, and in Art. 24, para. 2, that the host Member States "shall not be obliged to [...] grant maintenance aid for studies" prior to acquisition of the right of permanent residence, as an argument that the grant of such aid actually falls within the scope of the Treaty.[23] Contrary to the expectations raised by *Bidar* that students may qualify for maintenance aid before obtaining the right of permanent residence after 5 years of legal residence, in the *Förster* case the Court allowed for an extensive derogation of this principle, so that under the current state of affairs only those students of foreign EU nationality are eligible that have spent 5 years in the host State before applying.[24] As regards the exportability of maintenance grants and loans, the Court held in *Morgan and Bucher* that "where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States".[25]

[20] Regulation (EU) 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing "Erasmus+": The Union programme for education, training, youth and sport.

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

[22] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[23] In *Bidar*, cit., para. 43, the Court stated: "That development of Community law is confirmed by Article 24 of Directive 2004/38, which states in paragraph 1 that all Union citizens residing in the territory of another Member State on the basis of that directive are to enjoy equal treatment 'within the scope of the Treaty'. In that the Community legislature, in paragraph 2 of that article, defined the content of paragraph 1 in more detail, by providing that a Member State may in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families restrict the grant of maintenance aid in the form of grants or loans in respect of students who have not acquired a right of permanent residence, it took the view that the grant of such aid is a matter which, in accordance with Article 24(1), now falls within the scope of the Treaty".

[24] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster*.

[25] Court of Justice, judgment of 23 October 2007, joined cases C-11/06 and C-12/06, *Morgan*, para. 28.

This distinction between access conditions, comprising tuition fees, on the one hand, for which full equal treatment of mobile students is required, and on the other hand maintenance support for which equal treatment will only apply in exceptional cases, has an asymmetrical effect on Member States' higher education systems. Where a Member States subsidizes and organizes higher education through free or low-tuition access, EU law requires them to extend this to mobile EU students. Where, on the other hand, it subsidizes and organizes higher education through maintenance grants and loans, it does not have to do so. This works to the disadvantage of Member States with a social model of higher education, as "EU law requires Member States which choose to devote significant public resources to maintaining a high quality further education system for the benefit of their own populations to subsidize, through the principle of equal access, in addition potentially large numbers of foreign students"[26] while more Member States with a more "liberal" model with high tuition fees and support through maintenance grants or loans have to pay significantly less to mobile students in comparison.

In addition to the provision on vocational training discussed above, the Rome Treaty featured another competence related to education: Art. 53 TFEU on recognition of diplomas. Professional diploma recognition deals with the rules of Member States that make access to or pursuit of a regulated profession in their territory contingent on possession of professional qualifications.[27] Art. 53 TFEU provides an explicit legal basis for legislative action, approaching the issue from an internal market logic. Considering that currently around 800 professions are regulated by one or more Member States, the establishment of a common employment market would be fundamentally impaired if Member States could carve out these professions by applying their different statutory regimes. This has allowed the EU to adopt a range of legal measures. The numerous directives on co-ordination of training and recognition of qualifications have had a direct impact on content of courses.[28] For instance, Directive 78/687 caused the entire dentistry curriculum of Italian universities to be recreated.[29] The most important current measure is umbrella Directive 2005/36/EC.[30] It consolidated almost all the previous legislation, except for the specific directives on the provision of services and establishment of lawyers.[31] The umbrella directive does not substantially impact the higher education

[26] M. DOUGAN, *Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?*, in *Common Market Law Review*, 2005, p. 943 *et seq*.

[27] H. SCHNEIDER, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, Antwerp: Intersentia, 1995.

[28] J. LONBAY, *Education and the Law: The Community Context*, in *European Law Review*, 1989, p. 368.

[29] C. ZILIOLI, *The Recognition of Diplomas and Its Impact on Educational Policies*, in B. DE WITTE (ed.), *European Community Law of Education*, cit., p. 51.

[30] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

[31] Directive 77/249/EEC of the Council of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services and Directive 98/5/EC of the European Parliament and of the Council of 16

systems of the Member States in a direct way. It does not propose the harmonization of new professions, but simply applies a mutual recognition approach to the non-coordinated professions. Still, the mechanism of mutual recognition might have an effect on the national higher education systems, as it could put pressure on the systems that are less "efficient".

In contrast to professional recognition, academic recognition is said to be concerned with the academic status of obtained degrees. Academic recognition is often regarded to lie outside the scope of formal EU powers. Although it could be argued that this distinction is unfounded,[32] no EU legislation concerning the academic recognition of diplomas has been adopted. That is not to say that no European integration has taken place in this area. Firstly, the EU has adopted a number of supporting measures to facilitate academic recognition, such as the European Credit Transfer System for higher education (ECTS)[33] and for vocational training (ECVET),[34] Europass,[35] the European Qualifications Framework[36] and the Diploma Supplement.[37] Moreover, the case law of the Court has played an important role also here, as it has held that the refusal to recognize academic diplomas or titles from other Member States can constitute a restriction of the fundamental freedoms.[38] Beyond the mobility of students and diploma holders, EU law features important mobility rights for other education actors. Teachers qualify as "workers" and can therefore rely on all the rights and benefits connected to Art. 45 TFEU.[39] Furthermore, the activities of private education institutions qualify as "services"

February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

[32] S. GARBEN, *On Recognition of Qualifications for Academic and Professional Purposes*, in *Tilburg Law Review*, 2011, p. 127.

[33] ECTS was developed by the Commission in the context of Erasmus to enable students to take the credits obtained during their period of study abroad and use them within their home curriculum.

[34] Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Credit system for Vocational Education and Training (ECVET).

[35] Decision 2241/2004/EC of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass).

[36] Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning. The European Qualifications Framework constitutes a European reference framework, consisting of 8 levels, based on "learning outcomes".

[37] The Diploma Supplement is a European administrative annex to diplomas, which has been elaborated jointly by a working group of the European Commission, Council of Europe and UNESCO.

[38] Court of Justice, judgment of 31 March 1993, case C-19/92, *Kraus v. Land Baden-Württemberg*. The non-recognition on equal terms of secondary school qualifications was considered a restriction of Arts 18 and 21 TFEU on equal treatment of EU citizens, in Court of Justice: judgments of 1 July 2004, case C-65/03, *Commission v. Belgium*; judgments of 7 July 2005, case C-147/03, *Commission of the European Communities v. Republic of Austria*; judgments of 13 April 2010, case C-73/08, *Bressol and Others*.

[39] Court of Justice, judgment of 28 November 1989, case C-379/87, *Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*.

under Art. 56 TFEU.[40] Similarly, private education institutions have the right to free establishment across the EU. Member States may therefore in principle not restrict privately funded higher education institutions from offering education programmes and degrees in other Member States, and the diplomas they issue should in principle be recognized by that host Member State.[41]

Further relevant EU measures concerning mobile students include the Student Residence Directives. Directive 93/96[42] granted students the right of residence in the Member State of study, but under the conditions of sufficient health insurance and sufficient resources to avoid becoming a burden on the host State's social assistance schemes. This Directive was repealed by Directive 2004/38[43] on the right of citizens to move and reside freely within EU territory. The Directive constitutes a consolidation and clarification of all the legislation on the right of entry and residence for Union citizens. As discussed above, it indicates specifically that host Member States are not required, prior to the acquisition of the permanent right of residence, to grant maintenance aid for studies, including for vocational training, in the form of grants or loans. Directive 2004/114 in turn concerns students from third countries. The rationale behind the Directive is to "promote Europe as a whole as a world centre of excellence for studies and vocational training" by promoting the mobility of third-country nationals to the EU for the purpose of studies.[44] The Directive distinguishes four categories of third-country nationals, namely students, school pupils, unpaid trainees and volunteers. The conditions for entry of students and pupils are that they have a valid travel document and, if minors, come with parental authorization, that they have sickness insurance and sufficient resources to cover their stay and that they have been accepted by a higher educational establishment or school.

A final important aspect of EU higher education is the ERA, for which the Lisbon Treaty introduced a legal basis in Art. 179, para. 1, TFEU.[45] According to the text of Art. 179 TFEU, this area is characterized by increased mobility of researchers, scientific knowledge and technology, and increased "competitiveness" of the European research sector. This is

[40] Court of Justice, judgment of 11 September 2007, case C-76/05, *Schwarz and Gootjes – Schwarz*.

[41] Court of Justice, judgment of 13 November 2003, case C-153/02, *Neri*.

[42] Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

[43] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68.

[44] Preamble of Directive 2004/114/EC of the Council of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

[45] The ERA was initiated by the Commission in 2000, in its Communication COM(2000) 6 final of 18 January 2000 to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions "Towards a European research area", and established by a Council Resolution of 15 June 2000 establishing a European Research Area.

to be achieved by collaboration among the various actors engaged in research, both private and public; through the use of the internal market freedoms; and through the definition of common standards, for which Art. 182, para. 5, TFEU provides a legal basis prescribing the ordinary legislative procedure. In 2010, the European Council indicated its intention to have "the European Research Area completed by 2014 to create a genuine single market for knowledge, research and innovation".[46] That declaration also indicated mobility as a priority, noting that: "[i]n particular, efforts should be made to improve the mobility and career prospects of researchers, the mobility of graduate students and the attractiveness of Europe for foreign researchers".[47] Researchers can, in principle, qualify as "workers" in the sense of Art. 45 TFEU when they perform services under direction in return for remuneration,[48] but when they carry out their activities on the basis of a grant rather than a traditional salary, these conditions may not be met.[49] Several further obstacles tend to hamper mobility: many vacancies are not (internationally) openly accessible, many jobs in this sector still require (at least some degree of) knowledge of the national language; and social security provisions for researchers are highly heterogeneous and transferability of entitlements is troublesome.

Facing these challenges, the EU has adopted various policy measures. In 2005, the European Commission adopted a European Charter for Researchers and a Code of Conduct for the Recruitment of Researchers.[50] For the purpose of open, transparent and merit-based recruitment, the EU created the EURAXESS Jobs Portal,[51] the use of which is uneven but growing.[52] In 2014, RESAVER was launched. This is a single European pension arrangement offering a defined contribution plan, tailor-made for research organisations and their employees, to enable mobile and non-mobile employees to remain affiliated to the same pension vehicle when moving countries and changing jobs.[53] Furthermore, the European Research Council (ERC), which was established in its current form in 2007,[54] has had significant success in "opening up" research activities to competition at European level. As von Bogdandy notes: "[t]he success rate in obtaining funding

[46] European Council Conclusions of 4 February 2011, para. 19.

[47] *Ibid.*

[48] See Court of Justice, judgment of 17 July 2008, case C-94/07, *Raccanelli*.

[49] *Ibid.*

[50] Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers.

[51] The EURAXESS Jobs Portal is available at ec.europa.eu.

[52] About 47 per cent of researcher job postings in 2014 with 7.8 per cent compound annual growth rate in the period 2012-2014 in the EU. European Commission, Commission Staff Working Document SWD(2017)21 of 2017, Report from the Commission to the Council and the European Parliament, *The European Research Area: Time for implementation and monitoring progress* (ERA Progress Report 2016), ec.europa.eu.

[53] See New pan-European pension fund to boost researcher mobility, in European Commission Press Release of 1 October 2014, europa.eu and see www.resaver.eu.

[54] Commission Decision C(2013) 8915 of 12 December 2013 establishing the European Research Council, p. 23.

from one of its programs is perhaps the most visible instrument for an intra-European comparison regarding the attractiveness and capability of the research institutions of the member states".[55] Indeed, for many the most tangible element of the ERA is the funding for research it provides under Horizon 2020, which amounts to 8 billion Euro.

The ERA and EHEA have very different legal statuses from an EU law perspective. The ERA is firmly based in the Treaties and the EU's institutional setting, while as mentioned the EHEA is a feature of "public international soft law".[56] Still, there is a "substantial degree of resemblance in terms of scope, governance and working methods, actors and activity types".[57] There is also a certain alignment in overall political orientation, as both aim to increase competition and introduce market mechanisms in the higher education sector.[58] The fact that such sensitive decisions are taken through soft law processes, implying a certain accountability deficit, has met with some criticism.[59]

III. The UK and European higher education law and policy

III.1. The UK and the Bologna Process

Whereas at the end of the last century, other European countries were struggling with the faltering influence and standing of their once so glorious universities, and accordingly with the decreasing attractiveness of their higher education systems,[60] the only problem the UK had in attracting foreign students was that there were too many applicants from all over the world eager to study at the UK's universities, because of their world-class reputation and because of the opportunity for students to develop their English-language skills.[61] Accordingly, "the UK's strong position in European higher education raises questions about why it needs to be involved in the Bologna Process, what it has to gain, and why the UK should help other countries in the EHEA to modernise if that is going to risk its competitive advantage".[62] For indeed, the model towards which

[55] A. von Bogdandy, *National Legal Scholarship in the European Legal Area – A Manifesto*, in *International Journal of Constitutional Law*, 2012, p. 614 *et seq*.

[56] E. Hackl, *Towards a European Area of Higher Education*, cit., p. 28.

[57] P. van der Hijden, *Mobility Key to the EHEA and ERA*, in A. Curaj, P. Scott, L. Vlasceanu, L. Wilson, (eds), *European Higher Education at the Crossroads: Between the Bologna Process and National Reforms*, Dordrecht: Springer, 2012, p. 378.

[58] See S. Garben, *The Bologna Process and the Lisbon Strategy: Commercialisation of Higher Education Through the Back Door?*, in *Croatian Yearbook of European Law and Policy*, 2010, p. 209 *et seq*.

[59] *Ibid.* See also A. Gideon, *The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective*, in *Journal of Common Market Studies*, 2015, p. 1045 *et seq*.

[60] See for extensive discussion S. Garben, *EU Higher Education Law*, cit.

[61] P. Furlong, *British Higher Education and the Bologna Process: An Interim Assessment*, in *Politics*, 2005, p. 53 *et seq*.

[62] House of Commons Education and Skills Committee, *The Bologna Process*, Fourth Report of Session 2006-07, 16 April 2007, p. 4.

convergence was directed in the Sorbonne and Bologna Declarations closely resembles the UK Bachelor-Master system, which could have meant that other countries would copy precisely the aspects of the UK's higher-education system that are considered to be responsible for its success. That would risk diminishing the UK's advantageous position, without any additional benefits for the UK itself. Why indeed then, one could ask, is the UK one of the four founding members of the Bologna Process?

The initiative for the Bologna Declaration surely came from the French, Italian and German ministers more than from its fourth signatory, the UK junior minister Baroness Tessa Blackstone. The other three ministers already knew each other and had been discussing some of the issues already well before the Sorbonne event.[63] Hoareau reports that only "once France, Germany and Italy had agreed on the principle of a reform of degrees establishing an undergraduate degree of three years, and two postgraduate levels in two and eight years" they "contacted the British minister".[64] The three initiators were well aware that for the Declaration to have an optimum impact they needed the UK onboard "in light of the political clout the UK has as one of the 'larger' EU Member States".[65] Blackstone agreed to participate, probably because of the idea that the Bologna Process only proposed convergence towards the UK model. Indeed, Blackstone stated that signing the Sorbonne Declaration "was a riskier action"[66] for the other three signatories than for her: "They were committing their own systems of higher education to much greater change than I. The Anglo-Saxon model that was proposed that day in May 1998 was essentially the one that prevailed in the United Kingdom as well as North America. We in Britain had to make relatively few adaptations. In France, Germany and Italy more change was required following the Declaration".[67]

Together with this idea that no reforms would be required, it was important for Blackstone that the project would be a strictly intergovernmental one, without any binding agreement, and for that reason she was keen to keep the EU and the European Commission out.

[63] The three ministers from France, Germany and Italy had "come to know and esteem one another in the context of a virtually unknown international organization, sometimes called the 'G8 of research', the largely informal grouping of the ministers for research in the key industrialized countries of the world established by the Carnegie Commission on Science, Technology and Government". Tessa Blackstone, as a junior minister, was not in charge of research and had therefore not been a part of these conferences. J. SCHRIEWER, *Rationalized Myths in European Higher Education: The Construction and Diffusion of the Bologna Model*, in *European Education*, 2009, p. 31 *et seq*.

[64] C. HOAREAU, *Consequential Deliberative Governance? Analysing the Impact of Deliberation on Attitudinal and Policy Change in the European Higher Education Area*, in *London School of Economics Working Paper*, 2009.

[65] J. SCHRIEWER, *Rationalized Myths in European Higher Education*, cit., p. 37.

[66] T. BLACKSTONE, *Education and Training in the Europe of Knowledge*, January 2008.

[67] *Ibid.*

It is reported that when Blackstone returned from the Sorbonne meeting, she did face some "criticism for signing something so 'European' as a declaration on a common European Higher Education Area".[68] But contrary to what one might expect, it seems that there was no real controversy or even a heated public debate about the UK's participation in (creating) the EHEA. Blackstone's justification for her signature, stressing that the agreement only implied that Britain's system would be introduced elsewhere,[69] was apparently convincing enough. The government, the higher education sector and the public were all more or less on the same side, because the UK government did not have an agenda to participate in the Bologna Process to push national reforms in the same sense many of the governments of the other participating countries had.[70] In contrast to the governmental rhetoric in those other countries, UK officials were eager to water down the importance of the Declaration, stressing that no reforms would be necessary as the UK was the model country anyway. Indeed, its higher education sector was not subjected to the massive and sometimes painful reorganizations that their colleagues on mainland Europe faced in the wake of Bologna. This might have contributed to the fact the UK reaction mainly consisted of "complacency, based on the view that much of this amounts to catch-up by other European countries"[71] combined with a sort of indifference to Bologna's ins and outs.

This is not to say that the UK was not actively involved in the Process from the beginning. Seminars and meetings were organized on a relatively frequent basis already a few years after the signing of the Declarations. The national Quality Assurance Agency launched a national framework for higher education qualifications "with careful descriptions of bachelors and master's degree qualifications" in 2000.[72] In 2003, the UK Government ratified the Lisbon Recognition Convention, a key Bologna aim. A survey of UK higher education institutions by the Europe Unit in 2005 indicated considerable awareness and engagement with the Bologna Process among those institutions. However, it can be said that it was only in 2006, when the House of Commons Education and Skills Committee launched an inquiry focusing on Bologna that any kind of substantive debate really materialized. The inquiry was undertaken in the immediate run-up to the Bologna Process' London Ministerial Summit of May 2007 "in order to facilitate broad discussion of the UK position" "with the intention of making a constructive contribution to the negotiations

[68] K. MARTENS, K. WOLF, *Boomerangs and Trojan Horses: The Unintended Consequences of Internationalizing Education Policy Through in the EU and the OECD*, in A. AMARAL, G. NEAVE, C. MUSSELIN, P. MAASSEN (eds), *European Integration and the Governance of Higher Education and Research*, Dordrecht: Springer, 2009, p. 81 *et seq*.

[69] *Ibid.*

[70] For extensive discussion, see S. GARBEN, *EU Higher Education Law*, cit.

[71] P. FURLONG, *British Higher Education and the Bologna Process*, cit., p. 60.

[72] R. COWEN, *The Bologna Process and Higher Education in England*, in D. PALOMBA (ed.), *Changing Universities in Europe and the "Bologna Process"*, in *Comparative Education Studies*, 2008, p. 58.

at the 2007 Summit and beyond".[73] The Report thoroughly addressed the question why the UK should participate, because "as a European leader in higher education, the benefits of engagement in the Bologna Process might not be as immediately obvious for the UK as they are for other signatory countries in the EHEA".[74] As a minimum case for membership, it was argued that in the rapidly developing global market for higher education, the UK could simply not afford not to be involved. "The modernization of European higher education would continue to take place regardless of UK involvement and could have implications for the recognition of UK courses and competitive position".[75] It would therefore be better to participate and attempt to influence and steer the Process from the inside.[76] The Report made it clear that a sense of complacency had to be avoided, and identified the pressure that the convergence process put on the UK's higher education system. The competitive advantage in attracting overseas students, traditionally a particular focus of the UK, could be reduced if "comparability and compatibility would develop apace across the EHEA without efforts from the UK to keep up".

Beyond the minimum case for membership, the Report identified some significant benefits for the UK in active Bologna participation. The Committee found government and the organizations representing higher education to agree about such advantages, supported by student organizations as well as university leaders and academic staff involved in implementing the Bologna principles and action lines in practice. Engagement in the Process could be economically beneficial, through increased employment and productivity. Furthermore, involvement could increase the competitiveness of the UK higher education sector through promoting the attractiveness and international reputation of the EHEA at large. In addition, the Report pointed out that UK students could profit from increased mobility and employment opportunities. With regard to UK universities, active Bologna membership could guarantee an increased market for both EU and international students within the EHEA, increased mobility of staff, sharing of best practice and expertise in a broad range of areas, and increased opportunities for research collaboration across the ERA. All these considerations led the Committee to conclude that there were not only significant dangers for the UK not to be actively involved in the Bologna Process, but that there were also some significant advantages to be gained from membership, with the Bologna action lines increasingly reflecting the poli-

[73] House of Commons Education and Skills Committee, *The Bologna Process*, cit., p. 3.

[74] *Ibid.*, p. 25.

[75] *Ibid.*

[76] In the words of a UK Minister: "The problem is that they [mainland Europe] will get on with it, they will continue with this process and, given the competitive pressures that exist, over time for some of our institutions, I think that could hit them competitively in that they have ended up in a situation where a system of comparability and compatibility is developed elsewhere in the broader Europe [and] we are not a part of it [...] that is why I think the process is happening, we need to embrace it and we need to influence it in our national interest". See House of Commons Education and Skills Committee, *The Bologna Process*, cit., p. 25.

cy priorities in the UK. This settled the question of the desirability of the UK's membership of the Bologna Process, almost ten years after it had helped create it.

III.2. The UK and EU higher education and policy

In EU higher education law and policy, the UK equally occupies a privileged position. First and foremost, the UK and its higher education sector has been one of the main beneficiaries of the ERA. UK higher education institutions are highly successful in acquiring EU research funding, with the highest number of Horizon 2020 submissions obtaining the 2nd highest share of all funding, amounting to 15.2 per cent of overall available funding (as well as benefitting indirectly from funding allocated to their project partners from elsewhere in the EU).[77] It has been estimated that EU research funding generates more than 19,000 jobs across the UK, £1.86 billion for the UK economy and contributes more than £1 billion to Gross Domestic Product (GDP), according to a report produced for Universities UK.[78]

As regards student mobility, as set out in section II.2 above, EU law requires equal treatment in higher education as regards all access conditions, including tuition fees, but allows a 5-year prior residence requirement to be applied for the purposes of maintenance support. While it is difficult to establish an accurate overall financial picture, it can be expected that EU law as it currently stands thus plays out to the benefit of the UK system, which charges high tuition fees to all students (up to £9,250)[79] and provides its main subsidies to individual students through maintenance grants and loans. Of course, EU law prevents the UK from charging higher tuition fees to foreign EU students than it charges national students and, considering the UK's status as the biggest net-importer of students in the EU, this implies an opportunity cost. On the other hand, if the UK were in fact to charge higher tuition fees, it could be projected that fewer EU students would come. In any event, compared to Member States that do not charge any, or only low, tuition, the UK is required to pay less in regard to foreign students. Furthermore, UK students can, of course, benefit from other Member States' more "generous" education systems.

It may even be that the UK has a net financial benefit per foreign EU student. EU students will only be entitled to undergraduate tuition fee loans, to cover their ± £9000 yearly fees, which will have to be repaid. Only if they become permanent residents after 5 years of legal stay in the UK, can they apply for undergraduate maintenance sup-

[77] European Commission, *Horizon 2020 in Full Swing, Key Facts and Figures 2014-2016*, Luxembourg: Publications Office of the European Union, 2018, ec.europa.eu.

[78] U. Kelly, *Economic Impact on the UK of EU Research Funding to UK Universities*, May 2016, www.universitiesuk.ac.uk.

[79] Times Higher Education, *The Cost of Studying at a University in the UK*, in *THE*, 1 December 2017, www.timeshighereducation.com.

port.[80] As this is on "friendly conditions" and not all is always paid back, this of course can still be estimated to come at some cost to the UK taxpayer.[81] However, the EU student also spends money in the UK on various living costs such as accommodation, food and general consumption, meaning that on balance this could be projected to break even for the UK economy as a whole. As to the financial position of the universities themselves, while some are claiming that a student costs a university £16.000 a year,[82] there is no transparency concerning the calculations on which these figures are based.[83] It is possible that in the average cost of a student to the institution, universities calculate their various bursary and scholarship schemes which may in fact not always be accessible to EU students. This means that EU students may in certain cases be financing UK students at UK universities. In any event, all these calculations are of course apart from the less calculable but highly valuable knowledge the EU students bring to UK classrooms, the internationalization that adds to the overall competitiveness of the sector and other more intangible benefits to the UK economy and society at large.

If it is indeed considered that importing EU students provides the UK and its universities with significant benefits, it must thank the Court of Justice for its interpretation of EU law that made studying abroad so attractive even before the Bologna Process. Beyond access conditions and fees, it is the "outcome" of studying that is of major interest to students. The leading case of *Kraus*[84] illustrates this well. The German student Dieter Kraus studied law in Germany and passed the first State examination in law in 1986. In 1988 he obtained the university degree of Master of Laws (LL.M) following postgraduate study at the University of Edinburgh in the UK. In 1989 Mr Kraus sent a copy of his LL.M degree certificate from the University of Edinburgh to the Ministry of Sciences and Arts of the Land Baden-Wuerttemberg, requesting confirmation that, having done so, there was nothing further to prevent him from using his title in the Federal Republic of Germany. The Ministry replied that his request could be allowed only if he made a formal application for the authorization prescribed for the purpose by German law, using the appropriate form and attaching to it a certified copy of the diploma in question. Mr Kraus subsequently sent a certified copy of his Edinburgh degree, but refused to submit a formal application for authorization on the ground that the requirement for such an authorization prior to the use of an academic title awarded in another Member State

[80] Students with 3 years prior residence, but not for the main purpose of receiving full-time education during any part of this 3-year period, also have access to maintenance loans.

[81] For the highly complex calculations that could be made in this regard, see: Institute for Fiscal Studies, *Estimating the Public Cost of Student Loans*, 2014, www.ifs.org.uk.

[82] R. GARNER, *We Need Tuition Fees of Up to £16,000, Says Oxford Vice-Chancellor Professor Andrew Hamilton*, in *The Independent*, 9 October 2013, www.independent.co.uk.

[83] Times Higher Education, *Oxford Teaching and the £16K Question – How Does the University Calculate the Real Cost of Undergraduate Education?*, in *THE*, 17 October 2013, www.timeshighereducation.com.

[84] *Kraus v. Land Baden-Württemberg*, cit.

constituted an obstacle to the free movement of persons and also discrimination, both prohibited by EU law, since no such authorization was required for the use of a diploma awarded by a German establishment.

The Court of Justice considered that the freedom of movement for workers and freedom of establishment were hampered by a lack of academic diploma recognition, since the possession of an academic title constitutes "an advantage for the purpose both of gaining entry to such a profession and of prospering in it", improving "its holder's chances of appointment" and may lead to "higher remuneration or more rapid advancement or [...] access to certain specific posts reserved to persons with particularly high qualifications", and since "the possibility of using academic titles awarded abroad and supplementing national diplomas required for access to a profession greatly facilitates establishment as an independent practitioner and, in any event, the pursuit of a corresponding professional activity".[85] While Member States are allowed to restrict these freedoms in the interest of preventing abuse of academic titles, any authorization procedure must be intended solely to verify whether the postgraduate academic title obtained in another Member State was properly awarded, following a course of studies which was actually completed, in an establishment of higher education which was competent to award it.[86] The procedure must be easy of access and should not be excessively expensive.[87] Any refusal of authorization must be capable of being subject to judicial proceedings in which its legality under EU law can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken with respect to him.[88] Finally, whilst the national authorities are entitled to prescribe penalties for non-compliance with the authorization procedure, the penalties imposed should not exceed what appears proportionate to the offence committed.[89] As this provides important guarantees to any mobile student, this case law can be considered as instrumental to student mobility as the well-known *Gravier* doctrine.

Another leading diploma recognition case similarly shows how UK higher education institutions benefit from EU mobility rights, in an even more direct sense. Universities themselves can rely on the freedom to provide services and the freedom of establishment to offer for-profit education in other EU Member States. This reportedly comprises 13% of the UK higher education's sector's "transnational education" activities, which are an important profit-yielding part of its higher education model.[90] Ms Neri[91] enrolled

[85] *Ibid.*, paras 18-23.
[86] *Ibid.*, para. 38.
[87] *Ibid.*, para. 39.
[88] *Ibid.*, para. 40.
[89] *Ibid.*, para. 41.
[90] Universities UK International, *The Scale of UK Higher Education Transnational Education 2015-16*, January 2018, www.universitiesuk.ac.uk.
[91] *Neri*, cit.

at Nottingham Trent University (NTU) with a view to acquiring a Bachelor's honours degree in International Political Studies on completion of a four-year course of studies. Nottingham Trent University is a university subject to UK legislation included in the list of bodies authorised to award Bachelor's honours degrees having legal status. While Nottingham Trent University generally administers its courses of study at its establishment in the UK, where final degrees are awarded, it also provides for an "outsourced" system in accordance with Art. 216 of the Education Reform Act 1988. Under Art. 216 of the Education Reform Act, the Secretary of State approves a list of bodies who may provide any course which is in preparation for a degree to be granted by a recognised body and is approved by or on behalf of the recognised body, which includes the European School of Economics (ESE). The ESE is thus a Higher Education College authorised according to the UK educational system to organise and provide the university courses of study approved by NTU. It is incorporated as a limited liability company, established in the UK with a number of secondary establishments in other Member States, having 12 branches in Italy. ESE does not award its own degrees but for remuneration organises courses for the students enrolled with NTU in accordance with study plans validated by that university, which then awards a final degree of Bachelor of Arts with Honours. The quality of the courses of study provided by ESE is also subject to audit by the UK Quality Assurance Agency for Higher Education.

In view of the high financial cost attendant on residence in the UK for the entire duration of her studies, Ms Neri decided to attend university courses in Italy at ESE. Having enrolled for the first year of the course of studies held by ESE in Genoa, she learned from authoritative Italian sources that ESE was not authorised to organise university-level courses and that recognition could not be granted to the university's degrees, albeit legally recognised in the United Kingdom, if they had been obtained on the basis of periods of study completed in Italy. On this basis, Ms Neri brought a case that was referred to the Court of Justice. The Court considered that the organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment and that "for an institution like ESE, which organises courses intended to enable its students to obtain degrees capable of facilitating their access to the employment market, the recognition of those degrees by the authorities of a Member State is of considerable importance".[92] The Court held that it was clear that the Italian administrative practice, under which certain degrees awarded at the end of a university training course given by ESE are not recognised in Italy, is likely to deter students from attending these courses and thus seriously hinder the pursuit by ESE of its economic activity in that Member State. The Italian Government considered that restriction justified by the need to ensure high standards of university education. It maintained that the Italian legal order did not accept agreements such as the one be-

[92] *Ibid.*, para. 42.

tween ESE and Nottingham Trent University since it remains attached to a view of such education as a matter of public interest, expressing as it does the cultural and historical values of the State. According to the Italian Government, such an agreement on university education prevents direct quality control of these private bodies by the competent authorities both in the Member State of origin and the host Member State. The Court however held that "given that the Italian legal order appears to allow, pursuant to Art. 8(1) of Law No 341/90, agreements between Italian universities and other Italian establishments of higher education which are comparable to the agreement entered into between NTU and ESE" and since the non-recognition of degrees in question appeared to relate solely to degrees awarded to Italian nationals, the administrative practice did not appear suitable for attaining the objective of ensuring high standards of university education. Furthermore, the administrative practice was disproportionate, since it appeared "to preclude any examination by the national authorities and, consequently, any possibility of recognition of degrees awarded in circumstances like those in the main proceedings".[93] Thus, the upshot of the judgment is that while Member States may under circumstances limit the activities of for-profit higher education institutions on their territory, this is by way of exception to the internal market freedoms and therefore will have to comply with high standards of proportionality. As the facts of this case also clearly show, these provisions of EU law, as interpreted by the Court, are of particular benefit to the UK higher education system and its institutions.

IV. The implications of, and on, Brexit

The exact implications of "Brexit", if it in fact happens, are of course difficult to predict, especially as everything hinges on the specific conditions of the (various?) agreement(s) that the UK and the EU may conclude, if any, as well as complex and volatile political dynamics. Even in the case of a "hard Brexit", the future may see subject-specific cooperation agreements, which could very well include the area of higher education, where non-EU Member States regularly participate in various EU policies.[94] Then again, even the "softest" of Brexits may have profound implications for UK and European higher education, particularly if it were to in any way dilute mobility rights or re-organize research funding. These considerations thus limit the predictive effect of anything we may project or conclude in this *Article*. It can nevertheless be insightful, and hopefully somehow useful, to reflect on how the underlying dynamics in the area of higher education, as explored in the previous parts of this *Article*, may be affected by – and themselves affect – the UK's secession from the Union. The previous analysis has exposed a number of relevant "stakes" and "pressure points" when it comes to European higher educa-

[93] *Ibid.*, para. 49.

[94] For instance, the Faroe Islands, Moldova, Tunisia participate in Horizon 2020.

tion and the UK's position in it, which are likely to come to the fore in the Brexit negotiations and afterwards, in post-Brexit Europe, in respect of the area of higher education.

As regards the EHEA, it can firstly be presumed that the UK will remain party to it post-Brexit, as participation to the Bologna Process is entirely independent from EU membership. The Process is voluntary, so there is no reason to fear any loss of sovereignty, and in its post-Brexit isolation, this may *par excellence* be one of the remaining forums within which the UK can still seek to "lean in" on international affairs. In this respect, it is interesting to recall the comments made by a UK Minister in relation to UK participation in Bologna:

> "The problem is that they [mainland Europe] will get on with it, they will continue with this process and, given the competitive pressures that exist, over time for some of our institutions, I think that could hit them competitively in that they have ended up in a situation where a system of comparability and compatibility is developed elsewhere in the broader Europe [and] we are not a part of it [...] that is why I think the process is happening, we need to embrace it and we need to influence it in our national interest".[95]

These remarks have some additional poignancy, as they can be read to be about EU membership in general as much as about Bologna participation. They clearly show the stakes on the side of the UK: how to maintain influence in international decision-making and the capacity to pursue the national interest, especially considering economic competitive forces, while being excluded from the most important decision-making forum?

As such, it would not be wholly unexpected for the UK to seek to actually increase the standing and broaden the material scope of the Bologna Process, possibly "pulling" as much as it can away from the EU in this area, thereby hoping to represent its interests (particularly the interest of its higher education sector, and the public purse) and achieve its policy objectives concerning student mobility, diploma recognition and perhaps even research funding somehow within this purely intergovernmental project in which it can be expected to remain a full and influential member. Such would be a strategic course of action for the UK, considering that as we have seen in the previous sections, much of the Bologna Process depends, in reality, on EU law to give actual effect to it. It is EU law that grants hard and enforceable rights to individual students, teachers and higher education institutions, that make the (proclaimed virtues of the) EHEA from a paper tiger into a tangible reality. It would thus be rational for the UK to try and pry as much of that away from the EU as possible, or in any event to try and reach comparable outcomes in the context of Bologna. Clearly, it remains to be seen whether it will have any success in this regard. As was reported in section II.1. above, the UK was able to exclude the EU from Bologna, particularly as it found support in this from a number of other (larger) EU Member States. On the other hand, smaller Member States were less

[95] See House of Commons Education and Skills Committee, *The Bologna Process*, cit., p. 25.

keen on this intergovernmentalism, as it exposes them to the more traditional international power-play against which the EU is, in many ways, a bulwark.[96] Especially these countries are not likely to agree to (further) exchange the EU-forum for education law and policy making for the Bologna one. And in the post-Brexit climate, other larger EU Member States may be much less favourable towards the UK, its economic interests, and thus any of its attempts to assert Bologna over the EU decision-making process.

Whether there will be any such overt clashes of course remains to be seen. Overall, it should be emphasized that the policy-discourse of Bologna and of EU higher education policy have been very much in line. Both have been championing an Anglo-Saxon "liberal" model of higher education, in which education is conceptualized mainly in economic terms, as self-investment and market-driven, as opposed to the social model of higher education that sees it as a social entitlement for all citizens and a responsibility of the state.[97] Within the former model, one would tend to see more involvement of private and for-profit actors, deregulation, the establishment of quasi-markets and of public-private partnerships, and more generally an instrumental, labour market approach to higher education. The latter model instead tends to make state involvement central, will be focused on widening access to higher education, and may emphasize the citizenship-role of education and the pursuit of knowledge for knowledge's sake. Within the Bologna Process, this "liberalization" can be seen in its emphasis on "employability" of graduates, which is operationalized through its requirement that the Bachelor's degree has "labour market value" (whereas before, in most continental European countries, a Master's equivalent was usually needed for such labour market recognition), and, even more importantly in practice, through its quality assurance processes. In national accreditation procedures, which higher education institutions often need to follow to be authorized to award degrees under national (but often Bologna-inspired) law, the Bologna-"requirements" on "employability" are given real teeth, and it is here that much of the influential "steer" happens: universities are forced to show how their programmes (aim to) guarantee certain economic, labour market-outcomes, for otherwise they may jeopardize their very existence.

Within an EU context, analysis in section III.2. has shown how EU law tends to play out to the favour of a liberal model such as the UK's, and that it puts a higher burden on more social models that tend to subsidize higher education through open and free (or low-tuition) access. Furthermore, in recent years one of the most important sources of EU involvement in higher education is through its yearly cycle of economic policy coordination: the European Semester, where education is explicitly considered as a factor of economic stability and growth. The Country Specific Recommendations (CSRs) are predominantly concerned with the "cost-effectiveness" and "employability" of Member

[96] For extensive discussion, see: S. Garben, *EU Higher Education Law*, cit.
[97] See also S. Garben, *The Bologna Process and the Lisbon Strategy*, cit.

States' education systems. For instance, Denmark has been told that "[c]ontinued efforts are [...] needed to improve the quality and cost-effectiveness of its education and training systems"[98], Estonia to "[l]ink training and education more effectively to the needs of the labour market"[99] and Malta that it should "focus education outcomes more on labour market needs".[100] The CSRs can be remarkably detailed and specific on the required reforms concerning various aspects of national education systems.[101] For example, the Commission's proposed CSRs in 2017 for Croatia states: "Since 2015, as part of the implementation of the education, science and technology strategy, a reform of the school curricula was launched to improve on content and teaching of transferable skills. After ambivalent stakeholder reactions, the curricular reform was revised, and implementation has been significantly delayed. The process now needs to continue in line with the original objectives".[102] Furthermore, the CSRs reflect a clear policy to increase the involvement of the private sector in higher education and to make the funding of higher education "competitive". In this vein, for instance, Bulgaria has been given the recommendation that "frameworks fostering collaboration between universities and the private sector have to be further developed, and funding should be allocated in a competitive, merit-based and transparent way", and to "pursue the reform of higher education, in particular through better aligning outcomes to labour market needs and strengthening cooperation between education, research and business",[103] Estonia to "enhance cooperation between businesses and academia",[104] and Italy to address the "underperformance of the tertiary education system" *inter alia* by creating "a stronger link between universities' performance and the allocation of public funding".[105]

[98] Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Denmark and delivering a Council opinion on the Convergence Programme of Denmark, 2013-2016, para. 12.

[99] Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012-15, para. 14.

[100] Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Malta and delivering a Council opinion on the updated Stability Programme of Malta 2011-2014, para. 3.

[101] This could be said to sit uncomfortably with the national autonomy clause in Art. 165, para. 1, TFEU that EU action should fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

[102] Commission Recommendation of 22 May 2017 for a Council Recommendation on the 2017 National Reform Programme of Croatia and delivering a Council opinion on the 2017 Convergence Programme of Croatia.

[103] Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, para. 16, and Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2012-2016, para. 4.

[104] Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012-15, para. 14.

[105] Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Italy and delivering a Council opinion on the Stability Programme of Italy, 2012-2015, para. 16.

All this means that the general direction of the discourse in the Europeanisation of higher education, both in the context of the Bologna Process and the EU, is very much in line with the UK's approach, and benefits its model of higher education and its economic stakes in that model. Brexit is unlikely, as such, to bring any changes in this regard. The extent to which the UK will be able to continue to directly benefit from this development of continental higher education into a market-model like its own, is however likely to change fundamentally with Brexit. As the analysis in section III.2. showed, UK higher education institutions rely heavily on EU law to be able to offer services in other Member States and to be able to import talented students (the financial picture of which is unclear but which may, under the high tuition fee system, bring direct economic benefits to the universities as well as many indirect beneficial effects), and – through EU research grants – for the overall funding of its higher education and research and development sector(s). In this regard, the UK stands to lose more from Brexit than the other EU Member States: EU students, teachers, researchers and higher education institutions will still have access to 27 higher education systems, and they can continue to create a fully effective internal higher education and research area, as well as an internal market for higher education. In fact, now that following the UK's lead, EU Member States' higher education systems have become each other's competitors, there is much to gain from the UK's weakening role, and some other Member States are indeed gearing up to take over from the UK as "EU leader in Higher Education". Higher education may turn into one of Brexit's major spoils.

These projected consequences of Brexit of course may influence the Brexit-process and negotiations themselves. EU higher education law and policy, with all its current benefits for the UK, is thus an important bargaining chip for the EU, both within the negotiations and potentially as leverage for the UK's compliance with its obligations under any future relationship. As such, the UK's current strength in higher education is one of its weak spots in the Brexit negotiations. The two key issues in this regard are on the one hand research funding under Horizon 2020, of which the UK is one of the main beneficiaries, and on the other hand the internal market freedoms and mobility rights connected to EU citizenship that foster the economic activities of the UK higher education sector. While the former could arguably be negotiated between the EU and the UK on an ad hoc basis, the latter is entirely dependent on the position of the UK in the internal market and will have to be part of any "big" agreement on the future relationship between the EU and the UK. The UK may seek to use the Bologna Process as a "back door" to pursue its key interests in this regard, but the potential effectiveness thereof is doubtful. It does, however, seem to be its most rational course of action, as it will need to seek alternative forums to "win friends and influence people" once it has excluded itself from the most important forum to do so.

V. Conclusion

The UK higher education sector is estimated to generate £95 billion for the UK economy each year. It is difficult to calculate the precise direct and indirect negative impact on that lucrative sector in case Brexit would mean that the UK would have to give up EU research funding, student/staff (and knock-on) mobility as well as UK transnational education, but it is likely to be significant. While the overall policy-direction of European higher education is likely to continue, also post-Brexit, to champion the marketization of higher education along the lines of the Anglo-Saxon, liberal model, ironically it can be expected that the UK as a non-member of that growing internal market of higher education and research will be able to benefit less and less from it. At the risk of oversimplification, it could be said that the UK has first been instrumental and influential in creating a lucrative continental market for higher education, and now it has excluded itself from that market, as well as from its position of influence. While, of course, also EU citizens are disadvantaged by a limitation of their mobility rights *vis-à-vis* the UK, they are in a better position to shift the focus to any of the other 27 Member States, who remain stronger together.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

EU CITIZENSHIP AND LOSS OF MEMBER STATE NATIONALITY

ANNE PIETER VAN DER MEI*

ABSTRACT: This *Article* addresses questions concerning the loss of Member State nationality and the possible implications for EU citizenship. The Author first revisits *Rottmann* (Court of Justice, judgment of 2 March 2010, case C-135/08) and reflects on the limitations that EU places on decisions of Member States to deprive a person of his/her nationality. In addition, the contribution considers whether the *Rottmann* case law, and the logic underpinning it, can be extended to situations in which Member State nationality is lost as a result of a decision of a Member State to withdraw from the Union. Having answered the latter question in the negative – for UK nationals Brexit implies loss of EU citizenship – the author briefly discusses the recent proposal to introduce an associate EU citizenship for nationals of former Member States.

KEYWORDS: EU citizenship – nationality – withdrawal – Brexit – associate EU citizenship – Brexpats.

I. INTRODUCTION

The wording of Art. 20 TFEU – "[E]very person holding the nationality of a Member State shall be a citizen of the Union"[1] – suggests a notably simple relationship between EU citizenship and Member State nationality: to be an EU citizen one must be a Member State national. Third country nationals cannot acquire EU citizenship. Loss of nationality

* Professor of European Social Law, Maastricht Center for European Law, ap.vandermei@maastrichtuniversity.nl. The Author thanks the editors of this Special Section and dr. Hoai-Thu Nguyen for their valuable comments on an earlier draft of this *Article*. The usual disclaimer applies.

[1] See also the almost identically worded Art. 9 TEU.

implies automatic loss of this privileged status. When a Member State withdraws from the EU its nationals become third country nationals.[2]

From the case law of the CJEU, however, it follows that the relationship between EU and national citizenship perhaps is not as clear and straightforward as the Treaty text suggests. To be sure, the CJEU has never recognised, and not even suggested, any exceptions to the rule that EU citizenship is reserved for Member State nationals. Rather, in the well-known *Rottmann* ruling,[3] it did confirm the exclusive link between EU citizenship and national citizenship. What the Court held in this ruling – and this is what somewhat complicates the relationship between the two citizenships – is that Member States must, before taking a decision withdrawing "their" nationality, consider the consequences of such a decision for the person concerned as regards the loss of the rights he/she enjoys as an EU citizen. Loss of EU citizenship or the rights attached to it may preclude the lawful application of national rules on deprivation of national citizenship.

This is not just a theoretical matter. In recent years, questions concerning the loss of Member State nationality and the implications for EU citizenship have emerged, and increasingly so, in various contexts.[4] A first one concerns the fight against terrorism. Various Member States have adopted laws making possible or easier to deprive convicted or suspected terrorists of their nationality. As commentators have observed,[5] not only international law and European Convention on Human Rights (ECHR) law but also EU law, including the norms on EU citizenship, may restrict Member States law and policies on nationality deprivation. Further, in response to increased migration and the proliferation of multiple citizenship, various States have enacted laws aimed at promoting singular citizenship. Acquisition of the nationality of a third State may result in loss of a Member State nationality and, thus, EU citizenship. In *Tjebbes*,[6] a case that at the time of writing is still pending, the CJEU is given the opportunity to specify its holdings in *Rottmann* and to determine its significance for situations involving national fights against multiple citizenship.

[2] The same holds true when a region or comparable entity secedes from a Member State and becomes a new independent State. See further G. Marrero González, *Civis Europaeus Sum? Consequences with Regard to Nationality law and EU Citizenship Status of the Independence of a Devolved Part of an EU Member State*, Oisterwijk: Wolf Legal Publishers, 2017.

[3] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*, para. 39.

[4] For a comprehensive overview of Member States' rules and policies on loss of nationality and its implications for EU citizenship see S. Carrera Nunez, G.-R. de Groot, *European Citizenship at the Crossroads – The Role of the European Union on Loss and Acquisition of Nationality*, Oisterwijk: Wolf Legal Publishers, 2015. For theoretical reflections on loss of nationality and its significance for EU citizenship see R. Baubock, V. Peskalev, *Citizenship Deprivation – A Normative Analysis*, in *CEPS Paper in Liberty and Security in Europe*, 19 March 2015, www.ceps.eu.

[5] See e.g. E. Cloots, *The Legal Limits of Citizenship Deprivation as a Counterterror Strategy*, in *European Public Law*, 2017, p. 57 *et seq*.

[6] Court of Justice, case C-221/17, *Tjebbes and Others*, still pending.

And finally, there is of course Brexit. The UK's decision to withdraw from the EU has triggered numerous questions concerning the rights and interests of UK nationals. Early 2018, an Amsterdam court, in the *Brexpats* case,[7] announced its intention to ask the CJEU whether a hard Brexit indeed implies that UK nationals will become "ordinary" third country nationals. In the end the preliminary question was not referred to Luxembourg, but Brexit and the *Brexpats* case do trigger interesting questions on the status and rights of nationals of former EU Member States and, more generally, the link between EU and national citizenship.

II. Deprivation of Member State nationality

For a proper understanding of *Tjebbes* and the questions that arise in the case, let us first recall the lessons from *Rottmann*. First, while Member States are competent in nationality matters, they must exercise their powers with due regard for EU law.[8] Second, decisions depriving a person of his or her nationality are subject to review under EU law whenever loss of EU citizenship or the rights attached to it are at stake. It is not necessary that the person concerned has exercised free movement rights.[9] Third, Member States are entitled to protect the special relationship of solidarity and good faith, as well as the reciprocity of rights and duties, which form the bedrock of the bond of nationality.[10] Fourth, when deciding on possibly withdrawing nationality, Member States must observe principles of EU law, including the principles of proportionality,[11] legitimate expectations and equality.[12] Fifth, as regards proportionality, the CJEU demands from Member States to balance national interests, such as the acquisition of their nationality by deception or fraud, against the implications of a possible withdrawal of nationality for the person concerned.[13] Sixth, if proportionality is respected, Member States are entitled to withdraw nationality, which, if the person concerned does not hold the nationality of any other Member State, in turn implies the loss of EU citizenship.

In *Tjebbes* the Court is asked to clarify *Rottmann* in a case which concerns Dutch nationality law. The relevant rules stipulate that Dutch nationality is lost, by operation of law, if the person concerned also possesses a "foreign" nationality and has lived outside the EU for an uninterrupted period of ten years. In addition, according to the Dutch nationality rules, where a parent loses Dutch nationality on grounds of having lived in a

[7] Rechtbank Amsterdam, decision of 7 February 2017, C/13/640244 / KG ZA 17-1327, *Brexpats*.

[8] *Rottmann*, cit., paras 39-41 and 45.

[9] *Ibid.*, para. 42.

[10] *Ibid.*, para. 51.

[11] *Ibid.*, para. 55.

[12] G.-R. de Groot, P. Wautelet, *Reflections on Quasi-Loss of Nationality in Comparative, International and European Perspective*, in *CEPS Paper in Liberty and Security in Europe*, 1 August 2014, p. 27, www.ceps.eu.

[13] *Rottmann*, cit., para. 56.

third country for ten years, his or her minor children are deprived of Dutch nationality too, unless they would become stateless. Are these rules compatible with the Treaty provisions on EU citizenship?

II.1. Adults

As regards the rules applicable to adults, two issues arise. The first concerns the general interest that is pursued and that could possibly serve as a ground for justifying deprivation of nationality and, thus, of EU citizenship. Unlike the German rule at stake in *Rottmann*, the Dutch rule does not seek to fight wrong or fraudulent acquisition of nationality. Rather, the goal is to combat multi-citizenship and to ensure that nationals have and retain a genuine link with the Netherlands. Such a link is deemed to be lost in the event of long-term residence abroad. In his Opinion in the *Tjebbes* case, AG Mengozzi accepted the aim of the Dutch legislature as a legitimate one. In addition, he subscribed to the view that long-term residence abroad may indeed prove that there is no longer an effective bond between the person concerned and the Dutch State.[14]

These would appear to be quite uncontroversial positions, which are in accordance with international law. For example, the European Convention on Nationality – to which the CJEU also referred in *Rottmann*[15] – permits State parties to withdraw nationality in case of a lack of a genuine link between the State Party and a national habitually residing abroad, provided it concerns persons with double or multiple nationality, who do not run the risk of becoming stateless.[16] Further, it is important to point out that the Dutch provision under consideration withdraws Dutch nationality in the event of ten years habitual residence outside not only the Netherlands but also outside the EU. The latter would seem to be crucial. If long-term habitual residence in another EU Member State could be regarded as evidence of a lack of a genuine link with the Netherlands, Dutch nationals (who also possess the nationality of a third country) could lose EU citizenship for having exercised the right to freedom of movement that they enjoy in that capacity. Exercising EU citizenship rights could therefore lead to a loss of EU citizenship. This, of course, does not and cannot hold true.[17] Member States may impose long-term residence requirements as key elements for establishing a genuine link between them and their nationals, but, in principle, EU law and EU citizenship demand that they recognize periods of residence in another Member State as periods of residence on their own territory.

The second and more controversial issue, concerns proportionality. *Tjebbes* involves a national provision that withdraws nationality by operation of law. It should be

[14] Opinion of AG Mengozzi delivered on 12 July 2018, case C-221/17, *Tjebbes and Others*, paras 51-59.

[15] *Rottmann*, cit., para. 52.

[16] Art. 7, para. 1, sub-para. e, of the 1997 European Convention on Nationality.

[17] G.-R. de Groot, *Towards a European Nationality Law*, in *Electronic Journal of Comparative Law*, 2004, p. 8.

noted that it is plain that the Dutch legislature did not blindly pursue the above-stated "genuine link-aim". It also had an eye on the interests of the persons concerned. The Dutch legislature chose a quite long period of absence from the EU of ten years. It also showed flexibility: the ten-year absence rule does not apply to persons who, during this period, have lived in the Netherlands for a year or to whom have been issued a passport or identity card. Moreover, the rule only applies to persons who hold another nationality; the rule does not and cannot lead to statelessness. Further, and as already highlighted, the Dutch legislature showed due respect for EU law, and EU citizenship in particular, by not considering residence in another Member State as residence abroad for purposes of the ten-year rule. Finally, loss of Dutch nationality was not final and irreversible; Dutch nationals could retain it under preferential conditions.

So, the Dutch legislature did apply a proportionality test. The question that arises, however, is whether this suffices for compatibility with EU law or whether proportionality demands that all relevant factors and circumstances are taken into account in each individual case where nationality may be withdrawn. *Rottmann* concerned a decision in an individual case. Does the ruling in this case imply that the balancing act that proportionality entails must be performed by national authorities and/or courts in each individual case or is there room for regulatory balancing?

In the view of AG Mengozzi, a national provision may comply with the proportionality requirement, even if it is general or regulatory in nature. In support of this opinion the AG refers to the ruling in *Delvigne*,[18] in which the Court accepted that a national provision according to which persons convicted of a crime were deprived of their right to vote, also in European Parliament elections, could pass the proportionality test. Further, one cannot deduce from the ruling in *Rottmann* a requirement that proportionality must be considered in each and every case by any administrative authority or court. In the view of the Advocate General, this would even be at odds with the division of competences between the EU and the Member States. It is for the Member States to govern the conditions for acquisition and loss of their nationality, and national legislatures are in principle free to establish which criteria are determinative for the genuine link between them and their nationals. If the EU principle of proportionality would require each national court in each case to consider all factors and circumstances, including those that the legislature has deliberately not chosen, determining the genuine link, it would intervene too deeply in the national domain of nationality law.

Whether or not the Court will follow its Advocate General on this point is at the time of writing not known yet, but it is suggested that it should. One may add to the Advocate General's arguments that also the case law on the Citizenship Directive[19] or the European

[18] Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne*.

[19] E.g. Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic*.

Arrest Warrant[20] quite clearly demonstrate that a proportionality assessment may very well be carried out by the (European) legislature without there being a need for an additional proportionality assessment by executive authorities in each individual case.[21] AG Mengozzi is arguably right where he concludes that an obligation under EU law for national authorities and courts to check in every single case whether the legislature has sufficiently considered and balanced all factors relevant for the required genuine link would contravene the duty imposed by Art. 4, para. 2, TEU on the EU to respect national identities, of which "the composition of the national body politic is clearly an essential element".[22]

II.2. Minor children

When it comes to the rules applicable to minor children, greater doubts exist as regards the compatibility with EU law. Under these rules, Dutch children lose their nationality if the father or the mother loses Dutch nationality on the ground of having lived outside the EU for ten years or more. This holds true even if the child has lived during that period in the Netherlands or the EU. Dutch nationality is not lost if this would result in the minor child becoming stateless.

The Dutch legislature justified this by emphasizing the unity of nationality within the family. As such, this may not come as a surprise as promoting the aforementioned unity is internationally recognized as a permissible tool for combating multiple nationality.[23] However, one must add to this that this tool nowadays must always be applied in accordance with the overarching aim to give primacy to the interests of the children.[24] The question that immediately pops up is whether and, if so, how depriving children of their nationality can actually promote their interests. Leaving aside issues concerning military service, one would rather think that only rights to retain or acquire nationality can serve children's interests. It is hard to see how the fact that a child possesses an additional nationality to the one that he/she shares with the parent disadvantages him/her.[25] Arguably, the interests of the child call for the promotion rather than the reduction of multiple citizenship.

[20] Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*.

[21] Compare E. Muir, *EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit*, in European Papers, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1353 *et seq*.

[22] Opinion of AG Mengozzi, *Tjebbes and Others*, cit., para. 107, referring to Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottmann*, para. 25.

[23] See e.g. Second Protocol to the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality.

[24] See Art. 3, para. 1, of the 1989 Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

[25] R. Bauböck, V. Peskalev, *Citizenship Deprivation – A Normative Analysis*, cit., p. 24: "[the] only conceivable disadvantage is if at a latter point in life she is suspected of terrorism – in such cases the availability of a second citizenship may expose her to deprivation, while potential statelessness may protect her

From this, one could perhaps draw the conclusion that the aim of promoting the unity of nationality within the family cannot or should not be regarded as a ground for justifying rules such as the Dutch ones under consideration in *Tjebbes*. Considering that such rules imply also the loss of EU citizenship, they thus would appear to be at odds with EU law *per se*. In his Opinion in the case, however, AG Mengozzi does accept the goal of promoting unity of nationality within the family as a legitimate ground for justification, provided the children's interests are given due regard.[26] This forces him to consider the proportionality of the Dutch rules. The Advocate General rejects the argument of the Dutch Government that in case a parent loses his/her nationality because he/she no longer has an effective link with the Netherlands, it is reasonable to presume that also the minor children no longer have such a link. In his view the Dutch legislature incorrectly assumed that the unity of nationality within the family always coincides with the children's interests. This is not always correct, for example in situations in which children do not live with their parent(s). According to AG Mengozzi, the Dutch legislature has not properly assessed the variety of situations in which children might find themselves in and, by failing to do so, it has breached requirements of proportionality.[27]

In his Opinion, the Advocate General also criticizes the Dutch rules concerned because they would disregard the autonomous nature of EU citizenship. EU citizenship is not reserved for adults, and minors are not second-class EU citizens. Children's EU citizenship cannot be regarded as being derived from their parents' possession of that same status but must be regarded as an autonomous status. Therefore, the Advocate General argues, children ought to have the same procedural and substantive rights in relation to the possible loss of nationality and, thus, EU citizenship. In the case at hand, this was not the case *inter alia* because, under the Dutch nationality rules, only adults could break the uninterrupted period of ten years of living abroad by applying for e.g. a passport, and, by doing so, thereby retain both their nationality and EU citizenship.

On the latter point, one does not necessarily have to agree with the Advocate General. It may very well be true that EU citizenship has evolved to become an autonomous status which in itself may be a source of rights, and of course, these rights can be enjoyed by all EU citizens regardless of their age. Yet, from the fact that EU law itself may determine the scope and meaning of EU citizenship rights it does not necessarily follow that it is also exclusively up to EU law to decide on who possesses EU citizenship. We will return to the issue in the following sections, but the fact is that according to Art. 20 TFEU the possession of EU citizenship is directly and exclusively conditional upon Member State nationality. It is not for the EU but for the Member States to determine who

from losing her preferred citizenship. However, the probability that same person is exposed to potential derivative loss as a child and threatened with deprivation on security grounds as an adult seems extremely low".

[26] Opinion of AG Mengozzi, *Tjebbes and Others*, cit., para. 126.

[27] *Ibid.*, paras 128-148.

possesses "their" nationality. If children's nationality derives, under national law, from their parents' nationality, the same holds true for EU citizenship. Both for parents and children, EU citizenship is derivative in nature. Therefore, from the autonomous nature of EU citizenship it arguably does not (necessarily) follow that children ought to have the same procedural and substantive rights as adults under national law to obtain or retain Member State nationality and, by extension, EU citizenship.

III. Member State withdrawal from the Union

The *Rottmann* case law concerns national decisions withdrawing a Member State nationality and its implications for EU citizenship and the rights linked to that status. That case law thus is not directly applicable to situations in which a Member State nationality is lost because the Member State concerned decides to withdraw from the Union. Yet, can the logic underpinning the previous case law be extended to withdrawal situations?

Early 2018 an Amsterdam district court answered this question in the affirmative.[28] The court was faced with a case initiated by UK nationals living in the Netherlands, who claimed that the Dutch State and/or the city of Amsterdam had to take measures so as to ensure that they could continue to enjoy EU citizenship rights after Brexit. Referring to AG Poiares Maduro's Opinion in *Rottmann,*[29] the Amsterdam court observed that EU citizenship now constitutes an own autonomous source of rights and that decisions implying loss of Member State nationality must be proportional. The court opined that it can reasonably be doubted that loss of national citizenship implies loss of EU citizenship and stated its intention to refer the following preliminary questions to the Court of Justice: First, does the withdrawal of the UK from the EU automatically lead to the loss of EU citizenship of UK nationals and, thus, to the elimination of rights and freedoms deriving from EU citizenship, if and in so far as the EU and the UK do not agree otherwise in the exit-negotiations? Second, if Brexit does imply loss of EU citizenship, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship? In the end, however, the questions were not referred to Luxembourg.[30]

[28] *Brexpats*, cit. See also O. Garner, *Does Member State Withdrawal from the European Union Extinguish EU Citizenship?*, in *European Law Blog*, 19 February 2018, europeanlawblog.eu.

[29] *Brexpats*, cit., para. 5, sub-para. 20.

[30] The Amsterdam court had not yet taken the decision to refer the question to the Court of Justice. It had invited the parties of the proceedings to appeal its interlocutory decision before the Court of Appeals. The Court of Appeals recognized that a decision to refer preliminary questions cannot be made subject to an appeal (Court of Justice, judgment of 16 December 2008, case C-210/06, *Cartesio*), but held that it nonetheless had jurisdiction because parties could appeal the interlocutory decision also on grounds other than the decision to refer preliminary questions. The Court of Appeals shared the view that doubts indeed exist as regards the view that Brexit implies loss of EU citizenship, but it concluded that the British applicants' claims were too vague. Regardless of the possible answers of the Court of Justice to the suggested preliminary question, applicants had not adequately indicated what concrete

It is not clear on what grounds the Amsterdam court based its suggestion that UK nationals might keep EU citizenship after Brexit. It may very well be that EU citizenship has evolved to become a fundamental status that may constitute an autonomous source of EU rights, and that Art. 20 TFEU "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance"[31] of EU citizenship rights. From that, however, no conclusion can be drawn about a possible retention of EU citizenship itself after a Member State has left the EU. One could perhaps seek to interpret Art. 20 TFEU to imply that Member States – via their nationality laws – can only decide on the grant but not on the withdrawal of EU citizenship, but there is not much, if anything, in the text or drafting history to support this reading.[32] Further, it is hard to understand why or how the Court's line of reasoning in *Rottmann* can be extended to situations in which a Member State national loses his/her nationality as a result of the decision of his/her Member State to step out of the Union. Should, because of *Rottmann,* a Member State observe proportionality when taking a decision under Art. 50 TEU? A decision to withdraw nationality in individual cases and a decision to withdraw as an entire State from the EU are not in any serious manner comparable. The entire reasoning of the Court was clearly geared towards the specific individual situation in which Mr. Rottmann found himself. It simply does not make much sense to draw conclusions from this reasoning for the entirely different situation of Brexit, in which millions of citizens could lose EU citizenship as a result of a collective decision adopted in accordance with their own democratic rules.

Art. 20 TFEU makes it patently clear that EU citizenship is derivative in nature. Neither in *Rottmann* nor in any other ruling did the Court cut through EU citizenship's exclusive and absolute link with Member State nationality. From existing case law one arguably can only draw one logical conclusion: for UK nationals, Brexit implies loss of EU citizenship.

Of course, (some) UK nationals might hope for an activist Court that in a next case will be willing to change its position.[33] There are no sound reasons, however, why the Court would or should do so. The contrary rather holds true. If the Court were to accept that nationals of former Member States could retain EU citizenship, it would act contrary to the wishes of the drafters of the Treaty. First, in Maastricht the drafters made it patently clear that it is not the Union but the Member States who, through their nationality laws, decide on who holds EU citizenship. Second, in Lisbon, by including Art. 50 in the TEU and by thus ordering the EU to negotiate and conclude an agreement governing the arrangements for

measures they demanded to be taken by the State and city. See Gerechtshof Amsterdam, decision of 19 June 2018, case 2000.235.073/01.

[31] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*, para. 43.

[32] Compare M. Dawson, D. Augenstein, *After Brexit: Time for a Further Decoupling of European and National Citizenship*, in *Verfassungsblog*, 14 July 2016, verfassungsblog.de.

[33] Compare J. Shaw, *EU Citizenship: Still a Fundamental Status?*, in *EUI Working Papers RSCAS,* no. 14, 2018, pp. 10-11.

withdrawal with the exiting Member State, the drafters of the Treaty made it clear that a possible retention of EU citizenship and of the rights linked to it falls within the tasks of the political EU institutions, not of the Court. The entire structure of Art. 50 TEU implies that it is up to the Member States to withdraw from the Union in whichever manner they wish; EU law does not impose any limitations as to the reasons for the withdrawal, the manner in which this decision is taken, or the extent to which that Member State takes into consideration the interests of its own nationals. If a Member State decides to withdraw from the EU, and thus to deprive its nationals of EU citizenship, it is perfectly entitled to do this. The EU, including its highest court, cannot alter this.

IV. Associate EU Citizenship

Thus, under the Treaties, it essentially falls to the EU political institutions rather than the Court to prevent a situation in which UK nationals would lose EU citizenship status and/or rights as a consequence of Brexit. As regards the possibilities and options available, politicians,[34] non-governmental organisations[35] as well as academics have expressed their views.[36] The most interesting ones among the suggested proposals are those calling for the introduction of an associate EU citizenship. The original idea, if I am correct, stems from the mind of the European Parliament's Brexit coordinator, Guy Verhofstadt. In December 2016, Verhofstadt suggested a form of EU "associate citizenship" status that would allow individuals to "keep free movement to live and work across the EU, as well as a vote in European Parliament elections". His colleague Goerens supported the idea and added that "[f]ollowing the reciprocal principle of 'no taxation without representation', these associate citizens should pay an annual membership fee directly into the EU budget".[37] The European Parliament itself is also sympathetic to the idea and has proposed that the EU 27 examine how to mitigate the loss of EU rights by UK

[34] These include Member of the European Parliament Goerens and Verhofstadt. See further V. Miller, *Brexit and European Citizenship*, in *House of Commons – Briefing paper*, July 2018, and G. Austin-Greenall, S. Lipinska, *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, in *Citizen Brexit Observatory*, December 2017, globalcit.eu.

[35] See e.g. the various European citizens' initiatives Permanent European Union Citizenship, Retaining European Citizenship and EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis, available at ec.europa.eu. See further N. Athanasiadou, *The European Citizens' Initiative in Times of Brexit*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1379 *et seq.*

[36] See D. Kostakopoulou, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq*.

[37] See C. Goerens, *European Citizenship*, in *charlesgoerens.eu*, 9 November 2016, www.charlesgoerens.eu.

nationals by introducing such status, provided that full respect is given to the principles of reciprocity, equity, symmetry and non-discrimination.[38]

The idea of an associate EU citizenship has proven to be controversial, with someone indeed advocating it[39] and others (strongly) opposing it.[40] Discussions on this status are not always easy to understand, partly because it is not truly clear what associate European citizenship would actually entail. To be sure, associate European citizenship would differ from EU citizenship itself. Those who favour it do not seem to call for a retention of the status established by Art. 20 TFEU but rather for the creation of a new status. Further, it would be a status to be granted or offered to nationals of former Member States and not, for example, to third country nationals who have acquired long term residence status. Third, in terms of substance, the new status would encompass the most important EU citizenship rights: free movement rights (presumably including equal treatment) and active voting rights in European Parliament elections.

Numerous aspects, however, still remain unclear. For example, will paying a fee into the EU budget be a requirement, as Goerens suggested? The issue certainly is relevant for the legitimacy of Associate citizenship and reminds us of the "citizenship-by-investment" of Malta, and a few other Member States.[41] The Maltese programme has proven quite controversial *inter alia* because of a free rider problem. By buying Maltese citizenship, a country with which they may have no genuine link, third country nationals could acquire EU citizenship and, subsequently, move to other Member States, which otherwise would never have admitted them. This free rider problem would not exist if one were to introduce associate citizenship at EU level. Yet, is it desirable to ask a price for a citizenship like status, to commercialise it? Will it be a new status based on a genuine link that its holders have with the EU or one of its Member States, or will associate EU citizenship be a tradable good?

A next question that then arises is who would be the beneficiaries of this new associated citizenship? Concretely in the case of Brexit: will only the Brits who have moved to another Member State and have lived there for a given period of time be given the right or option to become associate EU citizens, or also those who have never done so

[38] European Parliament, Draft Motion for a Resolution to wind up the debate on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, 29 March 2017, B8-0000/2017.

[39] For an overview see G. AUSTIN-GREENALL, S. LIPINSKA, *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, cit.

[40] D. KOCHENOV, *Misguided 'Associate EU Citizenship' – Talk as a Denial of EU Values*, in *Verfassungsblog*, 1 March 2018, verfassungsblog.de and M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship after Brexit*, in *DCU – Brexit Institute, Working Paper*, no. 5, 2018, dcubrexitinstitute.eu.

[41] S. CARRERA, *The Price of EU Citizenship – The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 4046 *et seq*.

and find themselves in "purely internal British situation"? The answer to this question is relevant because it triggers the subsequent question of what the actual aim of associate citizenship would be: is it just a means to ensure the continuation of rights for nationals of exiting Member States living in other EU Member States, or does it have an own intrinsic or more deeply motivated aim? If the former is the case, why would UK nationals who have never settled across the Channel still need to have a right to vote for the European Parliament? Those who wish to include European Parliament election rights for this category of UK nationals must have something else or more in mind. Yet, what exactly? Even though the term "associate citizenship" is used, is it not that this is meant as a covert way to make sure that Brits, and potential other future ex Member State nationals, can nonetheless retain EU citizenship?

It is of course perfectly possible that advocates of associate European citizenship themselves do not exactly know what they are proposing or what the implications of their proposal might be. As noble as their motives may be, if these advocates have more in mind than merely freezing the legal status of UK nationals living in "Europe", one must be cautious. Critical questions must be addressed. If this envisaged status is meant as a status separate from EU citizenship, yet encompassing the same or very similar rights as the latter, does it not undermine EU citizenship? Even if it were established that the EU can formally confer all rights that it offers to its own citizens to third country nationals, does the very existence of EU citizenship not command restrictions? Further, and recalling what has previously been said about Art. 50 TEU, why is there at all a need for the EU to consider introducing a new status to the benefit of people who have collectively, and fully in accordance with their own internal constitutional norms and procedures, decided to step out of the Union and decided to give up their EU citizenship? Apparently, the majority who voted in favour of Brexit did not consider EU citizenship important enough. And whatever others may think of this choice, the choice to leave the EU made was entirely legally. Those who voted to remain simply have to accept that they, as a result of UK constitutional rules, lost the battle and, with that, EU citizenship and all rights flowing from this status. In fact, by offering one-sidedly associate citizenship to those UK nationals who wish to remain part of the European integration project, the EU is meddling in the internal affairs of a former Member State in which it arguably should not meddle.

Finally, and perhaps most importantly, why would the EU at all consider unilaterally offering a new status to British (or other former EU) citizens without there being any reciprocal status or legal protection for EU citizens living in the UK (or any other exiting Member State)? The number of EU citizens in the UK far exceeds the number of UK nationals living in "Europe". As noble as it may be to show legal and political compassion with UK nationals in EU-27 Member States, the EU's main commitment does not, or at least should not, lie with them but rather with EU citizens living in the UK. The EU should not give in to the pressure of all those who – often quite annoyingly – place so

much emphasis on the negative implications of Brexit for UK nationals living in the EU without giving equal (if any at all) attention to the rights and interests of EU citizens residing in the UK. Reciprocity is a must. Without it, introducing associate European citizenship is an idea that is doomed to be rejected by EU citizens.

V. Final remarks

There is no denying that the drafters of the European Treaties have decided to reserve EU citizenship for nationals of EU Member States. The Court of Justice has never cut through the exclusive link between Member State nationality and EU citizenship. As the legal situation stand at present, the Court is well advised not to alter its position just because of "Brexit". If it were to do so, it would likely be faced with accusations of undue judicial activism that may not be easy to dismiss.

Of course, one fully understands the frustrations of all those UK nationals who live in "Europe" and may lose the rights attached to EU citizenship, or all those British citizens who voted for "Bremain". And, yes, one understands the calls made by them, or on their behalf, for cutting through the umbilical cord between EU and national citizenship. Yet, this is not a task for the Court, but rather a task for "politics" and, more concretely, for the parties that have to negotiate the exit agreement under Art. 50 TEU. One may dislike the idea that individuals are subject to political negotiations and thus deals,[42] but that is essentially what the Treaty prescribes. Given their political, day to day nature one can only be satisfied that the Brexit-negotiators so far have limited themselves to a freezing of the rights of mobile EU citizens and have not yet burned their fingers on more fundamental questions concerning the scope and nature of EU citizenship. For an answer on those questions we, as European citizens, need to take more time to reflect.

[42] D. Kostakopoulou, *Scala Civium*, cit.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

RESIDENCE RIGHTS FOR EU CITIZENS AND THEIR FAMILY MEMBERS: NAVIGATING THE NEW NORMAL

NATHAN CAMBIEN*

ABSTRACT: One of the fundamental pillars of the European Union is the right of EU citizens and their family members to move freely between and reside in the different EU member States. In recent case law, the Court of Justice has made it abundantly clear that EU citizens derive these rights directly from their EU citizenship status, whereas their family members have only "derived" residence rights, which are dependent on the EU citizen having exercised his freedom of movement. The impact of Brexit on the free movement of persons between the UK and the remaining EU Member States has remained one of the most controversial and politically sensitive issues ever since the British people voted to leave the EU. This *Article* tries to shed some light on the legal arguments underlying this debate. On the one hand, it provides an overview of a number of arguments deriving from EU law or international law on the basis of which, according to some scholars, EU citizens and their family members would continue to enjoy the residence rights attached to citizenship after Brexit. On the other hand, it will analyse a number of legal principles which would, according to some scholars, have to be respected by any withdrawal agreement between the EU27 and the UK and which, arguably, provide a basis for continued residence rights after Brexit.

KEYWORDS: Brexit –Court of Justice – EU citizenship – residence rights for family members – acquired rights – withdrawal agreement.

* Assistant Professor, University of Antwerp, and Senior Associated Research Fellow, Institute for European Law, University of Leuven, nathan.cambien@law.kuleuven.be. Many thanks to Elise Muir and Mirna Romić for their valuable comments on an earlier draft. All views expressed herein are strictly personal.

I. Introduction

On 1 January 2017, around six months after the Brexit referendum on 23 June 2016, there were around 3.6 million citizens from other EU Member States (hereinafter "EU27 Member States") living in the United Kingdom (UK)[1] and likely around one million UK nationals living in other EU Member States.[2] Until Brexit happens, all these citizens are EU citizens and enjoy, in that capacity, together with their family members, far-reaching rights of free movement and residence. In this connection, it is not required that EU citizens are economically active. EU citizenship grants even non-economically active EU citizens and their family members the right to reside in another Member State under certain conditions. A well-known example are the numerous British pensioners residing in southern Europe: according to recent estimates, there are currently around 247,000 UK nationals aged 65 and over living in other EU countries, around 121,000 of which are living in Spain alone.[3]

The fate of these EU citizens and their family members after Brexit is most uncertain, and has been intensely debated in academic and political circles ever since the Brexit referendum was announced. In this *Article*, I will try to shed some light on the legal arguments underlying this debate. On the one hand, I will set out a number of arguments deriving from international law or EU law, as it currently stands, on the basis of which, according to some scholars, EU citizens and their family members would continue to enjoy the residence rights attached to citizenship after Brexit. On the other, I will analyse a number of arguments according to which these rights can be protected under an agreement to be negotiated between the UK and the EU27 and, in particular, legal principles the parties to such an agreement would have to take into account.

Throughout my *Article*, I will use the expression "EU27 citizens" to refer to persons having the nationality of one or more of the EU27 Member States and the expression "UK nationals" to refer to British nationals having EU citizenship.[4] Since I will be specifically examining the situation of UK nationals who may lose their EU citizenship after Brexit, I will not analyse the situation of UK nationals who also have the nationality of one or more of the EU27 Member States. Moreover, as far as the family members of EU

[1] Based on Eurostat figures: see appsso.eurostat.ec.europa.eu.

[2] A precise estimate is not, to my knowledge available. According the Office for National Statistics (ONS), around 900,000 UK citizens were long-term residents in other EU countries in 2010 and 2011 (www.ons.gov.uk). More recent figures from the United Nations show that, in 2017, around 1.3 million people born in the UK were living in other EU Member States (fullfact.org). See also the discussion in S. Carrera, E. Guild, N.C. Luk, *What Does Brexit Mean for the EU's Area of Freedom, Security and Justice?*, in *Center for European Policy Studies*, 11 July 2016, www.ceps.eu.

[3] Office for National Statistics, *Pensioners in the EU and the UK*, 5 September 2017, www.ons.gov.uk.

[4] Due to the complexity of British nationality laws, not all categories of UK nationals have EU citizenship. See in this regard, the declaration by the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals", annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

citizens are concerned, I will be mostly concerned with family members coming from third countries, in order to clearly distinguish their situation from that of EU citizens.[5]

II. EU citizens and their family members: "autonomous" *vs.* "derived" residence rights

The rules on EU citizenship, as first introduced by the Maastricht Treaty, are set out in Part Two of the TFEU. It follows from Art. 20, para. 1, TFEU that every national of a Member State is also an EU citizen.[6] That provision also sets out the rights enjoyed by EU citizens, the most prominent of which is without a doubt the right to move and reside freely, subject to certain limitations and conditions, within the territory of the Member States.[7]

Not only EU citizens themselves, but also their close family members enjoy a right of free movement and residence in the EU Member States, regardless of whether those family members are EU citizens themselves or not. The categories of family members which enjoy these rights are listed in Art. 2, para. 2, of Directive 2004/38.[8] There are three categories of such "privileged family members": *a*) the spouse or the registered partner of the EU citizen; *b*) the direct descendants of the EU citizen who are under the age of 21 or are dependent and those of the spouse or partner; and *c*) the dependent direct ascendants and those of the spouse or registered partner.[9] Besides, Art. 3, para. 2, of Directive 2004/38 provides that the Member States have to facilitate entry and residence for what one could call "non-privileged family members", i.e. *a*) other family members who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen and *b*) the partner with whom the Union citizen has a durable relationship, duly attested.[10] In this *Article*, I focus exclusively on the category of "privileged family members".

[5] Some family members of EU citizens are, obviously, EU citizens themselves.

[6] See also Art. 9 TEU.

[7] See, e.g., Court of Justice, judgment of 13 July 2017, case C-193/16, *E*, para. 16.

[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[9] There is some scope for discussion about the precise extent of this category. For instance, according to some authors, the category of ascendant-primary carer could be interpreted broadly to cover non-biological ascendants such as a stepparent or an adoptive parent or even foster parents or unmarried partners. See G. Barrett, *Family Matters: European Community Law and Third-Country Family Members*, in *Common Market Law Review*, 2003, fn. 81; H. Toner, *Partnership Rights, Free Movement and EU Law*, Oxford, Portland: Hart, 2004, pp. 81-82 and 229-231.

[10] See, in this regard, Court of Justice, judgment of 5 September 2012, case C-83/11, *Rahman and Others*. See also Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman and Others*, paras 83-84.

The conditions governing the right of residence for EU citizens and their family members are further fleshed out in Directive 2004/38. In the most basic terms, every EU citizen is entitled to move to another Member State and reside there, together with his family members for periods exceeding three months if he can prove that he is either economically active or has sufficient financial resources at his disposal.[11] Essentially, therefore, the right to free movement and residence of EU citizens is subject to two main conditions.[12] First, it can only be invoked by EU citizens once they leave their Member State and move to another Member State.[13] Second, EU citizens can only reside in another Member State for longer periods of time if they are self-sufficient, i.e. if they have a job or can fall back on sufficient personal means to support themselves and their family members.

However, in its seminal *Ruiz Zambrano* judgment,[14] the Court of Justice held that Art. 20 TFEU, in exceptional circumstances, grants even residence rights to EU citizens who do not satisfy these conditions. Indeed, the Court ruled that Art. 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of an EU citizen, which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as EU citizens.[15] Accordingly, an EU citizen can derive family reunification rights from EU law where the denial of such rights would deprive him of the genuine enjoyment of his EU citizenship rights even in a situation where he has not left the territory of its Member State and even where he is not economically active or self-sufficient. The Court of Justice has confirmed and clarified this principle in a number of follow-up cases.[16]

[11] See Art. 7 of Directive 2004/38, cit.

[12] For a discussion, see N. CAMBIEN, *Union Citizenship and Immigration: Re-thinking the Classics?*, in *European Journal of Legal Studies*, 2012.

[13] See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 34.

[14] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*. For a detailed discussion of the case see K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, in *Common Market Law Review*, 2011, pp. 1253 *et seq.*

[15] There is an abundant literature on this case law. See, e.g. the contributions in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017.

[16] Some of these cases deal with (third country) family members of adult EU citizens: e.g. Court of Justice: judgment of 5 May 2011, case C-434/09, *McCarthy*; judgment of 15 November 2011, case C-256/11, *Dereçi and Others*. For a discussion, see N. NIC SHUIBHNE, *Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and Others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011*, in *Common Market Law Review*, 2012, pp. 349–379, and S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci*, in *European Law Review*, 2012, pp. 176-190. Other cases deal with minor EU citizens and their primary carer: e.g. Court of Justice: judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*; judgment of 10 October 2013, case C-86/12, *Alokpa and Moudoulou*.

In this connection, the Court has made an important distinction between the nature of the free movement and residence rights of EU citizens, on the one hand, and those enjoyed by their family members which are not EU citizens themselves, on the other hand. While the Treaties confer autonomous rights on EU citizens, the rights conferred on third-country family members are not autonomous rights but rights derived from those enjoyed by the EU citizen.[17] The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with an EU citizen's freedom of movement.[18] This distinction is also relevant in the context of the debate about the residence rights that will be enjoyed by EU citizens and their family members after Brexit.

In the following, I will first analyse arguments according to which the residence rights enjoyed by EU citizens and their family members could be considered to be "inalienable" rights which, as such, "survive" Brexit. Next, I will analyse the possibility of protecting these rights under an agreement negotiated between the UK and the EU27.

III. Residence rights enjoyed by EU citizens as inalienable rights?

The first question to ask is whether or to what extent the residence rights currently enjoyed by EU citizens and their family members can still be enjoyed after Brexit in the absence of any agreement regulating these rights. In this context, it is necessary to make a distinction between, on the one hand, the residence rights enjoyed by UK nationals and their family members in the EU27 Member States and, on the other hand, the residence rights enjoyed by EU27 citizens and their family members in the UK.

III.1. Residence rights of UK nationals and their family members in the EU27

A number of scholars have argued that the rights attached to EU citizenship are of such a fundamental nature that, once acquired, they can no longer be taken away.[19] This would mean that the rights enjoyed by UK nationals residing in the EU27 Member States, would continue to exist after Brexit. Consequently, UK nationals and their family members would continue to have a right of residence in these Member States under the same conditions as those applicable before Brexit.

Two lines of argument have been put forward to defend this point of view. In the first place, it has been pointed out that EU citizenship is, according to settled case law of

[17] See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 33.

[18] Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others*, para. 62 and case law cited.

[19] See, e.g., the arguments discussed in the report by V. Roeben, J. Snell, P. Minnerop, P. Telles, K. Bush, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit, a Study for Jill Evans MEP*, 2017, www.jillevans.net.

the Court of Justice, the "fundamental status" of nationals of the Member States.[20] In its *Rottmann* judgment, the Court has famously held that a Member State cannot under EU law withdraw its nationality if such withdrawal entails the loss of EU citizenship, unless that withdrawal is in line with general principles of EU law, such as the principle of proportionality.[21] Hence, it could be argued that once EU citizenship has been acquired, it can no longer be withdrawn, and that, consequently, Brexit cannot entail, for UK nationals, a loss of EU citizenship.[22] However, according to other authors this argument fails to convince. One principal reason for this is that, after Brexit, UK nationals will no longer be nationals of a Member State, and will, as a logical consequence, no longer be EU citizens.[23] That consequence would not derive from the action of a Member State, but would flow directly from the Treaties. Indeed, in accordance with Art. 20 TFEU, "[e]very person holding the nationality *of a Member State* shall be a citizen of the Union". Moreover, it has been argued that there is nothing in Art. 50 TEU which provides that, in the event of a withdrawal, the rights attached to EU citizenship should continue to be guaranteed. As Eeckhout and Frantziou point out, at the Constitutional Convention, a number of delegates had proposed amendments that safeguarded existing rights, but these were not adopted.[24] It can be concluded, therefore, that, considered purely from the perspective of EU law as it currently stands, it is doubtful whether the residence rights enjoyed by UK nationals in the EU27 will survive in the event of Brexit.

It should be remarked that there is a possibility that the Court of Justice will have the opportunity to pronounce itself on the legal consequences of Brexit for the rights enjoyed by UK nationals and their family members residing in the EU27 Member States, if questions for a preliminary ruling on that matter were referred to it. With this purpose, a group of UK nationals living in the Netherlands had seized a Dutch court, which, initially, had agreed to questions to ask the CJEU if Brexit would lead to an automatic loss of rights attached to EU citizenship, in the absence of a negotiated solution agreed between the EU and the UK.[25] However, after an appeal by the Dutch government, the Dutch court even-

[20] See, for an early example, Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

[21] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*, paras 41-59. For an analysis, see N. CAMBIEN, *Janko Rottmann v. Freistaat Bayern*, in *Columbia Journal of European Law*, 2011.

[22] See the discussion in G. DAVIES, *Union Citizenship – Still Europeans' Destiny After Brexit*, in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

[23] See, e.g. D. KOCHENOV, *Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris*, in *Verfassungsblog*, 24 June 2016, verfassungsblog.de.

[24] P. EECKHOUT, E. FRANTZIOU, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 718. See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, "Part I of the Constitution: Article 59", european-convention.europa.eu.

[25] Court of Amsterdam, judgment of 7 February 2018, C/13/640244/KG ZA 17-1327.

tually decided not to refer the said questions.[26] The possibility cannot be ruled out, however, that the matter will come before the Court in the context of a different case[27].

In the second place, it has been argued that the rights attached to EU citizenship, such as the residence rights for EU citizens and their family members, are covered by the international law doctrine of "acquired rights".[28] In accordance with that doctrine, international law protects certain rights acquired under a Treaty, notwithstanding the termination of the Treaty.[29] This doctrine is not only vested in customary international law,[30] but is also codified to some extent in Art. 70, para. 1, let. b), of the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides as follows: "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention, does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". There is little doubt that the VCLT applies to a Member State withdrawing from the EU Treaties under Art. 50 TEU.

Some authors argue, on this basis, that certain EU citizenship rights, such as the right of permanent residence, are protected acquired rights.[31] Most commentators agree, however, that the rights enjoyed by EU citizens under the Treaties are not protected under the doctrine of acquired rights.[32] On one view, this is because Art. 50 TEU forms a *lex specialis* which contracts out on international rules on acquired rights, rendering the latter inapplicable in the case of a Member State withdrawal from the EU. In this connection, it has been observed that Art. 70, para. 1, VCLT explicitly states "Unless the treaty otherwise provides or the parties otherwise agree".[33] Another reason relied

[26] For a discussion, see O. GARNER, *Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244/KG ZA 17-1327 of the Rechtbank Amsterdam ("The Amsterdam Case")*, in *European Lae Blog*, 19 February 2018, europeanlawblog.eu.

[27] For a more detailed discussion, see the A.-P. VAN DER MEI, *EU Citizenship and Loss of Member State Nationality*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1319 *et seq.*

[28] See, on this issue, European Parliament, Committee on Constitutional Affairs, *The Impact and Consequences of Brexit on Acquired Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27*, 2 May 2017, www.europarl.europa.eu; the arguments discussed in the report by V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit,* cit., the arguments discussed in the report of House of Lords, *Brexit: Acquired Rights*, 14 December 2016, publications.parliament.uk.

[29] For a discussion, see, e.g., K. SIK, *The Concept of Acquired Rights in International Law: A Survey*, in *Netherlands International Law Review*, 1977, pp. 120-142.

[30] See P.A. LALIVE, *The Doctrine of Acquired Rights*, in M. BENDER (ed.), *Rights and Duties of Private Investors Abroad*, New York: International and comparative law center, 1965, p. 183.

[31] M. WAIBEL, *Brexit and Acquired Rights*, in *AJIL Unbound,* 2018, pp. 440-444.

[32] See, e.g., R. REPASI, *Die Rechte der Unionsbürger und ihr Fortbestehen nach dem Brexit,* in *ifo Schnelldienst*, 2017, pp. 30-33; S. DOUGLAS-SCOTT, *What Happens to "Acquired Rights" in the Event of a Brexit?*, in *UK Constitutional Law Blog,* 16 May 2016, ukconstitutionallaw.org; J.-C. PIRIS, *Should the UK Withdraw from the EU: Legal Aspects and Effects of Possible Options*, in *European Issues*, 2015, p. 10.

[33] See, e.g., House of Lords, *Brexit and the EU Budget*, 4 March 2017, publications.parliament.uk.

on to support this view is that under the VCLT, EU citizens are third parties with respect to the EU treaties, while Art. 70, para. 1, let. b), of the VCLT only applies to the rights, obligations, or legal situations of the State parties to the EU Treaties. In this connection, it can be pointed out that the International Law Commission, in its commentary on the scope of the identically worded predecessor to Art. 70, para. 1, let. b), (Art. 66 draft Vienna Convention) clarified that: "On the other hand, by the words 'any right, obligation or legal situation of the parties created through the execution of the treaty', the Commission wished to make it clear that paragraph l(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the 'vested interests' of individuals".[34]

It follows that, according to most scholars, it is unlikely that the international law doctrine of acquired rights could be successfully relied upon after Brexit by UK nationals and their family members residing in the EU27 Member State in order to preserve the full spectrum of residence rights attached to EU citizenship.

III.2. Residence rights of EU27 citizens and their family members in the UK

The situation, at the moment of Brexit, of EU27 citizens residing in the UK is different from that of UK nationals residing in one of the 27 other Member States. Indeed, in contrast to the latter group, EU27 citizens preserve their EU citizenship, in accordance with Art. 20 TFEU and Art. 9 TEU, even after Brexit. However, the arguments for considering that they could preserve the full spectrum of their residence rights in the UK would not appear to carry more weight.

First of all, since the UK would no longer be a Member State after Brexit, it would no longer be bound by EU law, neither by primary law provisions on EU citizenship nor by secondary EU law, such as Directive 2004/38. Consequently, EU27 citizens residing in the UK will no longer be able to rely on their EU citizenship rights on the UK, which would, in effect, have become a third country.

Second, it is not evident, for the same reasons as those outlined above, that the international law doctrine of acquired rights could be successfully relied upon after Brexit by EU27 citizens and their family members residing in the UK in order to preserve the full spectrum of their residence rights attached to EU citizenship.

III.3. Intermediary conclusion

It follows from the analysis above that it is far from certain that the various arguments discussed in order for EU citizens and their family members to be able to continue to rely (fully) on the residence rights would not succeed if they were invoked before a na-

[34] International Law Commission, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, Vol. II, 1966, p. 265.

tional court, for instance by a UK national who wanted to continue to enjoy his residence rights as an EU citizen in one of the EU27 Member States after Brexit. If, indeed, the residence rights attached to EU citizenship cannot be considered to be "acquired" rights, which continue to be enforceable after Brexit, these rights will only continue to be enjoyed if that is provided for in an agreement negotiated between the EU27 and the UK. This possibility will be analysed in part 0, below.

For the sake of completeness, it must be pointed out that, if no negotiated solution is reached between the EU27 and the UK, UK nationals and their family members, residing in the EU27 Member States, would, in any event, still enjoy the rights conferred by the EU on third country nationals. More in particular, they would enjoy the residence rights governed by a number of directives, such as the Family Reunification Directive,[35] the Long Term Residence Directive[36] or the Blue Card Directive.[37] The conditions laid down in these directives are, however, less beneficial than those governing the residence rights of EU citizens and their family members.[38] EU27 citizens residing in the UK, by contrast, would no longer have a claim to any rights derived under EU law. As third country nationals, they could still derive residence rights under UK law, but the conditions governing these would likely be stricter in many circumstances than those governing their prior residence rights as EU citizens.[39]

Moreover, both groups of citizens could still derive rights from the European Convention on Human Rights (ECHR), since both the UK and all the EU27 Member States are party to that convention and will continue to be parties for the foreseeable future. In this connection, some scholars have argued that the rights enjoyed by EU citizens up until Brexit will be "cemented" and protected after Brexit under the ECHR.[40] More particularly, as far as residence rights are concerned, reference is made to the judgment of the European Court of Human Rights in case *Kurić and Others v. Slovenia*,[41] which concerns the rights of former nationals of Yugoslavia in Slovenia. In that case, that Court held that Slovenia had breached Art. 8 ECHR by suddenly taking away the rights of cer-

[35] Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

[36] Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[37] Directive 2009/50/EC of the Council of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

[38] For an analysis, see *inter alia* P. MINDUS, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence*, Basingstoke: Palgrave Macmillan, 2017, ch. 3.

[39] See the discussion in A. SCHRAUWEN, *(Not) Losing Out from Brexit*, in *Europe and the World: A Law Review*, 2017, hdl.handle.net, pp. 8-13 and in M. KILKEY, *Conditioning Family-life at the Intersection of Migration and Welfare: The Implications for "Brexit Families"*, in *Journal of Social Policy*, 2017, pp. 797-814.

[40] See, e.g., G.M. GONZÁLEZ, *"Brexit" Consequences for Citizenship of the Union and Residence Rights*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 796-811.

[41] European Court of Human Rights, judgment of 26 June 2012, no. 26828/06, *Kurić and Others v. Slovenia*.

tain groups of these nationals. In this connection, it pointed out (at para. 355 of the judgment) that "measures restricting the right to reside in a country may, in certain cases, entail a violation of Art. 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned". However, it is well-known that Art. 8 ECHR allows Member States a rather broad margin of discretion and it seems fair to say that the residence rights enjoyed by EU citizens and their family members are not entirely protected under Art. 8 ECHR.[42] In addition, specifically as regards UK nationals, it is sometimes argued that the ECHR can be relied upon, in certain circumstances, to prevent the withdrawal of EU citizenship. While it is true that the European Court of Human Rights has held that, in certain circumstances, the loss of citizenship may fall within the ambit of Art. 8 ECHR,[43] it cannot be inferred with certainty from that case law that the loss of EU citizenship would be in breach of Art. 8 ECHR, especially given the fact that the said case law is concerned with national citizenship. Accordingly, according to the House of Lords European Union Committee it may be concluded that Art. 8 ECHR cannot be relied on to prevent the status of EU citizenship from being removed as a consequence of Brexit.[44]

In conclusion: while arguments derived from the ECHR would perhaps be more successful than arguments relying exclusively on EU law or the international law doctrine of acquired rights, it is not certain that these arguments provide solid basis to fully protect the residence rights currently enjoyed by EU citizens and their family members. A comprehensive solution would, therefore, have to be hammered out in an agreement between the UK and the EU27.

IV. Brexit and residence rights: an essential issue for any negotiated solution

The idea of negotiating a new set of rules to resolve some of the UK's concerns regarding the EU legal framework is not a new phenomenon, of course. It is well-known that the UK has managed to negotiate so-called "op-outs" in important areas of EU law, including in the so-called Area of Freedom, Security and Justice. When then Prime Minister David Cameron decided to hold the "Brexit" referendum, his idea was to achieve a new "deal" with the EU before the date of that referendum, a deal intended to sway many of the UK concerns regarding the impact and working of the EU, and, as a conse-

[42] See A. Schrauwen, *(Not) Losing Out from Brexit*, cit., p. 6: "Thus in any event the doctrine would not apply to those who have not yet acquired the right to permanent residence, and might imply a weaker position for those who recently decided to move abroad, arguably for the most part young people".

[43] See, e.g., European Court of Human Rights, decision of 7 February 2017, no. 42387/13, *K2 v. the United Kingdom*.

[44] House of Lords, *Brexit: Acquired Rights*, cit. P. Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence*, Basingstoke: Palgrave Macmillan, 2017, ch. 7, p. 108.

quence, to convince a majority of voters to stay in the EU. Not surprisingly, the new deal focused to a large extent on free movement and EU citizenship related issues. The European Council conclusions of February 2016 stated, *inter alia*, that the references in the Treaties and their preambles to the process of creating "an ever closer union among the peoples of Europe" would not apply to the United Kingdom, and they proposed to amend the existing rules on EU citizens and their family members in order to make them somewhat more restrictive.[45] Annexed to these conclusions was a declaration in which the Commission set out its intention to adopt a proposal to complement Directive 2004/38 in order to exclude from the scope of free movement rights certain third country nationals resorting to an abuse of rights.[46]

However, the proposed settlement was rejected when, on 23 June 2016, a small majority of British votes was cast in favour Brexit. On 29 March 2017, the United Kingdom officially notified the European Council of its intention to leave the European Union. In accordance with Art. 50 TEU this notification is followed by negotiations to set out the precise arrangements for withdrawal. These negotiations could last, in principle, no more than two years,[47] but they could in practice be followed by a so-called "implementation period" or "transition period" in order to avoid an abrupt change of the legal regime applicable to the UK and the EU27 Member States.

As far as the EU is concerned, it was apparent from the outset that EU citizenship would have to play a central role in these negotiations, as is clearly stated, for instance, in the guidelines for Brexit negotiations of the European Council[48] and the negotiation directives of the Council.[49] In fact, the Council, the European Parliament and the Commission have repeatedly stated that one of the first priorities for the negotiations is to agree on guarantees to protect the rights of EU citizens, and their family members, that

[45] See the European Council Conclusions of 18-19 February 2016, *A New Settlement for the United Kingdom Within the European Union* and the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18-19 February 2016.

[46] See the Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, in Annex 7 of European Council Conclusions of 18-19 February 2016. For a more in-depth analysis, see the E. MUIR, *EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1353 *et seq.*

[47] See Art. 50, para. 3, TEU, which provides: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".

[48] European Council Guidelines of 29 April 2017 following the United Kingdom's notification under Art. 50 TEU.

[49] Directives of the Council of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union.

are affected by Brexit. For instance, the Council's press release of 22 May 2017 explicitly states that the first priority for the negotiations is to agree on guarantees to protect the rights of EU and UK citizens, and their family members, that are affected by Brexit.[50] At the same time, the UK has made it clear from the outset that it wants to limit the rights of EU citizens and their family members in the UK, in particular their right to free movement and residence. Accordingly, a white paper published in February 2017 by the UK government stated unequivocally: "We will design our immigration system to ensure that we are able to control the numbers of people who come here from the EU. In future, therefore, the Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law".[51]

It is inevitable, therefore, that, in the context of the Brexit negotiations, the concept of EU citizenship, which was destined to be the fundamental status of all Member State nationals, will be deeply challenged. It remains to be seen how the concept of EU citizenship and the rights attached to it emerge from the negotiations.

The aim of this section is not to provide a critical analysis of the current state of negotiations, and neither to predict their outcome. At the moment of writing this *Article*, it is impossible to know what the outcome of the negotiations will be, or even to know whether a negotiated solution will be reached, in particular since, in order to do so, a number of important hurdles must still be overcome.[52] Rather, this section purports to examine, from a legal point of view, different possible options for dealing with the issue of the residence rights of EU citizens and their family members after Brexit. In this regard, I will examine, in particular, some of the legal principles that such negotiations would have to take into account.

IV.1. Changing citizenship statuses at the EU level

One radical way of dealing with the issue of residence rights for EU citizens after Brexit would be to change the status of citizenship at the EU level, or the access to it, in such a way that after Brexit, UK nationals remain citizens of the EU, and preserve the current rights associated to that status. Various options can be considered in this connection.[53] I will limit myself to discussing the three most important ones.

[50] Council (Art. 50) authorises the start of Brexit talks and adopts negotiating directives, in European Council Press Release 286/17 of 22 May 2017, www.consilium.europa.eu.

[51] See, Government of the United Kingdom, *The United Kingdom's Exit from and New Partnership with the European Union – White Paper*, 2 February 2017, www.gov.uk, para. 5.4.

[52] For a discussion of some of these hurdles, see Editorial Comment, *Polar Exploration: Brexit and the Emerging Frontiers of EU Law*, in *Common Market Law Review*, 2018, pp. 1 *et seq.*

[53] See the discussion in D. Kochenov, *EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?*, in *LEQS Europe in Question Paper*, no. 111, 2016.

The first option would be to turn EU citizenship into a truly independent form of citizenship, by decoupling it from Member State nationality.[54] In other words: having the nationality of a Member State would no longer be required in order for a person to be an EU citizen. Such an arrangement could allow UK nationals to remain EU citizens after Brexit, and hence to continue to enjoy the residence rights attached to that status in the EU27 Member States. This first option might be very interesting from an academic point of view, but may be more difficult from a political perspective, for a number of reasons. First of all, implementing this option would require changing the Treaties, and in particular Art. 9 TEU and Art. 20 TFEU. However, it is clear from the available documents that the Member States, at the time of the conclusion of the Maastricht Treaty, were not prepared to have an independent form of EU citizenship which would potentially become more important than their own nationality. Hence the clear wording of Art. 9 TEU and Art. 20 TFEU to the effect that "Citizenship of the Union shall be additional to and not replace national citizenship". It is unlikely that in the current context, in which anti-EU feelings have grown in intensity compared to past decades, Member States would change their mind on this issue. Moreover, even in the implausible event that Member States would be willing to make the said Treaty changes, those changes would not do anything to guarantee the residence rights of EU27 citizens in the UK, which will become a third country after Brexit.

A second option would be to create a form of "associate citizenship" for UK nationals, which would allow UK nationals to keep (some of) the rights associated with EU citizenship after Brexit.[55] This option would be less far-reaching than the first one, as it would not change the EU citizenship status as such, but would entail the creation of a separate status, with possibly more limited and a more static set of rights. Moreover, acquiring this status could be made subject to an individual opt-in, by UK nationals satisfying certain conditions, such as, for instance, the payment of a fee.[56] This second-option, while it would most likely also require an amendment of the Treaties,[57] would not require an overhaul of the existing EU citizenship concept, as interpreted in the case law of the European Court of Justice. Still, from a political level, granting associate citizenship to (certain) UK nationals would likely be acceptable only if the UK reciprocated,

[54] This idea has been suggested for a long time by some legal scholars. See the literature referred to in D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2017, p. 5.

[55] See the discussion in V. MILLER, *Brexit and European Citizenship*, in *House of Commons Briefing Paper*, no. 8365, 2018, pp. 24 *et seq.*

[56] See e.g. European Parliament, Draft Report of 9 November 2016, *Possible Evolutions of and Adjustments to the Current Institutional Set-up of the European Union*, Amendment no. 882 by Member of the European Parliament Charles Goerens, www.europarl.europa.eu.

[57] See the discussion in V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit, a Study for Jill Evans MEP*, cit.

for instance by granting a form of associate British citizenship.[58] However, such reciprocal commitments are considered to be problematic by many observers,[59] for the same reasons as outlined above.

A third option would be to facilitate access to EU citizenship for UK nationals after Brexit, for instance by granting the right to UK nationals residing for more than five years in a given Member State to obtain the nationality of that Member State – and, therefore, EU citizenship – by mere registration or declaration.[60] This option, while again interesting from an academic perspective, is problematic for a number of reasons. First, it would require harmonisation, to some extent, of Member State nationality laws, something that is unlikely to be accepted by the Member States. Indeed, so far the Member States have always resisted any interference of EU legislation in their nationality laws. This has led the Court of Justice to hold that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, while at the same time, Member States must unconditionally recognize each other's nationality.[61] Second, this solution could be problematic in Member States which do not allow dual nationality, because in those Member States UK nationals would lose their UK nationality upon acquiring the nationality of their host Member State, which would present them with a difficult choice between two less than satisfactory options. Third, there is, again, the political issue of the necessary reciprocity on behalf of the UK.

IV.2. Preserving residence rights for EU27 citizens/UK nationals and their family members

If the (access to the) citizenship status at EU level is left unchanged, the residence rights of EU27 citizens and UK nationals after Brexit may be the subject of an agreement between the EU27 and the UK. The content of that agreement would be based to a large extent on political considerations. Yet, the negotiators would also have to take into account a number of legal principles which are, arguably, relevant for the subject of residence rights after Brexit, as I will examine in what follows. The agreement would, arguably, have to deal, on the one hand, with the situation of EU27 citizens who have moved to the UK or UK nationals who have moved to another Member State before Brexit (or before the end of the transition period) and, on the other hand, of those EU27 citizens or UK nationals who will move after Brexit (or before the end of the transition period). In this section, I am dealing mostly with the situation of persons who have moved be-

[58] See the discussion in V. Roeben, J. Snell, P. Minnerop, P. Telles, K. Bush, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit*, cit.

[59] See, e.g., A.-P. van der Mei, *EU Citizenship and Loss of Member State Nationality*,, cit.

[60] D. Kostakopoulou, *Scala Civium*, cit., p. 8.

[61] Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*, para. 10.

fore Brexit (or before the end of the transition period), as, in my view, this group has the strongest claims on the basis of the said principles.

EU citizens and their family members who move to another Member State can enjoy three different types of residence rights, which are subject to different conditions. First, EU citizens and their family members can move to another Member State and reside there for periods up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport (see Art. 6 of Directive 2004/38). Second, for periods of residence longer than three months, they must, as was pointed out above, be economically active or self-sufficient (see Art. 7 of Directive 2004/38). Third, the strongest, most complete form of residence right is the so-called "permanent residence", which is acquired, in principle, after the Union citizen has resided legally for a continuous period of five years in the host Member State.[62]

As I will analyse in what follows, there are a number of legal principles which the withdrawal agreement would have to respect and which, according to some scholars, could provide arguments to the effect that EU27 citizens who reside in the UK or UK nationals having a right of residence in one of the EU27 Member States, especially those having acquired of right of permanent residence, would be entitled to preserve this under the agreement. Some of these legal principles could be binding on both the UK and the EU27 Member States, whereas other legal principles only bind the latter.

First of all, the withdrawal agreement would have to respect fundamental rights as laid down in the ECHR, to which both the UK and the EU27 Member States are a party.[63] The right to protection of family life laid down in Art. 8 ECHR precludes, under certain circumstances, residence rights being taken away. In this regard, the degree of integration in the host State certainly is a relevant consideration in assessing whether deportation is allowed under Art. 8 ECHR. Hence, this argument might be said to work in favour, especially of UK nationals having acquired a right of permanent residence in one of the EU27 Member States or EU27 citizens who are integrated in the UK.

Second, one could argue that "integration" itself is a guiding legal principle of EU law. In this context, one could refer to the objective stated in the preamble to the TEU of continuing "the process of creating an ever closer union among the peoples of Europe". The free movement of EU citizens plays a very important role for the achievement of this objective, and one could argue that respecting this principle requires to some extent guaranteeing residence rights for UK nationals in the EU27 Member States after Brexit. Again, this argument seems to be most convincing with regard to UK nationals having acquired a right of permanent residence. In this connection, it should be pointed

[62] See Art. 16 of Directive 2004/38, cit. See also the derogations laid down in Art. 17 of the Directive 2004/38, cit.

[63] See also *supra*, section III.3. for an analysis of the implications of the ECHR even in the absence of a withdrawal agreement.

out that recitals 17 and 18 of the preamble to Directive 2004/38 make it clear that permanent residence is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union and that in order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions. As such, this legal principle could provide some support for the view that, UK nationals who are sufficiently integrated in the society of one of the home Member States should be entitled to residence in the EU even after Brexit. A similar argument could not be made in favour of EU27 citizens residing in the UK, since the UK will no longer be bound by any "integration" principle.

Third, the negotiators should, according to some scholars, take into account the principle of legitimate expectations to claim a continued right of residence.[64] According to settled case-law of the Court, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union and must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives. The right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him.[65] It could be argued, on this basis, that UK nationals and their family members who had acquired a permanent right of residence in one of the EU27 Member States or were on track to acquire this, have a legitimate expectations that they would be able to continue to reside there. However, it would seem that the principle would not have to be taken into account by the UK as regards EU27 citizens residing in the UK. This argument is implicit in the policy paper of the UK Government, entitled *Safeguarding the Position of EU Citizens in the UK and UK Nationals in the EU*,[66] which states that "those EU citizens who arrived after the specified date will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – *but this group should have no expectation of guaranteed settled status*".

Fourth, one could add that by not guaranteeing the continued right of permanent residence after Brexit for UK nationals in the EU27 Member States under the same conditions as currently applicable, the *effet utile* of that right would be compromised. Admittedly, that right, as such would no longer be applicable to them. However, one could argue that, by suddenly taking away this right, one would compromise the *effet utile* of

[64] See in this regard the discussion in O. Garner, *Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244/KG ZA 17-1327 of the Rechtbank Amsterdam ("The Amsterdam Case")*, in *European Law Blog*, 19 February 2018, europeanlawblog.eu.

[65] Court of Justice, judgment of 26 July 2017, case C-560/15, *Europa Way and Persidera*, paras 79-80.

[66] UK Government, Policy Paper of 26 June 2017, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, www.gov.uk.

the build-up of that right which happened *in tempore non suspecto*, i.e. before Brexit. Indeed, UK nationals who moved to one of the EU27 Member States with a view to residing there in accordance with the conditions laid down in Directive 2004/38 will have done so with a view to settling in that Member State and to creating and strengthening family life in that State.[67] This whole purpose, which was in most case undertaken before any realistic prospect of Brexit came about, would, arguably be defeated if, after Brexit, the said nationals would be stripped of their right of residence. The *effet utile* of EU law is, therefore, another principle which the negotiating parties would have to take into account when reaching an agreement on the residence rights of EU citizens and their family members. As was the case for the second principle discussed above, this principle could be invoked by UK nationals living in the EU27, but not, conversely, by EU27 citizens in the UK, as the UK will arguably no longer have an obligation under EU law to respect the *effet utile* of provisions of EU law.

In this connection, it must be pointed out that, since Directive 2004/38 will no longer apply to UK nationals after Brexit, they could be made subject to certain administrative formalities in order to have their permanent right of residence as an EU citizen transformed into a similar right on the basis of the withdrawal agreement. However, those formalities should not be overly burdensome, in order not to compromise the *effet utile* of the right of permanent residence. Interesting to note in this regard is that para. 23 of the joint technical notes on EU-UK positions on citizens' rights that have been published after the second and third round of negotiations[68] states: "In order to obtain status under the Withdrawal Agreement by application, those already holding a permanent residence document issued under Union law at the specified date will have that document converted into the new document free of charge, subject only to verification of identity, a criminality and security check and confirmation of ongoing residence". Similarly, Art. 17, para. 1, let. h), of the draft withdrawal agreement of 15 March 2018 provides that

> "persons who, before the end of the transition period, are holders of a valid permanent residence document issued under Arts. 19 or 20 of Directive 2004/38/EC or a valid domestic immigration document conferring a permanent right to reside in the host State, shall have the right to exchange that document within two years of the end of the transition period for a new residence document after a verification of their identity, a criminality and security check [...] and confirmation of ongoing residence; such a document shall be free of charge".

[67] Court of Justice, judgment of 12 March 2014, case C-560/15, *O.*, para. 54. For a discussion, see N. CAMBIEN, *Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-state Requirement for EU Citizens?*, in *European Law Blog*, 11 April 2014, europeanlawblog.eu.

[68] These joint technical notes are available at ec.europa.eu.

It could be wondered whether, in order to fully preserve the *effet utile* of the right to permanent residence, this exchange of documents should not happen in a more automatic fashion.[69]

Fifth, another principle which would arguably have to be taken into account, by the EU side, is the principle of equal treatment and non-discrimination, which is a general principle of EU law, and which is also laid down in Arts 20 and 21 of the Charter of Fundamental Rights of the European Union (Charter). More in particular, the arrangements governing the residence rights for UK nationals and their family members should obviously not be more disadvantageous than those applying to other third country nationals, except where these nationals can benefit from certain advantageous arrangements in, for instance, association agreements with the EU.[70] As such, the principle of equal treatment and non-discrimination provides a sort of lower limit: negotiating residence rights for UK nationals after Brexit which fall short of those already enjoyed by third country nationals, would clearly violate that principle does not seem to be possible.

V. Concluding remarks

The precise arrangements governing the residence rights of EU citizens and their family members after Brexit will possibly be laid down in a withdrawal agreement to be concluded between the EU27 and the UK. According to some authors, that agreement would have to respect a number of legal principles which seem to provide some support for the view that UK nationals and their family members who have moved to the EU27 before Brexit, will be entitled to preserve their residence rights, in particular those UK nationals and their family members who have acquired a right to permanent residence. EU27 citizens who have moved to the UK before Brexit cannot rely on equally convincing arguments, since the UK will no longer be bound by EU legal principles after Brexit. However, the withdrawal agreement may only be accepted by the EU27 if the UK reciprocates and grants equal residence rights to EU27 citizens who moved to the UK before Brexit. This *Article* has not examined the situation of EU27 citizens and UK nationals who move after Brexit. It would seem that they cannot, or not to the same extent, rely on the said legal principles to continue to enjoy the same residence rights as those applicable before Brexit and it is possible that their rights will be considerably restricted by the withdrawal agreement compared to the current residence rights enjoyed by EU citizens.

[69] See the criticisms voiced by S. Peers, *EU27 and UK Citizens' Acquired Rights in the Brexit Withdrawal Agreement: Detailed Analysis and Annotation*, in *EU Law Analysis*, 13 March 2018, eulawanalysis.blogspot.lu.

[70] See the examples given in D. Kochenov, *Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris*, in *Verfassungsblog*, 24 June 2016, verfassungsblog.de.

This *Article* has mostly dealt with the issue of residence rights. For the sake of completeness, it should be out that, besides residence rights, there is, of course, the issue of the free movement between Member States. The most pressing question in this regard, is the following one: will UK nationals and their family members who enjoy a right of residence in one of the EU27 Member States after Brexit, equally have the right to freely move between and reside in other EU27 Member States? It would seem that the arguments examined above are not conclusive in this regard. Obviously, the principle of equal treatment precludes granting UK nationals more restrictive free movement rights than those generally enjoyed by third country nationals. Yet those rights are considerably less in scope than those enjoyed by EU citizens. Moreover, as Kochenov has pointed out, the UK is not in a position to reciprocate on free movement rights, since it is leaving the EU on its own.[71] Interesting to note in this connection is that Art. 32 of the draft Withdrawal Agreement of 15 March 2018 provides as follows: "In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States".

One option that could be envisaged as a solution to the residence and free movement-related issues after Brexit is a carefully tailored most favoured nation clause and a requirement of reciprocal treatment. In international law, reciprocal treatment is primarily envisaged as a means of protecting nationals or things,[72] although most-favoured-nation clauses are nowadays primarily used in the WTO context, as well as in the bilateral trade and investment treaties.[73] The said clauses are defined in the broadest of terms[74] which is why they should be used with caution.[75] When it comes to the EU, these types of clauses are often found in bilateral cooperation agreements, such as the one between the EU and the member parties to the Cartagena Agreement.[76] If this type of a clause were to be introduced into a withdrawal agreement, UK citizens living in the EU, but also EU27 citizens living in the UK could be granted preferential treatment in

[71] D. KOCHENOV, *Misguided "Associate EU Citizenship" Talk as a Denial of EU Values*, in *Verfassungsblog*, 1 March 2018, verfassungsblog.de.

[72] International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, Yearbook of the International Law Commission, Vol. II, part two, 1978, p. 17.

[73] International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, Yearbook of International Law Commission, Vol. II, part two, 2015, p. 2.

[74] Y. RADI, *The Application of the Most-favoured-nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"*, in *European Journal of International Law*, 2007, p. 758.

[75] Draft Articles on most-favoured-nation clauses with commentaries, 1978, p. 20.

[76] Regulation 1591/84 of the Council of 4 June 1984 concerning the conclusion of the Cooperation Agreement between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela – of the other part.

certain respects (e.g. free movement and residence rights similar to those enjoyed by EU citizens in the EU Member States) while no longer being entitled to the rights currently enjoyed by EU citizens in others.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

EU CITIZENSHIP, ACCESS TO "SOCIAL BENEFITS" AND THIRD-COUNTRY NATIONAL FAMILY MEMBERS: REFLECTING ON THE RELATIONSHIP BETWEEN PRIMARY AND SECONDARY RIGHTS IN TIMES OF BREXIT

ELISE MUIR*

TABLE OF CONTENTS: I. Introduction. – I.1. Mapping out the constitutional and legislative framework for EU citizenship law. – I.2. The multiple constitutional functions of Art. 21 TFEU. – I.3. Tensions between primary and secondary law: the UK Settlement as an illustration. – II. Deconstitutionalising the perimeters of EU citizenship law: from *Martínez Sala v. Freistaat Bayern* to *Brey* as reflected in the UK Settlement. – II.1. Enshrining EU citizens' rights in EU primary law: "constitutional engineering". – II.2. The adoption of new legislation: fresh political guidance. – II.3. Legislation acting as a gateway to EU citizenship rights. – II.4. *Interim* conclusion: deconstitutionalisation. – III. Constitutionalising the perimeters of EU citizenship law: from *Metock* to *Lounes*, via the UK Settlement. – III.1. EU legislation and the rights attached to EU citizenship: from *Singh* to *Akrich*. – III.2. Ambiguities on the sources of rights: the adoption of a new legislative framework & revirement in *Metock*. – III.3. Shifting to Art. 21, para. 1, TFEU: from the UK Settlement to *Lounes*. – III.4. *Interim* conclusion: constitutional protection? – IV. Soul searching: acknowledging the political dimension of EU citizenship law and locating the debate at legislative level. – IV.1. Art. 21, para. 1, TFEU and Directive 2004/38: the Directive as a gateway to EU primary rights? – IV.2. Concluding remarks on the relationship between primary and secondary rights.

ABSTRACT: In a series of recent cases on the rights of mobile EU citizens who do not perform an economic activity, the Court of Justice of the EU "deconstitutionalised" its understanding of key aspects of the free movement of EU citizens. The Court moved the discussion to the secondary law level, having kept it at the primary law level for many years. This line of cases sheds light on the ability of the Court to reframe the interplay between primary and secondary law as well as between the judicial and political guidance. The post-*Brey* case law provides a remarkable, if not unique, example of deconstitutionalisation following a period of intense constitutionalisation. The practical implications of this process are well illustrated in the context of the debate on Brexit that tests the relationship between treaty and legislative rights. This *Article* makes an enquiry into

* Head of the Institute for European Law, KU Leuven, and Visiting Professor, College of Europe, elise.muir@kuleuven.be. I am most grateful to Gillian More as well as Jonathan Tomkin for valuable comments on an earlier draft.

whether the trend towards a broader deference to political guidance in EU citizenship case law has been mirrored in other areas of citizens' rights having been subject to controversy in the context of Brexit, such as the status of third-country national family members.

KEYWORDS: EU citizenship – constitutionalisation – settlement for the UK – Brexit – *Metock* – *Brey*.

I. INTRODUCTION

It is often observed that EU law is highly "constitutionalised". The embedding of many EU rights in its "constitutional charter",[1] in other words the EU treaties, has two related effects. It allows for the granting of a high degree of protection to selected rights. Simultaneously, it limits the ability of the EU legal order to process disagreement on the content and scope of such rights through ordinary political channels. Academic writings regularly and critically examine the high level of legal protection afforded to economic rights in the EU, in particular the four freedoms.[2]

To date, little attention has been devoted to non-economic rights enshrined in EU constitutional norms. As illustrated by the reservations of the United Kingdom (UK), Poland and the Czech Republic on the justiciability of the "Solidarity" title of the Charter of Fundamental Rights of the European Union (Charter), owing to its Protocol no. 30,[3] the legal status of non-economic rights in the EU legal order is often lower than that of economic rights. Furthermore, and precisely for that reason, the argument usually is that the legal rank of non-economic rights should be upgraded to act as a counter-weight to EU economic rights.[4]

Yet, the EU "constitutional charter" does include provisions protecting a number of non-economic rights, in particular those of EU citizens. These have been actively used over the past few years. How do these constitutional norms protecting non-economic rights[5] interact with related EU legislation in this field?

[1] Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, para. 23.

[2] E.g. F.W. SCHARPF, *The Double Asymmetry of European Integration; Or: Why the EU Cannot Be a Social Market Economy*, in *Max Planck Institute for the Study of Societies Working Papers*, no. 12, 2009, p. 5.

[3] Art. 2 of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom and Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic, in Annex 1 of European Council Conclusions of 29-30 October 2009.

[4] For recent overviews and critical discussions of the matter see: S. GARBEN, *The Constitutional (Im)balance Between "the Market" and "the Social" in the European Union*, in *European Constitutional Law Review*, 2017, p. 23 *et seq*. and D. SCHIEK, *Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market*, in *European Constitutional Law Review*, 2017, p. 611 *et seq*.

[5] The material scope of the research is defined by reference to the UK Settlement, see *infra*.

This *Article* investigates the relationship between primary rights, understood as rights enshrined in the EU treaties or in EU law having the same rank, and secondary rights, understood as rights enshrined in EU legislation, by analysing some of the most controversial aspects of EU citizenship law over the past few years. This will serve as a basis for reflection on how high-level political disagreement on such non-economic rights,[6] as exemplified in the campaign in favour of Brexit,[7] is addressed within the EU legal order.

I.1. Mapping out the constitutional and legislative framework for EU citizenship law

At the outset, it is useful to briefly map out the key legal provisions and the relationship between them as provided in EU primary law. Art. 18 TFEU prohibits any discrimination on grounds of nationality within the scope of application of the treaties and *without prejudice to any special provisions* contained therein. The scope of application of the treaty is *inter alia* determined by Art. 21, para. 1, TFEU on the EU citizens' right to move and reside freely, but this right is also *subject to limitations and conditions laid down* in the treaties and measures adopted to give them effect (i.e. legislation for our purpose, as will be explained below). The same holds true for Art. 20 TFEU, which establishes EU citizenship, lists a set of related rights and refers to the *conditions and limits defined* by the treaty and by the measures adopted thereunder.

Adding to the constitutional dimension of EU citizens' rights, the prohibition of nationality discrimination within the scope of application of the treaties and without prejudice to any of their specific provisions is mentioned in the Charter in Art. 21, para. 2. The right to move and reside freely within the territory of the Member States is also "reaffirmed" as a fundamental right in Art. 45, para. 1, of the Charter.[8] Interestingly for our discussion below, Art. 45, para. 2, of the Charter states that "freedom of movement and residence may be granted, in accordance with the treaties, to nationals of third countries legally resident in the territory of a Member State".

Art. 21 TFEU on EU citizenship has been read in conjunction with Art. 18, para. 1, TFEU to prohibit discrimination on the grounds of nationality against certain non-economic actors.[9] It has also been asserted that "Union citizenship is destined to be the fundamental status of nationals of the Member States"[10] and Art. 21, para. 1, TFEU is directly effective.[11] The Court of Justice has repeated on multiple occasions that the

[6] It is acknowledged that political disagreement also related to economic rights; these however are not the focus of the present *Article* as explained above.

[7] See for instance the thoughts of C. Barnard, S.F. Butlin, *The Future of Free Movement of Persons in the UK (Part 1)*, in *EU Law Analysis*, 19 June 2018, eulawanalysis.blogspot.com.

[8] E.g. Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*, para. 29.

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

[10] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

[11] Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 86.

treaty provisions on EU citizenship shall only be relied upon if it is not possible to rely on the economic freedoms,[12] although it does not always examine the applicability of economic freedoms in detail before turning to Art. 21 TFEU. In the present analysis of the non-economic rights of EU citizens, much of our attention will be devoted to Art. 21, para. 1, TFEU.[13] Furthermore, impediments to the right conferred by Art. 21 TFEU to move and reside freely within the territory of the Member States ought to be checked before relying on Art. 20, para. 1, TFEU.[14] Art. 20, para. 1, TFEU is thus a "fall back" category to which little attention will be devoted in the present *Article*.

As will be further explained and as naturally derives from the wording of the treaty and Charter provisions thereby identified, the rights of non-economically active citizens are closely intertwined with EU legislation. The main legislative instrument is Directive 2004/38 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. It amends and replaces a set of earlier instruments[15] but it is the first legislative instrument designed to comprehensively regulate the rights of EU citizens as such. It also co-exists with Regulation 492/2011 (formerly 1612/68) of the European Parliament and of the Council on freedom of movement for workers within the EU.[16]

Clarifying the relationship between the Directive, treaty provisions on citizenship and other legislative instruments, the Court of Justice made clear that Directive 2004/38 "aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive fewer rights from that directive than from the instruments of secondary legislation which it amends or repeals".[17] The Court has therefore given a distinctly positive and forward looking role to Directive 2004/38. The Directive is understood as a development on pre-existing legislation, giving expression to the primary citizenship rights.[18]

[12] Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 45.

[13] On the rights of economic migrants as provided for in the EU treaties see: Art. 45, para. 2, Art. 49, para. 1, and Art. 56, para. 1, TFEU.

[14] Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras 48-49.

[15] As is clear from the title of Directive 2004/38, cit., itself.

[16] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[17] E.g. *Lassal*, cit., para. 30. See also Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock*, para. 59.

[18] Note that a number of EU directives give expression to the fundamental right not to be discriminated against; see further: E. Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford: Oxford University Press, 2018, ch. IV.

I.2. The multiple constitutional functions of Art. 21 TFEU

The constitutional anchorage of EU citizens' rights as just briefly described has important implications. Treaty articles such as Art. 21 TFEU perform three functions in the EU legal order.[19] First, Art. 21 TFEU can be seen as a benchmark against which the activities of EU and national organs falling within the scope of EU law may be reviewed, and in light of which such activities must be interpreted. In that respect, this treaty provision largely overlaps with relevant Charter provisions and corresponding general principles. In addition, Art. 21, para. 1, TFEU defines the scope and content of EU regulatory intervention in domestic policies to the extent that it is directly effective.[20] Thirdly, Art. 21, para. 2, TFEU constitutes a legal basis for the adoption of further legislation. This multiplicity of functions distinguishes this source of rights and obligations from other categories of instruments which only perform some of these functions. This also explains why the dividing line between secondary legislation and primary rights in this field is not always clear, as will be further illustrated below.

Such ambivalence is not uncommon in the EU legal order.[21] The normative content of the EU treaty performs the function of a constitutional benchmark (in the same way as the Charter). Meanwhile, as a "derivative" legal order,[22] the exercise of EU powers depends upon the allocation of specific competences so that the EU constitutional charter provides a set of provisions defining the scope of EU regulatory intervention. The process of European integration has resulted in embedding an atypical amount of normative content in the very same provisions that define the scope for EU regulatory intervention. This means that the scope and content of EU intervention are often actually merged, leading to the high level of constitutional protection mentioned above.

The existence or absence of legislation as referred to in the treaty provisions on citizenship may also mark the cut-off point of active intervention by the EU. The interpretation of the content and scope of legislation has direct implications on the relationship between domestic and EU competences. The judicial interpretation of the parameters of EU

[19] Reflecting on the different functions on treaty provisions on non-discrimination: E. Muir, *EU Equality Law*, cit., ch. III.A.

[20] On the first two functions, see *Baumbast and R*, cit., para. 86: the application of the limitations and conditions acknowledged in Art. 18, para. 1, TFEU in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Art. 18, para. 1, EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn*, para. 7).

[21] E.g. In relation to EU sex equality law see for instance Art. 157 TFEU; e.g. T.K. Hervey, *Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards*, in *Maastricht Journal of European and Comparative Law*, 2005, p. 307.

[22] N. Walker, *Human Rights in a Post-National Order: Reconciling Political and Constitutional Pluralism*, in T. Campbell, K.D. Ewing, A. Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press, 2001, p. 129.

legislation giving expression to EU citizens' rights is a delicate exercise: the process by which political institutions have thought to circumscribe EU intervention may be reviewed against the very primary right that the legislation is intended to shape. The CJEU's views on the primary law version of the right at hand thus more ostensibly competes with those expressed by political authorities. There is also a risk of hindering or swaying political debate by significantly interfering with the content and scope of rights defined in legislation through the interpretation of EU constitutional norms. In a derivative legal order such as that of the EU, the interpretation of legislation adopted at the supranational level therefore unquestionably raises questions of a constitutional nature.

As a consequence, by its very nature, Art. 21 TFEU places the constituent powers and the CJEU as well as the EU legislature in a position to jointly drive EU citizenship forward. This form of institutional collaboration is particularly interesting as it relates to the fleshing out of the concept of EU citizenship that is intended to legitimise the edifice of the European Union. However, the way forward may be bumpy: how does EU law address disagreement on such a symbolic concept?

I.3. Tensions between primary and secondary law: the UK Settlement as an illustration

The Settlement for the UK from 2016 (UK Settlement)[23] offered an occasion to test the relationship between the primary and secondary rights of EU citizens. It explored the boundaries of what could be adjusted within EU law in order to address the concerns of the UK with minimal constitutional impact. The nature of this exercise may remind us of similar sorts of "constitutional dialogues":[24] such as that leading to the adoption of the Barber protocol[25] or the insertion of Art. 157, para. 4, in the TFEU.[26] Although the UK Settlement did not enter into force,[27] it is the latest illustration of the ability to organise a political response to challenges to EU citizens' rights within existing EU primary law.[28]

[23] Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18-19 February 2016.

[24] See further: E. Muir, *EU Equality Law*, cit., ch. III.

[25] Protocol no. 2 concerning Art. 119 of the Treaty establishing the European Community. See further: D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, in *Common Market Law Review*, 1993, p. 17.

[26] It was inserted by the Treaty of Amsterdam, see also Declaration no. 28 on Art. 119, para. 4, of the Treaty establishing the European Community. See E. Howard, *The European Year of Equal Opportunities for All-2007: Is the EU Moving Away from a Formal Idea of Equality?*, in *European Law Journal*, 2008, pp. 175-176; M. Maduro, *La Cour de justice des Communautés européennes et la législation d'anti-discrimination*, in *Revue du droit Européen Relatif à la Non-Discrimination*, 2005, p. 25 *et seq.*

[27] Section E.2, of the Decision of the Heads of State or Government of 18-19 February 2016, cit.

[28] The objective was "to settle, in conformity with the Treaties, certain issues raised by the United Kingdom": Decision of the Heads of State or Government of 18-19 February 2016, cit.

The UK Settlement therefore provides a most useful opportunity to reflect on the constitutional design of EU citizenship law.[29]

It is noteworthy that of the various controversial aspects of the debate surrounding the Brexit referendum and in the UK Settlement, two were related to the non-economic rights of EU citizens and tested the relationship between primary and secondary law in that respect – more specifically the relationship between Art. 21 TFEU and Directive 2004/38. These aspects will be the focus of the present article. Selected excerpts from the UK Settlement are reproduced here for the ease of the reader.[30]

The first aspect of the UK Settlement of interest to this *Article* relates to the rights of non-economically active persons and sought to address concerns about the burden on the social assistance system of the host Member State that these persons represent.[31] Annex I, Section D on "Social benefits and free movement", point 1, of the UK Settlement reads as follows:

> "(b) Free movement of EU citizens under Article 21 TFEU is to be exercised subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect.
> The right of economically non-active persons to reside in the host Member State depends under EU law on such persons having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and on those persons having comprehensive sickness insurance.
> Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement *solely* in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence" (emphasis added).

The second aspect of the UK Settlement relates to the rights of third-country national family members of an EU citizen with no prior lawful residence, with a view to countering fears of circumvention of national immigration rules. Annex VII of the UK Settlement reads as follows:

> "The Commission intends to adopt a proposal to complement Directive 2004/38 on free movement of Union citizens in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host

[29] Case law developed exclusively on the basis of treaty provisions is left aside as it leaves little room for interaction with legislation. See for instance the line of cases developed on the basis of Art. 20 TFEU and the ruling in Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*.

[30] Others related to the free movement of workers (e.g. the indexation of child benefits, alter and safeguard mechanism) and the notions of public policy or public security.

[31] Other important aspects of the UK Settlement such as the safeguard mechanism related to in-work benefits for workers are not discussed in this *Article* devoted to the rights of non-economic actors.

Member State's immigration law will apply to the third country national. This proposal will be submitted after the above Decision has taken effect" (emphasis added).

The two themes thereby addressed by the UK Settlement and related to Art. 21 TFEU provide interesting case studies for the purpose of examining the relationship between primary and secondary rights in the context of intense political disagreement on non-economic rights. The challenges thereby identified – on the one hand, free movement of EU citizens *v.* fear of burdens on the social assistance system, and on the other, free movement of EU citizens *v.* national immigration law – have been framed in two different if not opposing ways in EU constitutional law.

On the one hand, on the issue of access to social benefits for non-economically active persons (section II), the case law of the CJEU has progressively proceeded to a "deconstitutionalisation" process (i.e. shifting attention from the right enshrined in primary law to the rights provided for in secondary law) on which the UK Settlement could subsequently comfortably rely. The UK Settlement could indeed rely on an interpretation of Directive 2004/38 which is favourable to the requests of the UK with little fear of breaching primary law.

On the other hand, the precise legal status of the rights of EU third-country national family members of EU citizens with no prior lawful residence was blurred. This allowed the UK Settlement to propose a political solution to address the claims of the UK – i.e. of a legislative nature – but recent case law suggests that this approach could be in breach of EU primary law. Indeed, the rights of third-country national family members of an EU citizen are currently seemingly protected by the EU treaty rights as we shall see (section III).

After spelling out the constitutional setting in relation to both types of rights, we will seek to draw lessons for the constitutional design of non-economic rights of EU citizens when treaty and legislation co-exist (section IV). It will be argued that whenever possible, emphasis shall be placed on legislative guidance so as to allow for political dialogue.

II. Deconstitutionalising the perimeters of EU citizenship law: from *Martínez Sala v. Freistaat Bayern* to *Brey* as reflected in the UK Settlement

In a now well-known series of recent cases on the rights of mobile EU citizens that do not perform an economic activity, the CJEU "deconstitutionalised" its understanding of key aspects of the prohibition of nationality discrimination (enshrined in Art. 18, para. 1, TFEU). In other words, the CJEU moved the discussion to the secondary law level, having kept it at the primary law level for many years.[32]

[32] Elements of the following sections build on E. Muir, *EU Equality Law*, cit., ch. III.

II.1. Enshrining EU citizens' rights in EU primary law: "constitutional engineering"

The story starts in the late 1990s when the Court's ruling in *Martínez Sala v. Freistaat Bayern*[33] captured the imagination of lawyers by asserting that a mobile EU citizen[34] "lawfully resident in the territory of the host Member State, can rely on [Art. 18 TFEU] in all situations which fall within the scope *ratione materiae* of [Union] law".[35] Furthermore, a situation would fall within the scope *ratione materiae* of Union law if the

> "Member State delays or refuses to grant to that claimant a benefit [covered by Regulations 1408/71[36] and 1612/68[37]] that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State".[38]

The Court thereby decoupled the personal scope of the EU prohibition of nationality discrimination from specific requirements established by EU legislative instruments regulating its material scope.[39] It was now enough to be an EU citizen lawfully residing in another Member State *under the law of that Member State*[40] to benefit from the prohibition of nationality discrimination (Art. 18, para. 1, TFEU), in order to obtain a benefit covered by specific EU legislation. This was remarkable progress for non-economically active and mobile EU citizens. Before that, their equal treatment rights did not have constitutional status in EU law and only legislative instruments setting specific *ratione personae* requirements applied to them before they could be granted a limited set of rights.[41] This framed the debate on EU mobile and non-economically active citizens' equal treatment rights in constitutional terms, despite the provision in the treaty articles on EU citizenship (Art. 20, para. 2, and Art. 21, para. 1, TFEU) and the general

[33] *María Martínez Sala v. Freistaat Bayern*, cit.

[34] *Ibid.*, para. 61.

[35] *Ibid.*, para. 63.

[36] Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

[37] Regulation (EEC) 1612/68 of 15 October 1968 of the Council on freedom of movement for workers within the Community.

[38] *Martínez Sala v. Freistaat Bayern*, cit., para. 63.

[39] *Ibid.*, paras 45 and 56-62. See further S. O'Leary, *Putting Flesh on the Bones of European Union Citizenship*, in *European Law Review*, 1999, pp. 77-78.

[40] *Martínez Sala v. Freistaat Bayern*, cit., para. 47.

[41] See Directive 90/366/EEC of the Council of 28 June 1990 on the right of residence for students; Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence.

prohibition of nationality discrimination (Art. 18, para. 1, TFEU) referring to the limits of the treaty and to its scope of application as possibly defined in legislation.

II.2. The adoption of new legislation: fresh political guidance

In interpreting the principle of equal treatment for mobile EU citizens in such an innovative way, the Court of Justice limited the possibility for the EU legislature to influence the personal scope of the said principle. In 2004, the European Parliament and the Council adopted Directive 2004/38.[42] According to this Directive and building on earlier legislative guidance, a pre-condition for a non-economically active person to have lawful residence for more than three months in another Member State *under EU law* is to have "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".[43]

Lawful residents would then enjoy equal treatment on the ground of nationality; this was repeated in Art. 24, para. 1, of the Directive subject to certain conditions, including an exception to the effect that: "the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) [establishing specific conditions for work seekers] to persons other than workers, self-employed persons, persons who retain such status and members of their families".[44] In other words, the Member States' concern to protect their social assistance systems against overburdening influenced both the conditions to obtain lawful residence in another Member State under EU law and equal treatment rights.

Although the Directive was only to apply in the Member States from 2006, the provisions adopted could have prompted the Court to give greater emphasis to the Union legislature's attempt to circumscribe the conditions under which free movement rights could be exercised. Nevertheless, the Court of Justice continued to reason directly on the basis of treaty provisions on issues concerned with equal treatment rights of mobile and non-economically active EU citizens.[45] In doing so it largely disregarded the concern expressed by political institutions to make non-economically active migrants' residence

[42] Directive 2004/38, cit.

[43] Art. 7, para. 1, let. b), of Directive 2004/38, cit.

[44] Art. 24, para. 2, of Directive 2004/38, cit.

[45] E.g. Court of Justice: judgment of 7 September 2004, case C-456/02, *Trojani*, para. 39; judgment of 15 March 2005, case C-209/03, *Bidar*, para. 46. The position of the CJEU can usefully be contrasted to that of the Advocate General in that case: Opinion of AG Geelhoed delivered on 19 February 2004, case C-456/02, *Trojani*. See further A.P. van der Mei, *Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State, Comments on Trojani (Case-456/02 of 7 September 2004) and Bidar (Case C-209/03 of 15 March 2005)*, in *European Journal of Migration and Law*, 2005, p. 209.

– and therefore equal treatment rights under EU law – conditional upon having a "sufficient" level of resources.[46]

II.3. Legislation acting as a gateway to EU citizenship rights

A move away from the constitutional approach described in the past section and towards deconstitutionalisation, or greater emphasis being placed on secondary legislation, was initiated by the *Brey* case of 2013.[47] This redirection was confirmed in three subsequent cases.[48] The characteristics of this new case law can be summarised as follows. To start with, the CJEU now declines to reason on the basis of treaty provisions on citizenship and nationality discrimination; it focuses instead almost exclusively on guidance provided in secondary legislation. Although this is visible in all four cases,[49] it is particularly clear in *Dano* where the Court had been specifically asked to reason on the basis of EU constitutional law but refused to do so. The Court of Justice indeed raised the fact that the Charter could only be applied within the scope of Union law. As the situation was not covered by EU secondary legislation, this condition was not fulfilled in the case at hand.[50] In other words, the Court refused to look at whether the treaty provisions on EU citizenship and nationality discrimination could bring the matter within the scope of EU law despite the limitations enshrined in secondary legislation. The Court further explained elsewhere in the ruling that protection of non-economically active mobile citizens against nationality discrimination when this occurred outside the scope of Directive 2004/38 would run counter to one of the Directive's objectives: to prevent such citizens from becoming an unreasonable burden on the social assistance system of the host Member State.[51] In other words, the CJEU did a methodological U-turn on its earlier case law, whereby such equal treatment rights were granted to all with direct reference to the treaty provisions on nationality discrimination and EU citizenship.

Secondly, from the EU secondary law sources, the CJEU places particular emphasis on Directive 2004/38 which lays down – *inter alia* – the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by EU citizens.[52] Not only does this emphasis result from the move away from

[46] Note that, and I am grateful to Gillian More for stressing this, there were also elements in the Directive intended to balance this approach such as Art. 14, para. 3, of Directive 2004/38, cit., according to which: "An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State".

[47] Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*.

[48] Court of Justice: judgment of 11 November 2014, case C-333/13, *Dano*; judgment of 15 September 2015, case C-67/14, *Alimanovic*; judgment of 25 February 2016, case C-299/14, *García-Nieto and Others*.

[49] See for instance: *Brey*, cit., paras 46-47 and 53-56; *Alimanovic*, cit., para. 50; *García-Nieto and Others*, cit., para. 39.

[50] *Dano*, cit., para. 90.

[51] *Ibid.*, para. 74, see also paras 60-62.

[52] Art. 1, let. a), of Directive 2004/38, cit.

treaty provisions, but it can also be read as a clarification of certain aspects of the relationship between this Directive and Regulation 883/2004 on the coordination of social security systems.[53] Directive 2004/38 is given precedence when it comes to defining EU citizens' rights of residence in another Member State.[54] As a consequence, the Directive acts as a gateway to EU equal treatment law on the grounds of nationality for non-economic actors[55] which, in the view of the Court, is indeed in line with one of the central objectives of the said Directive.[56]

Thirdly, in seeking guidance from Directive 2004/38, the Court of Justice sticks as closely as possible to the spirit, wording and gradual system established by it when possible.[57] When no such specific scheme exists, the Court provides guidance to the competent national authorities on how to ensure compliance with the general requirements of the Directive after closely examining its overall internal dynamics.[58] For instance, the Directive establishes that residence for more than three months[59] and less than five years for non-economically active persons who do not have a more specific and beneficial status[60] is dependent *inter alia* upon having "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State".[61] In *Brey*, the Court of Justice indicated that this must be understood as requiring "an overall assessment of the specific burden which [a national of another Member State requesting a particular social assistance benefit][62] would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned".[63] This amounts to requiring a case-by-case evaluation from the perspective of: *a*) the national social assistance system; as well as, *b*) the specific situation of the indi-

[53] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[54] *Brey*, cit., paras 50 and 53-54.

[55] *Dano*, cit., para. 83; see also: Court of Justice, judgment of 14 June 2016, case C-308/14, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, para. 68. For critical comments on that approach see H. VERSCHUEREN, *Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by Dano*, in *Common Market Law Review*, 2015, p. 377 *et seq.*

[56] Art. 1, let. a), of Directive 2004/38, cit.

[57] See Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman and Others*, fn. 62.

[58] E.g. *Dano*, cit., paras 69-73 and 77.

[59] Note that in *Brey* the applicant for social benefits desired to reside for more than three months, see *Brey*, cit., para. 53.

[60] See the other recitals of Art. 7 of Directive 2004/38, cit., concerning among others student and family members of a mobile EU citizen. The specific situation of those having involuntarily lost employment or workseekers is discussed further below.

[61] Art. 7, para. 1, let. b), of Directive 2004/38, cit.

[62] As defined under Directive 2004/38: *Brey*, cit., paras 60-63.

[63] E.g. *Brey*, cit., para. 64, see also the detailed analysis of the interplay between different provisions of the Directive at paras 65-72 and 77.

vidual, and keeping in mind, *c*) the specific nature of the benefits requested by the applicant. This case law seems to hold true, although the Court applied this test fairly strictly in the *Dano* case.[64]

In contrast, when more detailed guidance is provided in the form of a "gradual system" the Court of Justice actually relies on the legislature's choices.[65] In *Alimanovic*, the Court referred to and stuck to the gradual system established by the Directive: namely the retention of the status of "worker" and the relevant conditions to retain the right to reside and be given access to social assistance. That included the duration of the exercise of any economic activity.[66] The Court of Justice stressed that the advantage of such a scheme is to be unambiguous. As it is enshrined in legislation, it guarantees a significant level of legal certainty and transparency; and as it is gradual, it also complies with the principle of proportionality.[67] The Court of Justice rejected further attempts to call into question the balance performed by the EU legislature between individuals' right to free movement, and the burden that mobile EU citizens who have lost their employment status may constitute on the national system of social assistance.[68]

The same approach was adopted in *García-Nieto* in relation to jobseekers; the Court re-asserted that the Directive provides a set of detailed and gradual rights.[69] The Court of Justice may thus be ready to accept a rather inflexible system of allocation of rights if it is progressive and set in a way that ensures legal certainty and transparency.[70] In that sense, the Court defers to political guidance and departs from its constitutional case law which provided more individualised solutions, but which were also less predictable.[71]

II.4. *Interim* conclusion: deconstitutionalisation

Some have lamented that this novel approach constitutes a step backwards when compared to the early cases in which the Court of Justice developed a protective approach

[64] *Dano*, cit., paras 81 and 83. Here the Court entitled a Member State to refuse to grant social benefits when the applicant exercise their right to freedom of movement solely in order to obtain social assistance; *Ibid.*, paras 76 and 78.

[65] *Alimanovic*, cit., paras 59-60.

[66] *Ibid.*, para. 60.

[67] *Ibid.*, para. 61.

[68] *Ibid.*, paras 60 and 62.

[69] *García-Nieto and Others*, cit., paras 47-48.

[70] See Opinion of AG Wathelet, *Coman and Others*, cit., para. 62.

[71] Providing interesting analyses proposing to reconcile the old and new lines of cases: G. Davies, *Migrants and Social Assistance: Trying to Be Reasonable About Self-sufficiency*, in *College of Europe Research Papers in Law*, 2016 and G. Davies, *Has the CJEU Changed or Have the Cases? The Deservingness of Litigants as an Element in CJEU of Justice Adjudication*, in *Journal of European Public Policy*, 2018, forthcoming.

to equal treatment for EU citizens directly grounded in primary law.[72] Critics point out that the post-*Brey* case law may have been triggered by fears of social tourism and Eurosceptic debates in several Member States.[73] The point made here is more modest. This line of cases sheds light on the ability of the Court to reframe the interplay between primary and secondary law as well as between the judicial and political guidance. The post-*Brey* case law on access to social benefits provides a remarkable example of deconstitutionalisation following a period of intense constitutionalisation.

It may be added that the desire expressed in the UK Settlement from 2016 to "settle, in conformity with the treaties, certain issues raised by the United Kingdom in its letter of 10 November 2015",[74] sat comfortably with the post-*Brey* case law and in particular with the rulings in *Dano* (11 November 2014) and *Alimanovic* (15 September 2015). These cases indeed made it possible to accommodate the UK demands within the existing state of EU law and without there even being need for legislative reform. The UK Settlement recalled the wording of Art. 21 TFEU referring to the limitations and conditions laid down, *inter alia*, in legislation. As allowed by the deconstitutionalisation process resulting from the aforementioned rulings, the right of non-economically active persons grounded in EU secondary law is dependent, among other things, on having sufficient resources for themselves and their family member. Member States can therefore refuse to grant social benefits to persons who exercise their right of movement solely in order to obtain social assistance if they do not have a right to residence under EU law.[75]

III. Constitutionalising the perimeters of EU citizenship law: from *Metock* to *Lounes*, via the UK Settlement

The relationship between treaty provisions, Directive 2004/38, related case law and the dialogue initiated by the UK Settlement took a different shape in relation to the rights of third-country national family members of mobile EU citizens.

III.1. EU legislation and the rights attached to EU citizenship: from *Singh* to *Akrich*

This second part of our story starts with the *Surinder Singh* ruling by the Court of Justice in 1992. The Court asserted that a national of a Member State might be deterred from

[72] E.g. N. Nic Shuibhne, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889.

[73] E.g. S. Peers, *Benefit Tourism by EU Citizens: The CJEU Just Says No*, in *EU Law Analysis*, 11 November 2014, eulawanalysis.blogspot.com.

[74] As quoted in the Introduction.

[75] Exploring how this could impact a future agreement with the UK: C. Barnard, S.F. Butlin, *Fair Movement of People: Equal Treatment? (Part Two)*, in *EU Law Analysis*, 20 June 2018, eulawanalysis.blogspot.com.

leaving his country of origin if, on returning, the conditions of his entry and residence in his home State would constitute obstacles to his right of movement and establishment as provided in Arts 48 and 52 of the European Economic Community Treaty (EECT) at the time.[76] This would be particularly so if children and spouses – nationals of a third country – were not permitted to enter and reside in the State of origin under conditions at least equivalent to those granted in the host country under secondary legislation available at the time.[77]

In *Surinder Singh* as well as in a number of subsequent cases,[78] EU free movement rules were relied upon to enhance the (albeit derived) rights of third-country national family members. The main feature of these cases was the Court's heavy reliance on the EU legislature's attachment to protecting the family life of mobile EU citizens.[79] One question however was left unanswered: what if the third-country national family member has not yet been admitted, or is within the territory of the EU without leave to remain before seeking to obtain a right to enter and stay as a family member of a mobile EU citizen?[80]

The answer came, in a less protective way than third-country national family members of a mobile EU citizen might have hoped for, in the *Akrich* ruling from 2003. Here, prior lawful residence by the third-country national family member of an EU citizen in the EU state of origin was deemed to constitute a prerequisite for reliance on Art. 10 of Regulation 1612/68 on freedom of movement for workers, for the purpose of being able to claim residence rights against the state of origin.[81] The regulation therefore was used to limit the rights of EU citizens to move with their third-country national family members. In the absence of prior lawful residence in the host State, the third-country national had no right under Regulation 1612/68 in the host State and could therefore claim no right "by analogy" under EU law in the State of origin.[82] This approach was supported with reference to "the structure of Community provisions seeking to secure the freedom of movement for workers within the Community".[83]

[76] Court of Justice, judgment of 7 July 1992, case C-370/90, *Surinder Singh*, paras 19 and 23. Note that the same right can now be derived from Art. 21, para. 1, TFEU; Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.*, paras 48-49.

[77] *Surinder Singh*, cit., paras 20-21.

[78] For a more exhaustive overview see N. CAMBIEN, *Citizenship of the Union as a Cornerstone of European Integration: A Study of Its Impact on Policies and Competences of the Member States*, Leuven: KU Leuven (Doctoral thesis), 2011, p. 207 *et seq.*, available at limo.libis.be.

[79] E.g. Court of Justice: judgment of 25 July 2002, case C-459/99, *MRAX*, para. 53; judgment of 14 April 2005, case C-157/03, *Commission v. Spain*, para. 26.

[80] Opinion of AG Geelhoed delivered on 27 February 2003, case C-109/01, *Akrich*, para. 7.

[81] Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich*, para. 50.

[82] *Ibid.*, para. 54.

[83] *Ibid.*, para. 51.

III.2. Ambiguities on the sources of rights: the adoption of a new legislative framework & *revirement* in *Metock*

As is well known, the *Akrich* ruling was openly overruled in *Metock*.[84] In the latter ruling, the Court of Justice made clear that the right of an EU citizen to move within the EU with a third-country national family member cannot depend on the prior lawful residence of such a family member in the EU.[85] The Court explained its decision to reconsider the *Akrich* ruling[86] with reference to political guidance taken from the text of the (then) new Directive 2004/38:[87] the Directive does not distinguish between the status of various family members and entry to the territory of the host state must be possible even in the absence of a residence card. Furthermore, the Directive is understood as a tool that strengthens the right of free movement and residence of Union Citizens.[88] This heavy emphasis on political guidance could have indicated that the rights of EU citizens to move to and reside freely in another Member State with their third-country national spouse – with no need for prior lawful residence – are enshrined in the Directive.[89]

Yet, the ruling in *Metock* is ambiguous on that point. On the one hand, the Court of Justice explains that the legislature has competence to regulate the conditions for entry and residence of family members of EU citizens.[90] On the other hand, in para. 62 (to which we will come back below), the Court stresses that "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed *by the Treaty* would be seriously obstructed" (emphasis added).[91] As a consequence, although the Court largely reasons on the basis of Directive 2004/38 throughout the ruling, the reference to treaty protection of the right to free movement suggests a constitutional anchorage of the possibility for EU citizens to move within the EU with third-country national family members irrespective of their prior lawful residence. The content of Directive 2004/38 on that point could thereby be subsumed in EU primary law. Importantly, and unlike in certain earlier cases,[92] there is *no* statement from the Court in that ruling according to which such constitutional protection should be justified with reference to the fundamental right to family life. In fact, the case law of the European Court of Human Rights focusing on the fundamental right

[84] *Metock*, cit., para. 58.

[85] *Ibid.*, para. 58.

[86] See for instance, *ibid.*, paras 55-57 on earlier case law of the CJEU as well as para. 69 on the comparison with family reunification for third country nationals.

[87] *Ibid.*, paras 50-54.

[88] *Ibid.*, para. 59.

[89] See also Opinion of AG Maduro delivered on 11 June 2008, case C-127/08, *Metock*, para. 13.

[90] *Metock*, cit., para. 61.

[91] *Ibid.*, para. 62.

[92] I am most grateful to Jonathan Tomkin for pointing that out; e.g. *Baumbast and R*, cit., para 72 and see further: E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive: A Commentary*, Oxford: Hart, 2014, p. 133.

to family life was in that sense less generous than that of the Court of Justice focusing on freedom of movement. The European Court of Human Rights indeed limited interferences into domestic migration policy on behalf of family life to exceptional family circumstances; it built on the assumption that family life may be possible in other States than the one refusing entry or residence.[93]

The important treaty provision referred to in *Metock* is in Art. 21 TFEU as well as more specific treaty provisions for mobile economic actors.[94] Before delving further into the role of Art. 21 TFEU in the subsequent UK Settlement, it shall be made clear that the Court of Justice has consistently held that EU citizens may not rely on Directive 2004/38 against their state of nationality – as will be the case in several cases discussed below – as the Directive applies to "Union citizens who move and reside in a Member State other than that of which they are nationals".[95] However, Art. 21 TFEU protects the rights of mobile EU citizens to return to their country of origin.[96] The Court of Justice traditionally applies the content of EU legislation on free movement "by analogy" to rule on the rights of returning EU citizens under Art. 21 TFEU.[97] Nevertheless, as a consequence of the lack of clarity of the reversal of case law in *Metock*, it is not clear whether the entitlement of EU citizens to move freely with their third-country national family member with no prior lawful residence is derived from the content of Directive 2004/38 applied directly (in case of movement to a host Member State), or by analogy (in case of movement back to the Member State of nationality), or from Art. 21 TFEU *per se*.

III.3. Shifting to Art. 21, para. 1, TFEU: from the UK Settlement to *Lounes*

The UK Settlement, as quoted in the Introduction, ignored (it may be presumed intentionally) the possible constitutional anchorage of the rights of third-country national family members. It built on the assumption that the solution in *Metock* was a matter of EU secondary law *only*. The UK Settlement proposed to address the challenge to EU law on that point through legislative intervention. The UK Settlement indeed included a declaration by which the European Commission intended to adopt a proposal to "complement" Directive 2004/38.[98] The proposal to have been supported by the Member States

[93] European Court of Human Rights, judgment of 2 August 2001, no. 54273/00, *Boultif v. Switzerland*, paras 52-55. See also Opinion of AG Geelhoed, *Akrich*, cit., para. 147. See further: N. Cambien, *Citizenship of the Union*, cit., p. 222.

[94] *Metock*, cit., para. 61.

[95] Art. 3, para. 1, of Directive 2004/38, cit.

[96] This approach could already be observed in cases such as *Surinder Singh*, cit., paras 19-21.

[97] See also early cases such as Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*, paras 39-45.

[98] This was perhaps deemed as less difficult than re-opening a full negotiation of Directive 2004/38 in the near future: see for instance the more distant proposal made "on the occasion of a future revision of Directive 2004/38" in relation to the notions of public policy and public security, Annex 7 of Decision of the Heads of State or Government of 18-19 February 2016, cit.

within the Council would have been intended to undo the *Metock* ruling. Indeed, a new instrument would be proposed in order to "exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen, or who marry a Union citizen only after the Union citizen has established residence in the host Member State".[99] The UK Settlement thereby built on the assumption that reversing *Metock* could be achieved through legislative intervention. It was hoped that the European Parliament, as a co-legislator, would support this initiative.

Yet, in the *Lounes* case,[100] the Court of Justice adopted a different reading of its ruling in *Metock*. Ms Ormazabal, a dual national from Spain and the UK, sought to derive a right of residence in the UK for her husband from her EU citizenship status. The latter, Mr Lounes, was not lawfully residing in that country at the time of their marriage.[101] Ms Ormazabal, in the view of the Court, could not rely on Directive 2004/38. Although she had moved from Spain to the UK in her capacity as a Spanish national, she had subsequently acquired British citizenship before marrying Mr Lounes. The UK had thereby become her country of nationality[102] and she had an unconditional right of residence in the UK under international law.[103]

Although she could not rely on EU secondary law against her country of nationality, the Court found that Ms Ormazabal could rely on Art. 21, para. 1, TFEU. While in the past, similar findings were based on the risk of hindering the freedom of movement of EU citizens,[104] the Court of Justice here reasoned that "[a] national of one Member State who has moved to and resides in another Member State cannot be denied that right merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined".[105] The Court then went on to substantiate this finding.[106]

Leaving aside aspects of the rulings related to the specific case of mobile EU citizens acquiring the nationality of the host State and possibly related to the Draft Withdrawal Agreement[107] (as discussed elsewhere by Davies),[108] what is of particular interest in this

[99] *Ibid.*

[100] Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*.

[101] *Ibid.*, para. 16.

[102] *Ibid.*, para. 15.

[103] *Ibid.*, paras 37 and 41.

[104] As acknowledged by the Court of Justice in *Lounes*, cit., para. 48. See also *supra*, *Surinder Singh*, cit.

[105] *Lounes*, cit., para. 53.

[106] *Ibid.*, paras 54-59.

[107] Art. 9, of European Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, TF50 (2018) 35 – Commission to EU27.

[108] For an analysis of other aspects of the ruling in the context of Brexit see G. Davies, *Lounes, Naturalisation and Brexit*, in *European Law Blog*, 5 March 2018, europeanlawblog.eu. That discussion relates

Article is the anchorage of Ms Ormazabal's rights in Art. 21, para. 1, TFEU. These rights of EU citizens include "the right to lead a normal family life, together with their family members".[109] To support that finding, the Court of Justice reasoned by analogy to para. 62 of the ruling in *Metock*.[110] The Court insisted that for the rights conferred by Art. 21, para. 1, TFEU to be effective, citizens in a situation such as Ms Ormazabal must continue to enjoy the right to "build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse" under that provision.[111] Although there is no explicit reference to the lack of prior lawful residence, the ruling in *Lounes* can be read as bringing an end to the ambiguity created by para. 62 in *Metock*.

III.4. *Interim* conclusion: constitutional protection?

The rights of EU citizens to be with their family members from a third country in the host State, irrespective of the absence of prior lawful residence – as the facts of both *Metock* and *Lounes* indicate – would thereby be anchored in Art. 21, para. 1, TFEU. This approach implies that disagreement on the scope of free movement rights for EU citizens with third-country nationals with no prior lawful residence in a Member State cannot be addressed without treaty reform, contrary to the underlying logic of the proposal in the UK Settlement.

However, the ruling in *Lounes* replaces one ambiguity with another. Although that ruling is mostly structured around Art. 21, para. 1, TFEU, the Court concludes its reasoning in para. 61 by stating that the conditions for granting a derived right of residence to the third-country national spouse should not be stricter than those provided in Directive 2004/38, and that the Directive should be applied "by analogy".[112] This suggests that although the rights of EU citizens such as Ms Ormazabal are anchored in Art. 21, para. 1, TFEU, the Court of Justice puts flesh on the bones of EU primary law with the political guidance enshrined in EU legislation. This raises the following questions: would a modification of EU legislation (or other legal instrument of the EU ranking beyond primary law) favourable to domestic migration policies lead to a change of case law in a case such as *Metock* or *Lounes*? Or would the legislation be found to breach the constitutional right of EU citizens to move with their family members, even in the absence of prior lawful residence in a Member State?

to mobile EU nationals having acquired the nationality of the host State, that aspect of the ruling is therefore beyond the scope of the current *Article*.

[109] *Lounes*, cit., para. 52.

[110] *Ibid.*, para. 52.

[111] *Ibid.*, para. 60.

[112] *Ibid.*, para. 61.

IV. Soul searching: acknowledging the political dimension of EU citizenship law and locating the debate at legislative level

The analysis of the first set of rights – access to social benefits for non-economically active persons – showed how the Court of Justice reframed its initial approach grounded in EU constitutional provisions in order to discuss such rights in the context of Directive 2004/38. To the contrary, the analysis of the second set of rights – of third-country national family members of an EU citizen with no prior lawful residence – has shown that this set of rights is seemingly being elevated to EU primary law. The practical outcome of these divergent processes is usefully illustrated with reference to the UK Settlement: while controversies to do with the first set of rights could be addressed with reference to the legislation, as things currently stand, controversies related to the second set of rights could presumably *not* be addressed through legislative change. How can we reconcile or coherently articulate these two approaches?

IV.1. Art. 21, para. 1, TFEU and Directive 2004/38: the Directive as a gateway to EU primary rights?

As noted in section II, the recent case law of the Court of Justice on access to social benefits for non-economically active persons espouses the structure of Directive 2004/38 and acknowledges that the Directive acts as a gateway to equal treatment rights for EU citizens in the host State. In contrast, section III pointed at the possibility that the rights derived by third-country nationals with no prior residence from EU citizens are being anchored directly in Art. 21, para. 1, TFEU – although the wording of para. 61 of the ruling in *Lounes* leaves open the possibility of articulating the relationship between Directive 2004/38 and the primary right differently. It is submitted that, as far as the rights of EU citizens to move with third-country national family members with no prior lawful residence are concerned, Directive 2004/38 should remain the main point of reference to define the scope of the rights of EU citizens – be it "by analogy".[113]

This would allow discontent to be addressed through political dialogue as was proposed by the UK Settlement. This would also allow the approach of the Court of Justice in relation to third-country national family members to be brought closer to that adopted in the cases on social benefits examined above, while keeping in line with the European Court of Human Rights' approach to the fundamental right to family life.[114] This would finally allow for a better alignment of the related case law with the general approach of the Court of Justice as it has been shaping up over the past few years in other areas of EU citizenship law related to Art. 21 TFEU.

[113] See for instance Court of Justice, judgment of 12 July 2018, case C-89/17, *Banger*, para. 29 *et seq.*
[114] See for instance *Akrich*, cit., paras 58-60.

The Court of Justice is indeed increasingly consistently[115] using Directive 2004/38, and its Art. 7 in particular, as a gateway to access EU citizenship rights when the two layers of norms can inform each other. (Understandably, this has not been done in the context of rights anchored directly in treaty provisions and where the provisions of EU legislation were fully irrelevant).[116] Useful recent examples are the three Grand Chamber rulings in *O. and B.*, *Marín* and *Chavez-Vilchez*.[117] In *O. and B.*, the Court of Justice investigated the ability of EU citizens to derive rights for third-country national family members in their country of origin from the exercise of the freedom of movement. Although such rights would be anchored in Art. 21, para. 1, TFEU – as the Directive cannot be relied upon against the State of origin – the Court firmly asserted that the provisions of Directive 2004/38 would act as a gateway to Art. 21, para. 1, TFEU.[118] Directive 2004/38 was being applied by analogy[119] but with a detailed analysis of its provisions. Indeed, for rights to be derived from the treaty, it is necessary that "residence of the Union Citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State".[120] For that purpose, "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Art. 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State, and goes hand in hand with creating and strengthening family life in that Member State".[121] In contrast, residence under Art. 6, para. 1, would not be enough.[122] The Court of Justice insists that the conditions in Art. 7, paras 1 and 2, of Directive 2004/38 must be met for

[115] E.g. Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, paras 27-28 and 46; *Eind*, cit., paras 39-40; Court of Justice, judgment of 10 October 2013, case C-86/12, *Alokpa*, paras 29-30.

[116] See for instance Art. 20 TFEU and the case law developed on the basis of the ruling in *Ruiz Zambrano*, cit. In such cases though, there is very limited space for dialogue – to which this contribution is devoted – between European key players on the content of the rights. There are also naturally cases in which EU citizenship law is simply not applicable; e.g Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*, para. 73 *et seq.* It is acknowledged that there also exist situations where Art. 21, para. 1, TFEU cannot be used in conjunction with EU legislation. For a recent example see Court of Justice, judgment of 10 April 2018, case C-191/16, *Pisciotti*.

[117] See also for instance the ruling by the Court of Justice, judgment of 30 June 2016, case C-115/15, *NA*, para. 78.

[118] See also E. Spaventa, *Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G*, in *Common Market Law Review*, 2015, pp. 753-777, 767 and 769.

[119] *O. and B.*, cit., para. 50.

[120] *Ibid.*, para. 51.

[121] *Ibid.*, para. 53.

[122] *Ibid.*, paras 52 and 59. The CJEU also secures the role of Art. 7 of Directive 2004/38, cit., as an entry point by rejecting arguments based on the recognition of a residence card given by the host State to the third country national in the absence of a right derived from the EU citizen (*ibid.*, para. 60). Furthermore, the third-country national must have been a family member in the host State before being able to indirectly derive rights from the EU citizenship through Art. 21, para. 1, TFEU and using Directive 2004/38 by analogy (*ibid.*, para. 63).

the effectiveness of the right of the EU citizen, under Art. 21, para. 1, TFEU, to return with a family member who is a third-country national to be protected.[123] This applies *a fortiori* for residence pursuant to Art. 16, paras 1 and 2, of Directive 2004/38.[124]

This approach of using Directive 2004/38 as a gateway to Art. 21, para. 1, TFEU is further exemplified by the Court's efforts to rephrase preliminary questions raised by domestic courts so as to articulate its reasoning with reference to both Art. 21, para. 1, TFEU and Directive 2004/38. The case in *Marín* concerned the residence rights in Spain of a third-country national who was primary carer of two children, one with Spanish nationality, the other with Polish nationality. Although the domestic court asked the CJEU for guidance on Art. 20 TFEU,[125] the CJEU rephrased the question so as to be able to start the analysis with an examination of Art. 21 TFEU and Directive 2004/38.[126] The Polish nationality of the daughter living in Spain brought her within the personal scope of Directive 2004/38.[127] The Court derived from this observation that the daughter was therefore entitled to "rely on Article 21(1) TFEU and the measures adopted to give it effect"[128] and, therefore, that her right to reside in Spain was in principle conferred by Art. 21, para. 1, TFEU and Directive 2004/38.[129] Having acknowledged that the two provisions had to be read in conjunction, the Court of Justice went on to check if the conditions contained in the Directive were met with a particular focus on whether the daughter fulfilled the conditions under Art. 7, para. 1, let. b), of the Directive.[130] That provision was therefore used as a gateway to EU citizenship rights.[131] The Court further relied on Directive 2004/38 to examine the derived rights of the third-country national family member.[132]

The *Chavez-Vilchez* judgment also provides an illustration of the Grand Chamber of the Court of Justice's efforts to articulate the relationship between Art. 21, para. 1, TFEU and Directive 2004/38 in a similar way. The case arose from eight disputes surrounding the residence rights of third-country nationals who were primary carers of children in the latter's country of nationality. Once again, although the domestic court asked for guidance on Art. 20 TFEU, the CJEU brought Art. 21 TFEU and Directive 2004/38 as a preliminary point for

[123] *O. and B.*, cit., para. 54.
[124] *Ibid.*, para. 55.
[125] Court of Justice, judgment of 13 September 2016, case C-165/14, *Marín*, para. 23.
[126] *Ibid.*, paras 34-35.
[127] *Ibid.*, para. 41.
[128] *Ibid.*, para. 43.
[129] *Ibid.*, para. 44.
[130] *Ibid.*, para. 46.
[131] This is particularly clear at: *Marín*, cit., para. 52.
[132] *Ibid.*, paras 54, 57, 62 and 67. It may be noted that the reasoning on limitations to EU citizenships rights granted by Art. 20 TFEU in that case also seems to be strongly inspired from the content of Directive 2004/38 although the Directive is not explicitly mentioned. See also Court of Justice, judgment of 13 September 2016, case C-304/14, *CS*, para. 36 *et seq*. The Author is grateful to Stephen Coutts for pointing that out.

analysis for the one child who had exercised his free movement right.[133] The child had then returned to the country of nationality and Directive 2004/38 could not therefore apply as such; instead Art. 21, para. 1, TFEU would apply and the content of the Directive would be applied by analogy.[134] The Court then emphasised that the national court would therefore have to check if the conditions listed under Arts 5 to 7 of Directive 2004/38 were fulfilled before the child could claim derived rights from Art. 21, para. 1, TFEU and Directive 2004/38 for her third-country national carer. In other words, once again, the provisions of Directive 2004/38 were used as a gateway to EU citizenship rights.[135]

These cases illustrate not only that Art. 21 TFEU shall be given priority over Art. 20 TFEU, but also that Directive 2004/38 acts as an entry point to primary EU citizenship rights, even when the Directive is only applied by analogy, as in *O. and B.* and *Chavez-Vilchez* regarding returning EU citizens. This is precisely what the design of the treaty provisions call for by referring to the limitations and conditions defined in instruments adopted thereupon. This approach does not neglect the requirement for legislation to comply with primary law and fundamental rights such as the fundamental right to family life, this remains a pre-condition for the validity of EU secondary law. Nor does this approach prevent direct reliance on Art. 21, para. 1, TFEU.[136] It is more modestly argued that when legislation *co-exists* with primary rights, reliance on guidance enshrined in legislative instruments makes it possible to more easily address accusations of over-constitutionalisation of EU law and empowers actors to address challenges through political dialogue.

It is therefore suggested that, following the trend initiated by the post-*Brey* case law in relation to social benefits, the relationship between Art. 21 TFEU and Directive 2004/38 in the context of claims in favour of third-country national residents with no prior lawful residence could be clarified by placing stronger emphasis on legislative guidance. The constitutional status of EU citizenship would thereby be present and recognised with reference to Art. 21, para. 1, TFEU, but the precise scope of the rights at hand would rely on stronger political guidance that could be modified in case of disagreement subject to compliance with higher norms such as the fundamental right to family life as understood by the European Court of Human Rights.

It is in light of this last caveat on fundamental rights' compliance that the recent ruling in *Coman* may be understood and reconciled with the approach proposed in this *Article*.[137] The Grand Chamber of the Court of Justice was asked several questions on Directive 2004/38, as well as the Charter.[138] The national court asked for guidance on the possibility of a mobile EU citizen returning to his home country with a third-country

[133] Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*, paras 49-50.
[134] *Ibid.*, paras 54-55.
[135] This is particularly clear at: *Marín*, cit., para. 56.
[136] *Baumbast and R*, cit., para. 86.
[137] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others*.
[138] *Ibid.*, para. 17.

national whose status as a family member was unclear. Indeed, the same-sex couple had lawfully married in Belgium but same-sex marriage is not recognised by the Member State of origin of the EU citizen where the couple now wants to return. Once again, the Court reframed the dispute and focused on Art. 21 TFEU as well as Directive 2004/38 applied by analogy to the situation of a returning EU citizen.[139] The Court of Justice initially examines the term of "spouse" enshrined in Directive 2004/38 to conclude that national law cannot exclude same-sex couples lawfully married in another Member State "for the sole purpose of granting a derived right of residence to a third-country national".[140] While this first part of the ruling answers the call for emphasis on legislative instruments expressed above,[141] the Court then moves on to examining the domestic measure restricting the EU citizen's mobility in light of Art. 21 TFEU.[142] This shift towards a constitutional level of protection of the right is surprising in light of the cases discussed above which were more exclusively focused on Directive 2004/38. Yet, reference to the constitutional rights of EU citizens can be understood with reference to the fundamental right to family and private life of same-sex couples that may under specific circumstances be protected in the same way as that of heterosexual couples in similar situations as recognised by the European Court of Human Rights.[143]

IV.2. Concluding remarks on the relationship between primary and secondary rights

Looking beyond the cases discussed so far, several broader lessons can be drawn from the post-*Brey* and post-*Metock* case law as regards the role of key EU actors in shaping the contours of EU law. To come back to the initial concerns against the over-constitutionalisation of EU law, the post-*Brey* cases illustrate that the Court of Justice may be ready to engage in deconstitutionalisation processes, to thereby make more space for political dialogue. What influences the readiness of the EU judiciary to adopt such an approach? Several important factors in the hands of the drafters of the Treaty and EU political institutions can be identified.

Firstly, in the cases discussed above, the wording of the relevant treaty provisions clearly identified the need for further political guidance. As the Court of Justice itself ob-

[139] *Ibid.*, paras 18-27.

[140] *Ibid.*, para. 36.

[141] This is irrespective of the details of the CJEU's analysis of the actual wording of the Directive. See further Opinion of AG Wathelet, *Coman and Others*, cit., paras 43-76.

[142] *Coman and Others*, cit., para. 40 *et seq.* Note the interesting reference to national identity, which is beyond the scope of this *Article*, at paras 42-46.

[143] *Coman and Others*, cit., para. 48 (referring to the Charter) and para. 50 (referring to the case law of the European Court of Human Rights). See in particular European Court of Human Rights, judgment of 14 December 2017, nos 26431/12, 26742/12, 44057/12 and 60088/12, *Orlandi and Others v. Italy*. The Court of Justice does not however elaborate further on its approach to the fundamental rights at hand.

served in *Dano*: *a*) Art. 18, para. 1, TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the treaties, and without prejudice to any special provisions contained therein"; *b*) the second subparagraph of Art. 20, para. 2, TFEU expressly states that the rights conferred on EU citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder", and; *c*) under Art. 21, para. 1, TFEU the right of EU citizens to move and reside freely within the territory of the Member States is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".[144] All key treaty provisions thus call for further political guidance.

Secondly, and importantly, the secondary legislation relied upon in the deconstitutionalisation process described above has a strong organic link with the relevant treaty provisions (Arts 18, 20 and 21 TFEU). Arts 18 and 21 TFEU count among the legal bases for Directive 2004/38.[145] Furthermore, Art. 24 of Directive 2004/38 constitutes a specific expression of the principle of non-discrimination laid down generally in Art. 18 TFEU[146] for the benefit of EU citizens (as defined in Art. 20 TFEU), who exercise their right to move by virtue of Art. 21 TFEU. This organic link may make it easier for the judiciary to shift from one level of analysis to the other; that is from primary to secondary law. Now, this observation can work the other way around as illustrated by the ambiguities created by the rulings in *Metock* and *Lounes* examined above. It is submitted that, when treaty provisions and legislative guidance co-exist, emphasis shall be placed on the latter.

Thirdly, the Court of Justice places specific emphasis on the quality of the legislative materials it is relying upon and deferring to. In cases such as *Alimanovic* and *García-Nieto*, the Court indeed endeavours to highlight the progressive (and thus presumably proportionate) nature of the system of allocation of rights under Directive 2004/38; it also stresses the unambiguous wording that ensures transparency and legal certainty.[147] A similar emphasis on the gradual approach enshrined in Directive 2004/38 is clear from the *O. and B.* case. The Court of Justice emphasised the link between settling in another Member State in accordance with Art. 7 of Directive 2004/38 – and *a fortiori* under Art. 16 (permanent residence after five years) of that instrument – and creating and strengthening family life in that same Member State.[148] On the contrary, the absence of an intention to settle when movement is based on Art. 6 of Directive 2004/38 (residence of less than three months) excludes the possibility of residence that would be "sufficiently genuine so as to

[144] *Dano*, cit., para. 60.

[145] Recital 1 of Directive 2004/38, cit. (note that the numbering of treaty articles mentioned herein is pre-Lisbon).

[146] *Dano*, cit., para. 61.

[147] See *supra*, fn. 65 *et seq.*

[148] *O. and B.*, cit., paras 51-56 and 59.

enable that citizen to create or strengthen family life in that Member State".[149] Importantly, in establishing the gradual system in Directive 2004/38, and on which the *Lounes* case also insists,[150] the EU legislature made the policy implications of its choices sufficiently clear for the Court to be willing to defer to it. Critics of the system established by the Directive may then argue for changes in the legislation itself.

This analysis of the respective role of the drafters of the treaty, the EU's judicial, and political institutions in shaping EU citizenship law therefore sheds light on three elements that determine the pre-conditions for a healthy balance between the constitutional value of the relevant right, and the political dimension of decision-making on fundamental rights: the constitutional norm itself ought to explicitly call for political guidance. Building on such a constitutional mandate, political institutions ought to achieve a fine balance between acknowledging the existence of the constitutional right and giving it shape through legislation. It is submitted that this may be best done by asserting the policy implications of decision-making in the field and the policy arguments justifying choices made in EU legislation. Furthermore, the internal coherence, clarity and nuanced nature of the rights thereby regulated will make it easier for political guidance to be deferred to. As for the judiciary, when the constitutional framework is clear and the relevant political guidance fulfils the procedural requirements set therein, it may be encouraged to defer to that legislative framework.

[149] *Ibid.*, paras 51 and 59.
[150] *Lounes*, cit., paras 56-57.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

THE EUROPEAN CITIZENS' INITIATIVE IN TIMES OF BREXIT

NATASSA ATHANASIADOU*

ABSTRACT: In the era of Brexit negotiations, which will determine the future of citizens' rights in terms of the bilateral relations between the UK and the EU, EU citizens from different Member States have used the instrument of the European citizens' initiative in order to bring forward their claim for retaining the same rights also in the post-Brexit era. The present *Article* analyses the current legal framework for European citizens' initiatives against the benchmark of general principles of EU law, in particular the principles of good administration, legal certainty and legitimate expectations. On the basis of this analysis, the Brexit-related citizens' initiatives are used as a case study marking a change in the Commission's administrative practice, towards more openness and cooperative spirit in the phase of the admissibility check. However, this new approach bears the risk of creating false expectations to organisers and signatories as to the real prospect of an initiative. The *Article* concludes that, in order to enable the full potential of citizens' initiatives, the Commission should strengthen the cooperation mechanisms when registering initiatives in line with the principle of good administration.

KEYWORDS: Brexit – EU citizenship – citizens' initiatives – participation – democracy – European Commission.

I. INTRODUCTION

The European Citizens' Initiative (ECI) is an instrument of participatory democracy[1] introduced by the Lisbon Treaty (Art. 11, para. 4, TEU) and aiming to reinforce the influence of

* Assistant Professor of EU Law, Maastricht University, natassa.athanasiadou@maastrichtuniversity.nl.

citizens over the legislative agenda of the EU.[2] Pursuant to Art. 11, para. 4, TEU, not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal for a legal act of the Union. The right to participate in a European citizens' initiative constitutes one of the specific forms of the general right of every EU citizen to participate in the democratic life of the Union (Art. 10, para. 3, TEU).[3] It enables the involvement of EU citizens in the decision-making process at the EU level, while requiring that they come together with citizens from other Member States and present a proposal not of national, but of European interest. It thus introduces a new dimension of transnational participatory democracy, alongside representative democracy on which the EU is founded,[4] and adds another tool to the political arsenal of EU citizenship.[5] The effective functioning of citizens' initiatives could therefore strengthen the common identity of EU citizens and at the same time enhance the legitimacy of certain Commission proposals being initiated from citizens across the Union.

However, the impact of this instrument so far has been assessed as limited[6] and the European Commission has been criticised for depriving the European citizens' initiative of its effectiveness due to its own institutional practice.[7] On this point, it is important to underline that the Commission's interpretation of the material scope of application of citizens' initiatives has been confirmed in four out of six cases brought before the General Court.[8] The Commission has lost only once in substance, in the *Stop*

[1] On participatory democracy and the scope of Art. 11 TEU, see J. MENDES, *Participation and the Role of Law After Lisbon: A legal View on Article 11 TEU*, in *Common Market Law Review*, 2011, p. 1849 *et seq.*; V. CUESTA LOPEZ, *The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy*, in *European Public Law*, 2010, p. 123 *et seq*.

[2] Art. 11, para. 4, TEU echoes Art. I-47, para. 4, of the non-ratified Constitutional Treaty; see F. SIPALA, *La vie démocratique de l'Union*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds), *Genèse et destinée de la Constitution européenne*, Brussels: Bruylant, 2007, p. 367; M. DOUGAN, *What Are We to Make of the Citizens' Initiative?*, in *Common Market Law Review*, 2011, p. 1808.

[3] See General Court, judgment of 10 May 2017, case T-754/14, *Efler v. Commission*, paras 24 and 37.

[4] Art. 10, para. 1, TEU.

[5] See Art. 24 TFEU; General Court, judgment of 23 April 2018, case T-561/14, *One of Us v. Commission*, paras 72 and 93.

[6] See the second Commission report to the European Parliament and Council on the application of Regulation (EU) 211/2011 on the citizens' initiative, COM(2018) 157 final, p. 2.

[7] See C. SALM, *The Added Value of the European Citizens' Initiative (ECI), and Its Revision*, 13 April 2018, www.europarl.europa.eu, p. 11 *et seq.*

[8] See General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*, which was confirmed by Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Anagnostakis v. Commission*; General Court: judgment of 19 April 2016, case T-44/14, *Constantini and Others v. Commission*; judgment of 10 May 2015, case T-529/13, *Izsak and Dabis v. Commission*; judgment of 5 April 2017, case T-361/14, *HB and Others v. Commission*, which was confirmed by Court of Justice, judgment of 8 February 2018, case C-336/17 P, *HB and Others v. Commission*.

TTIP case,[9] and once for the procedural reason of lack of justification, in the *Minority SafePack* case.[10] It is the latter case, as it will be shown, that has influenced more the general administrative practice, notably from a procedural point of view. Following this case-law and under pressure by the European Parliament,[11] the European Ombudsman[12] and other stakeholders,[13] the Commission has revisited its application practice towards a more flexible approach.[14] In addition, it has submitted a proposal for a new Regulation governing the European citizens' initiative with a view to rendering this instrument more user-friendly and accessible to citizens.[15]

The timing of this revisited administration practice from the Commission's side coincides with the trigger of a series of Brexit-related citizens' initiatives. EU citizens from different Member States have brought forward initiatives aiming either to reverse Brexit or to secure the rights of EU-citizens whose country withdraws from the EU. EU citizens with United Kingdom (UK) nationality are able to organise and participate in European citizens' initiatives until the withdrawal of the UK from the EU takes effect. However, after the entry into force of the withdrawal agreement[16], UK nationals will lose, *inter alia*, this political right, since Art. 11, para. 4, TEU requires that participants of a European citizens' initiative are nationals of a Member State and not mere residents. It is noted that the current version of the draft withdrawal agreement excludes the applicability of the European citizens' initiative during the transition period.[17]

Given the wide public interest that Brexit has generated and the fact that already six European citizens' initiatives have been Brexit-related, this group of initiatives ("Brexit-related initiatives") constitutes a suitable case study in order to illustrate the evolution of the Commission's administrative practice and assess it against general principles underpinning the functioning of EU institutions. It will be argued that the changed Commission's approach towards more flexibility takes better account of the primary law

[9] *Efler v. Commission*, cit.

[10] General Court, judgment of 3 February 2017, case T-646/13, *Minority SafePack v. Commission*.

[11] European Parliament Resolution P8_TA(2015)0382 of 28 October 2015 on the European Citizens' Initiative.

[12] Own initiative report of the European Ombudsman of 4 March 2015.

[13] See for instance the opinion of the European Citizen Action Service (ECAS), *Revising the ECI: How to Make it "Fit for Purpose"*, 20 April 2017, www.euractiv.com.

[14] See the second Commission report COM(2018) 157 final, cit., p. 2 on the non-legislative measures taken by the Commission.

[15] Commission Proposal for a Regulation of the European Parliament and of the Council on the European citizens' initiative, COM(2017) 482 final.

[16] See Art. 50, para. 3, TEU.

[17] See European Commission, Secretariat-General, *Notice to stakeholders on the Withdrawal of the United Kingdom and EU Rules in the Field of the European Citizens' Initiative*, 13 April 2018, which notes that the rules in the draft Withdrawal Agreement concerning transitional arrangements, agreed at negotiators' level between the EU and the UK and published on 19 March 2018, exclude the applicability in the United Kingdom of EU law on the European citizens' initiative during the transition period.

right of EU citizens to participate in the democratic life of the EU. However, a closer look at the way the revisited approach works in practice reveals shortcomings which interfere with the right to good administration and the principles of legal certainty and legitimate expectations. These principles will serve as normative benchmarks when assessing the Commission's practice.

Good administration is a general principle of EU law and a right enshrined in Art. 41 of the Charter of Fundamental Rights of the European Union (Charter), which guarantees that every person has their affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.[18] This right also generates an obligation of the administration to inform adequately all involved persons in an ongoing administrative procedure.[19] From a broader perspective, good administration is connected with good governance and requires that the administration conducts a transparent information policy and provides guidance and assistance to the public.[20]

Legal certainty requires that legal rules and acts are clear and precise, and that legal relationships governed by Community law remain foreseeable.[21] While legal certainty refers to the clarity and foreseeability of the legal framework, the principle of the protection of legitimate expectations concerns the ability to rely on the presumed legality of individual measures and on precise assurances provided by the competent administrative organs.[22]

In the following sections, the role of the Commission as institutional mediator of European citizens' initiatives will be assessed against these principles, which form the procedural guarantees for the effective exercise of the right to participation. The cycle of a European citizens' initiative will be divided in two phases: the registration phase, in which the

[18] See Court of Justice, judgment of 4 April 2017, case C-337/15 P, *European Ombudsman v. Staelen*, para. 34.

[19] See Art. 41, para. 1, let. b), of the Charter on the access to the file which encompasses a more general information obligation; on this obligation see C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart, 2014, p. 88.

[20] On the elements of good governance see Art. 15 TFEU. On the connection between good administration and good governance see H. HOFMANN, G. ROWE, A. TÜRK, *Administrative Law and Policy of the EU*, Oxford: Oxford University Press, 2011, p. 461; C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, cit., p. 209. As example of the obligation of assistance and guidance to the public see Art. 1, para. 2, of Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[21] See Court of Justice: judgment of 15 September 2005, case C-199/03, *Ireland v. Commission*, para. 69; judgment of 29 October 2009, case C-29/08, *SKF*, para. 77; See also T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 242; H. HOFMANN, G. ROWE, A. TÜRK, *Administrative Law and Policy of the EU*, cit., p. 173.

[22] See *inter alia* Court of Justice: judgment of 16 June 1966, case 54/65, *Forges de Châtillon*; judgment of 19 May 1983, case 289/81, *Mavrides v. Parliament*; judgment of 20 March 1997, case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*. See also E. SHARPSTON, *European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom*, in *Northwestern Journal of International Law & Business*, 1990-1991, p. 87 *et seq*.

Commission applies the so-called admissibility test (section II), and the post-registration phase, in which the collection of signatures takes place and the Commission pronounces on an eventually successful initiative (section III). In the last section, the Brexit-related initiatives will be used as a case study illustrating the evolution of the Commission's practice towards more flexibility and the shortcomings which still remain (section IV).

II. Revisiting the admissibility test

The right to put in place a European citizens' initiative as enshrined in Art. 11, para. 4, TEU was rendered concrete through Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, which was adopted on the basis of Art. 24, para. 1, TFEU and entered into force on 1 April 2012.[23]

The procedure which citizens have to follow contains several steps: as a first step, the organisers of an initiative who must be EU citizens and residents of at least seven different member states (Art. 3) are required to apply for registration in the Commission's online register by submitting information on the subject matter and the objectives of the proposed initiative (Art. 4). The Commission has two months to examine the proposed initiative and check whether certain admissibility conditions are fulfilled (Art. 4, para. 2). If the initiative is found admissible and is registered by the Commission, the signature collection process begins (Art. 5). The organisers must collect within 12 months at least one million signatures from at least one quarter of Member States (Art. 7). Once all the conditions relating to the collection of signatures have been fulfilled and verified (Art. 8), the organisers may submit the initiative to the Commission for its consideration (Art. 9). The Commission publishes it and receives the organisers who can now explain their proposal in detail (Art. 10, para. 1, let. a) and b)). In addition, a public hearing is organised at the European Parliament with the participation of other institutions, the Commission included (Art. 11). Finally, within three months following the submission, the Commission sets out in a communication its legal and political conclusions on the initiative, the action it intends to take, if any, and its reasons for taking or not taking that action (Art. 10, para. 1, let. c)).

From this brief outline of the procedure, it becomes apparent that the role of the Commission is crucial at two stages, at the very beginning, at the stage of the admissibility check, and at the very end, when the Commission decides which action it intends to take in order to give effect to a successful initiative (follow-up stage).

The admissibility test encompasses one positive procedural and three negative substantive conditions. The procedural condition requires that the organisers have

[23] For critical remarks on Regulation 211/2011, see M. Dougan, *What Are We to Make of the Citizens' Initiative?*, cit., p. 1807; B. Kaufmann, *Transnational Babystep: The European Citizens' Initiative*, in T. Schiller, M. Setala (eds), *Citizens' Initiatives in Europe; Procedures and Consequences of Agenda-setting by Citizens*, London: Palgrave Macmillan, 2012, p. 229.

formed a citizens' committee of at least seven persons who are residents of at least seven different member states (Art. 3 and Art. 4, para. 2, let. b)). The substantive conditions concern the subject matter of the initiative and require that it is not manifestly abusive, frivolous or vexatious (Art. 4, para. 2, let. c)), it is not manifestly contrary to the values of the Union as set out in Art. 2 TEU (Art. 4, para. 2., let. d)) and, most importantly, as directly dictated by primary law, it does not manifestly fall outside the framework of the Commission's powers to submit a proposal of a legal act of the Union for the purpose of implementing the Treaties.

This latter condition has proven to be the main hurdle for organisers to achieve formal registration of their initiative and it has generated a series of judgments of the General Court. Nineteen initiatives[24] have so far been refused registration so far because, according to the Commission's justification, no legal basis in the Treaties could support a legal act of the Union on their subject matter, two of which were in the end (partially) registered following a court judgment.[25] Various stakeholders, including citizens' organisations,[26] academics,[27] the European Parliament[28] and the European Ombudsman[29] had urged the Commission, before the latest developments, to reconsider its current practice by offering better guidance to organisers and applying the admissibility test in a less strict way, so as to increase the number of successful registrations. However, as aforementioned, from a substantive point of view, the Commission's interpretation of its powers to submit proposals of legal acts of the Union has been confirmed in four out of six cases brought before the General Court.[30]

In the following sub-sections, two main recent developments, which bear also importance for initiatives in the context of the Brexit negotiations, will be analysed: firstly, the judgment in case *Minority SafePack*, which opened the way for partial registration of citizens' initiatives (II.1); secondly, the judgment in case *Stop TTIP*, which enabled the registration of initiatives aiming to influence ongoing negotiations of international agreements (II.2). These evolutions will be assessed against the right to participation and the general principles of good administration, legal certainty and protection of legitimate expectations.

[24] Available at www.ec.europa.eu.

[25] The Initiatives "Stop TTIP" and "Minority SafePack".

[26] See for instance the opinion of the European Citizen Action Service (ECAS), *Revising the ECI: How to Make it "Fit for Purpose"*, cit.

[27] J. ORGAN, *Decommissioning Direct Democracy?*, in *European Constitutional Law Review*, 2014, p. 422; A. KARATZIA, *The European Citizens' Initiative in Practice: Legal Admissibility Concerns*, in *European Law Review*, 2015, p. 509.

[28] European Parliament Resolution (2015)0382, cit.

[29] Own initiative report of the European Ombudsman of 4 March 2015, cit.

[30] See General Court, *Anagnostakis v. Commission*, cit.; *Constantini and Others v. Commission*, cit.; *Izsak and Dabis v. Commission*, cit.; *HB and Others v. Commission*, cit.

II.1. Possibility of partial registration

The main problem in the initial registration practice had been that the Commission perceived an initiative as an inseparable package leading to either acceptance or rejection of the initiative as a whole, without assessing each of its different components.[31] It seemed to apply a centre of gravity test on whether the essence of the initiative lied with the admissible or the non-admissible part and decide accordingly.[32] This approach prevented initiators from understanding which of the elements of their proposal could possibly qualify for resubmission, in order to come back with a new admissible project.[33] The opportunity for the Commission to reconsider this practice was given with the judgment of the General Court in case *Minority SafePack*. With this judgment the General Court annulled the Commission's decision refusing the registration of the initiative "Minority SafePack" on the formal ground of lack of justification, because the Commission did not specify which elements of the initiative where admissible and which were not (incomplete statement of reasons).[34] The General Court left open the legal consequences of partial admissibility.[35] Two different options seem to be possible, namely that partial admissibility leads to full rejection if the inadmissible content constitutes the essence of the initiative, or to partial registration if the content is indeed separable. As for the possibility of partial registration, it could also be argued that this should not be decided alone by the Commission, but that the latter should confer with the organisers whether they consent to partial registration.

The Commission's practice following the judgment in case *Minority SafePack* shows that, from this point onwards, the Commission identifies the elements of the initiative on which it could make a proposal for an act of the Union and accepts registration for these parts.[36] This evolution is welcome and indeed enables the registration of more initiatives, while respecting the principle of conferral of Union powers (Art. 5 TEU). Partial registration also takes better account of the principle of legitimate expectations, since the registered initiative is cleared from its inadmissible parts and therefore both the organisers and potential signatories have in this way an accurate picture of what they can achieve through their initiative.

[31] See for the Commission's interpretation *Minority SafePack v. Commission*, cit., para. 21.

[32] See for the Commission's position *Minority SafePack v. Commission*, cit., para. 28.

[33] See this argument in *Minority SafePack v. Commission*, cit., para. 29.

[34] *Ibid.*, para. 29. For a detailed analysis, see M. Inglese, *Recent Trends in European Citizens' Initiatives: The General Court Case-law and the Commission's Practice*, in *European Public Law*, 2018, p. 335.

[35] See *Minority SafePack v. Commission*, cit., para. 29. This open outcome is in line with Art. 266, para. 1, TFEU which provides that the institution draws the consequences of the annulment of its act.

[36] See the Commission Decision C(2017) 2200 of 29 March 2017 on the partial registration of the initiative "Minority SafePack", following the judgment in *Minority SafePack v. Commission*, cit.; see also the Commission Decision C(2017) 3382 of 16 May 2017 on the proposed citizens' initiative entitled "Let us reduce the wage and economic differences that tear the EU apart!".

However, the problem in the implementation of this practice is that the content of the initiative which is registered in the official Commission register (public website) is not adjusted to the Commission's decision to accept only part of the initiative, but it continues to include the inadmissible parts.[37] The webpage contains a disclaimer that the contents of the page are the sole responsibility of the organisers of the initiatives and they can in no way be taken to reflect the views of the Commission. However, this approach leads to the result that the official register does not provide a clear image of the admissible content of initiatives. This could have the negative effect of creating false expectations for those signatories who sign an initiative on the basis of the content featured on the website without looking concretely into the Commission decision of registration.

This recent practice of partial registration is now crystallised in Art. 6, para. 4, of the Commission Proposal for a Regulation of the European Parliament and Council on the European citizens' initiative ("draft Regulation"),[38] which proposes a fully-fledged mechanism of exchange of views between the Commission and the organisers, when upon request of registration of an initiative the Commission considers that the whole or parts of the initiative manifestly fall(s) outside of the Commission's powers, with a view to enabling at least partial registration of the initiative. This proposed mechanism of interaction between the Commission and the organisers is of major importance, because it will allow organisers to know in advance the Commission's position on the admissibility of their initiative, so as to adjust the content accordingly in order to achieve successful registration. Currently, such exchanges of views and clarifications regarding the content of the proposal appears to happen for the first time before the General Court, when the organisers challenge the non-registration of their initiative. This situation is an obstacle to effective democratic participation and is not considered to be in line with the principle of good administration in the broad sense, which as outlined above,[39] requires the provision of assistance and guidance to interested citizens. The importance of this principle in the context of European citizens' initiatives has been already stressed by the Court.[40] It is thus welcome that the draft Regulation includes an administrative phase of exchange of views between the Commission and the organisers.

The draft Regulation also provides that, when partial registration takes place, the organisers shall ensure that potential signatories are informed of the scope of the registration and of the fact that statements of support are collected only in relation to the scope of the registration of the initiative.[41] This provision is also of major importance towards achieving transparency and clarity about the final admissible content of an ini-

[37] See for instance the description of the initiative "Minority SafePack" following its partial registration, available at ec.europa.eu.

[38] Proposal for a Regulation COM(2017) 482.

[39] See section I.

[40] See General Court, *Anagnostakis v. Commission*, cit., para. 47.

[41] See recital 16 and Art. 6, para. 5, let. b), of Proposal for a Regulation COM(2017) 482 final, cit.

tiative, since, as already mentioned, organisers currently do not adjust the information provided in the official Commission register following a partial registration.

II.2. Possibility of influencing ongoing negotiations

A second important recent development, which bears significance also for initiatives in the context of Brexit, is the outcome in the case *Stop TTIP*. The organisers of the initiative "Stop TTIP" requested the Commission *inter alia* to withdraw its recommendation to the Council to authorise the opening of negotiations for the TTIP[42] The Commission rejected the request for registration on the basis of two arguments.

First, the Commission supported the view that Art. 11, para. 4, TEU refers only to formal Commission proposals leading to the adoption of final acts of the Union producing legal effects *vis-à-vis* third parties and thus excludes Commission recommendations which aim at the adoption of preparatory acts by another institution producing effects only among the institutions, such as the Council decision authorising the opening of negotiations.[43] This Council decision adopted on the basis of Art. 218, para. 3, TEU was perceived by the Commission as a preparatory/intermediate act; the final act of the procedure leading to the adoption of an international agreement would be the Council decision authorising the Commission to conclude the agreement.[44]

The second Commission's argument was that "negative acts" may be the object of citizens' initiatives only if they seek to amend or repeal existing acts, because Art. 11, para. 4, TEU provides that initiatives should aim at the adoption of an act *required for implementing the Treaties* (emphasis added). For this reason, according to the Commission, it is not possible for citizens to reunite in order to stop the institutions from acting for the first time.[45]

The General Court, following an action for annulment by the organisers of the "Stop TTIP" initiative, ruled that citizens could also invite the Commission on the basis of Art. 11, para. 4, TEU to submit recommendations for any act of the Union, including acts which deploy legal effects only among institutions, since the provision of the Treaties does not contain any indication to the contrary.[46] This conclusion was reinforced by the argument that the Council decision authorising the opening of negotiations constitutes a decision in the sense of Art. 288 TFEU and thus an "act of the Union" in the meaning of Art. 11, para. 4, TEU.[47] It is important to note that the General Court used the principle of democracy as a guiding principle when interpreting the legal framework, which is specifically pursued by

[42] See Commission Decision C(2014) 6501 of 10 September 2014 on the refusal to register the European Citizens' Initiative "STOP TTIP".

[43] *Ibid.*, p. 3.

[44] *Ibid.*, p. 2.

[45] *Ibid.*

[46] *Efler v. Commission*, cit., para. 35.

[47] *Ibid.*, para. 36.

the instrument of the European citizens' initiative. This principle requires, according to the judgment, a broad interpretation of the term "legal act of the Union", so as to enable citizens' participation in all legal acts which seek to modify the legal order of the Union, such as the acts preparing the conclusion of an international agreement.[48]

It follows from this judgment that the General Court interpreted the term "proposal" for an act of the Union, as used in Art. 11, para. 4, TEU, in a "non-technical" way and beyond the limits of Art. 17, para. 2, TEU, thus including also Commission recommendations or possibly other acts, with which the Commission gives its opinion to another institution for the adoption of any legal act of the Union. This broad interpretation of the term "proposal" could also be based on the wording of Art. 11, para. 4, TEU which refers to "any appropriate proposal" by the Commission, leaving the specific instrument open. It is interesting to note that the wording of Regulation 211/2011 appears to be more restrictive in this sense referring to "*a* proposal" by the Commission and not "*any appropriate* proposal" as in primary law (emphasis added).

The General Court dismissed also the second argument of the Commission with the justification that the objective of participation in the democratic life of the Union pursued by the mechanism of the European citizens' initiative manifestly includes the power to request the amendment or withdrawal of legal acts, such as the Council decision authorising the opening of negotiations with a view to concluding an international agreement. Acts whose object it is to prevent the signing and conclusion of such an agreement produce, according to the General Court, independent legal effects by preventing, as the case may be, an announced modification of European Union law.[49] The General Court also noted, that, were the Commission's opinion to be followed, the absurdity would be that citizens would have to await the conclusion of an international agreement, so as to be able to invite the institutions to end it.[50]

This judgment bears significant importance, since it clarifies the material scope of the European citizens' initiative. By using the principle of democracy as a normative benchmark, the Court interprets Art. 11, para. 4, TEU in the broadest possible way, with a view to enabling citizen involvement also in the area of ongoing negotiations. The straightforward interpretation of the term "legal act" as encompassing any legal act of the institutions strengthens not only participatory democracy but also legal certainty, because it avoids classifying EU legal acts in categories which would be difficult for potential organisers and citizens to follow.

[48] *Ibid.*, para. 37. The principle of democracy was used as interpretation guideline also in previous cases, see General Court, *Anagnostakis v. Commission*, cit., para. 26; *Constantini and Others v. Commission*, cit., para. 73; *Minority SafePack v. Commission*, cit., para. 18.

[49] *Efler v. Commission*, cit., para. 43. Following this judgment, the Commission registered the initiative "Stop TTIP" with its Commission Decision C(2017) 4725 of 4 July 2017 on the proposed citizens' initiative entitled "Stop TTIP".

[50] *Efler v. Commission*, cit., para. 44.

III. Managing expectations at the post-registration stage

The organisers of an initiative, even after they have cleared the hurdle of admissibility and have managed to gather the necessary number of signatures, have still no guarantee that the Commission will take action in line with their proposal. It is clear from the wording of Art. 11, para. 4, TEU ("inviting") that the Commission enjoys discretion on whether to follow the proposal made by the citizens and which exact action to take ("any appropriate proposal").[51] This means that the instrument of citizens' initiatives constitutes an agenda setting tool and not a way to formally initiate the adoption of a legal act.[52] The right of initiative remains with the Commission. This interpretation according to which the Commission has no legal obligation to make a proposal following the invitation of a successful initiative was confirmed by the recent judgment in the case *One of Us*.[53] The choice made by the Treaty not to confer to an ECI a formal right of initiative can be explained through the Commission's role in the EU institutional balance.[54] Pursuant to Art. 17 TEU, the Commission is in charge – *inter alia* – of safeguarding the general interest of the EU, ensuring respect of the Treaties (Art. 17, para. 1, TEU) and initiating the adoption of Union legal acts (Art. 17, para. 2, TEU). It follows from this last point that the Commission is also responsible for ensuring the coherence of EU policies and actions[55] on the basis of the Union's annual and multiannual programming (Art. 17, para. 1, TEU).[56] Thus, an initiative launched by citizens which contradicts a policy line, especially one based on existing legislation,[57] would provoke a public debate on the issue, but would not necessarily oblige the Commission to change its policy line.

Only four initiatives have so far collected the required one million signatures.[58] The Commission in its communications[59] as a follow-up to these successful initiatives com-

[51] Compare the wording of Art. 11, para. 4, TEU with Art. 225 TFEU on the equivalent right of the European Parliament and Art. 241 TFEU on the equivalent right of the Council, which both use the term "requests". See the preparatory works of the Constitutional Treaty, during which the initial term "requests" was replaced with the term "invites" in Art. I-46 of the draft Constitutional Treaty on the European citizens' initiatives, 12 June 2003, p. 5. On this, see also T. Hieber, *Die Europäische Bürgerinitiative nach dem Vertrag von Lissabon*, Tübingen: Mohr Siebeck, 2014, p. 9.

[52] On this agenda-setting function, see J. Organ, *Decommissioning Direct Democracy?*, cit., p. 424.

[53] *One of Us v. Commission*, cit., paras 111 and 122.

[54] On the "institutional balance" within the EU, see Court of Justice: judgment of 13 June 1958, case 9/56, *Meroni v. High Authority*, p. 152; judgment of 14 April 2015, case C-409/13, *Council v. Commission*, para. 64; *Efler v. Commission*, cit., para. 46; *One of Us v. Commission*, cit., para. 110 *et seq.*

[55] See *Council v. Commission*, cit., para. 87.

[56] On the Union's annual and multiannual programming see B. Martenczuk, *Art. 17 EUV*, in E. Grabitz, M. Hilf, M. Nettesheim (eds), *Das Recht der EU*, Munich: C. H. Beck, 2017, para. 51.

[57] See the Commission's argument in *One of Us v. Commission*, cit., para. 151.

[58] The initiative "Right2Water" on achieving universal access to water and sanitation and on exempting water supply and management from internal market rules; the initiative "Stop Vivisection" with the aim to phase out animal experiments for scientific purposes; the initiative "One of Us" aiming to ban and end the financing of activities which presuppose the destruction of human embryos and the initiative

mitted itself to further strengthening and improving the existing legal framework in the relevant subject matter, but it has been reproached for not fulfilling (all) the objectives of the organisers and for not initiating any new legislation in this regard.[60]

The organisers of the initiative "One of Us" aiming to end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health, have been the first to challenge the Commission's Communication[61] on its intended follow-up (non)action before the General Court. The Commission argued before the Court that its communications on its intended action or non-action do not constitute reviewable acts, because they do not produce legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position.[62] Contrary to the Commission's contentions, the Court ruled that such communications are indeed reviewable, because they are the closure act of an administrative procedure, which the Commission is obliged to issue while respecting certain procedural guarantees, such as the obligation to state reasons.[63] The General Court seems to allow judicial review so as to control the respect of these procedural guarantees, while noting that such review is of a limited nature given the wide margin of appreciation enjoyed by the Commission.[64]

Assessing the Commission's follow-up practice to date against the principles of good administration, legal certainty and legitimate expectations, *two lessons* can be learnt, which might help managing expectations for future successful initiatives and are relevant for Brexit-related initiatives.

III.1. False expectations in case of partially inadmissible initiatives

In the case of two successful initiatives, the Commission indicated in its Communications to the organisers at the very late stage of follow-up that it could not take any action for part of the aims of the initiatives, since they were Member State rather than EU competencies. More specifically, this concerned one of the aims of the initiative

"Ban glyphosate" aiming to ban glyphosate-based herbicides and improve the EU regulatory framework for evaluation of pesticides. All four initiatives can be found at www.ec.europa.eu.

[59] The Commission Communications can be found at ec.europa.eu.

[60] See A. Karatzia, *The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking*, in *Common Market Law Review*, 2017, p. 198; S. Bélier, *Fulfilling the Promise of the ECI, Learning from the Right2Water Experience*, in C. Berg, J. Thomson (eds), *An ECI that Works! Learning from the First Two Years of the European Citizens' Initiative*, Alfter: ECI Campaign, 2014, p. 81. On the follow-up action of the Commission to the so far successful initiatives, see the second Commission report COM(2018) 157 final, cit., p. 10 *et seq.*

[61] Commission Communication COM(2014) 355 of 28 May 2014 on the European Citizens' Initiative "One of us".

[62] *One of Us v. Commission*, cit., para. 69.

[63] *Ibid.*, para. 77 *et seq.*

[64] *Ibid.*, paras 169-170.

"Right2Water" to exempt water supply and management from privatisation[65] and the part of the initiative "One of Us" aiming to ban and end the financing of activities which presuppose the destruction of human embryos for research purposes.[66] The fact that these initiatives were fully registered despite containing certain inadmissible elements created false expectations for the organisers, the signatories as well as the general public that the Commission is competent to propose legislation in line with the initiatives. The Commission has been criticised for not fulfilling (all) the objectives of the organisers and for not initiating any new legislation in this regard,[67] although the real problem was the creation of false expectations from the outset. This example illustrates the importance of clearing the admissibility of the main aims of an initiative at the registration phase. Otherwise, the early admissibility check loses its rationale. The recent Commission practice of clearing the inadmissible parts through partial registration, as explained above, is expected to bring more clarity to the organisers and potential signatories of what they can reasonably expect as the outcome of their initiative.

III.2. Difficulty of influencing ongoing procedures

Another situation which can create frustration and disappointment for organisers is where they aim to influence ongoing procedures, such as the negotiation or signature of international agreements. In the case of the initiative "Stop TTIP", the organisers invited the Commission to recommend to the Council to repeal the negotiating mandate for the TTIP and not to conclude the Comprehensive Economic and Trade Agreement (CETA). The request for registration was made in July 2014, whereas in August 2014 the negotiations for CETA were already concluded and the negotiating mandate for TTIP had already been approved by the Council one year before the request for registration.[68]

Even assuming that there was the political will to repeal the negotiating mandate for TTIP, it is legally unclear whether the Commission has the power to return to the Council with a new recommendation after the Council has already approved the negotiating mandate. More precisely, Art. 293, para. 2, TFEU provides that the Commission can amend its *proposals* as long as the Council has not acted. The same was held by the Court of Justice as regards the Commission's right to withdraw its proposals under certain con-

[65] See Commission Communication COM(2014) 177 of 19 March 2014 on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!".

[66] See Communication COM(2014) 355, cit.

[67] See the reaction of the "Right2Water" citizens' committee at www.right2water.eu. See among the academic commentators A. Karatzia, *The European Citizens' Initiative and the EU Institutional Balance*, cit., p. 198; S. Bélier, *Fulfilling the Promise of the ECI*, cit., p. 81; N. Vogiatzis, *Between Discretion and Control: Reflections on the Institutional Position of the Commission Within the European Citizens' Initiative Process*, in *European Law Journal*, 2017, p. 261; M. Inglese, *Recent Trends in European Citizens' Initiatives*, cit., p. 358.

[68] On the facts, see *Efler v. Commission*, cit., para. 1.

ditions.[69] The Commission must respect this requirement also when it amends or withdraws a proposal following the invitation of a citizens' initiative, meaning that the withdrawal or amendment must take place before the Council has acted, since the Treaty provision does not contain any exceptions. Here, the question arises whether the same limitation should apply also when citizens invite the Commission to amend or withdraw its *recommendation* after the Council has already acted. In case this limitation of Art. 293, para. 2, TFEU is to be applied *mutatis mutandis* also in the context of Art. 218, para. 3, TFEU, it is highly doubtful that the Commission can come back with a new recommendation advising the opposite course of action to that it recommended previously.

The judgment of the General Court does not deal with these aspects at all, stating in a rather minimal way that the citizens' initiative "Stop TTIP" is "far from amounting to an interference in an ongoing legislative procedure".[70] It can be derived from this that the General Court assessed *in abstracto* whether the Commission has a general competence in the subject matter of the initiative without taking into account *in concreto* whether it would be able to submit any appropriate proposal on this matter in terms of timing. The aspect of timing is of particular importance bearing in mind that the organisers also need time for the collection of signatures (a maximum of one year).[71]

The case of *Stop TTIP* shows that the lengthy procedure of a European citizens' initiative does not seem to be best suited for quick reactions from citizens with a view to blocking ongoing procedures. Therefore, unless the revision of Regulation 211/2011 provides for a fast-track procedure, it is difficult to imagine that a citizens' initiative could successfully block the ongoing procedure in relation to the conclusion of an international agreement, since the gathering of signatures has no suspensive effect on the actions of the institutions. The draft Regulation does not provide for such a fast-track procedure and even extends the deadline for the Commission to decide on the follow-up to an initiative from three months under Regulation 211/2011 to five months.[72]

To conclude, in cases where the object of a citizens' initiative constitutes a moving target, the right to participation and the expectations of involved citizens to be able to influence policy making upon collection of the necessary signatures would be better safeguarded if by the end of the procedure their initiative is not deprived of its object. The Commission should therefore reflect on how to protect such expectations through a possibly faster procedure.

In sum, the Commission has in recent years been urged to become more open and flexible when interpreting the admissibility of ECIs. This is a welcome development, but it raises a set of new challenges to protect the legitimate expectations of organisers and

[69] *Council v. Commission*, cit. On this judgment, see D. RITLENG, *Does the European Court of Justice Take Democracy Seriously?*, in *Common Market Law Review*, 2016, p. 11.

[70] *Efler v. Commission*, cit., para. 47.

[71] See Art. 5, para. 5, of Regulation 211/2011, cit.

[72] See Art. 15 of Proposal for a Regulation COM(2017) 482, cit.

signatories as to the real potential of their initiatives. We can therefore observe a tension between a generous admissibility control with a view to enhancing participation and the need to adequately inform the public of what can be actually and pragmatically achieved at the end of the process. The difficulty of solving this tension by striking the right balance is evident also in the case of Brexit-related initiatives. It will be shown that Brexit-related initiatives have benefitted from the Commission's more open approach when applying the admissibility test as it has developed after the aforementioned judgments in cases *Minority SafePack* and *Stop TTIP*, but that no measures have been taken in order to manage the expectations of the citizens involved.

IV. Brexit-related initiatives as a case study

Brexit-related initiatives which have requested registration from the European Commission can be divided into two categories: first, initiatives aiming directly or indirectly at reversing the decision of the UK to withdraw from the EU, and, second, initiatives aiming at securing the rights of citizens whose countries withdraw from the EU. The Commission has applied a strict admissibility test to the first category stressing the sovereign power of the UK regarding the withdrawal decision, while it has shown considerable openness and flexibility *vis-à-vis* the second category.

IV.1. Towards a more flexible admissibility test

The category of initiatives aiming directly or indirectly at reversing the decision of the UK to withdraw from the EU consists of the initiatives "Stop Brexit" and "British friends-stay with us in EU". The main aim of the initiative "Stop Brexit" is that the UK stays in the European Union, without any further specification.[73] As regards the second initiative in this category, "British friends-stay with us in EU", its main aim is to "create a platform which would enable all European citizens to take part in this initiative and to reach a majority of British citizens (including those which live in the EU who were effectively disenfranchised in the original referendum) thereby giving to all British citizens an opportunity to voice their opinion".[74]

The Commission rejected registration of both initiatives with the argument that there is no legal basis in the Treaties which would allow for the adoption of a legal act of the Union in order to prevent a Member State from withdrawing from the Union, since the withdrawal decision is a sovereign decision of Member States according to their own constitutional requirements pursuant to Art. 50, para. 1, TEU.[75] This argumentation

[73] Available at ec.europa.eu.

[74] Available at ec.europa.eu.

[75] Commission Decision C(2017) 2000 of 22 March 2017 on the proposed citizens' initiative entitled "Stop Brexit".

appears to be self-evident for the initiative "Stop Brexit". However, the answer as regards the admissibility of the initiative "British friends-stay with us in EU" does not seem to be straight-forward. This initiative does not request that the Commission adopts an act in order to prevent the withdrawal of the UK, but merely the creation of a platform which will unite EU citizens against the Brexit outcome. The exact mission of this platform is not entirely clear; however, the initiative seems to request facilitation in order to unify the voices of British citizens against Brexit. It thus seems to invite the Commission not to adopt a legal act, but to proceed to a "material act", the creation of a platform.

The instrument of the European citizens' initiative should aim, according to Art. 11, para. 4, TEU, at the adoption of legal acts. The Commission's previous practice shows that the Commission does not exclude taking also measures other than the adoption of legal acts, such as the organisation of conferences, in order to fulfil the aims of an initiative.[76] However, such measures seem to be of a supplementary or preparatory nature *vis-à-vis* the adoption of a legal act. Therefore, it can be concluded that an initiative which aims exclusively at a "material" or "simple" act, such as the creation of a platform, and not of a legal act of the Union, falls outside the scope of the Art. 11, para. 4, TEU. Even though the outcome is the same, the Commission's justification of the rejection of the initiative does not seem to be reflecting the real content of the initiative, leaving the organisers without any sufficient explanation. The situation of unclarity as to the material scope of a European citizens' initiative hampers legal certainty. The Commission missed the opportunity to clarify whether Art. 11, para. 4, TEU fully excludes "material acts" or allows them only complementary, in conjunction with legal acts. This question apparently continues to remain perplexing for citizens.

The second category of initiatives, aiming at securing the rights of citizens whose countries withdraw from the EU, comprises four initiatives. All four initiatives managed to pass the hurdle of admissibility. The first initiative, registered as "European Free Movement Instrument" (known also as the "Choose Freedom initiative"), aimed at giving UK nationals EU passports in the form of a unified *laissez-passer* document,[77] similar to the *laissez-passer* document currently issued for EU officials and other staff members of the EU.[78] According to the Commission's press communication, the College of Commissioners decided to register this initiative, concluding that a legal act of the Union with the content of this initiative could indeed be adopted under the current Treaties.[79] The justification of this positive decision is indeed not evident, especially if it is taken

[76] See Commission Decision C(2015) 3773 of 3 June 2015 on the European Citizens' Initiative "Stop Vivisection".

[77] Available at ec.europa.eu.

[78] See Council Regulation (EU) 1417/2013 of 17 December 2013 laying down the form of the laissez-passer issued by the European Union.

[79] Commission registers European Citizens' Initiative calling for European Free Movement Instrument, in European Commission – Press release, 21 December 2016, europa.eu.

into account that the legal basis of issuance of the current *laissez-passer* documents is Protocol no. 7 on the privileges and immunities of the European Union, which aims to facilitate the functioning of the EU institutions, by conferring *inter alia* certain rights to their staff members. It is thus left unanswered under which basis a legal act of the Union conferring EU passports to non-EU citizens who are not employees of the institutions could be adopted.

This decision is diametrically opposed to the previous Commission practice, during which the Commission was examining in a very thorough and detailed way the possible legal bases for an initiative, without taking positive registration decisions in abstract terms, i.e. without having concretely identified at least one legal basis which could support the aim of the initiative.[80] Furthermore, it is the first time that the press communication refers to a decision of the "College of Commissioners"[81] and that the decision is signed on behalf of the College by the first Vice-President F. Timmermans, while all the previous decisions concerning the registration of European citizens' initiatives were signed by the Commission's Secretary General. This new practice of signature by the first Vice-President F. Timmermans has continued for all subsequent registration decisions to date, demonstrating a clear intention of the Commission to retain control of the admissibility practice at the highest level and to show to the public that it highly values the instrument of the European citizens' initiative. This change of practice is explicitly mentioned in the second Commission report to the European Parliament and Council on the application of Regulation 211/2011.[82]

It is not surprising that this both procedural and substantive change of practice began after the hearings in cases *Minority SafePack* and *Stop TTIP* and shortly before the General Court delivered its judgments in these cases, annulling the Commission decisions not to register the initiatives at stake. For all these reasons, the positive decision of the Commission registering the "European Free Movement Instrument" initiative seems to mark a new era as regards the Commission's practice when assessing the admissibility of initiatives.

This new approach, showing considerable openness when assessing whether the Treaties contain a legal basis which could support the object of the initiative, was confirmed also in three subsequent initiatives related to Brexit and citizens' rights. With the initiative "EU-citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis" (informally known as "Flock Brexit"), the organisers aimed at separating EU citizenship and nationality.[83] In a similar vein, the aim of the initiative "Retaining Euro-

[80] See also the facts mentioned in *Constantini and Others v. Commission*, cit., para. 54, as regards the Commission's detailed assessment of possible legal bases.

[81] Commission registers European Citizens' Initiative calling for European Free Movement Instrument (2016), cit.

[82] Second Commission report COM(2018) final 157, cit., p. 5.

[83] Available at ec.europa.eu.

pean Citizenship" was to "retain the rights of EU citizenship for all those who have already exercised their freedom of movement prior to the departure of a Member State leaving the Union, and for those nationals of a departing State who wish to retain their status as citizens of the Union".[84] Similar to both these initiatives, the last initiative "Permanent European Union Citizenship" invites the Commission to assure all EU citizens that, once attained, the fundamental status of EU citizenship is permanent and their rights acquired.[85]

All three initiatives aim(ed) in essence at the adoption of an act of the Union which would enable EU citizens whose countries withdraw from the Union to retain their rights and status of EU citizen. In all three cases, the Commission responded in its registration decisions that it cannot propose an act of the Union aiming at granting the citizenship of the Union to persons who do not hold the nationality of a Member State. However, it accepted registration of the initiatives based on the understanding that they aim at ensuring that following the withdrawal of a Member State its citizens continue to benefit from similar rights compared to EU citizens.[86] This means that although the subject matter of all three initiatives, as initially submitted by the organisers falls outside the powers of the Commission under the current Treaties, the Commission "re-qualified" their subject matter in a way that would allow acceptance for registration and collection of signatures. Requalification seems to go a step further than partial registration, since the Commission does not merely "clear" an initiative from its inadmissible elements, but it adjusts the subject in a way that could fall within its competences.

IV.2. Shortcomings at the post-registration stage

This openness and cooperative spirit demonstrates a clear change of the Commission's practice and enables a more effective use of the instrument. However, the Commission has not so far ensured in cases of such "re-qualification" of content or in cases of partial registration that the information on an initiative made available to potential signatories and the public corresponds to the exact scope of the registration by the Commission.

The Commission made an attempt to guide organisers towards gathering signatures on the basis of the "requalified" content of the initiative. More specifically, in its positive decision to register the initiative "EU Citizenship for Europeans" the Commission indicated that "statements of support may be collected, based on the understanding that it aims at a proposal for a legal act of the Union that would ensure that, follow-

[84] Available at ec.europa.eu.

[85] Available at ec.europa.eu.

[86] See Commission Decision C(2017) 2001 of 22 March 2017 on the proposed citizens' initiative entitled "EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis"; Commission Decision C(2017) 2002 of 22 March 2017 on the proposed citizens' initiative entitled "Retaining European Citizenship" and Commission Decision C(2018) 4557 of 18 July 2018 on the proposed citizens' initiative entitled "Permanent European Union Citizenship".

ing the withdrawal of a Member State from the EU the citizens of that country can continue to benefit from similar rights to those which they enjoyed whilst that country was a Member State".[87] However, the Commission did not use an equivalent caveat when accepting registration of the similar initiatives "Retaining European Citizenship" and "Permanent European Union Citizenship". This means that the registration of these two initiatives was unconditional and only in the recitals of the registration decisions the Commission mentioned this clarification of scope, although the need for a conditional registration is evident for these initiatives as well.

Furthermore, in all cases, the title and main aims of the initiatives, as displayed in the official Commission register and on the webpages where electronic signatures could/can be gathered, have not been adjusted to the Commission's "requalification" and feature(d) the initial inadmissible aim to decouple EU citizenship from nationality. As aforementioned, the webpage of the official register contains a disclaimer that the content of the page of the register dedicated to each initiative is the sole responsibility of the organisers of the initiatives. However, this approach leads to the result that the official register does not provide a clear image of the admissible content of initiatives.

Given this problematic situation, it is welcome, as mentioned above, that the draft Regulation provides that, when partial registration takes place, the organisers shall ensure that potential signatories are informed of the scope of the registration and of the fact that statements of support are collected only in relation to the scope of the registration of the initiative.[88] The obligation of organisers to accurately inform potential signatories should also apply, when the Commission "requalifies" an initiative, so as to shape it in a way that falls within its powers.

Apart from the organisers, the Commission should also ensure that all information appearing on its official register corresponds to the exact scope of the registered initiative in accordance with the principle of good administration. As outlined above,[89] this principle requires that the Commission provides adequate information and assistance to those involved in an administrative procedure. The different stages of a European citizens' initiative constitute altogether an administrative procedure, which ends with a Communication of the Commission in case of collection of the necessary number of signatures.[90] It is true that the collection of signatures takes place without the Commission's intervention. However, the Commission should ensure that this collection is carried out in a transparent way and on the basis of accurate information. Otherwise, even the mere validity of signatures which were collected on the basis of inaccurate or wrong information can be called into question.

[87] See Commission Decision C(2017) 2001, cit.
[88] See recital 16 and Art. 6, para. 5, let. b), of Proposal for a Regulation COM(2017) 482 final, cit.
[89] See *supra* section I.
[90] *One of Us v. Commission*, cit., para. 76.

So far, none of the Brexit-related initiatives, at least those whose deadline for collection of signatures has expired, have managed to gather sufficient popular support in any Member State in order to reach the required one million signatures and be able to request from the Commission a possible follow-up action in line with their aims.[91] They gained certain popularity in essence only in the UK and did not manage to create a transnational movement, which constitutes the added value of the ECI.[92] Different reasons can be evoked in order to justify this failure, such as the limited network of the organisers, the fragmentation of signatures among similar initiatives or even the lack of interest of other EU citizens to mobilise for the sake of securing the rights of UK nationals. An important reason, connected with the subject matter of this contribution, could also be the non-adjustment of the titles and main objectives of the registered Brexit-related initiatives so as to be in line with the current Treaties. It is possible that the discrepancy between the current Treaties, which make EU citizenship conditional upon holding the nationality of a Member State, and the initiatives' objectives, which aim at decoupling EU citizenship from the nationality of a Member State, have caused loss of credibility of these initiatives.

In order to restore trust in the instrument and to present to the general public a realistic picture of the potential of an initiative, the need for reinforced mechanisms of cooperation among the Commission and the initiatives' organisers are critical.

V. Conclusion

The instrument of the European citizens' initiative, as a tool of participatory democracy and EU citizenship, has the potential to reinforce the legitimacy of the political agenda and strengthen the active participation of EU citizens. The European Commission had been criticised for depriving the European citizens' initiative of its effectiveness due to its own institutional practice, particularly regarding the application of a strict admissibility test and the lack of adequate guidance to organisers. The Commission's practice following the judgment in case *Minority SafePack* shows that, from this point onwards, the Commission identifies the elements of the initiative on the basis of which it could make a proposal for an act of the Union and accepts registration for these parts. This adaptation of the Commission's practice is welcome and indeed enables the registration of more initiatives, while respecting the principle of conferral of Union powers. Partial registration also better takes into account the principle of legitimate expectations, since the registered initiative is cleared from its inadmissible parts and therefore both the organisers and potential signatories have this way an accurate picture of what they can achieve through their initiative.

[91] See the archived initiatives with insufficient support at ec.europa.eu.

[92] On the strengthening of trans-European society as an added value element of the ECI, see C. Salm, *The Added Value of the European Citizens' Initiative (ECI)*, cit., p. 14.

The effective use of the instrument of citizens' initiatives depends also on a clear understanding of citizens as to its material scope of application. The judgment in case *Stop TTIP* has contributed to enhancing legal clarity in this respect. However, the Commission, through its reasoning when accepting or rejecting initiatives, can further reinforce legal certainty, by explaining clearly to citizens what types of acts may fall within the material scope of an initiative. As the analysis of the admissibility of the initiative "British friends-stay with us in EU", which aimed at creating a discussion platform for Brexit, has shown, it remains unclear whether material acts could be the (principal) object of an initiative.

Brexit-related initiatives aiming at securing the rights of UK citizens have benefitted from the Commission's more open approach when assessing the admissibility of initiatives. When treating these initiatives, the Commission went even a step further than partial registration and showed a more proactive stance: it did not merely "clear" an initiative from its inadmissible elements, but it adjusted, i.e. requalified, the subject in a way that could fall within its competences.

However, the problem in the concrete implementation of this new approach is that the content of the initiative which is registered in the official Commission register (public website) is not adjusted to the Commission's decision which may only have accepted part of the initiative or which "requalified" the object but continues to include the inadmissible parts. This could have the negative effect of creating false expectations for the signatories of the initiative, who will sign the initiative on the basis of the content featured on the website without looking concretely into the Commission decision of registration.

The impact of this instrument in the context of the Brexit negotiations can be so far assessed as limited. None of the Brexit-related initiatives have managed so far to gather sufficient popular support in order to reach the required one million signatures and be able to request from the Commission a possible follow-up action in line with their aims. A possible reason for this poor outcome could be the lack of credibility of these initiatives, whose titles and main objectives, as presented throughout the signature collection process, were at odds with the current Treaties as regards the relationship between EU citizenship and nationality of a Member State. The Commission should therefore guide the organisers of an initiative as to how to adjust its title and content in accordance with the registration decision. Such obligations of assistance and cooperation derive from the principle of good administration understood in a broad sense through the lens of good governance. The evolution of the Commission's role from a mere respondent to a facilitator or even supporter of citizens' initiatives could potentially enhance the institutional role of this instrument. The initiation of six Brexit-related initiatives clearly demonstrates that, in a pressing situation for citizens' rights, the European citizens' initiative constitutes the main tool for EU citizens to raise their voices together. It remains to be seen whether these voices will gain force in the future.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

THE POSTING OF WORKERS DIRECTIVE REVISED: ENHANCING THE PROTECTION OF WORKERS IN THE CROSS-BORDER PROVISION OF SERVICES

PIET VAN NUFFEL* AND SOFIA AFANASJEVA**

ABSTRACT: In March 2016 the European Commission proposed a revision of the Posting of Workers Directive (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). Two years later, the co-legislators have adopted the revised Directive (Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services). This *Article* seeks to explain how this reform builds on the principles developed in the case law of the Court of Justice and eventually managed to upgrade the Posting of Workers Directive into an extended package of protective labour rules that nevertheless remains within the boundaries of internal market legislation.

KEYWORDS: free movement of services – protection of workers – posted workers – Posting of Workers Directive – Enforcement Directive – equal pay for equal work.

* Associate Professor, Institute for European Law, KU Leuven; Member of the Cabinet of Marianne Thyssen, Commissioner for Employment, Social affairs, Skills and Labour mobility, piet.vannuffel@kuleuven.be. All views are personal. The Authors would like to thank Jonathan Tomkin, Manuel Kellerbauer and Elise Muir for their comments on an earlier version of this *Article*.

** Master of Law graduate, KU Leuven and University of Zürich; former trainee at the Cabinet of Commissioner Marianne Thyssen, s.afanasjeva@gmail.com.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/276

I. Introduction

In an internal market where undertakings are free to provide services in other Member States, it is understandable that undertakings prefer carrying out cross-border services with their own employees rather than by having recourse to local subcontractors and local workforce. That is particularly the case when "posting" their own employees allows these undertakings to provide the services at lower costs than local undertakings. Where such "posted" workers constitute cheaper work force than local workers, it is equally understandable that local undertakings perceive that posting of workers as an instrument of unfair competition, or even as "social dumping". Regulating the increasing use of posted workers, a phenomenon that finds itself at the intersection of internal market and labour protection rules, has turned out to be politically sensitive. In the United Kingdom (UK), the issue of low-wage foreign workforce "stealing local jobs" has been intensively exploited by both "Leave" and "Remain" campaigns during the Brexit vote in June 2016.[1] Migration and free movement constituted central topics in the "Leave" campaign, which presented closing the borders to free movement as a solution to the migration issue. Some months earlier, in March 2016, upon the request of several Member States and considering that with the enlargement the existing legal framework for posted workers was not suitable anymore, the European Commission presented its proposal for a revision of the Posting of Workers Directive (the PoW Directive).[2]

Being high on the political agenda of many Member States, it was no surprise that this proposal became the subject of much controversy. Witness to this is the fact that French President Macron turned posting of workers into an important selling point of his campaign for the 2017 presidential elections. Together with other Western European Member States, France has been facing wage competition from workers posted from Eastern European Member States with lower wage levels, leading to the perception of posting of workers as an issue that directly opposes East to West within the EU. It is therefore a success that the Commission's proposal led in Spring 2018 to a widely supported political agreement on a revised PoW Directive.[3]

This *Article* seeks to explain how this reform builds on the principles developed in the case law of the Court of Justice and eventually managed to upgrade the PoW Directive, which is based on the Treaty provisions on free movement of services, into an extended package of protective labour rules that nevertheless remains within the boundaries of

[1] E.g., N. Farage, *Why we must vote Leave in the EU referendum,* in *Express*, 21 June 2016, www.express.co.uk and L. McCluskey, *A Brexit won't stop cheap labour coming to Britain*, in *The Guardian*, 20 June 2016, www.theguardian.com.

[2] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[3] Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

internal market legislation. There is still some uncertainty on what the revised PoW Directive will mean to the departing UK. According to the draft withdrawal agreement,[4] during the 21 months of the transition period lasting until 31 December 2020, the UK will still apply EU law, meaning that the revised PoW Directive, which is to be transposed by 30 July 2020, will briefly apply also to the UK. This is, of course, in case there is an agreed deal between the parties. Although migration and labour mobility played an important role in the Brexit debate, posting of workers as such has not been a key issue and the PoW Directive is hardly mentioned in the draft withdrawal agreement.[5] It is only if, post-Brexit, the UK agrees to stay in the internal market, for example within the European Economic Area, that the revised Directive would remain further applicable.

II. Posting of workers on European labour markets

The term "posted workers" refers to workers who are legally employed by an undertaking established in one Member State (the sending or home Member State) and sent by that undertaking to another (receiving or host) Member State in order to carry out work in the host Member State. Typically, such work is carried out under a contract concluded by the sending undertaking for the provision of services in the host Member State. There may also be "intra-group posting", when an undertaking sends an employee to work in a subsidiary in another Member State. A third category of posted workers covers workers hired out by temporary work agencies established in the home Member State to a user undertaking in the host Member State.[6]

Posting of workers is an increasing phenomenon within the EU. Since 2011, the overall number of posted workers is estimated to have increased by 58 per cent.[7] Posted workers are highly concentrated in specific sectors, such as construction and manufacturing, and somewhat less in education, health, social work services and business services.[8] Still, only a limited number of Member States is affected by the presence of posted workers. In 2016, the pre-2004 Member States constituted the destination of 85 per cent of total postings: among the countries most affected are Germany, France and Belgium as top 3 receiving countries (which altogether received 50 per cent of total postings in Europe) and Poland, Germany and Slovenia as top sending countries.[9] The UK is ranked seventh of receiving countries, with a number of workers received (57.000) that is only slightly higher than the

[4] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018.

[5] There is only a reference to provisions of jurisdiction contained in the PoW Directive as applying in legal proceedings instituted before the transition period. *Ibid.*, Art. 63, para. 1, let. b).

[6] See the categories of workers covered by Art. 1, para. 3, of the PoW Directive.

[7] F. De Wispelaere, J. Pacolet, *Posting of workers – Report on A1 Portable Documents issued in 2016*, Report to the Commission, December 2017, ec.europa.eu, p. 9.

[8] *Ibid.*, p. 27.

[9] *Ibid.*, p. 20.

number of workers sent out (49.000).[10] In contrast, Germany, France and Belgium received – with 440.000, 203.000 and 178.000 workers, respectively – far more workers posted than they sent (difference of 208.000, 71.000 and 108.000 workers, respectively).[11] In several sectors, Member States face an increasing number of workers being posted from Central or Eastern Europe Member States with generally lower wage levels. Most postings from low-wage Member States occur in the industry sector, with 45 per cent to be situated in the construction sector. In that sector, Member States such as Belgium and Austria have been experiencing a particularly large number of posted workers.[12] Such phenomenon is less measurable in the UK,[13] although studies indicate that also in the UK construction sector posted workers may have been substituting for local workers.[14]

Nevertheless, it must be stressed that looking at the general labour market, posting of workers remains a relatively limited phenomenon. Only 0.6 per cent of the EU workforce can be considered to be posted, which constitutes around 2 million people. Not more than one third of these postings concerns postings from low-wage to high-wage Member States.[15] There are indeed also a large number of postings between high-wage Member States, in particular in the services sector. The average duration of the posting period is less than four months.[16]

Posted workers remain employed by their employer in the home Member State and are sent abroad only temporarily. Their situation is therefore covered by the freedom to provide services, not the free movement of workers.[17] Since posted workers are sent abroad only temporarily, they do not intend to integrate in the labour market of the host Member State and thus remain covered by the social security system of the home Member State. Such workers will be issued a Portable Document A1 in their home Member State, confirming that contributions are paid for them in that Member State.[18] Under the Regulation on the coordination of social security systems, a posted worker continues to be subject to the social security legislation of the home Member State if the duration of

[10] *Ibid.*, p. 19 and 21.

[11] *Ibid.*, pp. 21-22.

[12] *Ibid.*, p. 46 (in Belgium construction sector: 27 per cent of employment; in Austrian construction sector: 19 per cent).

[13] *Ibid.*, p. 35 (posted workers representing 0,8 per cent of construction sector).

[14] See F. De Wispelaere J. Pacolet, *An ad hoc statistical analysis on short term mobility – economic value of posting of workers. The impact of intra-EU cross-border services, with special attention to the construction sector*, Leuven: HIVA KU Leuven, 2016, p. 19.

[15] Commission, *Posting of workers*, cit., p. 9-10.

[16] *Ibid.*, p. 31 (average of 101 days in 2016).

[17] See Court of Justice, judgment of 25 October 2001, case C-49/98, *Finalarte*, paras 22-23.

[18] See Administrative Commission for the Coordination of national social security systems, Decision A1 of 12 June 2009 the. For that purpose, the Portable Document A1 has replaced since May 2010 the previous E101 document.

the work in the host Member State does not exceed 24 months.[19] This prevents excessive administrative burden for posting undertakings and national authorities, which would otherwise have to change the applicable social security system for every worker performing services in another Member State for a limited time.

If the UK leaves the single market, the posting of workers to the UK will not disappear. However, undertakings that will post their employees to the UK will then need to comply with the rules applicable to foreign undertakings and their employees. Likewise, UK undertakings will be able to post workers to EU Member States only under the conditions applicable to third country nationals. The administrative requirements and limitations to be imposed under those legal frameworks – which are not discussed in this *Article* – may make such posting less attractive for sending undertakings than currently the case.[20]

III. Introducing workers' protection through the Posting of Workers Directive

It was the accession of Spain and Portugal in 1986 that started fuelling fears of large groups of workers from low-wage Member States entering the labour market of high-wage Member States after the Court of Justice had confirmed that companies could rely on the free movement of services to temporarily bring in their own workforce.[21] The Court's case law on the balance to be struck between free movement and workers' protection inspired the adoption of the PoW Directive in 1996 and also the Commission's 2016 proposal to revise that Directive.

III.1. The Court of Justice and workers' protection in the context of cross-border services

In the absence of legislative guidance, the Court of Justice was tasked with a challenging role. On the one hand, the free movement of services as a fundamental freedom had to be preserved against undue regulatory obstacles. On the other hand, the protection of workers and social policy goals had to be recognised as legitimate interests capable of justifying restrictions to that economic freedom. The Court could not escape the finding that measures imposed by a host Member State that put an obstacle to undertakings established in another Member State in their provision of services in the host Member State have to be qualified as "restrictions" to free movement. However, under the Court's established case law on free movement, such finding does not imply that any measures laid down by the host Member State to protect workers becomes subordinated to the

[19] Art. 12, para. 1, of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[20] Art. 1, para. 4, of the PoW Directive, cit., rules out that undertakings established in third countries could be given a more favourable treatment than undertakings established within the EU.

[21] See P. Watson, *EU Social and Employment Law*, Oxford: Oxford University Press, 2014, p. 281 and 301.

objective of market liberalisation underpinning the Treaty provisions on free movement. Restrictions to free movement may indeed be justified provided that they apply without distinction to all undertakings operating in the host Member State and remain proportionate to the pursued objective.[22]

In a number of cases, the Court concluded that social legislation restricting the provision of services from other Member States went beyond what was necessary to safeguard workers' rights, for example because service providers were required to pay social contributions for social benefits to which the undertakings already contributed in the home Member State.[23] At the same time, however, the Court confirmed that a host Member State may invoke social policy objectives to impose requirements that effectively ensure workers' protection. Thus, the Court considered in *Seco* that the free movement of services does not prevent a host Member State from applying legislation or collective labour agreements setting minimum wages to be paid to any person employed, even temporarily, within its territory, irrespective of the Member State where the employer is established, and from enforcing such rules by appropriate means.[24] In *Rush Portuguesa* the Court confirmed the host Member State's freedom to apply legislation protecting workers, without limiting it to minimum wages.[25] Those rulings prompted the Commission to come up in 1991 with a proposal for legislation "to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country".[26]

III.2. The Posting of Workers Directive laying down a nucleus of protective rights

The Commission's proposal of August 1991 acknowledged that a balance needed to be struck between opposing principles: free competition across the borders to realise the full potential of the internal market, even when the main comparative advantage of some Member States is a lower wage cost, and having Member States set minimum pay levels applicable to all workers on their territory to ensure a minimum standard of living.[27] It led to an exhaustive[28] list of rights set out in Art. 3, para. 1, of the PoW Directive, which not only

[22] See *Finalarte*, cit., paras 31-32; Court of Justice: judgment of 24 January 2002, case C-164/99, *Portugaia Construções*, para. 19; judgment of 12 October 2004, case C-60/03, *Wolff & Müller*, para. 34.

[23] See Court of Justice: judgment of 3 February 1982, joined cases 62/81 and 63/81, *Seco v. EVI*, para. 9; judgment of 28 March 1996, case C-272/94, *Guiot*, para. 22.

[24] *Seco and Desquenne & Giral*, cit., para. 14. See also *Guiot*, cit., para. 12; Court of Justice: judgment of 23 November 1999, joined cases C-369/96 and C-376/96, *Arblade*, para. 43.

[25] Court of Justice, judgment of 27 March 1990, case C-113/89, *Rush Portuguesa*, para.18.

[26] Recital 13 of the PoW Directive, cit..

[27] Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final. Amended Proposal COM(93) 225 final was submitted in June 1993.

[28] Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri*, paras 80-81. See also *infra*, section III.3.

aims at protecting the posted workers, but also at ensuring that the level of protection ensured by the PoW Directive does not render the cross-border provision of services too burdensome or costly for foreign undertakings. The "nucleus" of rights deals with those issues which are of immediate interest to the worker and the posting undertaking during the posting assignment, such as minimum rates of pay, including overtime pay, paid annual holidays, maximum work periods, and health, safety and hygiene at work. These terms and conditions have to be guaranteed by the posting undertaking based on the legal framework applicable in the host Member State. The list excludes provisions on dismissal and standards relating to the representation of workers, as those are not relevant for the short-term duration of the work provided in the home Member State.

The PoW Directive introduced that nucleus of mandatory rules for all posted workers, leaving the definition of a worker to be determined by the host Member State's legislation. Since the nucleus of the protective rights is applied in accordance with the host Member State rules, it would indeed not have made sense to regulate situations for which no protection is provided under that Member State's law. The PoW Directive does not set any maximum period for the posting activities falling within its scope. Likewise, it does not define any minimum duration, although it contains an exemption for workers posted less than eight days for assembling or installing goods and also allows Member States to exempt posting activities which do not exceed one month or which concern "not significant work". The Court of Justice however indicated that there may be circumstances, with several and brief crossing of borders, where it could be disproportionate for a host Member State to apply its legislation on minimum wages.[29] In the sector of international road transport, a host Member State can indeed be expected to require minimum wages only for posted workers having established a sufficient link with the territory of that Member State.[30]

The issue that stirred most debate in the adoption process of the PoW Directive, and continued to do so after its transposition, has been the application of the requirement to pay posted workers minimum rates of pay. The PoW Directive specifies that it is for the host Member State's law and practice to define the concept of minimum rates of pay (*Art.* 3, para. 1), indicating that allowances specific to the posting must be considered part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred by workers, such as expenditure on travel, board and lodging (Art. 3, para. 7). As the PoW Directive does not indicate what exactly falls under the notion of minimum rates of pay, it has been for the national courts to determine that notion on a case-by-case basis. When asked to clarify that notion, the Court of Justice held that it is for the host Member State's law to define the constituent elements of minimum rates of pay, while indicating that national

[29] Court of Justice, judgment of 15 March 2001, case C-165/98, *Mazzoleni and ISA*, paras 30-39.

[30] See recital 10 of the Commission Proposal of 16 December 1996 for a Directive amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, COM(2016)128 final.

legislation or collective agreements should not have the effect of impeding the freedom to provide services.[31] The notion of minimum wage does not include allowances or supplements which the law or practice of the host Member State does not define as constituent elements of the minimum wage and which alter the relationship between the service provided by the worker and the consideration received in return.[32]

Further clarification on the notion of minimum wage resulted from the Finish case *Sähköalojen ammattiliitto*[33] concerning a trade union in the electricity sector bringing pay claims assigned to it by workers posted to Finland by a Polish undertaking. Several allowances included in a collective agreement had not been taken into account by the Polish employer. The Court qualified the daily allowances imposed by the agreement as allowances specific to the posting within the meaning of Art. 3, para. 7, of the PoW Directive, as they intended to make up for the disadvantages entailed by the worker being removed from his usual working environment.[34] Thus, these allowances had to be considered part of minimum wage and had to be paid to posted workers without discrimination. The same applied to travelling time compensation, applicable whenever a worker had to travel every day for more than one hour from his lodging to the place of work, provided that the posted workers were in such situation.[35] However, other elements, like coverage for accommodation costs and meal vouchers were not considered constituent elements of pay, as they were paid to compensate for living costs actually incurred by workers during the posting assignment.[36]

III.3. Continued controversy in the balance between free movement and social protection

At the time of adoption of the PoW Directive, the Commission considered that legal framework fit for the purpose of ensuring a fair balance amongst the interests concerned by removing obstacles to the freedom to provide services and at the same time providing legal clarity on the nucleus of the working conditions applicable to posted workers.[37]

[31] Court of Justice, judgment of 12 February 2015, case C-396/13, *Sähköalojen ammattiliitto*, para. 34.

[32] Court of Justice, judgment of 14 April 2005, case C-341/02, *Commission v. Germany*, paras 31-39 (considering regularly paid "13th and 14th months" supplements as elements of minimum rates of pay, but not quality bonuses or bonuses for dangerous and heavy work paid to workers when they are required to carry out additional work or work under certain conditions). See also Court of Justice, judgment of 7 November 2013, case C-522/12, *Tevfik Isbir*, paras 40-44.

[33] *Sähköalojen ammattiliitto*, cit.

[34] *Ibid.*, para. 49.

[35] *Ibid.*, paras 53-57.

[36] *Ibid.*, paras 58-63.

[37] Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final, p. 14. See also K. Maslauskaite, *Posted Workers in the EU: State of Play and Regulatory Evolution*, in *Jacques Delors Institute Policy Paper*, no. 107, 2014 and C. Dhéret,

However, the subsequent enlargement from 15 to 25 and eventually 28 Member States brought enormous diversity to the Union, bringing together countries with very different wage levels and social security coverage.

At the same time, the Court of Justice had had to rule on several cases involving national legislation protecting workers, and some of these measures were found to be inconsistent with the Treaty provisions on free movement and/or the provisions of the PoW Directive. Most often, the proportionality test proved not to be fulfilled.[38] Various administrative requirements, such as requirements to obtain work permits for posted workers, were considered disproportionate as alternative measures were available that would be less restrictive to free movement, such as obligations to report beforehand on the presence of posted workers, the anticipated duration of their presence and the provision of services justifying the posting.[39] The Court considered other measures justified for the proper enforcement of the posting rules, including requirements for posting undertakings to facilitate controls by retaining on the work site essential documents, such as the employment contract, pay-slips and time-sheets, as well as the obligation to have these documents available in the language of the host Member State.[40]

Importantly, the Court of Justice also recognised that a host Member State may not only invoke the objective of workers' protection, but also the objective to prevent unfair competition on the part of posting undertakings paying their workers at a rate less than the minimum rate of pay.[41] The Court also made clear that in so far a host Member State applies measures pursuing an objective of public interest, such as minimum rates of pay, measures intended to facilitate posted workers to usefully assert their rights against their employer should equally be accepted. This is the case, for example, for provisions enabling, in case of contractors making use of a subcontractor, the subcontractor's workers to hold the first undertaking liable for payment of the minimum rate of pay.[42]

Although these rulings confirmed the Court's willingness to preserve workers' protection and fair competition when assessing national measures under the PoW Directive, full trust in the Court's willingness to give adequate weight to workers' rights became undermined by 2007 and 2008 case law on the protection of collective bargaining and collective action in a context of cross-border provision of services. It should be noted that

A. GHIMIS, *The Revision of the Posted Workers Directive: Towards a Sufficient Policy Adjustment?*, in *European Policy Centre*, 20 April 2016, www.epc.eu.

[38] See also P. SYRPIS, *EU Secondary Legislation and its Impact on Derogations from Free Movement*, in N. NIC SHUIBHNE, P. KOUTRAKOS, P. SYRPIS (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Oxford, Portland: Hart, 2016.

[39] See, for example, Court of Justice: judgment of 21 October 2004, case C-445/03, *Commission v. Luxembourg*, para. 31; judgment of 7 October 2010, case C-515/08, *dos Santos Palhota*, paras 51-60.

[40] *Commission v. Germany*, cit., para. 71.

[41] *Wolff & Müller*, cit., para. 41. To be noted that the PoW Directive, in recital 5, already referred to the transnational provision of services requiring "a climate of fair competition".

[42] *Wolff & Müller*, cit., paras 37-40.

in many Member States matters of pay, including minimum rates of pay, as well as other working conditions are traditionally determined by social partners through collective labour agreements. In its Art. 3, para. 1, the PoW Directive already provided that in the construction sector, an undertaking posting workers must not only apply the rights set out in the host Member State's legislation, but also those laid down by collective agreements that have been declared universally applicable.[43] In addition, the increasing presence of workers posted by undertakings from low-wage Member States prompted trade unions to take collective action against such undertakings, amongst which the famous *Laval* case[44] concerning a Latvian undertaking posting workers to Swedish construction sites. Swedish trade unions had initiated negotiations requiring Laval to pay its posted workers the Swedish usual hourly wage. The break-up of these negotiations lead to a blockage of the construction site, following which the dispute was brought to a Swedish court, which referred questions on the compatibility of the collective action with the freedom to provide services to the Court of Justice. Amongst others, the Court had to clarify whether the PoW Directive allows imposing conditions that do not result from universally applicable collective agreements and whether, more generally, other conditions can be imposed than the nucleus of protective rights set out in the PoW Directive.

On the first point, it was indicated above that Art. 3, para. 1, of the PoW Directive allows collective agreements that have been declared universally applicable to be taken into account when imposing minimum rates of pay in the construction sector. Art. 3, para. 8, of the PoW Directive allows Member States to rely also on collective agreements in the absence of a system to declare such agreements universally applicable, provided that these agreements are de facto generally applicable to all undertakings in the industry concerned. The purpose of both provisions is to prevent posted workers from being made subject to collective agreements that local undertakings are not obliged to apply. However, the Swedish situation was rather particular in the sense that no legislation or collective agreements existed containing minimum rates of pay, but only a practice whereby management and labour set the applicable wage rates (not the minimum rates) by way of collective negotiations on a case-by-case basis, at the place of work. In the absence of any public or collectively agreed provision on which foreign service providers could have relied, the Court concluded that there was no question of minimum rates of pay determined in accordance with Art. 3, paras 1 and 8, of the PoW Directive.[45] Since the collective action could not be justified by the PoW Directive, it had to be assessed in the

[43] Under Art. 3, para. 1, of the PoW Directive, cit., this is the case for "the activities referred to in the Annex". The Annex clarifies that this concerns building work relating to the construction, repair, upkeep, alteration or demolition of buildings.

[44] *Laval un Partneri*, cit.

[45] *Ibid.*, paras 69-71. See also S. FEENSTRA, *Detachering van werknemers in het kader van het verrichten van diensten – Het arbeidsrechtelijke kader – Richtlijn 96/71/EG*, in Y. JORENS (ed), *Handboek Europese detachering en vrij verkeer van diensten*, Bruges: Die Keure, 2009, p. 268.

light of the Treaty provision on free movement of services. In that context, the Court considered that the negotiations which the collective action sought to impose on Laval were not justified as this employer was already, pursuant to the PoW Directive, required to comply with a nucleus of mandatory rules and faced, in the absence of any transparent regulatory system, excessive difficulties to determine the additional obligations with which it was required to comply as regards pay.[46]

Second, the Court considered in *Laval* that by establishing the minimum protective rights that have to be respected by posting undertaking, Art. 3, para. 1, of the PoW Directive does not allow the host Member State to make the provision of services in its territory conditional on the observance of other terms and conditions.[47] Some authors consider that the Court's ruling went against indications in the PoW Directive that the Directive does not prevent conditions which are more favourable to workers,[48] arguing that the Court transformed into a "ceiling" what was supposed to be a "floor".[49] This alternative interpretation of the PoW Directive is however difficult to square with the PoW Directive's objective to create legal certainty on the rules that a host Member State may impose on foreign service providers. The level of protection which must be ensured to posted workers has indeed been limited to the protective rights set out in Art. 3, para. 1, of the PoW Directive, without prejudice to any further-going protection that the posting undertaking would accord them on its own volition or in accordance with the terms and conditions required under the law of the home Member State.[50]

Whereas both conclusions could thus arguably be derived from the PoW Directive's provisions, the *Laval* judgment was badly received in trade unions' circles. For a large part, this can be explained by the fact that the judgment was pronounced only one week after the judgment in the *Viking* case,[51] where the Court equally considered collective action by a trade union to constitute a restriction of free movement that could not be justified by the objective of protecting workers' rights. In two subsequent judgments (*Rüffert* and *Commission v. Luxembourg*),[52] the Court also concluded that a host Member

[46] *Laval un Partneri*, cit., paras 108-110.

[47] *Ibid.*, paras 80-81.

[48] Art. 3, para. 7 and recital 17 of PoW Directive, cit., indicate that the mandatory rules for minimum protection must not prevent the application of terms and conditions of employment which are more favourable to workers.

[49] See, e.g., V. HATZOPOULOS, *Actively talking to each other: the Court and political institutions*, in M. DAWSON, B. DE WITTE, E. MUIR (eds), *Judicial Activism at the European Court of Justice,* Cheltenham: Edward Elgar, 2013, pp. 121-122.

[50] *Laval un Partneri*, cit., para. 81. See also P. WATSON, *EU Social and Employment Law*, cit., p. 299; S. FEENSTRA, *Detachering van werknemers in het kader van het verrichten van diensten*, cit., p. 293 *et seq*.

[51] Court of Justice, judgment of 11 December 2007, case C-438/05, *Viking*.

[52] Court of Justice: judgment of 3 April 2008, case C-346/06, *Rüffert*; judgment of 19 June 2008, case C-319/06, *Commission v. Luxembourg*.

State's protective measures were not justified under the PoW Directive.[53] In the light of the increasing posting of workers from low-wage Member States to high-wage Member States, the frustration of trade unions and other advocates of more extensive instruments against "social dumping" can be understood. Still, it can reasonably be argued that the Court did no more than interpret the PoW Directive in accordance with the PoW Directive's double objective to create legal certainty for service providers and ensure workers' protection by laying down a nucleus of protective rights that the host Member State must guarantee to all workers carrying out work on its territory.[54] Interpreting the PoW Directive as allowing host Member States to impose further-going protective rules would have undermined the effectiveness of the PoW Directive and opened the door to discrimination against service providers exercising their free movement right.[55]

For example, in *Rüffert*[56] the Court had to rule on German legislation which allowed public tenders for construction projects to be awarded only to undertakings committing to pay their employees the minimum wage prescribed by the collective agreement in the place where the service is provided. In the case at hand, a contract with a German undertaking had been terminated when that undertaking's Polish subcontractor turned out to be paying wages below the level indicated in the collective agreement covering the sector. That agreement had however not been declared universally applicable within the meaning of Art. 3, para. 1, of the PoW Directive. Neither could the agreement fall within the scope of Art. 3, para. 8, of the PoW Directive, which only applies where – unlike in Germany – there is no system to declare collective agreements universally applicable. Therefore, the Court concluded that the rates of pay fixed by the collective agreement in question could not be considered minimum rates of pay and could under the PoW Directive not be imposed on the posting undertaking.[57] Otherwise, the Court would indeed have allowed the host Member State to impose conditions on posted workers that were not obligatory to local undertakings. In its later *RegioPost* judgment[58] the Court made clear that where minimum wage conditions are effectively fixed by law, even only within a region of the host Member State, it is not against the PoW Directive or free movement to

[53] These four judgments are also referred to as the "Laval-Quartet". See J. MALMBERG, *The Impact of the ECJ Judgments on Viking, Laval, Rüffert and Luxembourg on the Practice of Collective Bargaining and the Effectiveness of Social Action*, Study for the European Parliament, May 2010.

[54] For alternative views on the "Laval-Quartet" rulings, see, for example, A.C.L. DAVIES, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, in *Industrial Law Journal*, 2008, p. 126 *et seq.*; P. SYRPIS, T. NOVITZ, *Economic and Social Rights in Conflict: Political and Judicial Approaches to Their of 3 April 2008 Reconciliation*, in *European Law Review*, 2018, p. 411 *et seq*. and C. BARNARD, *Social Dumping or Dumping Socialism?*, in *Cambridge Law Journal*, 2008, p. 262 *et seq*.

[55] See also A. ROSAS, *Finis Europae socialis?*, in G. COHEN-JONATHAN, V. CONSTANTINESCO, V. MICHEL (eds), *Chemins d'Europe – Mélanges en honneur de Jean-Paul Jacqué*, Paris: Dalloz, 2010, p. 591 *et seq*.

[56] *Rüffert*, cit.

[57] *Ibid.*, para. 31.

[58] Court of Justice, judgment of 17 November 2015, case C-115/14, *RegioPost*.

require contractors and their subcontractors to respect those conditions. Unlike in *Rüffert*, the obligation for the employer had in *RegioPost* also been laid down in a transparent and non-discriminatory manner.

IV. Clarification of the rules through the Enforcement Directive

The wage differences that caused posting of workers to increase have unfortunately also led to increased attempts at fraud or circumvention of the rules by undertakings seeking to exploit business opportunities with underpaid workers. Circumvention of the posting rules goes from non-compliance with the labour law or social security regulations, which is left undetected due to limited or vague requirements of cooperation and information exchange for national authorities, all the way to the setting up of "letterbox companies" in a Member State with low-wage levels in order to have work carried out in a high-wage Member State by workers posted from the first Member State. To strengthen the enforcement of the PoW Directive, but also to address the developments in the case law on the right to take collective action (read: *Viking* and *Laval*), the Commission started working on two proposals. In March 2012 it proposed a Regulation on the exercise of the right to take collective action (the so-called Monti II proposal)[59] and a Directive on the enforcement of the PoW Directive, which avoided reopening negotiations on the provisions of the PoW Directive itself.[60] The first proposal was withdrawn after huge opposition from trade unions and national parliaments making use of the yellow card procedure foreseen in the Subsidiarity Protocol.[61] The second proposal was adopted in May 2014 by the European Parliament and the Council as Directive 2014/67/EU on the enforcement of Directive 96/71/EC (the "Enforcement Directive").[62]

In order to prevent abuse and circumvention of the posting rules, the Enforcement Directive calls upon national authorities to assess whether workers posted on their territory are genuinely posted, that is have a genuine employment relationship with the posting undertaking established in the home Member State, which in turn should genuinely perform substantial activities in that home Member State.[63] The host Member State must

[59] Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

[60] Commission Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final.

[61] See Art. 7, para. 2, of the Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

[62] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation").

[63] *Ibid.*, Art. 4.

make information on the terms and conditions imposed on posted workers available free of charge in a clear, transparent, comprehensive and easily accessible way, including on an official national website.[64] The Enforcement Directive further lays down obligations on mutual assistance, cooperation and monitoring and on the cross-border enforcement of administrative penalties and fines. Importantly, the Enforcement Directive also introduced rules on subcontracting.[65]

V. Revision of the Posting of Workers Directive

The Enforcement Directive laid the ground for improved information of service providers and better enforcement of the protective rules set out in the PoW Directive but did not lead to any changes in these rules. Since the PoW Directive requires posted workers to be guaranteed only minimal rates of pay in the host Member State, posted workers do not necessarily benefit from similar protection in terms of wages as local workers. As indicated above, differences in wage levels have been more marked following the accession of Eastern European Member States. Against that background, the Juncker Commission decided in March 2016 to propose a "targeted" revision of the PoW Directive (the "2016 Proposal").[66] The Commission put forward further clarifications of social security rules in situations of posting in a proposal submitted in December 2016 for a revision of Regulations 883/2004 and 987/2009 on the coordination of social security systems.[67]

V.1. The Commission's 2016 Proposal

The Commission announced its 2016 proposal as a "targeted" revision of the PoW Directive in view of ensuring fair working conditions for all workers. The essence of the proposal has been to replace the host Member State's obligation to impose minimum rates of pay by the requirement to have all legislation and collective agreements on remuneration applicable to posted workers, that is to say to have posted workers receiving wages determined in accordance with the same rules as local workers. For that purpose, relevant provisions of collective agreements declared universally applicable should be applied also outside the construction sector.[68] Guaranteeing the principle of "equal pay

[64] *Ibid.*, Art. 5.

[65] See fn. 105 and accompanying text.

[66] Commission Proposal for a Directive amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

[67] Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016) 815 final.

[68] See also below for the situations under which certain agreements that have not been declared universally applicable may be taken into account.

for equal work at the same place" not only aims at ensuring adequate protection of workers' rights, but also at strengthening the legitimacy of the internal market by ensuring fairness in the market. Since so-called social dumping can lead to the downgrade of existing labour rights and wage levels, the initiative also aimed at preventing distortion of national labour markets and promoting upwards social convergence.

Since it had already been difficult in 1991 to convince the Member States of the need to introduce rules for posted workers, it came as no surprise that in a Union with twice as many Member States, the appetite for another change of the rules applied to posted workers was not universally shared. Applying the Subsidiarity Protocol, fourteen parliamentary chambers from eleven mostly Eastern European Member States[69] issued reasoned opinions alleging that the revision would breach the principle of subsidiarity. Arguing that wage differences constitute a legitimate factor for competition between service providers, they considered the principle of equal pay for equal work at the same place to violate the Treaty provisions on the internal market. Again, the parliaments collected sufficient negative opinions to trigger the "yellow card" procedure, requiring the Commission to review its proposal. In its response,[70] the Commission pointed out that the proposal was not in breach of subsidiarity since posting of workers is by nature a cross-border so that an obligation to apply rules in all the Member States and across sectors could only be established at Union level. In the Commission's view, its proposal also remains in line with the spirit of the internal market as applying the same mandatory rules to all workers performing work at the same place also ensures undertakings to be subject to the same rules across the Union.

Since the Commission did not amend or withdraw its proposal, the legislative discussions on the 2016 Proposal could start, both in the Council, under successive Presidencies, and in the European Parliament, within its Employment Committee. Early 2017, an agreement in the Council seemed within reach until certain Member States hardened their position, including France (following President Macron's election), but also other Member States expressing discontent with the proposals on specific rules for posting in the road transport sector that the Commission tabled end May 2017.[71] By October 2017, however, the way had been paved for each of the co-legislators to find agreement on a position on the basis of which interinstitutional negotiations could start: the Council in a general approach adopted late-night after a memorable discussion on 23 October 2017

[69] Negative opinions came from Denmark and 10 Central and Eastern European Member States (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and the Slovak Republic).

[70] Communication of the Commission on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505 final.

[71] Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, COM(2017) 278 final.

in the Employment and Social Affairs Council,[72] the Parliament's Employment Committee with the adoption on 16 October 2017 of a report prepared by the two co-rapporteurs.[73] Importantly, these provisional agreements also received support in several Eastern European Member States,[74] attesting to the balance struck between the interests of enhancing workers protection and preserving free movement opportunities.

Under the Estonian and then the Bulgarian Presidency of the Council, the negotiators of the European Parliament, the Council and the Commission met in eight "trilogue" sessions, the Commission being represented by the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, who had initiated the revision in 2016. After a breakthrough on the main political issues in the early hours of 1 March 2018, a provisional agreement was reached on 19 March 2018 on the full text of the Directive revising the PoW Directive (referred to hereinafter as the "Revising Directive"[75]; the amended provisions of the PoW Directive are referred to as the "Revised PoW Directive"). Crucial for reaching that final agreement was the fact that the Revising Directive will only become applicable to the sector of road transport once the proposed specific rules for posting in that sector have been adopted and become applicable.[76] Following the endorsement of that provisional agreement in the European Parliament on 29 May 2018 and in the Council on 21 June 2018 – with even broader geographical support than the negotiation mandates[77] – the PoW Directive was adopted on 28 June 2018. It will apply as from 30 July 2020.[78] It should be noted that the UK did not actively support the revision in the Council, but always abstained.[79]

[72] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council amending 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 – General approach, doc. n. 13612/17, 24 October 2017.

[73] European Parliament, Committee on Employment and Social Affairs, Report of the Committee on Employment and Social Affairs, doc. n. A8-0319/2017, 19 October 2017.

[74] Bulgaria, the Czech Republic, Estonia, Romania and the Slovak Republic voted in favour in the October Council, whereas Croatia (together with Ireland and the UK) abstained and only Hungary, Latvia, Lithuania and Poland voted against. Pursuant to Art. 53 TFEU, the ordinary legislative procedure applied, in which the Council votes by qualified majority.

[75] Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[76] See Art. 3, para. 3, of the Revising Directive, cit. The review that the Commission must undertake within 5 years of the Revising Directive's entry into force will include an assessment of the need for further measures in the light of developments concerning this "lex specialis" (for example, in case the legislative negotiations on that "lex specialis" would not yet have been successful). *Ibid.*, Art. 2, para. 2. For all other sectors, the Revising Directive will be applicable in all Member States at the expiry of the two year transposition period. *Ibid.*, Art. 3, para. 1.

[77] Compared to the vote in Council of October 2017 (see fn. 74), at the June 2018 meeting of the Council just Hungary and Poland voted against, with only Croatia, Latvia, Lithuania and the UK abstaining.

[78] Art. 4 of the Revising Directive, cit.

[79] See fns. 74 and 77.

V.2. Revised rules for the Posting of Workers

Besides replacing the requirement to pay posted workers at least “minimum rates of pay” by the requirement of having posted workers' wages completely defined in accordance with the host Member State's laws and (universally applicable) collective agreements, the 2016 Proposal also put forward a higher level of protection for workers posted for a long-term period, defined as any period exceeding the 24 months period during which workers remain covered by the social security legislation of the home Member State.[80] In addition, the Commission proposed allowing Member States to extend the Directive’s requirements on wages to workers employed in subcontracting. In the course of the legislative discussions, those issues have been intensively debated while new issues were put on the table, such as the clarification of the status of posting allowances and collective agreements, guarantees of enforcement with respect to certain categories of posted workers, the conditions under which the posting rules would become applicable to the road transport sector and the general conditions for transposition and entry into force of the proposed Directive. Interestingly, the European Parliament also requested to have the objective of increased workers protection reflected in the legal basis of the proposed Directive, which, in its view, had to be considered not merely as the implementation of free movement provisions but also as pursuing social policy. However, as explained below, the increase in workers protection resulting from the revision has remained within the internal market legal basis of the initial PoW Directive.

V.3. Remuneration, posting allowances and collective agreements

As indicated above, the essential change of the revision has been to change the notion of "minimum rates of pay" applicable to posted workers under Art. 3, para. 1, let. c), of the PoW Directive to the notion of "remuneration", defined as “all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provisions, or by collective agreements or arbitration awards, which, in that Member State, have been declared universally applicable". With the revised Art. 3, para. 1, let. c), the nucleus of rights guaranteed to posted workers therefore includes all the elements of remuneration as defined in the host Member State, and not only minimum rates of pay. Whereas this provision eliminates wage competition between posted workers and local workers, it will lead to a wage increase for workers posted to high-wage Member States. By reducing the risk of unfair competition based on low working conditions, the revised Directive also ensures a "level playing field” for all businesses concerned. All in all, the revision therefore does not change the character of the PoW Directive as an instrument ensuring legal certainty for cross-border service providers, but it increases the level of ambition of that instrument from a social perspective, going from requiring employers to guarantee a minimum level of protection of posted workers to a requirement to make

[80] See fn. 19 and accompanying text.

posted workers benefit from the same rules on wages that apply to other workers carrying out the same kind of work.

Clearly, the proposed provision on "remuneration" does not align the levels of wages across the Member States, which is an area that the Treaty expressly excludes from the Union's harmonisation powers in social matters.[81] During the legislative discussions, both the European Parliament and the Council had no difficulty in accepting the notion of "remuneration", not however without emphasizing in the agreed text that setting rules on remuneration and wages remains an exclusive competence of the Member States and social partners.[82] Wages of posted workers will still be set by their employment contract, which is usually concluded under the law of the home Member State, and workers' salaries may therefore still differ, depending on the rules and practices of the Member States in question and of their employer. Still, once the Revised Directive applies, employers will have to pay their posted workers not only by complying with the rules on remuneration of the law applicable to the employment contract (home Member State legislation) but also by ensuring that the remuneration paid during the posting assignment is at least equivalent to the remuneration that worker would be entitled to under the relevant legislation and collective agreements of the host Member State. Upon the Council's request, the preamble to the Revised Directive clarifies how to assess the compatibility of the salary paid under the home Member State's rules with the elements of remuneration set by the host Member State's rules. In line with the Court's case law on minimum pay,[83] the posted worker's gross salary will need to be matched up to the gross amounts of pay required by the rules on "remuneration" rather than to individual elements of remuneration required by the host Member State.[84] As under the existing rules,[85] allowances specific to the posting should be considered part of the remuneration, unless they compensate for expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.[86] If, for example, the relevant collective agreement in the host Member State requires the posted worker to be paid a monthly salary of 1500 EUR and daily allowances of 300 euro, whereas that worker is, under home Member State rules, entitled to a salary of 500 euro but also to a seniority allowance and a flat-rate posting allowance of 100 euro and 1200 euro, respectively, it is the gross amount of 1800 euro paid to the worker under home Member State rules that must be compared with the gross amount of remuneration required under the host Member State rules (also 1800 euro in the example).

By having posted workers benefit from the elements of "remuneration" applicable to local workers in the host Member State – translated politically as the principle of equal

[81] Art. 153, para. 5, TFEU, according to which the powers set out in this *Article* do not apply to pay.
[82] Recital 17 of the Revising Directive, cit.
[83] *Commission v. Germany*, cit., para. 29.
[84] Recital 18 of the Revising Directive, cit.
[85] Art. 3, para. 7, of the PoW Directive, cit.
[86] Recital 18 of the Revising Directive, cit.

pay for equal work at the same workplace – the Revising Directive is likely to increase salaries for posted workers, especially those posted from lower-wage Member States to higher-wage Member States. During the legislative discussions, both the European Parliament and the Council also insisted on introducing amendments and clarifications on what constitutes remuneration and on the precise status of allowances paid on the top of salaries. The sensitivity of the issue of allowances may be explained, to a certain extent, by the phenomenon of posting undertakings seeking to increase their competitive advantage by paying lower social contributions and/or taxes and, for that purpose, preferring to pay their workers relatively low salaries supplemented with high allowances. To the extent that posting allowances do not concern expenditure actually incurred, they do qualify as remuneration for the purpose of the host Member State rules. This does not mean that the host Member State determines whether such allowances must be paid. It is indeed for the law or collective agreements of the home Member State to determine whether such allowances are to be paid at all, together with the amount of such allowances. In order to ensure that posting allowances taken into account for the purposes of remuneration under host Member State rules genuinely constitute part of the workers' remuneration, and not compensation for incurred expenditure, an amendment from the Council has been adopted according to which posting allowances are presumed to be compensation for expenditure actually incurred. Indeed, for an allowance to be considered reimbursement of expenditure, it must result from the terms and conditions applicable to the employment relationship not only that this is the case, but also for which elements of the allowance.[87] If the parts of the allowance constituting reimbursement are not defined in the applicable legislation, collective agreement or contractual arrangements, the entire allowance will be considered to be paid in reimbursement.[88]

Concerning allowances that constitute reimbursement of expenditure, the co-legislators added two more elements in the Revising Directive. First, upon a request from the Council, the nucleus of protective rights in Art. 3, para. 1, of the PoW Directive is complemented with a reference to allowances reimbursing travel, board and lodging expenditure incurred by posted workers that have to travel to and from their regular place of work within the host Member State.[89] In the above-mentioned Finnish case, the Court of Justice had already clarified that where a host Member State requires such posting allowances to be paid, they are part of the minimum wage that under the PoW Directive must be paid to local workers and posted workers alike.[90] This will now also be the case for the application of the notion of "remuneration". It has also been clarified that all this should not lead to posted workers receiving double payment for the same expenses.[91] Second,

[87] Art. 3, para. 7, new sub-para. 3, of the Revised PoW Directive, cit.
[88] See also Recital 19 of the Revising Directive, cit.
[89] See Revised Art. 3, para. 1, let. i), of the PoW Directive, cit.
[90] See fn. 34 and accompanying text.
[91] Recital 9 of the Revising Directive, cit. (requested by the European Parliament).

with respect to all allowances reimbursing expenditure for travel, board or lodging, the Revising Directive confirms the employers' obligation to reimburse the workers for the expenditure incurred, in accordance with the national law applicable to the employment relationship, which is normally the home Member State law.[92] This confirmation has been requested by the European Parliament.[93]

Regarding the nucleus of protective rights, it should also be mentioned that a request of the Council has been accepted to also include in Art. 3, para. 1, of the PoW Directive the "conditions of workers' accommodation where provided by the employer to workers away from their regular place of work".[94]

In the Commission's proposal, posted workers' rights were to be increased not only by imposing the host Member State's rules on "remuneration", but also by making wage and working conditions laid down in collective labour agreements applicable. Under the existing PoW Directive, that was already the case in the construction sector, but not in other sectors. The Commission's proposal had left the conditions unchanged allowing collective agreements to be applicable, that is to say only those agreements which have been declared universally applicable or, in the absence of a system for declaring agreements universally applicable, those which are generally applicable in the geographical area or in the industry concerned.[95] In order to avoid discrimination between local and posted workers, the Art. 3, para. 8, of the PoW Directive allows for the application of collective agreements in a Member State where no system of declaring agreements universally applicable exists (read: Sweden) only if equality of treatment is ensured in their application. The European Parliament insisted that also working conditions set out in non-universally applicable collective agreements should be applied to posted workers. This would have allowed for the reversal of the Court's ruling in the above-mentioned *Rüffert* case, where the Court did not allow Germany to impose minimum rates of pay set out in an agreement that was not declared universally applicable.[96] Eventually, the co-legislators agreed to extend the conditions set out in Art. 3, para. 8, to collective agreements that have not been declared universally applicable, so that, even in a Member State where that possibility exists, collective agreements that have not been declared universally applicable can be applied to posted workers falling within their sectoral or geographical scope of application, if the conditions of equal treatment set out in Art. 3, para. 8, are fulfilled.[97]

[92] See Art. 3, para. 7, sub-para. 2, of the Revised PoW Directive, cit.

[93] Initially, the European Parliament proposed language that remained unclear as to the basis for the obligation to reimburse, leaving it open whether the host Member State could introduce such obligation (see amendment 32 of the Report of the Committee on Employment and Social Affairs, cit.).

[94] See Art. 3, para. 1, let. h), of the Revised PoW Directive, cit.

[95] Art. 3, paras 1 and 8, of the PoW Directive, cit.

[96] See fn. 57 and accompanying text.

[97] See the changes in Art. 3, paras 1 and 8, of the Revised PoW Directive, cit.

It follows that, although the Commission's proposal already provided for increased protection of workers, the co-legislators accepted further provisions that are even more beneficial for the posted workers, while also introducing more clarity and transparency.

V.4. Long term posting

Whereas the PoW Directive states that posting of workers is of a temporary nature, it does not clarify the notion "temporary". In Regulation (EC) No 883/2004 on the coordination of social security systems, workers posted from a Member State for a period longer than 24 months are considered no longer having the required link with that Member State to be subject to that Member State's legislation for the purposes of social security coverage. By reference to that rule, the Commission had proposed to consider workers posted for longer than 24 months as falling under the host Member State's legislation for the purposes of determining their working conditions.[98] This alignment would have provided full legal clarity to the workers, the employers and the authorities.

During the legislative discussions, the Council agreed with the principle of having long-term postings made subject to the labour law of the host Member State, with exceptions as regards application of the rules on the conclusion and termination of contracts and on contributions for supplementary pension schemes. That text made it into the final agreement of the co-legislator.[99] However, the actual duration of the period triggering the change in regime has been the source of fierce debates, particularly because that period has been communicated by many governments and stakeholders as a maximum period that would prohibit longer posting assignments instead of being a trigger towards a (slightly) different legal regime.[100] In the 2016 campaign for the French presidency, Emmanuel Macron thus defended the need for a maximum period of 12 months. Following long and difficult discussions, the Council eventually agreed on 23 October 2017 to lower the 24 months threshold proposed by the Commission to 12 months, with an extension of 6 months to be granted to service providers submitting a "motivated notification" to the host Member State authorities. At the same time, the European Parliament had agreed to keep the Commission's reference to 24 months, while allowing for an extension

[98] The 2016 Proposal considered that, in case of an anticipated or effective duration of the posting exceeding 24 months, the worker should be deemed to habitually carry out its work in that Member State, which is the default connecting factor to determine the law applicable to an employment relationship. See Art. 8 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[99] See Art. 3, para. 1a, of the Revised PoW Directive, cit. The co-legislators also changed the Commission proposal so as to take account only of the effective duration of a posting assignment, not its anticipated duration, which probably would have been difficult to monitor.

[100] Given the extensive list of areas already covered by the nucleus of protective rights applicable to posted workers pursuant to Art. 3, para. 1, of the PoW Directive, cit., the areas of labour law for which long-term posted workers would see a shift in applicable law is indeed limited (for example, entitlements to leaves, such as parental leave, not included in Art. 3, para. 1, let. b).

of that period, but only upon assessment by the authorities of a reasoned request thereto. That amendment relied on the consideration that although the average duration of posting assignments does not exceed 4 months, high skilled professionals are sometimes seconded for longer periods than two years, so that lowering the threshold would create unreasonable burden for that kind of posting assignments. Eventually, the co-legislators agreed to keep the reference for the long-term posting at 12 months, with a quasi-automatic extension of 6 months upon a "motivated notification" by the service provider. In order to emphasize that Member States cannot prohibit posting assignments longer than 12 (or 18) months, a recital has been inserted which reminds the Member States that any measure restricting such posting assignments must be compatible with the freedom to provide services.[101]

V.5. Abuse and strengthened enforcement of the Posting of Workers Directive

Given the strengthened framework laid down in the 2014 Enforcement Directive, the 2016 Proposal did not as such tackle issues of enforcement of the posting rules. It however included a provision on subcontracting since posting of workers through subcontracting chains is often used to circumvent posting rules.

The system whereby a principal contractor outsources tasks or activities to other companies or self-employed workers is a common business model across the Union, especially in sectors like construction and road transport, where there is also a high involvement of posted workers. The Commission estimated that in the construction sector, in 2011, payments by undertakings to subcontractors ranged between less than 15 per cent (in Romania, Poland, Portugal, Italy and Denmark) to over 30 per cent (Slovakia, Czech Republic and the UK) of turnover.[102] In a cross-border subcontracting chain, an undertaking providing services may outsource an activity to another company to which workers are posted from another Member State or directly to a subcontractor established in another Member State. In a context of weak cooperation between national authorities in matters of social security and labour law, subcontracting may be instrumental in organising circumvention of rules and fraud.[103] The PoW Directive does not contain specific rules for subcontracting chains, leaving certain posted workers in sub-contracting chains in a situation of particular vulnerability. The 2014 Enforcement Directive covered the gap in subcontractors' liability by providing a legal framework for posted workers to hold the

[101] Recital 10 of the Revising Directive, cit.

[102] See Commission Staff Working Document – Impact Assessment accompanying the 2016 Proposal, SWD(2016) 52 final, point 2.4.1.

[103] See, for example, Court of Justice, judgment of 6 February 2018, case C-359/16, *Altun and Others*.

undertaking that subcontracted with their employer liable for any outstanding payments.[104] Still, it only provided for joint liability in direct subcontracting situations, without ensuring protection of posted workers throughout the entire subcontracting chain. It indicated however that Member States may adopt further going measures if that is done on a non-discriminatory and proportionate basis.[105]

To better protect posted workers in subcontracting situations, the Commission had proposed to broaden the possibility for Member States to regulate subcontracting. The Proposal provided that, whenever a host Member State requires undertakings to subcontract only to companies that guarantee certain terms and conditions of employment covering remuneration, that Member State could extend such obligation also to undertakings subcontracting with companies established in another Member State that post workers to the host Member State. The proposed provision only contained a possibility, not an obligation for Member States to extend workers' protection to subcontracting involving posted workers. However, it did not receive any support in the Council and, even though the Parliament supported it, the wide-spread opposition amongst the Member States made it impossible for the co-legislator to introduce any obligation for subcontractors to follow the rules on remuneration. As a matter of compromise, the co-legislator agreed that in the context of a future revision of the Directive, the Commission is to assess whether further measures in subcontracting are needed to ensure workers' protection and a level playing field for businesses.[106]

In its Proposal, the Commission also tackled another situation in which posting of workers is prone to abuse, that is posting of workers by temporary work or placement agencies, which hire out workers to user undertakings established or operating in another Member State. The PoW Directive also applies to such posted workers, subjecting them to the host Member State's minimum rates of pay and other working conditions set out in Art. 3, para. 1. Art. 3, para. 9, of the PoW Directive also goes further by allowing Member States to provide that temporary agency workers posted on their territory must be fully subject to the same working conditions as local temporary workers. In the 2016 Proposal, the Commission suggested to make this option obligatory, in line with Art. 5 of the Temporary Agency Work Directive,[107] which already establishes the obligation for a user undertaking to grant domestic temporary workers the same basic working and employment conditions as permanent workers in the same job. The co-legislators agreed with this proposal,[108] so that, with respect to the basic working and employment condi-

[104] Art. 12 of the Enforcement Directive, cit.

[105] See recital 36 of the Enforcement Directive, cit.

[106] Art. 2, para. 2, of the Revising Directive, cit.

[107] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[108], Art. 3, para. 1b, of the Revised PoW Directive, cit.

tions set out in the Temporary Agency Work Directive, posted workers are to be guaranteed equal treatment with local workers. Moreover, the co-legislators added an optional clause according to which Member States may ensure posted temporary workers also equal treatment with respect to the other working and employment conditions.[109] All this does not only improve the situation of the workers concerned, but also ensures a level-playing field for the agencies concerned. Through this equal treatment clause, posted temporary workers may actually benefit from provisions in collective agreements that would otherwise not be applicable to them, for example, collective agreements concluded only at company level or sectoral agreements that have not been declared universally applicable, thereby going beyond the more circumscribed application foreseen for collective agreements under Art. 3, para. 8, of the revised PoW Directive.[110]

The co-legislators added the obligation for the user undertaking to inform the temporary work agencies of the terms and conditions applied by it.[111]

Another issue related to the temporary working agencies, is so called "double" or "chain" posting, which occurs when a worker posted by an agency to a user undertaking in a host Member State, is then asked by that user undertaking to carry out work in a third Member State. This situation often creates legal uncertainty as, first, the agency is not always informed of the "double" posting, and, second, national authorities have difficulties in determining the rights on remuneration and working conditions applicable to such worker. Since Art. 1, para. 3, of the PoW Directive requires the existence of an employment relationship between the undertaking making the posting and the posted worker during the whole period of posting, it could be argued that the "second" sending abroad of the worker is not "genuine" and should not be considered to be posting within the meaning of the Directive. The question then arises, however, which working conditions are applicable to that worker in the third Member State. Building upon amendments suggested by the European Parliament, the co-legislators agreed to provide that in such a situation of double posting it must be considered that the worker is posted in the third Member State and that the temporary agency is the posting undertaking responsible for guaranteeing that worker the rights to which he or she is entitled under the PoW Directive and the Enforcement Directive.[112] In order to make that rule enforceable, a provision has been added according to which the user undertaking must inform the temporary agency of posted workers that will be temporarily carrying out work in a Member State other than the one to which they have been posted. These provisions will make a real difference on the ground by clarifying the application of the posting rules in situations currently in

[109] See Art. 3, para. 9, of the Revised PoW Directive, cit.
[110] See fn. 110 and accompanying text.
[111] Art. 3, para. 1b, of the Revised PoW Directive, cit. See also recital 12 of the Revising Directive, cit.
[112] Art. 1, para. 3, new sub-paras 2 and 3, of the Revised PoW Directive, cit.

a “grey zone”. By making the temporary agency as employer responsible for any subsequent posting, the PoW Directive will contribute to preventing circumvention of rules through chain posting of temporary workers.

In addition to these changes regarding temporary agency workers and chain posting, the revised Directive also contains strengthened rules on access to information and fighting fraud and abuse in situations of non-genuine posting. As indicated above, the Enforcement Directive already establishes an obligation for a host Member State to ensure that information on the applicable terms and conditions of employment is made generally available in a transparent way. The co-legislators agreed that the host Member State's authorities must publish on the official website foreseen in the Enforcement Directive accurate and up to date information on the constituent elements of remuneration.[113] Upon request of the European Parliament, a provision was added to ensure that workers that are not genuinely posted are not left without any protection. The difficulty of such provision is that workers which are found not to be in a situation covered by the PoW Directive may, for example, be permanently employed in a host Member State instead of temporarily posted, or self-employed. Art. 4 of the Enforcement Directive already provides the Member States with criteria for assessing whether the relationship between an undertaking and a worker is a genuine employment relationship. The co-legislators eventually agreed that in a situation where after such assessment by the host Member State it is established that an undertaking is improperly or fraudulently creating the impression that a worker is posted in accordance with the PoW Directive, that Member State shall ensure that the worker benefits from "relevant law and practice" and not be subject to "less favourable conditions than those applicable to posted workers".[114] Whereas this provision does not clearly indicate which conditions should be applied to a worker who, by definition, falls outside the scope of the PoW Directive, it nonetheless requires Member States to ensure that such workers do not stay in a disadvantaged situation as compared to posted workers.

As posting of workers is by definition a transnational issue, certain cases of circumvention and abuses may remain undetected or not penalised due to lack of cooperation and adequate information exchange between the competent authorities of the Member State concerned. The PoW Directive already created in Art. 4, para. 1, an obligation for the Member States to provide for cooperation between public authorities and to share information in fighting unlawful and abusive transnational activities. The Enforcement Directive further developed these cooperation requirements. Also the Commission’s proposal on revision of the Regulations on social security coordination provides for a strengthening of the requirements on information exchange and verification of the socials security status of posted workers to prevent unfair practices or abuse.[115] To enhance

[113] See Art. 3, para. 1, new sub-paras 3-5, of the Revised PoW Directive, cit.

[114] Art. 5, sub-paras 4-5, of the Revised PoW Directive, cit.

[115] See the proposed revision of Arts 5, 14, 16 and 19 of Regulation 987/2009, cit.

cooperation and ensure better enforcement of cross-border mobility situations, the Commission submitted on 13 March 2018 a proposal for establishing a European Labour Authority.[116] Although this agency is meant to facilitate cooperation between the Member States' enforcement authorities in all areas of labour mobility and social security coordination, its expertise and network should certainly ensure enhanced enforcement of the posting rules, more intense cooperation between the competent national authorities through liaison officers working within the Authority and eventually stronger protection of posted workers against abuses and fraud. Cooperation at Union level between the authorities responsible for labour law and social security issues is essential to guarantee proper enforcement of the existing rules and prevent fraud and abuse.

VI. Conclusion

The PoW Directive remains a delicate piece of legislation as it constitutes a compromise struck between the conflicting interests behind opening up the internal market and safeguarding national protective social standards. It remains therefore a significant achievement that a revision of that Directive has been agreed upon without unduly sharpening the divisions between lower-wage and higher-wage Member States and with express support from many low-wage Member States. As indicated above, the UK preferred to remain on the side in the legislative discussions. This is interesting in the light of the importance that migration and presence of foreign workforce played in the debate leading up to the Brexit referendum. Post-Brexit – and beyond the transition period it would only be in the (currently still unlikely) scenario that internal market rules would be applicable to the UK that the revised PoW Directive would remain applicable.

Towards those who advocate that the Revised PoW Directive should have been transformed into a social policy instrument based on the Treaty's social policy legal basis, it must be stressed that the fact that the PoW Directive also promotes the internal market and free movement should not be perceived as making workers' rights subordinate to economic interests. It is true that the Court of Justice, when interpreting the PoW Directive, has found several national measures aimed at protecting workers' rights to be contrary to the PoW Directive. However, the Court has been interpreting the available legal texts in the light of the Treaty provisions, with the principles of non-discrimination and proportionality as guiding values. Moreover, the Court has equally recognised that the social goals pursued by the PoW Directive are not only the protection of posted workers' rights, but also the preservation of fair labour markets and combating social dumping,[117] implying that social rights of local workers and, more generally, the preservation of Member States' social protection systems are to be taken into account as well. Together with the Enforcement Directive, the

[116] Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM(2018) 131 final.

[117] See fn. 41 and accompanying text.

Revised PoW Directive has now stepped up the level of social protection by introducing the principle of equal pay for equal work in the same place, while still attaining the objective of preserving legal certainty for undertakings providing services in the internal market. Time will show how the provisions of the revised PoW Directive will be interpreted, but the stronger social dimension will not be left unnoticed.

With the 2016 revision of the PoW Directive, the Juncker Commission's ambitions for ensuring fairer labour mobility have not ended, as there is not only the reform of the Regulations on social security coordination and the establishment of the European Labour Authority to be approved, but also the "*lex specialis*" on the application of the posting rules on the road transport sector. Compared to the initial hostile reactions that the 2016 Proposal received, there is now broad acceptance, also in many low-wage Member States, that stepping up the social protection of posted workers is not an expression of economic protectionism, but a change necessary for the internal market to preserve its social legitimacy. The conditions imposed by the PoW Directive to cross-border service providers are also in line with changes made by the Lisbon Treaty to certain parameters in the Treaty framework with the recognition of the legally binding nature of the Charter of Fundamental Rights, including its Art. 31 on fair and just working conditions, and the introduction of Art. 9 TEU, according to which the Union is to take the requirement of adequate social protection into account in defining and implementing its policies and activities. These changes reflect the understanding that economic growth and liberalisation must go hand in hand with adequate social protection. The same understanding led the European Parliament and the Council to accept in November 2017 the Commission's call for a joint proclamation of a European Pillar of Social Rights, which constitutes a political confirmation of the recognition of the need for upward social convergence across the Union.

ARTICLES
SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

FREE MOVEMENT OF PERSONS IN THE EU *V.* IN THE EEA: OF EFFECT-RELATED HOMOGENEITY AND A REVERSED *POLYDOR* PRINCIPLE

CHRISTA TOBLER*

TABLE OF CONTENTS: I. Introduction. – II. The incorporation of Directive 2004/38 into EEA law: legal framework. – III. The meaning of the reservation according to the EFTA Court's *obiter dictum* in *Wahl*. – IV. Other EFTA Court case law on Directive 2004/38 in the EEA context. – IV.1. Unproblematic in the present writer's opinion: *Clauder*. – IV.2. From *Clauder* to *Gunnarsson* and *Jabbi*: a very particular understanding of homogeneity. – IV.3. *Gunnarsson* and *Jabbi*: facts and issues. – IV.4. The EFTA Court's decision in *Gunnarsson*. – IV.5. The EFTA Court's decision in *Jabbi*. – V. Findings with respect to the reservation and relevance in other contexts, including notably Brexit.

ABSTRACT: When the EEA Agreement was concluded in the early 1990s, it reflected, in the fields covered, the state of the then Community law, also with respect to the free movement of persons. Since then, both EEA and EU law have developed further, though with certain marked differences. Notably, the EU Treaty revision of Maastricht led to the introduction of Union citizenship. The fact that there is no corresponding concept in the EEA Agreement had led to certain challenges within the EEA with respect to the free movement of persons, due notably to the double nature of Directive 2004/38 as a further development of the free movement law of the Communities and a Union citizenship instrument. Today, the EEA and the EU rules are identical with respect to the market access rights of economic agents. In contrast, it is debated whether and to what extent the incorporation of Directive 2004/38 into the EEA legal system is indeed limited for those purposes. This relates in particular to case law of the EFTA Court on persons who are not economically active, where the Court, in the EEA context, gives Directive 2004/38 a broader interpretation than the CJEU does in the EU context. The EFTA Court's aim, despite the lack of Union citizenship in EEA law, is to arrive at the same level of protection. Commentators speak about a particular understanding of homogeneity and of the *Polydor* principle. This approach raises questions also with respect to the external relations of the EU with other non-Member States, including notably the United Kingdom of Great Britain and Northern Ireland following its withdrawal from EU membership ("Brexit").

* Professor of European Union law, Europa Institutes of the Universities of Basel, Switzerland, and Leiden, Netherlands, christa.tobler@unibas.ch.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/277

KEYWORDS: free movement of persons – Union citizenship – EEA law – homogeneity – *Polydor* principle – EU external relations.

I. INTRODUCTION

When the EEA Agreement was concluded in the early 1990s, it reflected, in the fields covered, the state of the law of the then Community law.[1] This also applied in the field of the free movement of persons. Since then, both EEA and EU law in this field have developed further, though with certain marked differences. Most notably, in the Union the Treaty revision of Maastricht led to the introduction of Union citizenship on the Treaty level. Subsequently, Directive 2004/38 was adopted as a further development of the law on former free movement, on the one hand, and as a Union citizenship instrument, on the other hand.[2] This double nature of the Directive and the fact that there is no concept corresponding to Union citizenship in the EEA Agreement led to certain challenges within the EEA, when faced with the demand of the EU that the Directive should be incorporated into EEA law. In fact, it was difficult to convince some of the EEA/European Free Trade Association (EFTA) States to agree to such incorporation. When eventually it was incorporated, this was done with certain reservations.

Today, it can be stated that the EEA and the EU rules are identical with respect to the market access rights of economic agents (e.g. the right of migrant workers to be employed in another contracting State without discrimination on grounds of nationality and without restrictions). In contrast, it is debated whether and to what extent the incorporation of Directive 2004/38 into the EEA legal system is limited for those purposes. Doubts have arisen notably in the context of recent case law of the EFTA Court (which deals with EEA law matters arising in the three EEA/EFTA States Iceland, Liechtenstein and Norway) in the context of travel and residence rights and of family reunification.

This issue forms the subject matter of the present contribution, which explores the differences in the legal regime on the free movement of persons in the EU as compared to the EEA. The contribution begins with a brief description of the legal framework of the incorporation of Directive 2004/38 into EEA law (section II). In its main part, it then turns to the EFTA Court's case law on the possible limits of that incorporation (section III) and, more generally, on the meaning of the Directive in the EEA context (section IV). A final part will summarise the findings and ask what they mean in other contexts, in-

[1] European Economic Area Agreement of 2 May 1992. For a consolidated version of the Agreement that incorporates subsequent changes, see www.efta.int.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

cluding notably that of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU ("Brexit") (section V).

II. The incorporation of Directive 2004/38 into EEA law: legal framework

Through the EEA Agreement, the participating EFTA States[3] associate themselves to EU law in a number of important areas, the core of which is the Union's internal market law. With respect to persons, this included from the beginning not only the (then Community) rules on the free movement of persons and services, but also the movement and residence rights for the economically non-active under what was then Directives 90/364,[4] 90/365[5] and 93/96.[6] In this as in other fields, Community law developed further following the signing of the EEA Agreement. For this situation, the EEA Agreement envisages a dynamic system of updating the EEA *acquis*: if new EU law falls within a field covered by the EEA Agreement, the EEA Joint Committee will decide on its incorporation into EEA law. Should this decision not be taken, the consequence may be that the relevant part of the EEA Agreement is suspended (Art. 102 EEA Agreement).[7]

This mechanism also came into play with regard to Directive 2004/38,[8] which was incorporated into Annex V to the EEA Agreement, concerning the free movement for workers, and into Annex VIII, concerning freedom of establishment, by Decision of the

[3] This includes all EFTA States except Switzerland. Whilst the Swiss Government wanted the country to join and participated very actively in the negotiation of the EEA Agreement, a popular vote held in 1991 yielded a negative result with respect to membership; see P.G. Nell, *Suisse-Communauté Européenne. Au coeur des négotiations sur l'Espace économique européen*, Paris: Economica, 2012. Following the vote, Switzerland continued on its previous path of concluding sectoral agreements with the Communities and the Union; for a brief introduction in the English language, see M. Oesch, *Switzerland and the European Union. General Framework. Bilateral Agreements. Autonomous Adaptation*, Zurich, St. Gallen: Dike; Baden-Baden: Nomos, 2018. For more details, e.g. M. Oesch, *Europarecht. Band I Grundlagen*, *Institutionen, Verhältnis Schweiz-EU*, Berne: Stämpfli, 2015; T. Cottier, N. Diebold, I. Kölliker, R. Liechti-McKee, M. Oesch, T. Paysova, D. Wüger, *Die Rechtsbeziehungen der Schweiz und der Europäischen Union*, Berne: Stämpfli, 2014, and C. Tobler, J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-)Rechts. Systematische Darstellung in Text und Tafeln*, Zurich, St. Gallen: Dike, 2013.

[4] Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence (no longer in force).

[5] Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (no longer in force).

[6] Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students (no longer in force).

[7] For the incorporation procedure, see e.g. G. Baur: *Decision-making Procedure and Implementing of New Law* and *Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures*, both in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Cham: Springer, 2015, respectively at p. 45 *et seq.* and 69 *et seq.*

[8] See already C. Tobler, *Bikers Are(n't) Welcome. (Jan Anfinn Wahl v. The Icelandic State, EFTA Court, Judgment of 22 July 2013, E-15/12)*, in *European Law Reporter*, 2013, p. 250 *et seq.*

EEA Joint Committee 158/2007 ("Joint Committee Decision" or "JCD").[9] For these purposes, the Directive's geographic scope had to be broadened (namely to include the EEA/EFTA States) and its wording had to be adapted (e.g. to be read as referring, for the purposes of EEA law, not to "Union citizens" but rather to "national(s) of [EU] Member States and EFTA States", Art. 1, para. 1, let. c), JCD). In addition, there was the problem that the concept of EU citizenship does not apply in the EEA/EFTA States. For that reason, the EEA/EFTA States were not enthusiastic about incorporation. However, the EU refused an approach whereby the provisions of the Directive that are linked to EU citizenship would have been excluded from incorporation into EEA law. Instead, the parties agreed to a compromise under which the full text of the Directive was incorporated, though with certain limits regarding their interpretation and application.

First, the JDC circumscribes the fields where the incorporation takes effect. According to Arts 1 and 2 JCD, the Directive "shall apply, as appropriate, in the fields covered by this Annex", i.e. the free movement for workers under Annex V and that of freedom of establishment under Annex VIII. However, it should be noted that these Annexes concern not only the legal position of migrant workers and the self-employed, respectively, with the nationality of an EEA State, but also that of their family members as defined in the Directive. Further, Annex VIII also touches upon services and includes rules on the movement and residence of non-economic agents. Overall, this means that not only in the framework of EU law but also in that of EEA law, Directive 2004/38 applies to the movement of natural persons in a rather broad sense (workers, the self-employed, service providers and recipients, and non-economically active persons under certain conditions), though according to the JCD only "as appropriate". As will be seen *infra*, section IV, the EFTA Court appears to have given a surprising meaning to this latter term.

Second, the contracting parties noted in the preamble to the JCD that the concept of Union citizenship is not included in, and immigration policy is not part of, the EEA Agreement. This is elaborated on in a Joint Declaration. With reference to EU citizenship, it states:

> "The concept of Union Citizenship as introduced by the Treaty of Maastricht [...] has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals".

[9] EEA Joint Committee, decision of 7 December 2007 no. 158/2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.

Burke *et al*. note that, as a result of its incorporation into EEA law, the Directive 2004/38 now applies in two divergent legal contexts (namely EU law and EEA law).[10] For practical purposes, the challenge lies in the fact that when the EEA Joint Committee limited the application of the Directive to the (broad) scope of the two annexes as just described and at the same time stated that EU citizenship and immigration policy are not part of EEA law, it consciously left it to the courts to decide through interpretation what this means in concrete terms. In other words, the letter of EEA law is not clear on this matter.

The following part deals with the case law existing so far on Directive 2004/38 in the EEA context and on the meaning of the reservation in the JCD with respect to Union citizenship, in the latter context more specifically on the meaning of the second sentence in the above quote from the Joint Declaration ("The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship"). At the time of writing, there is no case law yet of the CJEU on either the incorporation of Directive 2004/38 into the EEA legal acquis or on the meaning of the Directive in this context.[11] In contrast, there are four EFTA Court judgments on Directive 2004/38 in the EEA context. Of these, only one addresses the substantive meaning of the reservation with respect to Union citizenship, namely *Wahl*,[12] and then only in an *obiter dictum*.

III. The meaning of the reservation according to the EFTA Court's *obiter dictum* in *Wahl*

The *Wahl* case concerned the limitations to the right of entry and residence of persons with the nationality of an EEA State under Art. 27 of Directive 2004/38. The EFTA Court held that the above-mentioned reservation cannot be relevant in this context. In the present writer's opinion, that is correct, as the case concerned a provision on limitations to free movement that simply codified CJEU case law on the previous derogation rules, both of which had already been part of EEA law before the incorporation of Directive

[10] C. Burke, Ó. Ísberg Hannesson, K. Bangsund, *Chapter 12: Schrödinger's Cake? Territorial Truths for Post-Brexit Britain*, in M. Kuyer, W. Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law*, 2017, p. 287 *et seq*., p. 309.

[11] In the EU law context, this could notably be an action for annulment under Art. 263 TFEU of the decision of the EU to agree to the incorporation of the JCD (compare, in a different context, Court of Justice, judgment of 27 February 2014, case C-656/11, *UK v. Council*) or a preliminary ruling under Art. 267 TFEU on an EEA matter arising in the territory of an EU Member State. In the latter context, an example of a matter falling within the jurisdiction of the CJEU would be an Icelandic national who faces problems when wishing to exercise EEA free movement rights in Spain (or in any other EU Member State). Conversely, where an EEA matter arises on the territory of an EEA/EFTA State, it falls within the jurisdiction of the national courts of that State and of the EFTA Court.

[12] EFTA Court, judgment of 9 December 2013, case E-15/12, *Jan Anfinn Wahl v. The Icelandic State.*

2004/38 and neither of which relates specifically to Union citizenship. In fact, *Wahl* is simply a successor to the European Economic Community (EEC) free movement for workers case of *Van Duyn.*[13]

Even so, the EFTA Court addressed the incorporation of the Directive into EEA law and the meaning of the reservation as follows

> "The Directive was incorporated into the EEA Agreement by the adoption of Joint Committee Decision No 158/2007 ('the Decision'). According to the Decision, the concept of 'Union Citizenship' and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties ('the Declaration'). However, these exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly. In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals [...]. To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA. The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence".[14]

In the present writer's analysis of the *Wahl* judgment, the EFTA Court's statements with regard to Art. 24 of Directive 2004/38 in the EEA context might be the point where the *Polydor* principle enters EEA law.[15] According to this principle, provisions of agreements concluded by the EU with non-Member States are not automatically to be interpreted in the same manner, even if they are very similar or even identical; rather, relevant differences in the context may lead to a different interpretation. Weiss and Kaupa observe more generally that free movement rights under EEA law may have to be interpreted differently from EU law if the legal or factual situation differs.[16] In the present context, this might mean that certain provisions of Directive 2004/38, including in particular Art. 24, though formally part of both EU law and EEA law, might not have the same relevance or meaning in the two legal orders. Indeed, it could even mean that the incorporation of Directive 2004/38 into EEA law implies certain substantive carve-outs, an approach that could be useful also in other contexts of the EU's external relations,

[13] Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn v. Home Office*. See on this point C. TOBLER, *Bikers Are(n't) Welcome*, cit., p. 249 *et seq.*

[14] *Jan Anfinn Wahl v. The Icelandic State*, cit., para. 74 *et seq.*

[15] C. TOBLER, *Bikers Are(n't) Welcome*, cit., p. 252.

[16] F. WEISS, C. KAUPA, *European Union Internal Market Law*, Cambridge: Cambridge University Press, 2014, p. 24.

including notably the EU-Swiss Agreement on the free movement of persons.[17] This has, however, not been confirmed through case law so far.

Other commentators on the EFTA Court's *Wahl* decision were more critical. Fredriksen and Franklin[18] thought that the EFTA Court's reference to "in particular, Art. 24 of the Directive", to the exclusion of other aspects, meant that the wind was already seemingly snatched out of the Joint Declaration's sails. In this context, it is interesting to note the Norwegian Government's argument before the EFTA Court that Directive 2004/38 has a more limited scope under EEA law than under EU law, due to the fact that Union citizenship is not part of the former. However, the following parts of this contribution will show that that is not the gist of subsequent case law of the EFTA Court. Whilst the expectation that identical provisions might not have the same meaning under EU and EEA law has been confirmed, this is in a rather different manner than expected by the present writer in her annotation of the *Wahl* judgment. Indeed, the result of more recent EFTA Court case law appears to be, not that of *limiting* the meaning of Directive 2004/38 under EEA law but, on the contrary, of *broadening* it beyond that applicable under EU law, based on a rather particular understanding of homogeneity.

IV. Other EFTA Court case law on Directive 2004/38 in the EEA context

None of these other decisions applies the reservation, and none elaborates on its meaning. On the contrary: several commentators are of the opinion that, in terms of their substantive finding, these decisions are, in fact, based on elements of Union citizenship, thereby going beyond the limits of EEA law. It is submitted that at least one of these decisions is unproblematic, whilst the other two indeed raise a number of questions.

IV.1. Unproblematic in the present writer's opinion: *Clauder*

Clauder[19] was the first EFTA Court decision on Directive 2004/38 in the EEA context, handed down shortly before *Wahl*, without elaborating on the reservation in the Joint Declaration with respect to Union citizenship. The case concerns the right of permanent

[17] C. Tobler, *Bikers Are(n't) Welcome*, cit., p. 253. More specifically, this would mean that certain matters, in the context of EU law, are clearly linked to Union citizenship, though formally part of the Directive also in the EEA context, would in fact not be part of EEA law, e.g. the right to equal treatment of the economically non-active with respect to social assistance (see also *infra*, footnote 30). Similarly, Fredriksen and Franklin thought that where the Court of Justice bases its decisions on these Union citizenship provisions or gives a "citizenship reading" of worker's rights under EU law, the same direct methods will not be possible under EEA law. As an example, they mention job-seekers' rights to equal treatment under Art. 45 TFEU; H.H. Fredriksen, C.N.K. Franklin, *Of Pragmatism and Principles: The EEA Agreement 20 Years on*, in *Common Market Law Review*, 2015, p. 640.

[18] *Ibid.*, p. 643.

[19] EFTA Court, judgment of 8 April 2013, case E-04/11, *Arnulf Clauder*.

residence of family members of EEA nationals under Art. 16 of the Directive. Mr Clauder, a German national living as a pensioner in Liechtenstein, drew old age pensions from Germany and Liechtenstein and supplementary social welfare benefits in Liechtenstein. Mr Clauder's wife, a German national, lived in Germany at the time of their marriage. The authorities based their refusal of family reunification on the argument that Mr Clauder could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. The case led to a request for an advisory opinion to the EFTA Court under Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement).[20]

It should be noted that even though Art. 16 of the Directive mentions the right to permanent residence for family members in para. 2 (a fact that is sometimes overlooked in comments on the *Clauder* decision), this relates specifically and exclusively to "family members who are not nationals of a Member State". These are given a right to permanent residence if they have legally resided with the Union citizen in the host Member State for a continuous period of five years. In contrast, no mention is made of family members whose nationality is of a Member State, as was the case with Ms Clauder. It is therefore not clear from the wording of the Directive whether such persons, too, must fulfill the residence condition (which Ms Clauder did not), possibly combined with the condition of sufficient means and comprehensive health insurance.

According to the EFTA Court, there are no such conditions for EU nationals and there is a right to immediate permanent residence, even where the family member will be claiming social welfare benefits. As Franklin[21] notes, the EFTA Court made no direct reference to CJEU citizenship case law. The respective reservation is not mentioned in the judgment, and the JCD appears only in the part where the EFTA Court describes the EEA legal context [22] According to Wennerås,[23] the Court "dodged the issue", relying instead on elements such as the right to protection of family life and the strengthening of free movement rights.[24]

Opinions with respect to the acceptability of the EFTA Court's approach differ. According to Fløistad,[25] the EFTA Court in *Clauder* took an innovative step towards free

[20] *Id est* 1994 Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, available at www.efta.int.

[21] C.N.K. FRANKLIN, *Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 177.

[22] *Arnulf Clauder*, cit., para. 5.

[23] P. WENNERÅS, *Article 6 Homogeneity*, in F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER (eds), *Agreement on the European Economic Area: EEA Agreement. A commentary*, Munich: C.H. Beck, 2018, p. 209 *et seq.*, para. 15.

[24] *Arnulf Clauder*, cit., para. 33 *et seq.*

[25] K. FLØISTAD, *Article 28 Free Movement of Workers*, in F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER (eds), *Agreement on the European Economic Area*, cit., p. 3690 *et seq.*, para. 15.

movement rights for economically inactive citizens in the EEA Agreement, in fact comparable to the CJEU citizenship case law in the EU legal order. Similarly, Jay writes about an active, pro-integrationist stance of the EFTA Court and suggests that in *Clauder* the Court has essentially assimilated nationality of an EEA/EFTA State with EU citizenship for the purposes of free movement and residence.[26] In Jay's view, no other conclusion is tenable if the homogeneity of the internal market is to be maintained in a manner which secures fair and effective legal rights, though this can be seen to come at the cost of legal certainty. Still in the same vein, Einarsson considers the Court's (implicit) view that the EEA adaptations (i.e. with respect to the scope and the interpretation of the law) have no impact on the interpretation of the Directive well founded, as otherwise there would be very major deviations from the very wording of these adaptations.[27]

In contrast, the authors writing for Simonsen Vogt Wiig AS[28] opine that, according to the wording of the Directive, family members who do not fulfil the requirements for permanent residence pursuant to Art. 16, para. 2, of the Directive may only be granted a right of residence pursuant to Art. 7, para. 1, let. c), in conjunction with Art. 7, para. 1, let. b), of the Directive. In effect, this means that according to this view Art. 16, para. 2, is relevant also for family members with the nationality of an EU Member State.

In the present writer's view, the legal situation in *Clauder* is special in that the EFTA Court was faced with the gap in Art. 16 of Directive 2004/38 with respect to family members with an EU nationality. It was, moreover, a gap that had not yet been filled by the CJEU in its case law. There was, therefore, no previous CJEU case law which the EFTA Court could or should have taken in account. Rather, the situation was one of "first go" for the EFTA Court, which gave it the chance to shape the interpretation of EEA law, at least for the time being (i.e. awaiting what the CJEU would make of it once it would have the issue before it).

Did the EFTA Court fill the gap by using Union citizenship elements derived from CJEU case law on Union citizenship dating from after 7 December 2007, contrary to the reservation in the Joint Declaration? It is submitted that is not the case: where the EFTA Court, in the relevant parts of the judgment, relies on CJEU case law, it does so with respect to the basic right to family unification. Did the Court otherwise rely on Union citizenship, outside the limits of the reservation? It is true that under EU law, entitlement to social assistance for the economically non-active as such is historically linked to Union citizenship (i.e. it has developed through CJEU Union citizenship case law).[29] Insofar, one

[26] M.A. JAY, *Homogeneity, the Free Movement of Persons and Integration Without Membership: Mission Impossible?*, in *Croatian Yearbook of European Law and Policy*, 2012, p. 87 *et seq.*

[27] Ó.J. EINARSSON, *Article 31 Freedom of Establishment*, in F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER (eds), *Agreement on the European Economic Area*, cit., p. 400 *et seq.*, para. 38.

[28] Advokatfirmaet Simonsen Vogt Wiig AS, *Legal Study on Norway's Obligations Under the EU Citizenship Directive 2004/38/EC*, 2016, www.udi.no, p. 123.

[29] On this issue e.g. C. TOBLER, *Auswirkungen Einer Übernahme der Unionsbürgerrichtlinie für Die Schweiz – Sozialhilfe nach Bilateralem Recht als Anwendungsfall des Polydor-prinzips*, in A. EPINEY, T.

may argue that the fact that Directive 2004/38 does not maintain these conditions, for the economically non-active, in the context of the newly created *status* of permanent residence is a consequence of Union citizenship, rather than a "mere" further development of the free movement aspects of previous law. However, that cannot be relevant under the Union citizenship reservation, which only relates to the evaluation of the EEA relevance of *future* EU legislation as well as *future* CJEU case law based on the concept of Union Citizenship.

More generally, it should be noted that Mr Clauder's personal right to reside in Liechtenstein, in spite of the fact that he was in receipt of social welfare assistance, was not in dispute. Rather, the case exclusively concerned the right to family reunification and in this vein Ms Clauder's residence rights.

Overall, the present writer's conclusion is that *Clauder* is in no way problematic, but rather represents a sensible approach to filling the gap in Art. 16 of the Directive 2004/38. After all, in a situation where the Directive clearly states certain conditions for third country family members only, it is quite legitimate to assume that the legislator did not wish the same conditions to apply to EU nationals, and it would be unreasonable to assume that EU family members would not enjoy permanent residence at all.

IV.2. From *Clauder* to *Gunnarsson* and *Jabbi*: a very particular understanding of homogeneity

Compared to *Clauder*, the situation in the subsequent cases of *Gunnarsson*[30] and *Jabbi*[31] was different, as the EFTA Court in its judgment ruled on the meaning of the provisions of Directive 2004/38 in contexts that had already been addressed by the CJEU in its case law. Accordingly, the EFTA Court was bound by the homogeneity principle under Art. 6 EEA.

According to this principle, the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of EU law shall be interpreted in conformity with the relevant rulings of the CJEU given prior to the date of signature of the EEA Agreement. However, the EFTA Court has held generally that it does not consider this limitation in terms of time – i.e. relevance only of CJEU judgments given prior to the date of signature of the EEA Agreement – useful. Rather, in the interest of the effectiveness of EEA law, the EFTA Court goes beyond this date and also takes into account subsequent case law.[32]

Gordzielik (eds), *Personenfreizügigkeit und Zugang zu Staatlichen Leistungen/Libre circulation des personnes et accès aux prestations étatiques*, Zurich, Basel, Geneva: Schulthess, 2015, p. 55 *et seq.*

[30] EFTA Court, judgment of 27 June 2014, case E-26/13, *The Icelandic State and Atli Gunnarsson*.

[31] EFTA Court, judgment of 26 July 2017, case E-28/15, *Yankuba Jabbi v. The Norwegian Government*.

[32] For example, EFTA Court, judgment of 5 April 2013, case E-2/06, *EFTA Surveillance Authority v. Norway.* In this case, commonly referred to as the *Norwegian Waterfalls* case, the EFTA Court stated: "The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way" (para. 59).

In academic writing, it has been noted that homogeneity does not have to be slavish but can be creative.[33] As was already indicated, both *Gunnarsson* and *Jabbi* reflect a very particular type of creative homogeneity, where the EFTA Court consciously interprets EEA law differently from EU law, in order to achieve the same level of protection for EEA citizens as for EU citizens. Before these decisions were handed down, a hint of this approach could, perhaps, be found in an article by the former President of the EFTA Court, Carl Baudenbacher, entitled *The Goal of Homogeneous Interpretation of the Law in the European Economic Area. Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance*.[34]

In the following sections, the facts and issues of the *Gunnarsson* and *Jabbi* cases are described and the EFTA Court's judgments in these cases are discussed, again, in view of the reservation with respect to Union citizenship.

IV.3. *GUNNARSSON* AND *JABBI*: FACTS AND ISSUES

According to Fredriksen and Franklin,[35] the *Gunnarsson* case represented the litmus test of the EFTA Court's approach with respect to the reservation in the above-mentioned Joint Declaration (more specifically: of the second sentence of the above quote). The case involved an Icelandic couple who had lived in Denmark for a certain time. Their income, which was taxed in Iceland, consisted of various pensions and benefits, including, among others, an employment-related pension of Mr Gunnarsson. He claimed that, for the purposes of taxation in Iceland, he should be allowed to use his wife's unused personal tax credit in respect of his income for the time during which he resided in Denmark. This was denied to him because, under the law in force at the time (which was subsequently amended), the transfer of a personal tax credit was only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension. None of this applied in the case at hand. Mr Gunnarsson demanded repayment of the income tax that he considered to have paid in excess. When refused, he brought an action to the relevant District Court. Both he and the Icelandic State appealed against this court's decision, whereupon the Icelandic Supreme Court turned to the EFTA Court for an advisory opinion. The Supreme Court's questions related to the applicability of Art. 28 EEA and/or Art. 7 of Directive 2004/38 in circumstances as that at hand. In addition, the national court asked whether it is of any signifi-

[33] E.g. C. TIMMERMANS, *Creative Homogeneity*, in M. JOHANSSON, N. WAHL, U. BERNITZ (eds), *Liber amicorum in Honour of Sven Norberg: A European for all Seasons*, Brussels: Bruylant, 2006, pp. 471-484.

[34] C. BAUDENBACHER, *The Goal of Homogeneous Interpretation of the Law in the European Economic Area. Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance,* in *The European Legal Forum*, 2008, p. I-22 *et seq.*

[35] H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles*, cit., p. 643.

cance that the EEA Agreement does not contain a provision corresponding to Art. 21 TFEU, on the free right to movement of Union citizens.

Before the EFTA Court, Iceland, Norway and EFTA Surveillance Authority (ESA) argued that Art. 7 of Directive 2004/38 does not impose obligations on the home State and therefore cannot be applicable in case like *Gunnarsson*. Rather, in EU law – and only there – such obligations follow from Art. 21 TFEU. Alternatively, Norway argued that if Art. 7 of the Directive should entail rights in relation to the home State, it follows from the JCD that only economically active persons are included. In contrast, the European Commission was of the opinion that Mr Gunnarsson could rely on Art. 7 of the Directive in order to claim equal treatment with residents of Iceland in relation to the pooling of personal tax credits with his spouse, based on the argument that the rights of free movement and residence envisaged by this provision would be set at nought if the home State could obstruct persons wishing to avail themselves of them.

The *Jabbi* case concerned the question of whether "Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen".[36] Mr Jabbi had married his Norwegian wife when she lived in Spain as an economically inactive person. From there they later returned to Norway. When Mr Jabbi's application for residence in that country was refused, he went to court which turned to the EFTA Court for help with the interpretation of Directive 2004/38.

Before the EFTA Court, the ESA argued that the scope of free movement rights granted to EFTA nationals should be the same as for EU nationals; further, that the lack of a citizenship concept in the EEA Agreement means that the Directive should be accorded a more important role in the EEA context and that its scope must therefore be broadened on the basis of the principle of effectiveness. The European Commission, interestingly, criticised previous CJEU case law (mentioned further below) and argued that it should not apply in the present context.

IV.4. The EFTA Court's decision in *Gunnarsson*

In *Gunnarsson*, the Court mentions both the JCD and the accompanying Joint Declaration, acknowledging that "the incorporation of Directive 2004/38 cannot introduce rights in to the EEA Agreement based on the concept of Union Citizenship". However, it then adds that "individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU".[37] This has to be seen against the background of the secondary law on movement and residence that applied before the incorporation of Directive 2004/38 into EEA law. In fact,

[36] *Yankuba Jabbi v. The Norwegian Government*, cit., para. 26.
[37] *The Icelandic State and Atli Gunnarsson*, cit., para. 80.

the EFTA Court found that due to temporal aspects of the *Gunnarsson* case, both the former Directive 90/365 and the subsequent Directive 2004/38 were applicable. Noting that Directive 90/365 – in contrast to Directive 2004/38 – does not explicitly mention a right of exit, the EFTA Court points out that taking up residence in another state presupposes a move from the EEA State of origin. From this, it concludes that Art. 1 of Directive 90/365 on the right of residence must be understood as also prohibiting the home State from hindering the person concerned from moving to another EEA State.[38]

In the present writer's opinion, so far, the judgment is easy to follow and logical, if understood literally as relating to the right of exit by crossing the national border. What follows is perhaps more surprising. Pointing out that the substance of Art. 1 of Directive 90/365 has been maintained in Art. 7, para. 1, let. b), of Directive 2004/38, the Court finds that there is nothing to suggest that the latter provision must be interpreted more narrowly than the former with regard to a right to move within the EEA from the home State. On the contrary, according to recital 3 of its preamble, Directive 2004/38 aims in particular to strengthen the right of free movement and residence. Against this background, the EFTA Court concludes that

> "Article 1(1) of Directive 90/365 and Article 7, para. 1, letter b, of Directive 2004/38 must be interpreted such that they confer on a pensioner who receives a pension due to a former employment relationship, but who has not carried out any economic activity in another EEA State during his working life, not only a right of residence in relation to the host EEA State, but also a right to move freely from the home EEA State. The latter right prohibits the home State from hindering such a person from moving to another EEA State. A less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance. Furthermore, a spouse of such a pensioner has similar derived rights, cf. Article 1(2) of Directive 90/365 and Article 7(1)(d) of Directive 2004/38, respectively".[39]

The Court then elaborates on the meaning of the principle of equal treatment with respect to EEA direct tax law, thereby relying on CJEU case law on EU direct tax law.[40] With respect to justification, the Court states that less favourable treatment of a pensioner and his wife who have exercised the right to move freely within the EEA is not compatible with Art. 1, paras 1 and 2, of Directive 90/365 and Art. 7, para. 1, let. b) and let. d), of Directive 2004/38, where the pension received by the pensioner constitutes all or nearly all of that person's income, unless objectively justified. However, the EFTA Court refuses to consider the arguments by Iceland based on the grounds of fiscal cohesion and the effectiveness of fiscal supervision (both arguments that often appear in

[38] *Ibid.*, para. 77.
[39] *Ibid.*, para. 82.
[40] *Ibid.*, para. 84 *et seq.*

tax cases), pointing out that such grounds are permitted neither under Directive 90/365 nor under Directive 2004/38.

In the analysis of Wennerås,[41] the Court swept everything aside that it had said in *Wahl* in relation to the reservation in the Joint Declaration in relation to Union citizenship, resulting in an interpretation of EEA law that on the level of secondary law, covers a field of law falling outside the Main Part of the EEA Agreement itself. Conversely, in the present writer's analysis, the reservation played no real role in the EFTA Court's decision. It is, however, true that the Court's approach is very particular in other respects.

With respect to the reservation, the decisive question is, again, whether the EFTA Court relied on Union citizenship case law of the CJEU that dates from after 7 December 2007. That is not the case. Whilst several authors comment generally on the influence of Union citizenship on the outcome of the EFTA Court's judgment, they do not address the time issue. Thus, Burke and Hannesson note that without the CJEU case law on citizenship in EU, "it is doubtful that the EFTA Court would have required this level of protection".[42] Similarly, Arnesen *et al.* argue that in *Gunnarsson* (as well as in the subsequent case of *Jabbi*) the EFTA Court opted for an interpretation of provisions of Directive 2004/38 at odds with CJEU case law in order to "remedy" the lack of EEA Treaty provisions mirroring Art. 20 *et seq.* TFEU.[43] The present writer joins these commentators in arguing that even though formally not in contradiction with the Joint Declaration, the EFTA Court's approach is problematic in a context where the Court uses this approach in order to interpret EEA secondary law differently from the relevant secondary EU law, thereby manifestly going beyond both the wording of this law and the relevant CJEU case law.

As was already indicated above, the present writer considers the EFTA Court's statements about an implied right of exit as such under Directive 90/365 convincing. At that time, the secondary law relating to movement and residence of economically active persons contained explicit provisions on the right of exit (of the Member State of origin) and of entry (into the host Member State; e.g. Arts 2 and 3 of Directive 68/360).[44] In contrast, the Directives on persons who were not economically active only mentioned the right of residence. It is logical that this implies both a right of exit and a right of entry. However, the EFTA Court disregards the fact that under the Directives that were explicit on this matter, these rights concerned specifically and exclusively the right to cross the border and its technicalities ("simply on production of a valid identity card or passport").

[41] P. WENNERÅS, *Article 6 Homogeneity*, cit., para. 15.

[42] C. BURKE, Ó.Í. HANNESSON, *Citizenship by the Backdoor? Gunnarsson*, in *Common Market Law Review*, 2015, p. 1111 *et seq.*, p. 1127.

[43] F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER, *Introduction. The EFTA States, the EEA and the Different Views on the Legal Integration of Europe*, in F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER (eds), *Agreement on the European Union*, cit., p. 1 *et seq.*, para. 17.

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

The same is true for Directive 2004/38. In the relevant provisions, there was, and is, no link to equal treatment and freedom of restrictions in other respects.

Moreover, when the CJEU began to develop its case law on measures that could deter Union citizens from making use of their free movement rights, this was in the context of market access rights for the economically active under the Treaty (e.g. *Singh*,[45] *Bosmann*,[46] *Kranemann*).[47] Similarly, when the Court subsequently extended this approach to Union citizenship by introducing a prohibition of restriction, it again linked it to the substance of the right to free movement as stated in the Treaty (e.g. *De Cuyper*,[48] *Rüffler*).[49] It should also be noted that Art. 24 of Directive 2004/38 adds to this a right to equal treatment only in respect to further matters, excluding those already covered under other Union law.[50]

There is, therefore, a difference between the right to cross the border as a purely technical issue, on the one hand, and the right not be discouraged from making use of a free movement right in a more general sense. Importantly, these different rights are regulated on different levels, and this is where EU law and EEA differ, since the latter in respect to persons who are not economically active includes only one of the two levels, namely that of secondary law.

The EFTA Court is aware of this gap but considers it irrelevant:

> "Nor can it be decisive that, in the EU pillar, the [CJEU] has based the right of an economically inactive person to move from his home State directly on the Treaty provision on Union Citizenship, now Article 21 TFEU, instead of on Article 1 of Directive 90/365 or Article 7 of Directive 2004/38. As the [CJEU] was called upon to rule on the matter only after a right to move and reside freely was expressly introduced in primary law, there was no need to interpret secondary law in that regard".[51]

As is stated by some commentators, this is not convincing, not least because of the different nature of the regulation on the two levels. In their careful and extensive annotation of the *Gunnarsson* judgment, Burke and Hannesson note that, up to the point of jus-

[45] Court of Justice, judgment of 7 July 1992, case C-370/90, *Singh*.

[46] Court of Justice, judgment of 15 December 1995, case C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others*.

[47] Court of Justice, judgment of 17 March 2005, case C-109/04, *Karl Robert Kranemann v. Land Nordrhein-Westfalen*.

[48] Court of Justice, judgment of 18 July 2006, case C-406/04, *De Cuyper*.

[49] Court of Justice, judgment of 23 April 2009, case C-544/07, *Rüffler*.

[50] Art. 24, para. 1, of Directive 2004/38 cit., states: "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence". Para. 2 then provides for certain derogations.

[51] *The Icelandic State and Atli Gunnarsson*, cit., para. 81.

tification, the EFTA Court interprets the Directives in conformity with a component of the EEA Agreement's free movement provisions, namely the prohibition of discriminations and restrictions in the context of market access (it should be added: rather than movement and residence in a technical sense).[52] The authors consider it rather artificial to do so in the context of a situation falling outside the material scope of these very same free movement provisions (namely because under EU law, it falls under Union citizenship provisions which do not exist under EEA law). The authors also argue – again, convincingly in the present writer's opinion – that it is difficult to reconcile the EFTA Court's use of the exhaustive list of derogations under the Directives with the CJEU and EFTA Court case law on restrictions, where the category of objective justification is open. Against that background, Burke and Hannesson criticise the EFTA Court's "complete absence of a convincing and explicit methodology", including also the fact that this Court relied on selected CJEU case law only, to the exclusion of other, more recent case law.[53] This latter point relates notably to *O. and B.*,[54] which had been handed down before *Gunnarsson* (and which the European Commission criticised before the EFTA Court). In *O. and B.*, the CJEU held that it follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not cover situations of a Union citizen returning to the Member State of nationality, or their family members. Instead, the Court found Art. 21 TFEU to be applicable (in which context Directive 2004/38 applies by analogy).[55]

Overall, Burke and Hannesson[56] note that as a result of the EFTA Court's decision in *Gunnarsson*, there is now a significant cleavage between the EU and the EEA regime in relation to the interpretation of an identical norm. At the same time, the authors note that had the EFTA Court transposed CJEU case law, EFTA nationals would not have been afforded equal protection in their home states on the basis of EEA law when compared to their counterparts in EU Member States relying on EU law. From that perspective, the authors consider that the conclusion in *Gunnarsson* would seem justified, even though based on "a rather stretched teleology".

It is submitted that here lies the key to the EFTA Court's approach: rather than opting for a homogeneous interpretation of Art. 7 of Directive 2004/38 in the sense of following the interpretation in the relevant CJEU case law, the EFTA Court consciously deviates from that interpretation in order to arrive, not at the same interpretation, but rather, *through different interpretation, at the same overall level of protection under EU law and under EEA*. The fact that this is the Court's guiding star in interpreting Directive 2004/38 becomes evident in the next judgment, in the case of *Jabbi*, through explicit statements to that effect.

[52] C. Burke, Ó.Í. Hannesson, *Citizenship by the Backdoor?*, cit., p. 1125 *et seq.*
[53] Similarly C.N.K. Franklin, *Square Pegs and Round Holes*, cit., p. 180.
[54] Court of Justice, judgment of 12 March 2014, case C-456/12, *O.*
[55] More recently, see also Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others*.
[56] C. Burke, Ó.Í. Hannesson, *Citizenship by the Backdoor?*, cit., p. 1132.

IV.5. The EFTA Court's decision in *Jabbi*

Having been criticised for disregarding the *O. and B.* decision of the CJEU in *Gunnarsson*, the EFTA Court in *Jabbi* sets out to explain why that judgment could not affect its approach. The EFTA Court begins by acknowledging that under EU law, the right to return of economically non-active citizens together with their family members is based on Art. 21 TFEU, and that the CJEU had explicitly rejected the application of Directive 2004/38. The EFTA Court continues in the following manner:

> "Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue. However, if the Court ensures the same level of protection in the EEA, it must explain why the [CJEU's] statement in *O. and B.* regarding the Directive cannot decide the matter. [...] The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law".[57]

Having set out its path in this manner and having, further, drawn attention to the preamble of the EEA Agreement, according to which a uniform interpretation and application of the EEA Agreement shall be achieved in full deference to the independence of the courts,[58] the EFTA Court recalls its finding in *Gunnarsson*, namely that Art. 7, para. 1, let. b), of Directive 2004/38 confers on an EEA national the right to move freely from the home EEA State and to take up residence in another EEA State, that an EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law, including in relation to family members covered by the Directive.[59]

Referring to *Singh*[60] and *Eind*,[61] the EFTA Court further recalls that the right to return is protected under EU law. In the latter, in particular, the CJEU recognises that an EU migrant worker may rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he previously exercised his EU rights. According to the EFTA Court, this reasoning is equally relevant when the person returning is not a former migrant worker, but rather an economically inactive person who has exercised the right to free movement under Art. 7, para. 1, let. b), of the Directive. The EFTA Court therefore concludes that,

> "[w]hen a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the

[57] *Yankuba Jabbi v. The Norwegian Government*, cit., paras 66 and 68.
[58] *Ibid.*, para. 70.
[59] *Ibid.*, para. 75.
[60] *Singh*, cit.
[61] Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*.

> EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State".[62]

From the perspective of the reservation in the Joint Declaration, again, the question should be asked whether the EFTA Court relied on CJEU case law on Union citizenship dating from after 7 December 2007. First, it may be noted that, contrary to the suggestion of the European Commission, the EFTA Court did not refer to *McCarthy II*,[63] handed down in 2014 and recommended by the European Commission as a benchmark. However, this is perhaps understandable in view of the fact that that case concerned an entirely different provision of the Directive, namely Art. 35, on measure to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. The Court did, however, rely on *Eind*, a decision that dates from 10 December 2007. But is it a citizenship case? As stated above, the case involved a former migrant worker who wanted to return home without being economically active there. The CJEU notes that

> "the right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by Community law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68",

adding that "that interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States".[64]

In other words, it may be argued that the real basis of the Court's reasoning in that case remains the free movement for workers, which is a particular aspect of the economic side of Union citizenship. If so, it must be concluded that the Court respected the limits of the reservation.

Again, academic comments on *Jabbi* do not focus on the temporal aspect of (alleged) Union citizenship case law of the CJEU that the EFTA Court relies on in *Jabbi*. They rather tend to discuss the EFTA Court's particular approach to the homogeneity principle under EEA law. They note that in interpreting Art. 7 of Directive 2004/38, the EFTA Court chose a different approach than the CJEU did in the case of *O. and B.*, formally distinguishing the case before it from that precedent but in fact openly departing from it. Thus, according to Wennerås,[65] the EFTA Court held that Directive 2004/38 "could be

[62] *Yankuba Jabbi v. The Norwegian Government*, cit., para. 77.
[63] Court of Justice, judgment of 18 December 2014, case C-202/13, *McCarthy and Others*.
[64] *Eind*, cit., para. 10.
[65] P. Wennerås, *Article 6 Homogeneity*, cit., para. 66.

applied by analogy and gave the applicant the same rights as the [CJEU] had said could only be derived from the concept of Union citizenship in Article 21 TFEU. The judgment speaks volumes about how the EFTA Court perceives the principle of homogeneity and the objectives of the EEA Agreement". Following Falch,[66] *Jabbi* suggests that the EFTA Court will do much to preserve homogeneity with EU law in its interpretation and application of EEA law, even in situations where the parallel in EU law has been interpreted and applied in light of provisions not made part of the Agreement (i.e. Union citizenship provisions). Franklin notes that

> "[t]he EFTA Court's point seems to be that if one of the aims of the Citizenship Directive was to strengthen pre-existing rights of free movement, then one cannot rely on the introduction of Citizenship to do away with such pre-existing rights in an EEA context. Even if the concept of Citizenship cannot be used to enhance the pre-existing rights which applied under EEA law, it should certainly not be used as an argument to limit rights which were intended to survive. The creative technique opted for by the EFTA Court will therefore presumably be capable of ensuring homogeneity between EEA and EU law in most cases, notwithstanding the contrary impression one might otherwise get from (and perhaps the intention behind) the Joint Declaration".[67]

A final example, Arnesen and Fredriksen argue that "[t]he controversial aspect of *Jabbi* lies in the fact that the EFTA Court found its break with the case law of the [CJEU] to be *supported* by the homogeneity principle (as opposed to representing a deviation from it) and, as a result, advocated a more extensive reading of the Citizenship Directive in the EEA law context than in the EU law context". [68]

In this context, again, much depends on the meaning of the homogeneity principle. If homogeneity is understood as requiring, in principle, the same interpretation of a given provision under EEA law as under EU law, then the EFTA Court clearly strayed from it. However, quite clearly, the EFTA Court in the present context does not aim at this type of homogeneity, but rather at homogeneity in view of the same result or the same level of protection. Wennerås argues that, "[u]nderneath it all lays, it would seem, a conviction that the Contracting Parties wants EEA law to provide the same *results* as EU law and that it is for the EFTA Court to carry out this task".[69] Following the terminology of Baudenbacher and Fredriksen, Burke and Hannesson in the context of *Gunnarsson* refer to "effect-related homogeneity", stating that this decision represents the first occasion on which the EFTA Court interpreted EEA law to entail more extensive rights

[66] I. Falch, *Article 4 Non-discrimination on Grounds of Nationality*, in F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, C. Vedder (eds), *Agreement on the European Economic Area*, cit., para. 20.

[67] C.N.K. Franklin, *Square Pegs and Round Holes*, cit., p. 183.

[68] F. Arnesen, H.H. Fredriksen, *Preamble*, in F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, C. Vedder (eds), *Agreement on the European Economic Area*, cit., p. 150 *et seq.*, footnote 100.

[69] Wennerås, *Article 6*, cit., para. 66.

than what follows from a settled interpretation of an identical norm of EU law by the CJEU.[70]

Franklin opines that,

> "as a result of the EFTA Court's Opinions in both *Gunnarsson* and *Jabbi*, it seems as though all rights – both autonomous and derived – contained in EEA rules pre-dating yet furthered in the Citizenship Directive will continue to enjoy the same protection under EEA law today and will continue to be interpreted in conformity with EU developments. It would seem as though almost any case in which the Court of Justice bases its findings on the Citizenship rules of the Treaty, and where aspects of the rights in question find at least some resonance in the provisions of the Directive, might therefore be capable of being followed – by way of analogy".[71]

The present writer would submit that the EFTA Court's approach could be seen to reflect a new, reversed version of the *Polydor* principle: different contexts of the same provision must lead to different interpretations, where that is necessary in order to achieve the same overall result in terms of the level of peoples' protection.

V. Findings with respect to the reservation and relevance in other contexts, including notably Brexit

To return to the reservation in the Joint Declaration with respect to Union citizenship, Pirker[72] quite rightly called it "in practice hardly ever relevant". According to Jay,[73] this raises the question of how accurate it is to say that citizenship rights do not form part of the EEA Agreement, given that the EFTA Court has essentially assimilated nationality of an EEA/EFTA State with EU citizenship for the purposes of free movement and residence.

However, it remains to be seen whether the reservation would have any meaning in the context of Article 24 of Directive 2004/38, as indicated by the EFTA Court in *Clauder.* It also remains to be seen what the CJEU will make of the EFTA Court's approach should it be faced with an EEA case on Directive 2004/38 in similar circumstances as those of *Clauder*, *Gunnarsson* and *Jabbi*. Will it follow the EFTA Court's interpretation, or will it go in a different direction, adhering to its own, previous EU case law, also in the overall different context of the EEA? Or will it follow a middle path, opting for an EEA-specific interpretation that is different from that by the EFTA Court? In this context, it will be remembered that the European Commission had urged the EFTA Court to depart from *O. and B.*, apparently aiming at the judicial dialogue between the two Courts and possibly hoping that an interpretation by the EFTA Court along the lines suggested by it would,

[70] C. Burke, Ó.Í. Hannesson, *Citizenship by the Backdoor?*, cit., p. 1117 *et seq.*

[71] C.N.K. Franklin, *Square Pegs and Round Holes*, cit., p. 183.

[72] B. Pirker, *Switzerland and the EEA*, in F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, C. Vedder (eds), *Agreement on the European Economic Area*, cit., p. 80 *et seq.*, para. 32.

[73] M.A. Jay, *Homogeneity, the Free Movement of Persons and Integration Without Membership*, cit., p. 88.

subsequently, lead the CJEU to take the same approach when dealing with Directive 2004/38 in the EEA context. As Baudenbacher notes, the CJEU has shown itself willing to enter into a dialogue with the EFTA Court and in some instance even to reconsider and to adjust its case law in the light of the EFTA Court's jurisprudence.[74]

Finally, there is the question of what all of this could mean in other contexts, i.e. in the legal relations of the EU with other non-Member States. In this respect, different legal regimes must be distinguished. For example, under the Ankara Agreement between the EU and Turkey,[75] Directive 2004/38 is not part of the common legal *acquis*. At the same time, it is established CJEU case law that "the principles enshrined in the Treaty articles relating to freedom of movement for workers must be extended, as far as possible, to Turkish nationals who enjoy rights under the EEC-Turkey Association", and that the law of the Ankara Agreement must be interpreted by analogy with EU Treaty and secondary law (e.g. *Ziebell*).[76] Against that background, the applicant in the case of *Ziebell* argued that Art. 28 of Directive 2004/38, which establishes a system of protection against expulsion measures which is based on the degree of integration of the person in question in the host Member State, should apply also in the context of the agreement. The CJEU disagreed, stating that it is "the very concept of citizenship [which] justifies the recognition, for Union citizens alone, of guarantees which are considerably strengthened in respect of expulsion, such as those provided for in Article 28(3)(a) of Directive 2004/38".[77]

Another example relates to the EU-Swiss agreement on the free movement of persons (FMP).[78] In terms of movement, residence and family reunification, this agreement is based on secondary EU law that predates Directive 2004/38. Whilst the EU desired the incorporation of that Directive into the acquis of the agreement, the Swiss Government resisted. So far, this has been possible because the agreement does not provide for a system of dynamic updating in line with the evolving EU law on which the agreement is based. However, this is now under negotiation, as the FMP is part of a package of market access agreements for which the EU has demanded the introduction of a new institutional system, including, among others, a dynamic system of updating.[79] Whilst Switzerland agreed to enter into negotiations on a renewed institutional system for the relevant agreements as well as for any future market access agreements, the Federal

[74] C. BAUDENBACHER, *The Goal of Homogeneous Interpretation of the Law in the European Economic Area*, cit., pp. I-24 *et seq*.

[75] Agreement of 12 September 1963 establishing an Association between the European Community and its Member States, of the one part, and the Republic of Turkey, of the other part.

[76] Court of Justice, judgment of 8 December 2011, case C-371/08, *Ziebell*, para. 58.

[77] *Ibid*., para. 73.

[78] Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

[79] See generally C. TOBLER, *One of Many Challenges After "Brexit". The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 575 *et seq.*

Government has aimed at leaving the incorporation of Directive 2004/38 out of the scope of the negotiations. It remains to be seen whether this will be successful.

After the EFTA Court's decision in the case of *Wahl* had been handed down, the present writer suggested that given the Court's statements about the limits of the incorporation of the Directive into the EEA Agreement, a similar legislative approach as in the EEA might be useful for Switzerland, i.e. incorporation of the Directive minus its Union citizenship elements.[80] However, the EFTA Court's subsequent case law, as discussed in this contribution, has shown that for such a carve-out to be effective, it would be wise to frame it in much more explicit terms.

This, then, would also be the lesson in the context of Brexit in the – though at present admittedly unlikely – event that the UK and the EU, following the former's withdrawal from the Union, should agree on a future legal relationship including some form of free movement of persons based on EU rules. Again, should the United Kingdom wish for a carve-out of specific Union citizenship elements, it would have to insist on a specific and unambiguous regulation of the matter.

Alternatively, should the UK decide to (re-)join the EEA – though also unlikely at the time of writing – then it would find that free movement of persons under EEA is to a very large extent the same as under EU law, in spite of the absence of Union citizenship under EEA law. Indeed, the only clearly established difference is the presence, in the EEA Agreement only, of a permanent safeguard clause. Art. 112 of the EEA Agreement provides:

> "1. If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.
> 2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.
> 3. The safeguard measures shall apply with regard to all Contracting Parties".

This EEA law clause – which has been used only once it its history, namely by Liechtenstein before it secured a special deal under the EEA that limits its obligation to let other EEA nationals settle on its territory – gives a certain leeway to the contracting States which is not available under EU law, if only in special circumstances.[81] It is obvious that this is far from letting the States control the movement of persons based on

[80] C. TOBLER, *Bikers Are(n't) Welcome*, cit., p. 254; subsequently also C. TOBLER, *Auswirkungen Einer Übernahme der Unionsbürgerrichtlinie für Die Schweiz – Sozialhilfe nach Bilateralem Recht als Anwendungsfall des Polydor-prinzips*, in A. EPINEY, T. GORDZIELIK (eds), *Personenfreizügigkeit und Zugang zu Staatlichen Leistungen/Libre circulation des personnes et accès aux prestations étatiques*, Zurich, Basel, Geneva: Schulthess, 2015, p. 55 *et seq.*

[81] See C. TOBLER, *Schutzklauseln in der Personenfreizügigkeit mit der EU*, in *Jusletter*, 16 February 2015, https://jusletter.weblaw.ch/juslissues/2015/790.htmlprint.

their own, unilateral decision, as is the aim of the present UK government for the time post-Brexit. In fact, to be completely "free" of EU law-related ramifications to the movement of persons, both on the substantive and on the institutional level, requires a common regime that makes no use whatsoever of substantive EU law concepts. Only in that case, will no issues of parallel interpretation arise.

European Forum

The following *Insights*, included in this issue, are available online here.

Insights

European Papers web site: www.europeanpapers.eu. The web site is an integral part of *European Papers* and provides full on-line access to the contributions published in the four-monthly *e-Journal* and on the *European Forum*.

Submission of Manuscripts to European Papers: complete instructions for submitting a manuscripts are available on the *European Papers* web site at Submitting to the *e-Journal*. Before submitting their manuscripts, Authors are strongly recommended to read carefully these instructions and the *Style Guide*. Authors are invited to submit their manuscripts for publication in the *e-Journal* to the following e-mail address: submission@europeanpapers.eu. Manuscripts sent through other channels will not be accepted for evaluation.

Manuscripts Submission and Review Process: complete instructions for submitting a manuscripts are available on the *European Papers* web site.

1. *European Papers* encourages submissions for publication in the *e-Journal* and on the *European Forum*. Submissions must be related to the distinctive field of interest of *European Papers* and comply with the Submission to the *e-Journal* and Submission to the *European Forum* procedures, and with the Style Guide.
2. Authors are invited to submit their manuscripts to the following e-mail address: submission@europeanpapers.eu. Authors are also requested to produce a short CV and to fill in, subscribe and submit the *Copyright and Consent to Publish* form. Authors must indicate whether their manuscript has or will been submitted to other journals. Exclusive submissions will receive preferential consideration.
3. *European Papers* is a double-blind peer-reviewed journal.
4. Manuscripts submitted for publication in *European Papers* are subject to a preliminary evaluation of the Editors. Manuscripts are admitted to the review process unless they do not manifestly comply with the requirements mentioned above or unless, by their object, method or contents, do not manifestly fall short of its qualitative standard of excellence.
5. Admitted manuscripts are double-blindly peer-reviewed. Each reviewer addresses his/her recommendation to the reviewing Editor. In case of divergent recommendations, they are reviewed by a third reviewer or are handled by the reviewing Editor. Special care is put in handling with actual or potential conflicts of interests.
6. At the end of the double-blind peer review, Authors receive a reasoned decision of acceptance or rejection. Alternatively, the Authors are requested to revise and resubmit their manuscript.

Books for Review ought to be sent to Prof. Enzo Cannizzaro (*Book Review Editor*), Department of Legal Sciences, University of Rome "La Sapienza", Piazzale Aldo Moro, 5 – I-00185 Rome (Italy); e-books ought to be sent to: submission@europeanpapers.eu. The books will not be returned. Submission does not guarantee that the book will be reviewed.

Administration and contact information: Research Centre for European Law c/o "Unitelma Sapienza" – University of Rome, Viale Regina Elena, 295 – I-00161 Rome (Italy) – info@europeanpapers.eu.

Abstracting and Indexing Services: European Papers is applying to join, *inter alia*, the services mentioned on the *European Papers* web site at *International Abstracting and Indexing Services*.

ISSN: 2499-8249