ARTICLES

FREE MOVEMENT OF EU CITIZENS

Including for the Poor?

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ABSTRACT

This article analyses the ambiguity within the Union's policy goals of free movement of Union citizens and the combating of poverty and social exclusion. The former is viewed as a fundamental right with constitutional status, whereas the latter is viewed as a central policy objective of the EU. Yet, the right to free movement of economically inactive persons and to equal treatment with the host state's citizens with regard to social benefits is subject to the economically inactive persons having sufficient resources. As a result, in practice the right to free movement could very well become impossible for indigent people. This article examines the legal context offered by the Treaty, secondary legislation (Directive 2004/38 and Regulation 883/2004) and the Court of Justice's case law. It finds that the EU has problems in reconciling the right to free movement and the policy objectives of fighting poverty and social exclusion. To conclude, the article presents some ideas and proposals on how this ambiguity and these contradictions could be solved so as to guarantee the right to free movement for all, including the poor.

Keywords: combating poverty; free movement of EU citizens; the 'sufficient resources' requirement

§1. INTRODUCTION

The right of EU citizens to move freely within the EU Member States has evolved from a right for economically active persons (within the context of Europe's economic integration) to a right for all EU citizens whether or not they are economically active. In parallel, the fight against poverty and social exclusion is supposed to be at the core of the EU's political agenda. However, the right to free movement of economically non-active

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persons and to equal treatment with the host state's citizens with regard to social benefits is subject to having sufficient resources so as not to become an unreasonable burden on the host state's social assistance system. As a result, indigent people could very well be deprived of the right to free movement in practice, which would amount to ambiguity between these two policy goals.

Quite a large number of Union citizens are affected by this issue. Indeed, according to the most recent figures published by Eurostat,[1] in 2013, 16.7% of the population of the European Union were at risk of income poverty, meaning that their disposable income was below their national at-risk-of-poverty threshold.[2] These figures show that in total numbers more than 80 million EU citizens live under the poverty threshold.

The issue is also high on the political agenda. At the Council's request, the Commission published a study on this issue in October 2013.[3] In both the literature and consultations with the stakeholders little evidence can be found to suggest that the main motivation of EU citizens to migrate and reside in a different Member State is benefit-related as opposed to work or family-related. On 25 November 2013, the Commission published a Communication on the free movement of EU citizens which proposed five points of action to help national and local authorities to effectively apply EU free movement rules and use available funds on the ground.[4] However, based on very anecdotal evidence, politicians and the popular press in several Member States openly criticized the fact that Union citizens from other Member States wanted to make use of the social assistance schemes of the host state. It is not uncommon for migration of this kind to be called 'benefit tourism'. Some Member States' political leaders openly proposed to amend the rules on free movement, including the Treaty provisions, not only for economically inactive Union citizens but also for workers.[5]

This article analyses the ambiguity within the Union's policy goals of free movement and the combating of poverty and social exclusion. It starts by reiterating the legal meaning of the right to free movement as well as the EU policy commitment to combat poverty. Next, it examines the current rules and the case law of the Court of Justice (CJEU) on the right to minimum subsistence benefits for migrant workers and persons who can

1 Eurostat News release, *More than 120 million persons at risk of poverty or social exclusion in 2013*, 4 November 2014, 168/2014.

2 This threshold is set at 60% of the national median equivalized disposable income.

3 ICF and Milieu Ltd, 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU-migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', *Website of the European Commission* (2013), http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes#, p. 276.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions on Free movement of EU citizens and their families: Five actions to make a difference, COM(2013) 837.

5 See for instance the proposals formulated on 28 November 2014 by D. Cameron, Prime Minister of the UK, BBC News, 'David Cameron urges EU support for migration plans', 28 November 2014, www.bbc.com/news/uk-politics-30224493. Compare, 'Editorial comments. The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare', 51 *CMLRev* (2014), p. 729–740.

rely on that status. The sometimes-blurred definition in EU law of who is economically active and who is not will also be examined. The possibilities and limitations for indigent (economically inactive migrant) Union citizens to obtain a right to reside in another Member State and have access to social minimum benefits there are also assessed. This article critically analyses the balance that the Court of Justice tried to strike in its recent judgment in *Brey* and *Dano*, between the free movement rights and the Member States' interest in limiting access to their solidarity systems. Finally, the article intends to present some ideas and proposals on how this ambiguity and these contradictions could be solved in order to guarantee the right to free movement for all, including the poor.

§2. THE RIGHT TO FREE MOVEMENT WITHIN THE EU AS A FUNDAMENTAL RIGHT

The right to free movement within the EU is first and foremost a right for those who are economically active (Articles 45 and 49 TFEU). The Maastricht Treaty of 1992 complemented this purely economic integration context with a more politically oriented integration, most visibly expressed through the establishment of European citizenship. A key element of this European citizenship was the creation of the Union citizens' right to move and reside freely within the territory of the Member States, irrespective of the exercise of an economic activity, but subject to the limitations and restrictions laid down by Union law (Article 8A EEC Treaty and now Article 21 TFEU). This right is also enshrined in Article 45 of the Charter of Fundamental Rights of the EU.

The CJEU has recognized the direct effect of Article 21 TFEU, confirming that this right is conferred directly on every Union citizen.[6] The CJEU also observed that Union citizenship confers on each citizen a primary and individual right to move and reside freely within the territory of the Member States.[7] The CJEU qualified this freedom to move and reside within the territory of the Member States as a fundamental freedom guaranteed by the Treaty[8] which must be interpreted broadly.[9] Hence, limitations and conditions laid down in EU law must be interpreted restrictively and applied in accordance with the principle of proportionality.[10] In *Grzelczyk*, the Court stated that the status of Union citizen is destined to be the fundamental status of nationals of the

6 Case C-413/99 *Baumbast*, EU:C:2002:493, para. 84 et seq.

7 Case C-162/09 *Lassal*, EU:C:2010:592, para. 29; Case C-434/09 *McCarthy*, EU:C:2011:277, para. 27; Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, para. 35 and 36; and Case C-220/12 *Thiele Meneses*, EU:C:2013:683, para. 19.

8 See recently: Cases C-523/11 and C-585/11 *Prinz and Seeberger,* EU:C:2013:524, para. 25; Case C-220/12 *Thiele Meneses,* para. 20; and Case C-275/12 *Elrick*, EU:C:2013:684, para. 20.

9 See inter alia Case C-200/02 *Zhu and Chen*, EU:C:2004:639, para. 31; Case C-408/03 *Commission v. Belgium*, EU:C:2006:192, para. 40.

10 Case C-413/99 *Baumbast*, para. 91; Case C-200/02 *Zhu and Chen*, para. 32; Case C-408/03 *Commission v. Belgium*, para. 39; Case C-162/09 *Lassal*, para. 29–31; and Case C-140/12 *Brey*, EU:C:2013:565, para. 70.

Member States, a statement which later became paradigmatic, since it was repeated on numerous occasions in subsequent case law.[11] The Court also added that every Union citizen therefore may rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in situations relating to the exercise of the right to move and reside within the territory of the Member States (subject to such exceptions as are expressly provided for).[12]

The right to move and reside freely on the territory of the Member States and the right to equal treatment is firmly endorsed in the Treaty provisions as well as in the case law of the CJEU as a fundamental right of every EU citizen, regardless of whether the person exercises an economic activity. It has constitutional status in EU law.[13]

§3. THE FIGHT AGAINST POVERTY AS A CENTRAL POLICY OBJECTIVE OF THE EU

Ever since the launch of the Lisbon Strategy in the year 2000, the EU has paid full regard to the fight against poverty and social exclusion when formulating policy objectives and instruments. It was a central theme within the context of the Open Method of Coordination in the field of social protection and social inclusion as well as in employment strategy. This objective was further confirmed in 2010 by the conclusions of the European Council of 17 June 2010 on the Europe 2020 Strategy.[14] Indeed, the European Council adopted an EU headline target for promoting social inclusion, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and exclusion by 2020. This was also taken on board by the Europe 2020 Strategy Integrated Guidelines, including the Broad Guidelines for the Economic Policies and the Guidelines for the Employment Policies adopted by the Council on 21 October 2010, in particular Guideline 10, entitled 'Promoting social inclusion and combating poverty'. The implementation by the Member States of these guidelines is monitored every six months in the so-called 'European Semester'.[15]

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11 Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 31. See also, Case C-413/99 *Baumbast*, para. 82; Case C-148/02 *Garcia Avello*, EU:C:2003:539, para. 22; Case C-200/02 *Zhu and Chen*, para. 25; Case C-135/08 *Rottmann*, EU:C:2010:104, para. 43; Case C-367/11 *Prete*, EU:C:2012:668, para. 24; Case C-46/12 *L.N.*, EU:C:2013:97, para. 27; Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger*, para. 24; Case C-275/12 *Elrick*, para. 19; and Case C-333/13 *Dano*, EU:C:2014:2358, para. 58.

12 Case C-184/99 *Grzelczyk,* para. 31; Case C-224/98 *D'Hoop*, EU:C:2002:432, para. 28; Case C-148/02 *Garcia Avello*, para. 22 and 23; Case C-138/02 *Collins*, EU:C:2004:172, para. 61; Case C-224/02 *Pusa*,EU:C:2004:273, para. 16; Case C-367/11 *Prete*, para. 24; and Case C-333/13 *Dano*, para. 59–60.

13 See explicitly the Opinion of Advocate General Wahl in Case C-507/12 *Saint-Prix*, EU:C:2013:841, para. 2.

14 See European Council, Conclusion of the European Council of 17 June 2010, EUCO 13/10. See also Communication from the Commission of 3 March 2010, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

15 For an overview of the country-specific recommendations for 2013 to 2014, see Communication from the Commission of 13 November 2013 – Annual Growth Survey 2014, COM(2013) 800 final.

The main objective of these European policy initiatives is to support the Member States in their national policies to combat poverty. However, they do not have a direct impact on legal claims for financial or other support by persons faced with poverty or social exclusion. Still, these objectives have found their way into legal instruments of the EU, and more specifically into the Treaties as amended in the Lisbon Treaty (in force on 1 December 2009). Article 9 TFEU declares that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to (…) the fight against social exclusion (…)'. Furthermore, Article 3(3) TEU states that the construction of the internal market is to be realized by means of policies based on 'a highly competitive social market economy, aiming at full employment and social progress'. This article also confirms that '[i]t [meaning the EU] shall combat social exclusion (…)'. Article 151(1) TFEU also refers to the combating of social exclusion as an objective of the Union and the Member States. Article 34(3) of the Charter of Fundamental Rights reflects these goals, stating that

> in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national law and practices.

Furthermore, Article 1 of the Charter of Fundamental Rights states that human dignity is inviolable and must be protected and respected.

There is no doubt that the fight against poverty and social exclusion is a policy objective which is high on the political agenda of the European institutions and supported by provisions in the Treaties as well as in the Charter.

§4. ACCESS TO MINIMUM SUBSISTENCE BENEFITS FOR MIGRATING EU CITIZENS

Since the right to move and reside freely within the EU Member States is a fundamental right for all EU citizens and the fight against poverty and social exclusion is at the core of the proclaimed EU policy objectives, we should ask ourselves to what extent these two goals are (not) compatible, more specifically with a view to the legal provisions and case law on the free movement of persons. The question we would like to address in this article is to what extent the EU equal treatment provisions also guarantee the right to social benefits intended to support indigent migrants. What is the balance between the claim for equal treatment and the concerns of the Member States to protect their welfare systems against the burden laid upon them by such claims from migrants coming from other Member States?

A. THE RIGHT TO MINIMUM SUBSISTENCE BENEFITS IN THE HOST STATE FOR INDIGENT MIGRANT WORKERS

Migrant workers can rely on the prohibition of discrimination on grounds of nationality included in Article 45(2) TFEU and Article 7 of Regulation 492/2011[16] (ex Regulation 1612/68).[17] This ban on discrimination refers to working conditions, but also to all social and tax advantages granted by the legislation of the Member State of employment. The CJEU considers social assistance to be such a social advantage.[18]

The personal scope of these provisions has been interpreted very broadly by the CJEU. Any person pursuing activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'.[19] The origin of the funds from which the remuneration is paid or the limited amount of that remuneration do not impact a person's status as a 'worker'.[20] The fact that the income from employment is lower than the minimum required for subsistence does not prevent a person employed from being regarded as a 'worker' within the meaning of Article 45 TFEU, Regulation 1612/68 and what is now Regulation 492/2011.[21] This is also the case when the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the state in which he/she resides.[22] Furthermore, regarding the duration of the activity pursued, the fact that employment is of short duration does not exclude in itself such employment from the scope of Article 45 TFEU.[23] Moreover, in the view of the Court, the income can also consist of an indirect contribution, such as board and lodging.[24] This case law was recently reconfirmed by the Court of Justice.[25, 26]

Yet, this case law also implies that it is not always easy to draw the line between 'work' that falls under these definitions and 'work' that does not.[27] How many hours a

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16 Regulation 492/2011 on freedom of movement for workers within the Union, [2011] OJ L 141/1.

17 Regulation 1612/68 on freedom of movement for workers within the Community, [1968] OJ L 275/2.

18 Case 249/83 *Hoeckx*, EU:C:1985:139; and Case 316/85 *Lebon*, EU:C:1987:302.

19 For early statements of this rule, see, inter alia, Case 139/85 *Kempf*, EU:C:1986:223, para. 13; Case 66/85 *Lawrie-Blum*, EU:C:1986:284, para. 16. See more recent Case C-413/01 *Ninni-Orasche*, EU:C:2003:600, para. 23; Case C-228/07 *Petersen*, EU:C:2008:494, para. 45; and Case 46/12 *L.N.*, para. 39.

20 Case 344/87 *Bettray*, EU:C:1989:226, para. 15; and Case C-10/05 *Mattern and Cikotic*, EU:C:2006:220, para. 22.

21 Case 53/81 *Levin*, EU:C:1982:105, para. 15 and 16; and Case C-317/93 *Nolte*, EU:C:1995:438, para. 19.

22 Case 139/85 *Kempf*, para. 14; and Case C-444/93 *Megner & Scheffel*, EU:C:1995:442, para. 18.

23 Case C-3/90 *Bernini*, EU:C:1992:89, para. 16; Case C-444/93 *Megner & Scheffel*, para. 18; and Case C-413/01 *Ninni-Orasche,* para. 25.

24 Case 196/87 *Steymann*, EU:C:1988:475.

25 Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, para. 26–29; and Case C-46/12 *L.N.*

26 The same case law also applies if EU migrants are self-employed persons: Case 63/86 *Commission v. Italy*, EU:C:1988:9; and Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira*, EU:C:1997:44.

27 See also, L. Nogler, 'Rethinking the *Laurie-Blum* Doctrine of Subordination: A Critical analysis Prompted by Recent Developments in Italian Employment Law', 26 *International Journal of*

week does a person have to work for his/her employment to be considered as 'real and genuine' and not as 'purely marginal and ancillary'? Chores in return for food, lodging and pocket money were considered 'work' in *Steymann* but not in *Trojani*.[28] And in *Bettray*, 'work merely as a means of rehabilitation and reintegration' was not considered as an economic activity by the CJEU. It is also clear from the definition of 'worker' that volunteers are excluded since they do not receive any remuneration, despite the fact that they may contribute to the host state's development.[29]

Apart from that, the provisions on residence rights in Directive 2004/38[30] show that there can be no resources requirement vis-à-vis citizens of other Member States who can prove that they are working as employed or self-employed persons falling within the scope of the CJEU's case law. The same applies to their family members.[31]

This case law suggests that indigent migrant workers and self-employed persons, in the very broad sense of these terms, can claim social assistance and other minimum benefits in the host country where they are economically active, and on an equal footing with the nationals of this host country. This is even the case when these workers only provide a limited contribution to the economy of the host state. The social integration into the host society is seen by the CJEU as an instrument for promoting participation in the EU internal market and its economic goals of free movement of factors of production, even if their 'productivity' is rather low. The rationale behind this case law has more to do with the 'internal market' than with 'combating of social exclusion', even if this actually contributes to the latter. For the Court, being economically active constitutes a sufficient link of integration, inter alia, because migrant workers also contribute to the financing of the social policies of the host state by paying taxes.[32]

Yet, in other and more recent case law, the CJEU seems to depart from this mechanical application of the equal treatment provisions concerning migrant workers' claims for social benefits. In *Geven*, the Court had to rule on the refusal of the competent German authorities to grant a child-raising allowance to a Dutch national who resided in the Netherlands and worked between 3 and 14 hours a week in Germany. In its judgment, the Court accepted as appropriate the justification according to which the measure intended

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Comparative Labour Law and Industrial Relations (2010), p. 83–101; C. O'Brien, 'Social Blind spots and Monocular Policy Making: The ECJ's Migrant Worker Model', 46 *CMLR* (2009), p. 1107–1141; T. Van Peijpe, 'EU Limits for the Personal Scope of Employment Law', 3 *European Labour Law Journal* (2012), p. 35–54; and 'Editorial comments: The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare', 51 *CMLR* (2014), p. 735–736.

28 Case C-456/02 *Trojani*, EU:C:2004:488.

29 See on the position of volunteers: C. O'Brien, 'Drudges, dupes and do-gooders. Competing notions of "value" in the Union's approach of volunteers', 1 *European Journal of Social Law* (2011), p. 49–75.

30 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, [2004] OJ L 158/77; 1st corrigendum, [2004] OJ L 228/35; 2nd corrigendum (only for the English version), [2005] OJ L 197/34.

31 See Article 7(1)(a) and Article 14(4)(a) of Directive 2004/38.

32 Case C-542/09 *Commission v. Netherlands*, EU:C:2012:346, para. 65–66; and Case C-379/11 *Caves Krier*, EU:C:2012:798, para. 53.

to encourage the birth rate in Germany and that it should be limited to migrant workers having a sufficient link with Germany. For the CJEU, the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned constitutes a legitimate justification for refusing to grant the social advantage at issue.[33]

Giersch dealt with the claim for study grants for children of a frontier migrant worker, who worked in Luxembourg but resided in France. The CJEU argued that a frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that Member State. The CJEU stated that in order to avoid the risk of 'study grant forum shopping' and to ensure that the tax paying frontier worker who also pays social security contributions in Luxembourg has a sufficient link with Luxembourg, the financial aid could be made conditional on the frontier worker having worked in that Member State for a certain minimum period. The CJEU suggested a period of five years.[34]

Geven and *Giersch* constitute a remarkable departure from previous case law, since the CJEU seems to indicate that migrant workers can no longer in all circumstances claim equal treatment in the Member State where they work and first have to demonstrate sufficient integration into the society of the host Member State before they can claim a benefit. This would amount to the introduction of a 'genuine link' requirement which the CJEU has so far only applied for economically inactive migrants.[35] Some submitted that the Court did not respect the boundaries between its case law on workers and its case law on citizenship.[36] Others called this 'cross-pollination' between the free movement of citizens and workers.[37] It remains to be seen if the CJEU will continue in this vein in its future case law.

B. THE RIGHT TO MINIMUM SUBSISTENCE BENEFITS IN THE HOST STATE FOR INACTIVE MIGRANTS WHO CAN RELY ON THE STATUS OF 'WORKER'

1. First time jobseekers

In a number of cases, the CJEU also brought jobseekers within the scope of these EU provisions on the right of free movement for workers. As a result, persons looking for a job in a Member State other than their own for the first time were able to claim the

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33 Case C-213/05 *Geven*, EU:C:2007:438, para. 26. For a critical comment: 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', *Yearbook of European Law* (2008), p. 167–193; and P. Ploscar, *The Principle of Solidarity in EU Internal Market Law* (PhD, Department of Law, University of Antwerp, 2014), p. 237–240 and 317–318.

34 Case C-20/12 *Giersch,* EU:C:2013:411, para. 65 and 80.

35 See more on this case law below in Section 3.D.

36 E. Guild, S. Peers, and J. Tomkin, *The EU Citizenship Directive* (Oxford University Press, 2014), p. 227.

37 P. Ploscar, *The Principle of Solidarity in EU Internal Market Law*, p. 237–240.

financial support that a Member State granted its own jobseekers. In *Collins*, the Court held the view that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC (now Article 45 TFEU) on the right to free movement for workers and jobseekers and, therefore, have the right to equal treatment.[38] This right also applies to financial benefits intended to facilitate access to employment on the labour market of a Member State. The CJEU confirmed this approach in its subsequent case law.[39] In this context it referred to the adoption of EU citizenship in Article 17 EC (now Article 20 TFEU).[40] However, the Court considered it legitimate for a Member State to grant such an allowance only after a real link between the jobseeker and the labour market of that Member State has been ascertained.[41] The existence of such a link can be more specifically determined by establishing that the person concerned has for a reasonable period genuinely sought work in the Member State in question.[42]

According to this case law, an economically inactive person, such as a jobseeker, coming to a Member State with the intention of looking for a job may invoke provisions with regard to the prohibition of discrimination on grounds of nationality initially aimed at workers against the Member State where this person seeks employment. This right to equal treatment can also refer to a social minimum benefit as in *Collins*, which concerned the means-tested jobseekers allowance in the UK, or in *Vatsouras* and *Koupatantze,* which concerned a dispute with regard to a German basic benefit in favour of jobseekers.

2. Former migrant workers

Other categories of economically inactive persons can also invoke the EU provisions regarding the free movement of workers and the principle of equal treatment included therein. Indeed, the European legislator confirmed in Article 7(3) Directive 2004/38 that in certain circumstances an EU citizen can maintain his/her status as an employee or self-employed person. This is the case where the Union citizen is temporarily unable to work as a result of illness or accident, or is in duly recorded involuntary unemployment, or embarks on vocational training.[43] In these circumstances the person concerned not only retains the right to reside in the host state, but, on the basis of Article 24(1) of Directive 2004/38, can also claim the same treatment as the nationals of this host

38 Case C-138/02 *Collins,* para. 56.

39 Case C-258/04 *Ioannidis*, EU:C:2005:559; Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 36–37; and Case C-367/11 *Prete*, para. 25.

40 Case C-138/02 *Collins*, para. 63; Case C-258/04 *Ioannidis,* para. 22; and Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 37.

41 Case C-224/98 *D'Hoop*, para. 38; Case C-258/04 *Ioannidis*, para. 30; and Case C-367/11 *Prete*, para. 33.

42 Case C-138/02 *Collins*, para. 70; Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 38 and 39; and Case C-367/11 *Prete*, para. 46.

43 Unless the person involved is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment. This provision was inspired by the case law of the Court of Justice: see for instance Case 39/86 *Lair*, EU:C:1988:32; and Case 413/01 *Ninni-Orache*.

country with regard to all kinds of social benefits, including study finance grants for persons undergoing vocational training.

In 2009, the CJEU expressly confirmed this in *Vatsouras* and *Koupatantze* concerning a dispute about a German basic benefit in favour of jobseekers.[44] Normally, this category will be entitled to a number of social security benefits such as unemployment benefits or compensation for incapacity for work. However, this does not rule out that individuals in this category, because of the low amount of this benefit, find themselves in a state of destitution and have to ask for additional social assistance or other social minimum benefits.

Moreover, the CJEU recently confirmed that the list in Article 7(3) of Directive 2004/38 containing the circumstances in which migrant workers who are no longer in an employment relationship may nevertheless continue to benefit from that status is not exhaustive. In *Saint-Prix*, the Court stated that a woman who gives up work or gives up seeking work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker' within the meaning of Article 45 TFEU, provided she returns to work or finds a job within a reasonable period after the birth of the child.[45]

Therefore, being economically active does not appear to be an absolute prerequisite for entitlement to equal treatment with workers in the host state. Those who find themselves in an intermediate situation because they are (temporarily) unemployed or started vocational training remain covered by the provisions applicable to migrant workers.

3. Family members of migrant workers or former migrant workers

Furthermore, the right to access to social minimum benefits also applies to workers' or ex-workers' economically inactive family members, even when they are no longer living together with the worker in the host state. This was illustrated by the Court's judgments in *Ibrahim* and *Teixeira*.[46]

These cases concerned single mothers who were economically inactive and had applied for housing assistance in the UK. Their request was denied under the argument that their right of residence and that of their children was not based on EU law. To demonstrate that it did rest on EU law, both mothers invoked Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011). This provision grants the children of EU migrant workers the right to access to general education, apprenticeship and vocational training. In these judgments the CJEU confirmed its earlier case law that, pursuant to Article 12 of Regulation 1612/68, the children of an EU citizen who have settled in a Member State during their parent's exercise of rights of residence as a migrant worker in that Member

44 Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 31–32.
45 Case C-507/12 *Saint-Prix*.
46 Case C-310/08 *Ibrahim*, EU:C:2010:80; and Case C-480/08 *Teixeira*, EU:C:2010:83.

State are entitled to reside there in order to attend general educational courses.[47] The fact that the parents of the children concerned have meanwhile divorced and the fact that the parent who exercised rights of residence as a migrant worker is no longer economically active in the host Member State is irrelevant. It is sufficient that the child settled in the Member State concerned at the time that one of the parents resided there as a migrant worker.[48] The Court also ruled that as a consequence of the children's right to reside, the parents who are their carers must be allowed to remain in the host Member State during the period of their children's education.[49]

This means that these economically inactive family members of a person who at one time worked as a migrant worker in the host country can continue to invoke the status of a family member of a worker within the meaning of Regulation 1612/68 (now Regulation 492/2011) with a view to maintaining an autonomous right of residence while the children pursue an education. This right of residence will not be subject to the conditions for the right of residence in Directive 2004/38 for economically inactive migrants. As a result of their EU status as family members of a worker they will also be able to claim the social benefits the host Member State grants to persons lawfully residing in their territory (such as housing assistance in *Ibrahim* and *Texeira*).[50]

From this case law, it can be inferred that even when they are inactive, in quite a number of circumstances migrant persons within the EU can claim rights linked to the status of worker in the host Member State, including the access to social assistance or other social minimum benefits. This also applies to certain family members of such workers, even when the worker ceased to be economically active in the host Member State or has returned to his Member State of origin. In these cases, the link with the exercise of one of the economic freedoms of the internal market becomes rather distant. So perhaps the Court's first objective in these judgments is the combating of social exclusion even if it does not mention this objective specifically.

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47 For a recent confirmation of this case law: Case C-529/11 *Alarape and Tijani*, EU:C:2013:290, para. 26–27.

48 Case C-480/08 *Teixeira*, para. 72 and 74.

49 Case C-310/08 *Ibrahim,* para. 50; Case C-480/08 *Teixeira*, para. 61. See earlier Case C-413/99 *Baumbast,* para. 63 and 71.

50 However, the recent judgment of the Court of Justice in Case C-333/13 *Dano* could raise some doubts on this conclusion. Indeed, in this judgment, the Court submitted the right to equal treatment as regards social benefits for economically inactive Union citizens to the right to reside pursuant to the provisions of Directive 2004/38 alone. This could be interpreted in the sense that Union citizens whose right to reside in the host Member State is not based on Directive 2004/38, but on another EU instrument, such as Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011) as in Case C-310/08 *Ibrahim,* Case C-480/08 *Teixeira* and Case C-529/11 *Alarape,* would not be entitled to claim, on the basis of EU law, equal treatment for social benefits in the host Member State. See further on this judgment Section 3.D.

C. ENTITLEMENT TO SOCIAL MINIMUM BENEFITS UNDER THE EUROPEAN SYSTEM OF COORDINATION OF SOCIAL SECURITY SCHEMES IN REGULATION 883/2004

The European system of coordination of social security schemes in Regulation 883/2004[51] (as well as in its predecessor Regulation 1408/71)[52] is designed to remove obstacles to the free movement of persons resulting from the diversity of the social security systems of the Member States. Economically inactive persons are also covered by this EU coordination system since in the definition of its personal scope this regulation refers to all nationals of a Member State who are or have been subject to the legislation of one or more Member States (Article 2), no longer referring to the status of employed or self-employed persons (as was the case in Article 2 of Regulation 1408/71).

This EU social security coordination system guarantees that persons migrating within the EU can keep their social security allowances (export of benefits) or have access to benefits in the new host country through the mechanism of aggregation of periods or the right to equal treatment. Therefore, this coordination is an important instrument in preventing poverty as a result of exercising this right to free movement.

Regulation 883/2004 applies to all branches of social security.[53] Yet, social assistance is excluded from the scope of this coordination,[54] even though the Court of Justice has always interpreted this exclusion quite narrowly. In its case law during the 1970s and 1980s, the CJEU developed a broad definition of social security within the meaning of Regulation 1408/71. This also included special non-contributory benefits that are half-way between traditional social security and social assistance and to which the CJEU applied the export provision.[55] Examples of such benefits are supplements to pensions and special benefits for disabled or invalid persons.

In response to this case law, the EU legislature intervened in 1992 by creating a special coordination system for these benefits.[56] For the benefits listed in the newly created Annex IIa of Regulation 1408/71, Member States could apply a residence condition preventing the export of these benefits. As a consequence, a beneficiary of such a benefit would, on the

51 Regulation 883/2004 on the coordination of the social security systems, [2004] OJ L 200/1.

52 Regulation 1408/71 concerning the application of the social security schemes to employees and self-employed persons, as well as to their family members travelling within the Community.

53 Article 3 of Regulation 883/2004 refers to the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits.

54 Article 3(5) of Regulation 883/2004.

55 See for instance Case 1/72 *Frilli*, EU:C:1972:56; Case 187/73 *Callemeyn*, EU:C:1974:57; Case 63/76 *Inzirillo*, EU:C:1977:18; Case 139/82 *Piscitello*, EU:C:1983:126; Cases 379–381/85 and 93/86 *Giletti and others*, EU:C:1987:98; Case C-356/89 *Newton*, EU:C:1991:265.

56 By Regulation 1247/92 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [1992] OJ L 192/1, which amended Regulation 1408/71.

one hand, lose it when transferring his/her residence to another Member State and would, on the other, be entitled in his/her new Member State of residence to benefits of that state listed in Annex IIa. Even prior submission to the host Member State's social security legislation was no longer required.[57] This entitlement in the Member State of residence is seen as a compensation for the non-exportability of these benefits.[58] The justification for limiting the export of these benefits was mainly that they were not based on the payment of contributions by the beneficiary and were meant to guarantee a level of subsistence taking account of the cost of living and integration in a particular Member State. This purpose would be lost if it were to be granted outside the Member State of residence.[59]

Article 70 of Regulation 883/2004 took over this special coordination regime for the benefits listed in its Annex X. Article 70(4) of Regulation 883/2004 indeed confirms that the special non-contributory cash benefits listed in Annex X shall be provided exclusively in the Member State in which the persons concerned reside at the expense of this Member State's institutions. The only requirement for entitlement to these benefits is the person's place of residence, defined in Article 1(j) of Regulation 883/2004 as the place where a person habitually resides.

However, the CJEU recently decided that these 'special non-contributory cash benefits' must also be qualified as 'social assistance' within the meaning of the provisions of Directive 2004/38.[60] This qualification has important consequences for the entitlement of migrant persons to these benefits in the host state. Indeed, Article 14(1) of Directive 2004/38 provides that Union citizens have the right to three months' residence in the host Member State, as long as they do not become an unreasonable burden on the social assistance system of the host Member State. Moreover, the right of residence for more than three months and the retention of this right for economically inactive persons is conditional upon the citizens having sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State (Article 7(1(b)) and Article 14(2) of Directive 2004/38). It is only once a Union citizen has acquired the right to permanent residence within the meaning of Article 16(1) of Directive 2004/38 (after five years of legal residence) that his/her right to reside is not subject to any conditions.

In *Dano*, the CJEU specified that economically inactive Union citizens cannot claim equal treatment with nationals of the host state for these 'special non-contributory

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57 Case C-20/96 *Snares*, EU:C:1989:486, para. 48.

58 R. Cornelissen, 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy', in E. Guild, S. Carrera and K. Eisele (eds.), *Social Benefits and Migration. A contested Relationship and Policy Challenge in the EU* (Centre for European Policy Studies (CEPS), 2013), p. 91; and F. Van Overmeiren, E. Eichenhofer and H. Verschueren, 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Nijhoff, 2014), p. 257.

59 See Case 160/02 *Skalka*, EU:C:2004:269, para. 24.

60 Case C-140/12 *Brey*, para. 61; and Case C-333/13 *Dano,* para. 63.

cash benefits' in the first three months of residence. For periods of residence longer than three months but shorter than five years they are only entitled to equal treatment for these benefits if their residence complies with the provisions of Directive 2004/38. The latter is only the case if such an economically inactive Union citizen has sufficient resources for himself/herself and his/her family members.[61] This case law actually adds a supplementary condition to the entitlement to these benefits which is not included in Regulation 883/2004 itself. Clearly, the recent judgments of the Court make it more difficult for economically inactive EU migrants in the future to rely on the social minimum benefits listed in Annex X to Regulation 883/2004. It is not doubted that this result jeopardizes the right to free movement of indigent persons.[62]

D. THE RIGHT TO FREE MOVEMENT FOR ECONOMICALLY INACTIVE PERSONS AND EQUAL TREATMENT IN THE HOST STATE FOR MINIMUM SUBSISTENCE BENEFITS

The above analysis shows that a large number of persons migrating within the EU can invoke the prohibition of discrimination on grounds of nationality to exercise rights regarding social minimum benefits in the host country because of their status as workers or self-employed persons or a status linked to this capacity. However, if migrant Union citizens do not belong to the category of economically active or post-active persons, their recourse to social assistance in the host Member State is much more controversial, both legally and politically.

The starting point of the discussion is the statement by the Court of Justice that non-economic migration between Member States also triggers the application of the Treaty prohibition of discrimination on grounds of nationality in the host Member State (now Article 18 TFEU).[63] In its case law prior to the coming into force of Directive 2004/38, the CJEU confirmed that this principle also applies to social assistance benefits,[64] as well as to other non-contributory benefits, such as student maintenance grants.[65] Nevertheless, in these rulings the CJEU accepted possible justifications for derogations of equal treatment with regard to social minimum benefits, provided the proportionality test is met.

The CJEU actually took a traditional 'functional approach' in its interpretation of the Treaty provision on the free movement of persons. Indeed, in this case law, Union citizenship appears to be an instrument to increase mobility within the EU.[66] However,

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61 Case C-333/13 *Dano,* para. 69–76.

62 See further on this case Section 3.D.

63 See for the first time Case C-85/96 *Martinez Sala,* EU:C:1998:217; and most recently confirmed in Case C-333/13 *Dano,* para. 59.

64 Case C-184/99 *Grzelczyk*; and Case C-456/02 *Trojani*.

65 Case C-209/03 *Bidar*.

66 K. Lenaerts and T. Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice', 2 *European Constitutional Law Review* (2006), p. 103; E. Spaventa, 'The Constitutional impact of Union Citizenship', in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *The Role of Courts*

the Court did not grant economically inactive migrants unconditional access to the welfare benefits of the host Member State. Depending on the case, the applicant should 'not become an unreasonable burden on the public finances',[67] 'have a genuine link with the employment market of the State concerned',[68] or 'need to demonstrate a certain degree of integration into the society of the host State'.[69] For the Court, requiring a genuine link with the host Member State could reflect a legitimate objective, capable of justifying restrictions on the right to move and reside freely in the territory of the Member States.[70] It would seem that the requirement of a genuine link with the host Member State is an attempt to strike a fair balance between the rights of economically inactive migrants and the Member States' legitimate wish to protect their national welfare systems.[71]

This approach is reflected by the EU legislation in Directive 2004/38. This directive provides in Article 24(2) for a derogation of the principle of equal treatment for social assistance during the first three months of residence of economically inactive persons, for jobseekers as long as they continue to seek employment and have a genuine chance of being engaged and, for students, even during the first five years as regards maintenance aid for studies.[72] In addition, Article 14(1) provides that Union citizens have the right to three months of residence in the host Member State, as long as they do not become an unreasonable burden on the social assistance system of the host Member State. Moreover, the right of residence for more than three months and the retention of this right for economically inactive persons is conditional upon the citizens having sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State (Article 7(1(b)) and Article 14(2)

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in Developing a European Social Model. Theoretical and Methodological Perspectives (DJOF Publishing, 2010), p. 165; C. Timmermans, '*Martinez Sala* and *Baumbast* revisited', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), p. 348–349; and A.P. van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State', 7 *European Journal of Migration Law* (2005), p. 207–209.

67 Case C-184/99 *Grzelzyck,* para. 44; and Case C-75/11 *Commission v. Austria*, EU:C:2012:605, para. 60.

68 Case C-138/02 *Collins,* para. 67–69; and Cases C-22/08 and C-23/08 *Vatsouras* and *Koupatanze*, para. 38 and 39.

69 Case C-209/03 *Bidar*, para. 57. See also Case C-258/04 *Ioannidis,* para. 30 et seq.; Case C-158/07 *Förster*, EU:C:2008:630, para. 54; and Case C-103/08 *Gottwald*, EU:C:2009:597*,* para. 32 et seq.

70 D. Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits', in M. Adams et al. (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2013), p. 162.

71 Case 413/99 *Baumbast,* para. 90; *Zhu and Chen*, para. 32; and Case C-408/03 *Commission v. Belgium,* para. 37 and 41. In the same vein: K. Lenaerts, 'European Union citizenship, National Welfare Systems and Social Solidarity', 18 *Jurisprudence* (2011), p. 398–400; E. Spaventa, in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model. Theoretical and Methodological Perspectives*, p. 146; and P. Minderhoud, 'Directive 2004/38 and Access to Social Assistance', in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship*, p. 210–212 and 223–224.

72 Which the CJEU approved in Case C-158/07 *Förster.*

Directive 2004/38).[73] It is only after five years of legal residence in the host Member State that a migrant EU citizen is granted the right to permanent residence (Article 16), and this is no longer subject to any subsistence requirement. It offers the citizen in question a full right to equal treatment with the nationals of that state, including for matters of social assistance.

In *Ziolkowski and Szeja*, the Court confirmed that those conditions are intended to prevent Union citizens from becoming an unreasonable burden on the social assistance system of the host Member State.[74] In *Brey*, it stated that these provisions are based on the idea that the exercise of the right of residence can be subordinated to legitimate concerns of the Member States, such as the protection of their public finances.[75] And in *Dano*, the Court stated that Article 7(1)(b) 'seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.[76]

Yet, after the entry into force of Directive 2004/38, discussions continued on what exactly could be considered as an 'unreasonable burden', which benefits should be regarded as social assistance and if the Member State of residence could subject access to social benefits to compliance with the necessary requirements for obtaining a legal right of residence in the host Member State on the basis of this Directive.

In its most recent case law, the CJEU tried to find an answer to these questions. First, the Court defined the concept of 'social assistance' in Directive 2004/38 as referring

> to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State.[77]

This concept of social assistance includes the 'special non-contributory cash benefits' listed in Annex X to Regulation 883/2004.[78]

In addition, the Court stated in *Brey* that national authorities cannot conclude that the person has become an unreasonable burden without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterizing the individual situation of the person concerned. The Court indicated that

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73 See Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, para. 39–41; and Case C-333/13 *Dano,* para. 70–73.

74 Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, para. 40.

75 Case C-140/12 *Brey,* para. 54 and 72.

76 Case C-333/13 *Dano,* para. 76.

77 Case C-140/12 *Brey* para. 61; and Case C-333/13 *Dano,* para. 63.

78 Case C-140/12 *Brey*, para. 61; and Case C-333/13 *Dano,* para. 63.

the national authorities may take into account, inter alia, the amount and the regularity of the income which the economically inactive migrant person receives, the fact that those factors have led those authorities to issue him/her with a certificate of residence and the period during which the benefit applied for is likely to be granted to him/her. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, the Court considers that it may be relevant, agreeing on that point with the Commission, 'to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State'.[79]

It seems that with this judgment the CJEU has increased rather than alleviated the legal uncertainty and confusion created by its previous case law referred to above, in particular when it comes to determining what is an 'unreasonable burden'.[80] Indeed, it remained very unclear on the basis of which elements and according to which procedure the national court should make such an assessment, meaning *Brey* only created more confusion and legal uncertainty.

In its ruling of 11 November 2014 in *Dano*, the Court attempted to clarify this. In essence, the Court stated that economically inactive Union citizens can only claim equal treatment for social benefits with nationals of the host state, as guaranteed by the TFEU as well as by Regulation 883/2004 and Directive 2004/38, if their residence on the territory of that state complies with the conditions of Directive 2004/38. In the period of residence between three months and five years in the host state, those conditions include the requirement that economically inactive Union citizens must have sufficient resources for themselves and their family members (Article 7(1)(b) of Directive 2004/38). Therefore, Member States have the possibility of refusing to grant social benefits to Union citizens who exercise their right to free movement solely in order to obtain another Member State's social assistance benefits although, upon arriving in the territory of that state, they do not have sufficient resources to claim a right to reside. In order to determine whether these persons meet the latter condition, their financial situation should be examined in detail, without taking account of the social benefits claimed.

However, this judgment allows both a strict interpretation and a broad interpretation of the possibilities the host Member States would have in order to deny a Union citizen the right to equal treatment as regards social benefits. As far as a strict interpretation is concerned, one could deduce from paragraphs 78 and 66 of this judgment that the Court limits the scope of the derogation from the equal treatment principle to situations in which Union citizens' only motive for moving to another Member State is to obtain social assistance. This means that it should be clear from the very beginning of their residence that they have no intention of integrating into the host society (for instance by

79 Case C-140/12 *Brey,* para. 78.

80 For a more detailed analysis of this judgment, including its relevance for the meaning of Regulation 883/2004 on the social security coordination see H. Verschueren, 'Free movement or benefit tourism: the unreasonable burden of *Brey*', 16 *European Journal of Migration and Law* (2014), p. 147–179.

taking up or seeking employment). Such a derogation would be justified as it is intended to prevent 'benefit tourism' and an unreasonable burden on the host state's social assistance system. In such cases, no further proportionality test or 'genuine link' test would be required. That would explain why in this judgment the Court does not refer at all to the proportionality test as defined in Articles 8(4), 14(3) and recital 16 of Directive 2004/38 and to which the Court referred to in its previous case law, including *Brey.* In all other circumstances, the limitations to the right to equal treatment should continue to be subject to such a test, in the context of which the Court also held that the genuine link required between the person claiming a benefit and the host Member State should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes.[81]

This strict interpretation of the derogation from the equal treatment principle as outlined above would be in line with the legal context of the right to free movement as a fundamental right, requiring each derogation to this principle to be strictly defined and proportionate.[82] In this sense, the term 'benefit tourism' is limited to situations in which the motives or intentions of the migrant Union citizen are 'solely to obtain another Member State's social assistance'.[83] Consequently, other situations in which a migrating Union citizen claims social benefits in the host state, but did not move to the host state solely to obtain such benefits, should not be qualified as 'benefit tourism'.

Yet, the wording of this judgment would also allow a broader interpretation of the possibilities the host Member State would have to derogate from the prohibition of discrimination on grounds of nationality for the granting of social benefits to economically inactive Union citizens. First, in paragraph 69 (to which paragraph 81 explicitly refers) the Court states that 'a Union citizen can claim equal treatment with nationals of the host Member State *only* if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38' (emphasis added). In paragraph 73, the CJEU states that for those persons whose period of residence in the host Member State has been longer than three months but shorter than five years, Article 7(1)(b) subjects the right to reside to 'the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members'. Accordingly, the Court adds in paragraph 82 that national legislation may exclude nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits'.

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81 See to that effect, Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze,* para. 41 and 42; Case C-103/08 *Gottwald,* para. 34; and Case C-75/11 *Commission v. Austria*, para. 63.

82 Case 413/99 *Baumbast,* para. 91; Case 200/02 *Zhu and Chen,* para. 32; Case C-408/03 *Commission v. Belgium*, para. 39; Case C-162/09 *Lassal,* para. 29–31, Case C-75/11 *Commission v. Austria,* para. 54; and Case C-140/12 *Brey,* para. 70.

83 See Case C-333/13 *Dano,* para. 78.

Moreover, the Court does not limit the exceptions to the equal treatment provisions to social assistance benefits alone. In paragraph 73 as well as in paragraphs 74, 77 and 78, the Court refers to the claim of 'social benefits' in general, without, however, defining this concept and despite the fact that elsewhere the Court qualified the German benefit at stake as a 'social assistance benefit' (paragraph 63). In paragraph 76, the Court even refers to the 'Member State's welfare system'[84] and says that 'Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'. Yet, the 'welfare system', '*le système de protection sociale*' or '*das System der sozialen Sicherheit*' is far more than only the 'social assistance system' of the Member States to which Article 7(1)(c) refers. In addition, these paragraphs are worded very generally and no reference at all is made to a proportionality test, and any reference to the initial motives of the migrating Union citizens is also lacking both in these paragraphs as well as in the Court's *dictum*.

Therefore, the Court's analysis of the meaning of Directive 2004/38 could be interpreted to the effect that Member States are allowed to refuse to pay any social benefits, including social security benefits, to economically inactive Union citizens who do not have the right to reside under Directive 2004/38 because they do not possess sufficient resources of their own. There is a risk that under the pressure of public opinion, popular press and Eurosceptics some Member States will interpret and apply the possibilities offered by the wording of the judgment in *Dano* as broadly as possible.

However, it is not clear what the consequences of this case law would be on the host Member State's ability to expel Union citizens who do not possess sufficient resources. Indeed, Article 14(3) of Directive 2004/38 expressly provides that expulsion measures shall not be the automatic consequence of a Unions citizen's recourse to the social assistance system of the host state. Is such a measure still subject to the 'unreasonability' test the Court adopted in *Brey*? And what if the expulsion is not allowed on the basis of such a criterion, but the citizen involved can be refused access to social benefits in the host state on the basis of the Court's reasoning in *Dano*? This kind of situation would manifestly result in the creation of poverty on the territory of the host state. Would this not be in contradiction with the objectives of the Union as enshrined in provisions such as Article 3(3) TEU, Articles 9 and 151(1) TFEU as well as Articles 1 and 34(3) of the EU Charter of Fundamental Rights?

It is submitted that such a broad interpretation would be contrary to the abovementioned principles and objectives of the EU on the free movement for persons, including those who are or who become economically inactive.[85] It remains to be seen

84 The French version of the judgment, from which the translations in the other languages are made, uses the term '*le système de protection sociale*' and the German translation speaks of '*das System der sozialen Sicherheit*'.

85 For a further in-depth analysis of the judgment in *Dano* see also: H. Verschueren, 'Preventing benefit tourism in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano?', 52 *Common Market Law Review* (2015), p. 363–390.

whether the Court would indeed adopt such broad interpretation in its future case law. Therefore, it is necessary to await further case law of the Court in this matter in order to know exactly what the consequences will be. The Court will undoubtedly be confronted with new cases on these issues, the advantage of which is that it will have the opportunity to clarify its case law further.[86]

§5. FREE MOVEMENT: INCLUDING FOR THE POOR?

The above analysis reveals the ambiguity between the EU's objective of guaranteeing the right to free movement of persons and equal treatment on the one hand and the objective of fighting poverty and social exclusion on the other.

This is related to the concern, as expressed for example in Directive 2004/38 and recognized by the case law of the Court of Justice, to prevent economically inactive migrants from becoming an unreasonable burden on the host Member State's social assistance system. Therefore, the exercise of the right of residence can be subordinated to legitimate concerns of the Member States, such as the protection of their public finances. As we already pointed out in the introduction, this concern of the Member States as well as the danger of so-called 'benefit tourism' has been much publicized lately. The balance the Court of Justice has had to find is not just a balance between legal and political objectives at EU level but also between these objectives and the Member States' interests. The fact that since 2004, the Union has been expanding with a number of Member States whose standard of living is lower than that in the older Member States certainly has something to do with this.[87]

Nevertheless, recent studies of the European Commission show that migration within the EU is only inspired by this benefit tourism to a small extent.[88] The findings of this study can be summarized as follows: non-active EU migrants represent a very small share of the total population in each Member State. On average, EU migrants are more likely to be employed than nationals living in the same country. Pensioners, students and jobseekers accounted for more than two-thirds of the non-active EU migrant population (71%) in 2012. The vast majority of non-active EU migrants (79%) live in economically active households and the majority of them have previously worked in the current country of residence (64%). Evidence also shows that the vast majority of migrants move to find (or take up) employment and that this remains the key motive

86 See in particular the already pending cases: Case C-67/14 *Alimanovic*, [2014] OJ C142/14; Case C-19/14 *Talasca*, [2014] OJ C 142/9; and Case C-308/14 *Commission v. United Kingdom*, [2014] OJ C 329/2.

87 E. Guild, 'Does European Citizenship Blur the Borders of Solidarity?', in E. Guild, C. Gortazar Rotaeche, and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship*, p. 206.

88 ICF and Milieu Ltd, 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU-migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', *Website of the European Commission* (2013), http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes#, p. 276.

for intra-EU migration. Moreover, activity rates among such migrants have increased over the last 7 years. The study found little evidence in the literature and stakeholder consultations to suggest that the main motivation of EU citizens to migrate and reside in another Member State is benefit-related as opposed to work or family-related. This is underpinned by data showing that in most countries, immigrants are not more intensive users of welfare than nationals.

Therefore, one could wonder why the entitlement to social benefits for economically inactive migrating Union citizens is an issue at all. It could very well be more a matter of perception and political sensitivity than of reality. Nonetheless, the legitimacy of the entitlement of indigent EU migrants to social minimum benefits in the host state is more disputed than ever. This clearly affects the way the CJEU handles this issue. As recently illustrated by its judgment in *Brey* and *Dano*, the Court tries to reconcile the right to free movement, including that for inactive persons, with the Member States' justified concerns to protect their social system from unwanted intruders.

Meanwhile some ideas have been put forward for new legislative initiatives in this field.[89] One of the ideas could be to extend the waiting period of three months in Article 24(2) of Directive 2004/38 before a migrating economically inactive person is entitled to social assistance benefits in the host state. In the interim period, such a person would continue to be entitled to the social assistance benefits of his/her home state, which would then be obliged to export these benefits.

Introducing a cost compensation mechanism between the former Member State of residence and the new state of residence for residence-based minimum subsistence benefits could also alleviate the burden on the latter state. Such a system would entail the reimbursement by the first Member State of the benefits paid by the latter. It could be limited to a certain length of time (one year), after which the host state would take over the financial responsibility for the payment of social minimum benefits. Such a reimbursement system already exists in the context of the EU social security coordination system of Regulation 883/2004. For the costs of medical care, Article 35 of Regulation 883/2004 provides for a reimbursement system between the Member State of insurance and the Member State in which the medical treatment has been provided. In addition, Article 65(6)-(8) of Regulation 883/2004 introduces a limited reimbursement system for the costs of the unemployment benefits provided by the Member State of residence for workers who, before their unemployment, worked as frontier workers in another Member State. These examples show how a cost compensation mechanism in the field of social security could operate at EU level. Even the creation of an EU fund for the purpose of cost compensation for social minimum benefits paid to indigent migrant persons was

89 Some of the following suggestions are taken from: F. Van Overmeiren, E. Eichenhofer and H. Verschueren, in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship*, p. 258–262. For other suggestions see also: A.P. van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits* (Hart, 2003), p. 203–220.

suggested, so that the cost of providing such minimum support would be shared and distributed amongst all the Member States.[90] This solution would prevent an indigent migrant person from falling between two stools in this period. Such a person would at any time be entitled to social minimum benefits in some Member State. However, the political feasibility of such compensation schemes is questionable.

Others plead for the adoption of an EU instrument regarding the minimum income the Member States would have to provide to the persons living on their territory.[91] Such an instrument could take the form of an EU Framework Directive on the adequacy of minimum income schemes, which would include agreed common criteria.[92] The European Anti-Poverty Network (EAPN) has made a number of concrete proposals regarding such a Framework Directive on Minimum Income.[93] However, it remains uncertain whether the Treaties contain a legal basis for such an instrument, and it is even more uncertain whether there is the political will to adopt it.[94]

A comparable idea would be the adoption of an EU instrument introducing common standards for the protection of vulnerable people in need, including basic forms of support, shelter and aid for the destitute and homeless. Such standards should correspond to the basic human rights responsibilities of the Member States.[95] Interestingly enough, such an instrument already exists for a specific category of third-country nationals, namely asylum seekers. Indeed, Directive 2003/9 on minimum standards for the reception of third-country asylum seekers provides for the obligation of Member States to take measures with regard to material reception conditions in order to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. The Directive specifies that the 'material reception conditions' shall mean reception conditions that include housing, food and clothing, provided in kind or as financial allowances or in vouchers, and a daily expenses allowance.[96] Moreover, the

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90 G. Vonk, 'Homelessness and the Law: Challenges for the European Union', Paper presented at the 21st International Conference of Europeanists, Washington D.C., 14–16 March 2014, p. 15. See also A.P. van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits*, p. 210–211.

91 See for instance M. Ferrera and S. Sacchi, 'A More Social EU? In What Areas? In What Forms', 1 *European Governance* (2007), p. 18.

92 H. Frazer and E. Marlier, *Minimum Income Schemes Across EU Member States* (EU Network of National Independent Experts on Social Inclusion, 2009), p. 13.

93 A. Van Lancker, *Working document on a Framework Directive on Minimum Income* (European Anti-Poverty Network, 2010), p. 22.

94 On the discussion of the legal basis for an EU instrument creating the right to a minimum income, see H. Verschueren, 'Union Law and the Fight Against Poverty: Which Legal Instruments?', in B. Cantillon, H. Verschueren and P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia, 2012), p. 208–213. See also: P. Schoukens and J. Beke Smets, 'Fighting Social Exclusion under the EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations?', 16 *European Journal of Social Security* (2014), p. 51–72.

95 See G. Vonk, *Homelessness and the Law: Challenges for the European Union*, p. 16–18, for a more detailed presentation of this idea.

96 See Article 2(j) and Article 13(1) and (5) of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, [2003] OJ L 31/18.

Member States are required to adjust the reception conditions to the situation of persons with specific needs, such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or serious forms of violence (Articles 17–20).

In a recent judgment, the CJEU confirmed that these provisions observe the fundamental right laid down in Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected. According to the CJEU, where a Member State has opted to provide the material reception conditions in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living adequate for the health of applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market.[97] Comparable obligations are also laid down in the recently adopted Directive 2013/33 which will replace Directive 2003/9 from 21 July 2015.[98] Therefore, EU law obliges Member States to provide an adequate standard of living for all third-country nationals present on their territory who have applied for international protection. The CJEU has explicitly linked this requirement to the obligation under Article 1 of the EU Charter to respect human dignity. Therefore, suggesting that such a requirement should also be introduced for indigent EU citizens who have made use of their fundamental right to free movement would be very reasonable.

Moreover, recently the EU has set up a fund in order to support the Member States in providing material assistance to the most deprived. The Fund for European Aid to the Most Deprived (FEAD) created by Regulation 223/2014[99] and worth € 3.8 billion in real terms from 2014–2020, will financially support Member States' actions to provide a broad range of non-financial material assistance including food, clothing and other essential goods for personal use for materially deprived people. It complements the Structural Funds. The FEAD is a recent example of how the EU could alleviate the financial burden of providing assistance to deprived persons.

§6. CONCLUSION

From the above analysis, it follows that the EU has difficulties in reconciling the right to free movement of persons and to equal treatment as a fundamental right with a constitutional status on the one hand with the policy objectives of fighting poverty and social exclusion explicitly laid down in the Treaty provisions and policy documents on the other. As a result of European integration as an economic principle, economic migrants almost automatically have access to financial support by the host state to help them avoid

97 Case C-79/13 *Saciri and others*, EU:C:2014:103, para. 35–42.

98 See Articles 2(g), 17 and 21–24 of Directive 2013/33/EU laying down standards for the reception of applicants for international protection, [2013] OJ L 180/96.

99 Regulation 223/2014 on the Fund for European Aid for the Most Deprived, [2014] OJ L72/1.

poverty. It demonstrates the resilience of the EU's market integration rationale and the dominance of 'mercantile' citizenship.[100] Yet, we see that the most recent case law seems to impose prior integration conditions on economic migrants as well. Conversely, non-economic migrants face legal limitations on the fundamental right to free movement and to equal treatment. Their right to reside in a Member State depends on not being an unreasonable burden on the social assistance system of the host state. Indigent EU migrants even face the risk of being expelled from the Member State where they reside because of the burden they would place on the host state's social assistance system.[101] Limitations on their right to equal treatment for social minimum benefits may lead to destitution as a consequence of the exercise of the fundamental right to free movement.

It appears that the EU conditions imposed upon economically active as well as inactive migrants to obtain the right to reside in and to social benefits from the host state are not based on a genuine sense of solidarity. This is the case even though Union law 'establishes a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' as the Court stated in *Grzelczyk*[102] and which it applied in the abovementioned citizenship case law. The discussions about the impact of EU law on the boundaries of national solidarity systems question the extent to which European integration can legitimately contribute to a cross-border form of solidarity between Member States and their citizens. The fundamental right to free movement as well as to equal treatment seems to conflict with the traditional territorial understanding of interpersonal solidarity which presupposes 'the "willingness" of citizens to share with "others" within the same "political community"'.[103] Such a willingness seems to be the pre-condition to create a solidarity mechanism of its own which aims at preventing and alleviating destitution by redistributing resources at EU level.

Apart from the structural funds, the EU currently lacks a redistribution instrument and criteria for distributive justice. As Poiares Maduro has put it: 'This limited version of the European social self does not really recognise Europe's right and legitimacy to establish and exercise and independent redistributive function'.[104] Hence, European

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100 See for a recent analysis: C. O'Brien, 'I Trade, Therefore I am: Legal Personhood in the European Union', 50 *CMLR* (2013), p. 1643–1684. See also F. De Witte, 'Transnational Solidarity and conflicts of Justice', 18 *EL Journal* (2012), p. 705–706; N. Nic Shuibhne, 'The Resilience of EU Market Citizenship', 47 *CMLR* (2010), p. 1597–1628; P. Ploscar, *The Principle of Solidarity in EU Internal Market Law*, p. 241–242; and D. Schiek, *Economic and Social Integration. The Challenge for EU Constitutional Law* (Edward Elgar, 2012), p. 48–49.

101 Recently a question submitted to the Commission in the European Parliament (Parliamentary question E-000183–14) revealed that for this reason, Belgium had expelled 343 EU citizens in 2010. In 2011, their number grew to 989, and in 2012 it doubled, reaching 1, 918. In the first nine months of 2013, another 1,130 EU citizens were expelled for this reason.

102 Case C-184/99 *Grzelczyk*, para. 44.

103 See also F. De Witte, 18 *EL Journal* (2012), p. 697; and M. Ferrera, *The Boundaries of Welfare* (Oxford University Press, 2005), p. 46.

104 M. Poiares Maduro, 'Europe's Social Self: The Sickness Unto Death', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart, 2000), p. 341.

citizenship continues to lack the 'social' dimension as identified by Marshall.[105] This is still the domain of the Member States. It explains the ambiguity between free movement and the combating of poverty on the one hand, and the Member States' concerns to protect their social systems from 'foreign intruders' on the other. It also contrasts with the US federal integration process which has created a shared responsibility for welfare with the US Constitution, thus enabling the federal government to adopt redistributive policies via tax-and-spend power. In the US, poverty problems caused by the 'migrating poor' are perceived as issues requiring cooperation of the states and the federal government, based on a sink-or-swim-together rationale, which no longer entitles states to exclude indigent migrants coming from other US states who want to reside on their territory from social assistance.[106]

A comparable redistributive system is still lacking at EU level, the introduction of which would need a stronger political commitment to an EU-wide fight against poverty and social exclusion and the will to transfer powers and financial resources to the EU. The recently established Fund for European Aid to the Most Deprived is a modest first example of how the EU could possibly take more redistributive initiatives. However, it remains to be seen if the EU will be able to develop more advanced redistribution systems. Meanwhile, the right to social minimum benefits for migrant EU citizens will remain nested in the national systems and the nation-bound forms of solidarity.[107] In this context, the EU cannot but take into account the Members States' wish to protect their welfare states from intruders. Therefore, the EU will continue to struggle with the ambiguity of its legal instruments and policy goals and will remain far from the objective which van der Mei formulated as follows: 'When taken seriously, Union citizenship ought to be developed in such a way that both the "rich and the poor" can enjoy the rights that come with it.'[108]

105 T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press, 1950).

106 A.P. van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits*, p. 178–203. This part of his book contains an in-depth analysis and comparison of the US and EU free movement rights and entitlement to social benefits for indigent migrant persons. See also A.P. van der Mei, 'Freedom of Movement for Indigents: a Comparative Analysis of American Constitutional Law and European Community Law', 19 *Arizona Journal of International and Comparative Law* (2002), p. 803–861. Compare K. Lenaerts, 18 *Jurisprudence* (2011), p. 400–402.

107 M. Ferrera, 'Modest Beginnings, Timid Progress: What's Next for Social Europe', in B. Cantillon, H. Verschueren and P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, p. 17–27; and P. Ploscar, *The Principle of Solidarity in EU Internal Market Law*, p. 215–216 and 317.

108 A.P. van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits*, p. 220.