Free Movement of Persons and Social Benefits in the EU: The Case Law of the EU Court of Justice in Context

Sose Mayilyan

PhD 2023

Free Movement of Persons and Social Benefits in the EU: The Case Law of the EU Court of Justice in Context

Sose Mayilyan, LLB, LLM

Thesis Submitted for the Award of PhD

School of Law and Government

Dublin City University

Supervisor: Prof Federico Fabbrini

March 2023

Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of PhD is entirely my own work, and that I have exercised reasonable care to ensure that the work is original, and does not to the best of my knowledge breach any law of copyright, and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

Signed: Sose Mayilyan ID No.: 17212397 Date: 31 March 2023

Table of Contents

List of Tables

List of Figures

List of Abbreviations

AG	Advocate General
CEE	Central and Eastern European
CJEU	Court of Justice of the European Union
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
EU8	Lithuania, Latvia, Estonia, Poland, Czech Republic, Hungary, Slovakia, Slovenia
EU10	Lithuania, Latvia, Estonia, Malta, Cyprus, Poland, Czech Republic, Hungary, Slovakia, Slovenia
EU15	EU Member States until 2004
MS	Member State
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
WRS	Workers Registration Scheme

Abstract

Sose Mayilyan

Free Movement of Persons and Social Benefits in the EU: The Case Law of the EU Court of Justice in Context

Article 20 TFEU establishes the citizenship of the European Union. A core element of EU citizenship is the right of all EU nationals to move and reside freely within the territory of EU Member States. The free movement of EU nationals brings with it the issue of their access to social benefits. The interaction between the two notions comes into play when a national of one Member State applies for or receives social benefits in a Member State other than that of his/her nationality.

The Court of Justice of the European Union (CJEU), which plays an important role in interpreting EU law provisions, has addressed the abovementioned issues in a number of judgments. However, the Court's jurisprudence in this regard has changed throughout time from an EU citizen-friendly approach to a more Member State-friendly one, albeit with some recent changes of mind. This evolution has been taking place not in an isolated legal vacuum but rather in a specific socio-political context, which has been shaped by several factors.

This thesis analyses the evolution of CJEU case law on free movement of persons and social benefits with the aim of contextualising its development. The thesis then examines several institutional, social and political dynamics, which provided the background for the developments in the Court's jurisprudence. Particularly, the thesis suggests that the 2004 enlargement, the increase of intra-EU migration and the rise of Eurosceptic populism - most evident in the Brexit process - were the background of the CJEU jurisprudence and may play a role in explaining its evolving approach. By answering its research question through an interdisciplinary lens, employing the 'law in context' approach, this thesis argues that the Court's case law developed in its socio-political context, and uses the example of the UK as a case study to support this argument.

Acknowledgements

Four years of full-time research and preparation has gone into writing this PhD thesis on “EU Free Movement of Persons and Social Benefits”, which at times was a solitary journey, however it is not something one does completely on one’s own. The collaboration and insistence of many people is involved in producing a dissertation, and they have in one way or another contributed to the completion of my thesis.

I benefitted from an enormous amount of help from a broad range of sources, and I would like to take this opportunity to express my gratitude to the following for their assistance in the completion of this dissertation. They have contributed through their encouragement, constructive criticism and advice over the years, and while this is a short text only, I would like to mention my gratitude to these people in particular.

First and foremost, I would like to thank my supervisor Prof Federico Fabbrini for his guidance, his continuous support and encouragement throughout the whole PhD process. The journey that, essentially, started from being his supervisee in my Master’s programme at the University of Copenhagen, would have not been the same without him. The experience I had under his supervision is one of progress and improvement. The always helpful and supportive interactions with Prof Fabbrini were nothing less than inspiring. His belief in me and my abilities immensely encouraged me to pursue this research and helped me to bring it to its finish line despite all challenges. He has had an immense contribution to my realisation as a professional.

I gratefully acknowledge the support of Dublin City University and the Faculty of Humanities and Social Sciences, who have been by my side and supported me with the scholarship and assisted with any issue I addressed to them. I would particularly like to thank late Prof Robert Elgie, Prof Iain McMenamin, as well as Dr Brenda Daly, Dr Rebecca Schmidt and Dr Rónán Condon for taking their time to provide me with their constructive and detailed feedback, which always hugely helped me in improving my work.

I would like to thank my friends and family for giving me a legitimate reason to talk about something other than my thesis from time to time and for their encouragement and incredible support during difficult times. I would like to thank my aunts, Arminé and Gayané, for their unconditional and strong belief in me, and my grandma, Silva, for the look of happiness and pride in her eyes every time she hears me speak English (even if she does not speak it). I would like to send very special thanks to Michael Cashin and Gerard Glynn for their detailed feedback and comments on my final draft: their huge help simply cannot be overestimated. Thanks should go to all my friends (Anna, Kristina, Tatev, Sid, Jasmine, Kostas) who helped me in this long process with their endless positivity and continuous encouragement.

Last but very certainly not least, I would like to thank my parents. My father, Aram Mayilyan, who passed away last year, was looking forward to seeing me defend my thesis in Dublin. His continuous support, encouragement and love helped me immeasurably while he was alive, and the memories and values he left me gave the strength to keep going after him. I would like to thank my mother, Nariné Mkrtchyan: saying that she supported and helped me would not be enough. Her patience, her belief in me and her incredible encouragement always drove me to advance and progress. Her strength in the face of challenges continues to inspire me to keep going every day. The importance of my parents' love and support is inestimable.

Without the assistance and support of these people I would not have been able to approach this literary effort and this complex yet fascinating journey. Their encouragement and belief in me have been an immense help throughout the PhD experience and especially in its finalisation.

Finally, I want to say thank you to Ireland, to this small country for its big warmth.

Chapter 1

Introduction

The topic of this research is the free movement of persons in the European Union (EU) and the access of EU citizens to social benefits, focusing on the case law of the Court of Justice of the European Union (hereafter, also 'Court of Justice' or 'CJEU'). The research aims to discover the interconnection between the evolution of CJEU jurisprudence and several institutional, social and political dynamics.

This thesis seeks to address a broad research question, namely: How and in what direction has the CJEU changed its approach with regard to free movement of EU citizens and their access to social benefits and how can we explain that?

To answer this research question, the thesis will have to deal with a number of more specific issues, such as:

- What is the EU legal framework on free movement and access to social benefits?
- How has the case law of the CJEU on the matter evolved?
- What factors provided the fundamental context for these developments?
- What role do social changes and political dynamics play in this evolution?

The problem of free movement of EU citizens within the Union has been covered in the academic literature rather extensively, and from various aspects, including, for instance, social welfare. However, this thesis offers a new perspective to the existing scholarship. Particularly, to comprehensively understand the legal issues at question, the thesis suggests examining the Court's jurisprudence on free movement of persons and social benefits in its socio-political context. For this purpose, the thesis analyses the manifestation of several institutional (2004 EU enlargement), social (intra-EU migration) and political (rise of radical right-wing populist parties) dynamics in the United Kingdom. As such, this thesis embraces a 'law in context' approach to EU studies. Following on Martin Shapiro's,[1] Francis Synder's[2] and, eventually, Joseph HH Weiler's footsteps, this approach is crucial 'to truly understand' the legal developments of EU law.[3] It is their very approach and theory of 'Community law in context', neatly conceptualised in Weiler's work, that provides the necessary framework for the

[1] M Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California Law Review 537.
[2] F Snyder, 'New Directions in European Community Law' (1987) 14 Journal of Law and Society 167.
[3] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2431.

argument of this research. Shapiro argued that law should not be 'oblivious to the context or living matrix' of the constitutions,[4] while Snyder held that EC law as 'an intricate web of politics, economics and law'.[5] Conceptualising these ideas, Weiler analysed the EC constitutional order by paying particular attention to 'its living political matrix', which includes interactions between the Court of Justice and the political organs. Therefore, methodologically, the Court's jurisprudence is interpreted through an interdisciplinary lens.

It should be noted from the outset that the term 'social benefits' throughout the thesis is used rather broadly and, essentially, as an umbrella term for the different types of benefits encountered in the case law and in the socio-political discussion. This approach ensures that the term does not to constrain itself to a specific type of benefits, especially since the pivotal cases discussed in the thesis concern a range of benefits. Therefore, to ensure that the benefits which were the subject matter of the relevant case law are duly represented, the term 'social benefits' is to be understood as an umbrella term for the benefits discussed throughout the thesis.

In methodological terms, the thesis firstly provides a descriptive and analytical approach, discussing the CJEU case law (comprising of a sample of 12 cases between 1998-2020) and the socio-political discourse of the same time period in the EU and, particularly, in the UK. The case of the UK is used for supporting and clarifying the general argument. The interdisciplinary approach is fully elaborated afterwards, through the contextualisation of the development of the Court's jurisprudence.

In substantive terms, the thesis argues that CJEU case law on free movement of persons and social benefits has undergone changes, which took place not in isolation but rather in the broader context of developing institutional, social and political dynamics. The thesis argues that the Court's stance has shifted throughout time from an EU citizen-friendly approach to a more Member State-friendly one, albeit with some recent changes of mind. The thesis highlights that this change has occurred in a specific institutional, social and political context. In particular, the thesis underlines how the context for this changing jurisprudence includes the

[4] M Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California Law Review 537, 538.
[5] F Snyder, 'New Directions in European Community Law' (1987) 14 Journal of Law and Society 167, 167.

2004 ‘big bang’ enlargement, the trends in intra-EU migration and the rise of Eurosceptic right-wing populism across the EU but with a particularly convincing manifestation in the UK - a process which ultimately culminated in Brexit, the withdrawal of the UK from the EU.

The thesis is divided into 5 Chapters. The first Chapter introduces the topic, providing an outline of the methodology used and the structure of the thesis. The second Chapter presents an overview of the EU legal framework on free movement of persons and access by EU citizens to welfare systems of EU Member States by discussing crucial provisions of the primary and secondary EU law. The third Chapter analyses in depth the case law of the Court of Justice on the issues in question and its evolution, by focusing on a sample of relevant cases and the Court’s judgments in the period between 1998 and 2020. The fourth Chapter examines several institutional, social and political factors to study the context they provided for the development of the Court’s jurisprudence. Specifically, the 2004 EU enlargement, the phenomenon of intra-EU migration and the rise of radical right-wing populist parties in the EU are analysed, with a particular focus on the realisation of these phenomena in the UK in light of the attitudes towards intra-EU migration and the Brexit process. The final, fifth Chapter offers conclusions on the development of the CJEU case law on free movement of persons and social benefits in light of the institutional, social and political dynamics discussed in the thesis.

Chapter 2

EU Legislation

1. Introduction

This Chapter examines the legal framework of the European Union (EU) on freedom of movement of persons and access by EU citizens to social assistance systems of the EU Member States (MSs). To this end the chapter discusses both primary and secondary EU law. This will include the discussion of provisions regulating the free movement of persons and access to social benefits in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as well as a discussion of relevant legislation, including the Citizenship Directive[1] (hereafter, 'Directive 2004/38' or 'Citizenship Directive') and Regulations 1612/68 on freedom of movement for workers within the Community, 1408/71 on the application of social security schemes to employed persons and their families, 883/2004 on the coordination of social security systems and 492/2011 on freedom of movement for workers within the Union. Moreover, the Chapter points out the interpretation of the provisions of the Court of Justice by discussing the relevant provisions in light of the Court's judgments.

It should be emphasised that while this Chapter engages with the case law of the CJEU in relation to the relevant provisions discussed below, it, nevertheless, only discusses 'the law in the books', leaving the examination of 'the law in action' to the next Chapter on the case law of the Court of Justice. In other words, this Chapter aims to provide an introductory overview of the EU legal framework in place, while the detailed analysis of its implementation will follow in the next Chapter.

2. Primary and Secondary Law

In order to observe and understand the changes in the interpretation of the EU legislation by the CJEU, a discussion of the legislation should be conducted. In Section 2 of this Chapter the primary law on free movement of persons and social benefits (the TEU and the TFEU) will be examined, as well as various legislative acts forming the secondary law for the field will be

[1] Council 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 [2004] OJ L 158/77.

discussed, with a special focus on Directive 2004/38 (the Citizenship Directive) and Regulation 883/2004, given that these two pieces of legislation regulate the issues in question in most detail and are the main legislative acts in force in connection with free movement of persons and social benefits. Thus, this Chapter of the thesis will summarise the primary and secondary law on the issues in question.

2.1. Primary Law Provisions

Following the amendments which took place through the Lisbon Treaty in 2007, the Treaty on European Union (TEU), immediately after stipulating the establishment of the European Union in Article 1 and setting out the new stage of the creation of an 'ever closer union', moves on to reinstate that the Union is based on certain values characteristic for societies in which 'pluralism, *non-discrimination*, tolerance, justice, solidarity and equality between women and men prevail' (Article 2 TEU).[2]

The second part of the Treaty on the Functioning of the European Union (TFEU) is entitled 'Non-discrimination and citizenship of the Union'. Before the amendments of the Lisbon Treaty, the title for this part of TFEU included a reference only to the citizenship of the Union. The addition of the non-discrimination clause to this can only signal the importance the drafters of the Treaty attach to this idea and to the close link between these two concepts. Article 18 TFEU, particularly, stresses that 'any discrimination on grounds of nationality shall be prohibited'. Additionally, it provides the possibility for the European Parliament and the Council to adopt rules for ensuring the prohibition of such discrimination. In the context of EU law, discrimination 'generally occurs when comparable situations are treated differently and different situations treated in the same way', unless objective justifications exist for such treatment.[3]

At this instance, there are two notions which are important to consider for the purpose of this research and for ensuring a comprehensive analysis of the legislation in question. Particularly,

[2] Emphasis added.
[3] J Maliszewska-Nienartowicz, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?' (2014) III International Journal of Social Sciences 41, 42; Case 106/83 *Sermide* [1984] ECR 4209, para 28.

a distinction between two main types of discrimination should be made, those being direct and indirect discrimination. This distinction is important also from a practical point of view, as '[F]rom the perspective of the victim of the alleged discrimination, a finding of its direct form will always be preferable', as justification possibilities are always more limited.[4]

Direct discrimination 'occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of any of the prohibited grounds', including specific MS nationality.[5] So, in cases concerning social benefits, the national rules on social assistance explicitly would not allow other MS nationals to access the social assistance of the host MS. Indirect discrimination, on the other hand, occurs when 'an apparently neutral provision, criterion or practice would put persons protected by the general prohibition of discrimination at a particular disadvantage compared with other persons'.[6] Thus, the criteria in these cases are not formally prohibited and, in fact, can be justified by an objective and legitimate aim, if the means of achieving that aim are appropriate and necessary. In other words, it 'involves the elimination of requirements which, while apparently nationality-neutral on their face, have a greater impact or impose a greater burden on nationals of other MSs or have the effect of hindering the free movement of persons', ie it focuses on 'the effect of a measure'.[7] The Court of Justice defines indirect discrimination as 'intrinsically liable to affect nationals of other MSs more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage'.[8] In case of social assistance this would mean that the legislation of an EU MS would not directly and obviously prohibit other MS nationals from gaining access to its social assistance system but would, nonetheless, create a situation where it would be unreasonably difficult or simply not possible for them to make use of their rights to social benefits.

---

[4] C Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005) 307.
[5] J Maliszewska-Nienartowicz, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?' (2014) III International Journal of Social Sciences 41, 42.
[6] Ibid, 42-43.
[7] C Barnard, *EU Employment Law* (Oxford University Press 2012) 161.
[8] Case C-237/94 *O'Flynn* [1996] ECR I-2617, paras 19-20; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, para 40; Case C-73/08 *Bressol and Others* [2010] ECR I-02735, para 41.

Another important Article in the Treaties to consider is Article 20(1) TFEU, by which the Union citizenship is established and every person who has the nationality of any of the MSs is considered an EU citizen. Later, the CJEU refers to this as the 'fundamental status' of any EU citizen throughout its rulings in a number of cases.[9]

The Article also stipulates that the Union citizenship does not replace the national citizenship each person already possesses and is only additional to it. Article 20(2) TFEU furthermore notes that the citizens of the Union have the rights and the duties that are set out in the Treaties, which are to 'be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. It mentions, inter alia, the right to move and reside freely within the territory of the Member States.

These rights are restated in the further Articles, such as Article 21(1) TFEU, which notes that every EU citizen has the right to move and to reside freely within the territory of the MSs, of course, with limitations and conditions set out in the Treaties and legislation designed to implement them.

One of the key concepts behind the idea of Union citizenship is the desire to facilitate free movement and intra-EU migration by enabling EU citizens to leave the home State and encouraging the integration into the host State, an aim to be achieved first of all 'by guaranteeing the migrant's social status and ensuring his or her access to welfare benefits', thus by calling upon the host MS 'to accept participation of new members within the national solidaristic community'.[10] Through several formative cases,[11] the Court accentuated 'the independent legal value of Union Citizenship by linking' Article 21 TFEU directly with the

[9] See, eg, Case C-184/99 *Grzelczyk* [2001] ECR I-6229; Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-138/02 *Collins* [2004] ECR I-2733; Case C-34/09 *Zambrano* [2011] ECR I-01177.
[10] A Iliopoulou Penot, 'The Transnational Character of Union Citizenship' in M Dougan, N Nic Shuibhne, E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen: Modern Studies in European Law* (Hart Publishing 2012).
[11] See, eg, Case C-85/96 *Martínez Sala* [1998] ECR I-2708, Case C-456/02 *Trojani* [2004] ECR I-7595.

right to equal treatment under Article 18 TFEU with regard to access to social assistance in the host MSs.[12]

The third Part of the TFEU starts out with a separate Title on the internal market. Article 26(1) in the Title puts an obligation on the EU to establish and ensure the functioning of the internal market by means of adopting relevant measures in accordance with the Treaty provisions. Article 26(2) explains what the concept of 'the internal market' includes: particularly, it should 'comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. The guidelines and conditions necessary for the balanced progress in all of these areas, according to Article 26(3), are determined by the Council based on a proposal from the European Commission. The same Article lays down the basis for the regulation of the free movement of persons.

Thus, it can be seen that the main clause providing the basis for the freedom of movement of persons is the provision on prohibition of discrimination on grounds of nationality (Article 18 TFEU), which is closely connected with the provision establishing the EU citizenship (Article 20 TFEU). In this way, the Treaties put even more emphasis on the idea of equality between EU citizens. Based on these clauses, Article 21 TFEU provides for the right of EU citizens to move and reside freely within the Union. In addition, the provision set out in Article 26 TFEU establishes the internal market and the free movement of persons, an indivisible part of it. The close connection between all these ideas is clear from the fact that the freedom of movement of persons has turned into a broader notion throughout time and 'has become inextricably linked with the concept of European citizenship and other wider issues of free movement'.[13]

An important clause is set out in Article 27 TFEU, which takes into consideration the differences in development that various EU MSs may have and stipulates that the European Commission should also consider the extent of the efforts that economies of MSs would have to be able to make for the establishment of the internal market and, consequently, should propose appropriate provisions in those situations. It adds that such provisions should be

[12] M Jesse, DW Carter, 'Life after the 'Dano- Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in N Cambien, D Kochenov, E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff 2020) 140.
[13] N Foster, *Foster on EU Law* (5th edn, Oxford University Press 2015) 299.

temporary in nature and result in 'least possible disturbance to the functioning of the internal market', in case they are formulated as derogations.

The next set of provisions dealing with the freedom of movement of persons is more specific: Chapter 1 of Title IV, entitled 'Workers', in essence, refers to the free movement of persons.

It should be noted here that despite being 'the lynchpin' to Article 45 and being used in the secondary law, particularly in certain Directives, the term 'worker' has not been defined in the Lisbon Treaty.[14] Therefore, from the early days of the European Communities, the Court of Justice was left with the task of providing a definition or at least guidelines on how the concept should be interpreted. In the case of *Hoekstra v BBDA*[15] the Court noted that the term must have a Union meaning and thus cannot be interpreted differently by the courts of the MSs, otherwise it would be 'possible for each member state to modify the meaning of the concept of "migrant worker" and to eliminate at will the protection afforded by the treaty to certain categories of persons'.[16] The Court gave a narrow definition of the term 'worker' in this case but broadened it in its later case law.

The first Article in Chapter 1 of Title IV of the TFEU stipulates that the 'freedom of movement for workers shall be secured within the Union'[17] and that it should include the 'abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.[18] More specific rights are laid down in Article 45(3), which include the right (i) to accept offers of employment, (ii) to move freely within the territory of MSs for the purpose of employment, (iii) to stay in a MS for the purpose of employment, (iv) to remain in a MS after having been employed there.

In the meantime, the Article regulates that these rights could be subjected to limitations, and these limitations can be justified on grounds of public policy, public security or public health.

[14] C Barnard, *EU Employment Law* (Oxford University Press 2012) 144.
[15] Case 75/63 *Hoekstra v BBDA* [1964] OJ Spec Ed 00177.
[16] Ibid, part 1.
[17] Article 45(1) TFEU.
[18] Article 45(2) TFEU.

This is, essentially, the main basis which MSs refer to in cases brought against them in front of the CJEU, if they wish to prove that the measures they have taken are justified on one of the mentioned grounds.

Title X of the Treaty states that the EU and its MSs shall respect social rights (for instance, those set out in the European Social Charter of 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989) and have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. According to the second paragraph of Article 151, both the Union and the MSs shall implement measures which 'take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy'. The Article also states that such a development will result not only from the functioning of the internal market itself, 'but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action'.

Article 153 TFEU lists the areas where the EU 'shall support and complement the activities' of its MSs. This list includes areas such as 'social security and social protection of workers' (Article 153(1)(c)), 'the integration of persons excluded from the labour market' (Article 153(1)(h)), 'the combating of social exclusion' (Article 153(1)(j)) and 'the modernisation of social protection systems' (Article 153(1)(k)).

In the meantime, Article 153(4) states that the provisions which would be adopted according to and in pursuance of the clauses set out in it earlier, must still allow the MSs to define the central principles of their social security systems and also must not have a significant effect on its financial equilibrium. In addition, the provisions of this same Article cannot prevent any MS from maintaining, as well as introducing more stringent protective measures which would be compatible with the Treaties.

While the Treaties lay down the fundament for EU citizens to exercise their right to free movement, further particulars of this sphere are regulated in detail through the secondary law of the Union, which will be discussed below.

2.2. Secondary Law Provisions

As mentioned earlier, the Citizenship Directive and several Regulations will be discussed in this Section. Various pieces of legislation, which had been adopted earlier, have now been replaced and amended by newer legislative acts, and the area of the freedom of movement of persons and access to social benefits by EU citizens is currently regulated mainly by Directive 2004/38/EC and Regulation 883/2004. Nevertheless, in order to understand how the legislation in question has developed throughout time, it is important to briefly touch upon the main aspects of several other pieces of legislation too, which currently regulate or regulated in the past the free movement of persons and social benefits. It should also be noted that the selected legislative acts have been chosen due to the high level of detail in which they regulate the area in question. Moreover, as will be seen in the discussion below, these legislative acts have been the subject matter of numerous crucial CJEU cases. Therefore, an examination of the most relevant provisions of these acts is critical. The relevant Regulations will be discussed in chronological order. Afterwards, a discussion of the Citizenship Directive will follow.

2.2.1. Regulation 1612/68 on Freedom of Movement for Workers

Regulation 1612/68,[19] along with Directive 64/221[20] and Directive 68/360[21], facilitated the implementation of the rights derived from the provisions on the prohibition of any discrimination based on nationality set out in the Treaty of Rome. Building on Article 48 of the Treaty, the Preamble of the Regulation reiterates that the freedom of movement for workers should be secured and that this objective 'entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. Moreover, the Regulation provides that the freedom of movement is a fundamental right of workers and their families, further asserting the significance of the freedom of movement for the then European

[19] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257.
[20] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Spec Ed 117.
[21] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ Spec Ed 485.

Community. At the time of its adoption, Regulation 1612/68 was a substantial measure effectively implementing the ideas of non-discrimination and free movement of workers.[22]

The Regulation was largely concerned with the introduction of mechanisms aimed to support the free movement of workers but did not shy away from conferring specific rights on the migrant workers and their families.[23] Notably, as a specific application of the general non-discrimination principle set out in Articles 7 and 48 of the Treaty of Rome, Article 7(2) of the Regulation stipulated that a migrant worker 'shall enjoy the same social and tax advantages as national workers'. Through the case law of the Court of Justice, this Article expanded into 'a formidable instrument of wide personal, material and territorial scope' and suggested that a rather specific rule can, in fact, reach 'a wider application than its apparent scope would suggest'.[24]

Regulation 1612/68 was the subject matter in several of the CJEU cases discussed in the next Chapter. For instance, in *Martínez Sala,*[25] examining the concept of social advantage referred to in Article 7(2) of the Regulation, the Court defined that the term includes 'all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'.[26] Moreover, in *Collins*[27] based on these provisions the Court of Justice established that other MS nationals who have already entered the employment

[22] J L Fuster, 'Council Regulation 1612/68: A Significant Step in Promoting the Right of Freedom of Movement within the EEC' (1988) 11 Boston College International and Comparative Law Review 127, 127.
[23] D O'Keeffe, 'Equal Rights for Migrants: The Concept of Social Advantages in Article 7(2), Regulation 1612/68' (1985) 5 Yearbook of European Law 93, 94.
[24] Ibid, 123. For the case law of the Court of Justice on Article 7(2) of Regulation 1612/68 referred to by O'Keeffe, see, eg, Case 44/72 *Marsman v Rosskamp* [1972] ECR 1243; Case 76/72 *Michel S* [1973] ECR 457; Case 187/73 *Callemeyn* [1974] ECR 553; Case 63/76 *lnzirillo* [1976] ECR 2057; Case 65/81 *Reina* [1982] ECR 33; Case *122/84 Scrivner* [1985] ECR 1029; Case 249/83 *Hoeckx* [1985] ECR 982.
[25] Case C-85/96 *Martínez Sala* [1998] ECR I-2708.
[26] See also Case 249/83 *Hoeckx* [1985] ECR 973, para 20.
[27] Case C-138/02 *Collins* [2004] ECR I-2733.

market of the host MS, can certainly claim the same social and tax advantages as national workers.[28]

Regulation 1612/68 remained in force until June 2011 and was repealed by Regulation 492/2011 discussed later below. Until then, a number of changes were made to the Regulation, including via the Citizenship Directive (discussed later below), which repealed Articles 10 and 11 concerning the rights of the family members of EU workers 'to install themselves' in the host MSs and established similar provisions with a clearer wording. It is noteworthy to mention that Article 3(2) of Regulation 1612/68 sets out a non-exhaustive list of practices which would fall under the definition of (indirect) discrimination. Particularly, that can be the case where the national legislation sets a special recruitment procedure for foreign nationals, limits or restricts the advertising of vacancies, and/or requires registration with employment offices as a prerequisite for eligibility for employment or hinders the recruitment of individual workers not residing in the country. This list is helpful in providing guidance in the assessment of whether a given situation can be deemed as discriminatory or not.

2.2.2. Regulation 1408/71 on Social Security Schemes for Employed Persons

Regulation 1408/71[29] covers the application of social security schemes to employed persons and their family members moving within the Community.

It should be noted that this Regulation was raising issues with regard to the definition of special non-contributory benefits. The definition was added by an amendment in 2005 only.[30] Notably, the personal scope of the Regulation, which at first covered only employed persons, was extended to self-employed persons, thereby also expanding the definition of a worker. In fact, the scope of the regulation has continuously developed. Article 42 EC aimed to pave way for the adoption of social security measures which would facilitate the freedom of movement for workers. Based on this provision, Regulation 1408/71 was established to, first and

[28] Ibid, para 31.
[29] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed 416.
[30] Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 [2005] OJ L 117

foremost, remove barriers to the free movement of workers caused by social security provisions. Nonetheless, the scope of the Regulation was extended throughout time to include self-employed persons, civil servants and notably students.[31] According to the Court's case law, a MS national is considered an employed person under this Regulation where he/she is covered 'by a general or special social security scheme mentioned in Article 1(a)', and the existence of an employment relationship is irrelevant.[32]

Article 10 of the Regulation concerned the waiving of residence clauses. Under this provision, several types of benefits (such as old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants) acquired under the legislation of one or more Member States cannot be subjected 'to any reduction, modification, suspension, withdrawal or confiscation' merely for the reason that the recipient resides in another MS. Essentially, this set out the principle of the exportability of benefits which is enshrined also in Article 7 of Regulation 883/2004, discussed below.[33]

It is noteworthy that the Court of Justice held that if a social advantage falls within the scope of both Regulation 1612/68 and 1408/71, Article 7(2) of the former may be applied, since Regulation 1612/68 'is of general application regarding the free movement of workers'.[34]

Generally, Regulation 1408/71 was amended on numerous occasions in order to adapt to the developments at the Community and national level, as well as the interpretations of the Court of Justice.[35] The need for 'a general overhaul of the legislation' and for the 'modernisation and simplification of the rules on the coordination of social security schemes' led to the proposal by the European Commission to reform and simplify Regulation 1408/71,[36] which led to the adoption of a new Regulation on the coordination of social security systems, Regulation 883/2004 discussed below.

---

[31] Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47, 52-53.
[32] Case C-85/96 *Martínez Sala* [1998] ECR I-2708, para 36.
[33] H Verschueren, 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ' (2009) 11 European Journal of Social Security 217, 218.
[34] Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, para 21.
[35] European Commission, 'Proposal for a Council Regulation (EC) on coordination of social security systems' COM (1998) 779 final.
[36] Ibid.

2.2.3. Regulation 883/2004 on Social Security Systems' Coordination

Regulation 883/2004[37] on the coordination of social security systems is one of the main legislative acts regulating the area of the provision of social assistance in the EU. The reason for coordinating this area in a more detailed manner stems from the idea that in the absence of harmonisation the MSs would be free to determine how to regulate a given field in their national legislation, and such a 'margin for manoeuvre'[38] can result in certain inconsistencies between domestic legislations, as well as has the potential to give rise to discrimination on grounds of nationality. Moreover, the social security coordination has two vital aims: promoting the free movement of persons and ensuring that individuals do not lose their social security rights as a result of using their free movement rights.[39]

As noted above, Regulation 883/2004 was born as a result of the need to modernise and simplify the social security coordination rules. Before its adoption, the field of free movement of persons was mainly coordinated by Regulation 1612/68[40] and Regulation 1408/71[41] touched upon above, which were being amended frequently due to the recurrent changes in the national legislations of the MSs, as well as because of the persuasive manner of the CJEU case law on subject matter.[42] Currently, Regulation 883/2004 harmonises the area in question through an expansive set of provisions.

In terms of the personal scope of the Regulation, Article 2 states that the regulation applies to nationals of any EU MS, to stateless persons and refugees residing in any of the MSs who have been or are subject to the legislation of one or more MSs, as well as to the members of their families and to their survivors. This formulation without references to economic activity

[37] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166.
[38] Case C-140/12 *Brey* [2013] OJ C 344/43, para 71.
[39] H Verschueren, 'The EU Social Security Co-ordination System: A Close Interplay between the EU Legislature and Judiciary' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 177-178.
[40] Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed 475.
[41] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed 416.
[42] H Verschueren, 'The EU Social Security Co-ordination System: A Close Interplay between the EU Legislature and Judiciary' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 177-178.

symbolised a new approach in the EU social security coordination. It indicated the progress of the social security coordination system in line with the developments in the field of European citizenship, 'promoting the unhindered free movement of any EU citizen, regardless of engagement in an economic activity' and representing a shift from the economically focused social security rules, now intended to include also economically non-active persons.[43]

The basis for covering EU nationals is the provision set out in the Treaty provisions on non-discrimination and free movement of persons. The citizens of the EEA MSs (Iceland, Norway and Liechtenstein) and Switzerland are covered instead by Regulation 1408/71. The main difference to note in terms of the coverage between Regulation 1408/71 and Regulation 883/2004 is that the latter encompasses a broader scope of beneficiaries. Nonetheless, it has been argued that this expansion does not have any explicit impact, since 'the extent of any benefit provided for in the Regulation depends on the prior determination of Member States'.[44] Regarding the *ratione materiae* scope of the Regulation, Article 3 provides a list of the branches of social security to which the Regulation applies. Those include:

(a) sickness benefits;
(b) maternity and equivalent paternity benefits;
(c) invalidity benefits;
(d) old-age benefits;
(e) survivors' benefits;
(f) benefits in respect of accidents at work and occupational diseases;
(g) death grants;
(h) unemployment benefits;
(i) pre-retirement benefits;
(j) family benefits.

The second paragraph of the same Article notably states that the Regulation applies to both general and special social security schemes, regardless of them being contributory or non-contributory, as well as to schemes relating to the obligations of an employer or a ship owner.

[43] Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47, 53.
[44] N Rogers, R Scannell, J Walsh, *Free Movement of Persons in the Enlarged European Union* (2nd edn, Sweet & Maxwell 2012) 242.

Importantly enough, Article 3(3) states that the Regulation in question also applies to the special non-contributory cash benefits which are covered by Article 70. The latter applies to special non-contributory cash benefits provided under legislation which possesses characteristics 'both of the social security legislation referred to in Article 3(1) and of social assistance' due to its 'personal scope, objectives and/or conditions for entitlement'.[45] Furthermore, the Article in its second paragraph explains that the special non-contributory cash benefits should have specific features to be deemed as such. Particularly, to be classified as such, cash benefits should be intended to provide 'supplementary, substitute or ancillary cover', guaranteeing for the person concerned 'a minimum subsistence income' or should be focused on specific protection solely for the disabled. In addition, to be deemed a special non-contributory cash benefit, a benefit's financing should 'exclusively derive from compulsory taxation', thus not requiring any contribution by the beneficiary.[46] Finally, special non-contributory cash benefits should be included in the list of such benefits available in each MS, separately provided in Annex X. The Regulation stipulates that Article 7 on the waiving of residence rules (principle of exportability of benefits), as well as the other provisions set out in the Title on the various categories of benefits, shall not apply to special non-contributory cash benefits. Finally, these benefits 'shall be provided exclusively in the Member State in which the persons concerned reside' and in accordance with the legislation of that MS, at the expense of the competent authority of the place of residence.[47]

The special non-contributory cash benefits are of a 'double' or 'mixed' nature, possessing characteristics of both social security and social assistance.[48] Notably, these types of benefits were the subject matter in, inter alia, *Brey*[49], *Dano*[50], *Alimanovic*[51] and *Jobcenter Krefeld*[52]. In *Brey* and *Dano*, the Court stressed that Article 70 does not lay down 'the conditions creating

[45] Article 70(1) of Regulation 883/2004.
[46] However, this reason on its own is not sufficient to consider the benefits which are provided to supplement a contributory benefit to be contributory benefits.
[47] Article 70(4) of Regulation 883/2004.
[48] As per Article 70(1). See also J Paju, 'On the Lack of Legal Reasoning in Case C-308/14, *European Commission v United Kingdom'* (2019) 48 Industrial Law Journal 117, 117-118; S Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 European Law Journal 360, 364.
[49] Case C-140/12 *Brey* [2013] OJ C 344/43.
[50] Case C-333/13 *Dano* [2014] OJ C16/05.
[51] Case C-67/14 *Alimanovic* [2015] OJ C 371/10.
[52] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794.

the right to special non-contributory cash benefits' and, therefore, each MS is free to lay down those conditions.[53] Consequently, the Court held that a MS is free to set out a condition requiring the beneficiary concerned to obtain a legal right of residence in order to be eligible for a special non-contributory cash benefit.[54] In *Dano,* the Court took this reasoning a step further and held that 'when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law', overtly stating that it does not have jurisdiction to answer one of the questions referred through the preliminary ruling.[55] The same reasoning was followed in *Alimanovic,* where the Court stated that the national legislation is free to exclude other MS nationals who entered the host MS in order seek employment (ie jobseekers) from entitlement to certain special non-contributory cash benefits, even if those benefits are granted to nationals of the host MS who are in the same situation.[56] Nonetheless, this reasoning changed in *Jobcenter Krefeld*. Here, the Court held that while the MSs can prevent the grant of special non-contributory cash benefits to other MS nationals, who are economically non-active, by requiring them have a right to reside lawfully in the host Member State, 'a right of lawful residence based on Article 10 of Regulation No 492/2011' entitles other MS nationals to the right to equal treatment with regard to special non-contributory cash benefits.[57] In these cases decided upon in the period between 2013-2020, the Court continuously favoured the arguments put forward by the MSs aimed at the protection of the welfare systems before turning to the principle of equal treatment again in *Jobcenter Krefeld*. This potentially indicates a change of approach by the Court throughout with regard to the access of other MS nationals to the welfare systems of the host MSs. This shift, however, is further discussed in the next Chapter.

In its case law, the Court engaged also with Article 11 of the Regulation, which sets out general rules on the determination of the applicable legislation. Article 11(2) is a specific provision concerning persons who are temporarily out of work. It stipulates that 'persons receiving cash benefits because or as a consequence of their activity as an employed or self-

[53] Case C-140/12 *Brey* [2013] OJ C 344/43, para 41; Case C-333/13 *Dano* [2014] OJ C16/05, para 89.
[54] Case C-140/12 *Brey* [2013] OJ C 344/43, para 42.
[55] Case C-333/13 *Dano* [2014] OJ C16/05, paras 90-91.
[56] Case C-67/14 *Alimanovic* [2015] OJ C 371/10, para 63.
[57] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, paras 84-85.

employed person shall be considered to be pursuing the said activity'. However, this does not apply to 'invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period'. The status of persons who were previously active and who later become non-active was unclear in Regulation 1408/71, and the clarification provided by Article 11(2) is a significant improvement in this light.[58] Notably, the special non-contributory benefits are to be provided 'exclusively in the Member State in which the persons concerned reside', at the expense of the relevant institutions of that MS. In other words, these benefits are not exportable. To that effect, the Court has held that the EU legislature can adopt provisions derogating from the principle of exportability of social security benefits.[59]

This clause was at the core of the *Bogatu*[60] case. Addressing the question of whether a person must be employed or in receipt of the cash benefits mentioned in Article 11(2) in the host MS in order to be eligible for family benefits, the Court held that no such requirement is necessary.[61] The case also revolved around Article 67 of the Regulation, which entitles EU nationals to receive family benefits in the host MS, 'including for his/her family members residing in another Member State' as if they are residing in the host MS.[62] When discussing this provision, the Court reminds that one of the objectives of Regulation 883/2004 was to extend the scope 'to categories of person other than employed persons […] and, in particular, to economically inactive persons' not covered in Regulation 1408/71.[63] According to the Court, this becomes apparent from the use of the word 'person' rather than 'employed person' in Article 67, reflecting 'the intention of the EU legislature no longer to restrict the entitlement to family benefits solely to employed persons, but to extend it to other categories of person'.[64] Essentially, the CJEU employed these two provisions of the Regulation to provide economically non-active EU nationals with access to family benefits.

[58] JP Lhernould, 'New Rules on Conflicts: Regulations 883/2004 and 987/2009' (2011) 12 ERA Forum/Journal of the Academy of European Law 25, 28-29.
[59] Case C-537/09 *Bartlett* [2011] ECR I-3417, para 38.
[60] Case C-322/17 *Bogatu* [2019] OJ C131/5.
[61] Ibid, para 33.
[62] The Article continues to state: 'However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension'.
[63] Case C-322/17 *Bogatu* [2019] OJ C131/5, para 26.
[64] Ibid, para 28.

In an earlier case concerning child benefits and child tax credits, *Commission v UK*[65], the Court of justice dealt with Article 11(1) and 11(3) of Regulation 883/2004. The former stipulates a general rule according to which the persons covered by the Regulation 'shall be subject to the legislation of a single Member State only'. Article 11(3)(e), as explained by the Court itself, sets out 'a "conflict rule" for determining the national legislation applicable to payment of the social security benefits' which are covered by the Regulation, including family benefits and which can be claimed by economically non-active persons.[66] While the Court reiterates that the provision in question is intended, inter alia, to ensure that EU nationals falling into the scope of the Regulation 'are not left without social security cover because there is no legislation which is applicable to them', it, nevertheless, emphasised several other points: (i) that the Regulation aims to coordinate (and not harmonise), (ii) that the provision in question 'is not intended to lay down the conditions creating the right to social security benefits', and (iii) that each MS is free to lay down the necessary conditions for eligibility.[67] In other words, the Court considered the exclusion of economically non-active persons to be an acceptable practice and deemed Article 11(3)(e) a provision on competence of the MSs, rather than one on eligibility.[68] According to Article 70(3), Article 7[69] and other Chapters of Title III (Articles 17-70)[70] should not be applied to special non-contributory cash benefits. This shows that the listed special non-contributory cash benefits are specific in nature and are treated differently, as compared to other social benefits.

Regulation 883/2004 is more than a simple set of provisions or rules: it encompasses several principles which play a central role in social security coordination. The principles commonly referred to in the literature are the principles of equal treatment of EU nationals (Article 4),

[65] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.
[66] Ibid, para 63.
[67] Ibid, paras 64-65, 67.
[68] C O'Brien, 'The ECJ sacrifices EU citizenship in vain: *Commission v. United Kingdom*' (2017) 54 Common Market Law Review 209.
[69] Article 7 on the waving of residence rules states: 'Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated'.
[70] Title III contains special provisions concerning the various categories of benefits.

equal treatment of benefits, income, facts or events (Article 5), aggregation of periods (Article 6), exportability of benefits (Article 7) and rules for the determination of the (single) applicable legislation (Title II).[71]

The principle of equal treatment of EU nationals is reiterated in Article 4 of the Regulation, which essentially states that persons falling within the personal scope of the Regulation are entitled to the same benefits and are subject to the same obligations as the nationals of a given MS under its legislation, unless provided otherwise in the Regulation.

Furthermore, as a result of the developments in the Court's case law, the principle of equal treatment of benefits, income, facts or events was introduced into EU law.[72] The legislature acknowledged this in Recital 9 of Regulation 883/2004 and, furthermore, entered a Recital which set out 'the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable'.[73] However, in order to avoid an abuse of this principle 'for the creation of periods of insurance',[74] it should not result in an obligation for MSs to take into account facts or events occurring in other MSs 'without these facts or events being considered as periods of insurance, employment, self-employment or residence completed under the legislation of that other Member State'.[75] This principle is further specified in Article 5 of the Regulation, which sets out two clauses: (i) the legal effects attributed to the receipt of social security benefits (or other income) under the legislation of a given MS shall apply to the receipt of equivalent benefits (or other income) acquired under the legislation of another MS; (ii) a given MS shall take account of facts or events, to which legal effects are attributed,

[71] For a discussion on these principles see, eg, Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47; H Verschueren, 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ' (2009) 11 European Journal of Social Security 217; H Verschueren, 'Regulation 883/2004 and Invalidity and Old-Age Pensions' (2009) 11 European Journal of Social Security 143.

[72] H Verschueren, 'Regulation 883/2004 and Invalidity and Old-Age Pensions' (2009) 11 European Journal of Social Security 143, 152. For case law, see, eg, Case 20/85, *Roviello* [1988] ECR 2805; Case C-349/87, *Paraschi* [1991] I-4501.

[73] Recital 10 of Regulation 883/2004.

[74] Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47, 66.

[75] H Verschueren, 'Regulation 883/2004 and Invalidity and Old-Age Pensions' (2009) 11 European Journal of Social Security 143, 153-154.

occurring in any MS 'as though they had taken place in its own territory'. Recital 10 of Regulation 883/2004 discussed above refers to the principle of aggregation of periods, which is then specified in Article 6 stipulating that a MS shall consider 'periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State' as though they were completed under its own legislation. While Regulation 1408/71 was referring to the aggregation of periods in each of its chapters, Regulation 883/2004 'transformed them into one general provision to be applied horizontally', thanks to which the need of repetition throughout the text was eliminated (with very few exceptions).[76]

The principle of exportability of benefits in light of Regulation 883/2004 is mentioned more from the point of view of derogations from this principle. Recital 39 of the Regulation states that, in accordance with the case law of the Court of Justice, 'provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly', ie derogations can apply only to the benefits which satisfy the required conditions. Exportability, the Recital continues, can then be restricted with regard to special non-contributory benefits which are listed in Annex X of the Regulation. It is argued that this special regime was introduced as MSs were opposing the export of these types of benefits and preferred that these benefits be restricted to persons residing in their territory.[77]

Moreover, the application of the exportability principle can be subjected to conditions, as is the case, for instance, with unemployment benefits set out in Article 64 of the Regulation. A jobseeker, who is a national of another MS, is 'wholly unemployed' and satisfies the conditions set out in the legislation of the home MS for receiving unemployment benefits there, retains his right to entitlement to unemployment benefits in cash in the host MS to which he/she moves with purpose of seeking employment there, under certain conditions and limits which are listed in the Article.[78] The entitlement to unemployment benefits, however, is retained also in the cases where the EU national returns to the home MS 'on or before the expiry of the period' during which he/she is entitled to such benefits, as per Article 64(2).

[76] Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47, 68.
[77] F Pennings, 'Co-Ordination of Social Security on the Basis of the State-of-Employment Principle: Time for an Alternative?' (2005) 42 Common Market Law Review 67, 75.
[78] Article 64(1) of Regulation 883/2004.

While under the main rule of *lex loci laboris* the entitlement to benefits is tied to the MS where the worker carries out his employment,[79] nonetheless special rules are established in the Regulation not only for 'wholly unemployed' persons (discussed above) but also for 'partially or intermittently unemployed' persons who reside in a Member State other than the state of last employment. Such persons are eligible to receive benefits in accordance with the legislation of the competent MS as if he/she were residing in that MS.[80]

Finally, the principle of determination of applicable legislation is set out in Title II of the Regulation. It not only determines the applicable legislation but also ensures that only one legislation applies and that the beneficiaries are not left without any legislation applicable to them. This principle has (i) an exclusive effect, as only the legislation indicated in the coordination system can be applicable, and (ii) an overriding effect, as 'national affiliation conditions are waived if their application would deprive the conflict rules of their practical effect'.[81]

The Regulation contains provisions also on, inter alia, old-age and survivors' pensions (Articles 50-60), the calculation of benefits (Article 62), special rules in cases of lack of a system of benefits for self-employed frontier workers (Article 65a),

2.2.4. Regulation 492/2011 on Freedom of Movement for Workers

Regulation 492/2011[82], which replaced Regulation 1612/68 discussed above with the purpose of ensuring 'clarity and rationality',[83] was particularly designed to facilitate free movement of workers (and their families) and to ensure 'their integration into the community of the host

[79] R Cornelissen, F De Wispelaere, 'Sixty Years of European Social Security Coordination: Achievements, Controversies and Challenges' in B Vanhercke, D Ghailani, S Spasova, P Pochet, (eds) *Social Policy in the European Union 1999-2019: The Long and Winding Road* (European Trade Union Institute 2020) 149.
[80] Article 65(1) of Regulation 883/2004.
[81] Y Jorens, F van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47, 72.
[82] Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141.
[83] Ibid, Recital 1.

state'.[84] This Regulation, similar to other pieces of secondary legislation, was influenced by the jurisprudence of the Court of Justice. Among many cases, the judgments in *Heylens* and *Bosman* can be mentioned, which referred to the free access to employment as a fundamental right that 'the Treaty confers individually on each worker in the Community'.[85] This wording was employed in the Preamble of Regulation 1612/68, as well as in Recital 4 of its successor Regulation 492/2011, providing that the 'freedom of movement constitutes a fundamental right of workers and their families'.

The Regulation sets out provisions aimed at protecting workers and jobseekers,[86] as well as former workers.[87] The protection of the latter category of mobile EU nationals was strengthened by the CJEU in 2020 in its ruling on *Jobcenter Krefeld*[88], where the Court held that a former worker is covered by Article 7(2) of the Regulation and, thus, can claim the same social and tax advantages as national workers, as set out in the Article.[89] In fact, the Court further supported this statement by making a reference to Article 45 TFEU on the freedom of movement for workers[90] and by stressing that the scope *ratione personae* of Article 7(2) includes workers who have become unemployed in the host MS, as noted in Article 7(1).[91] The provision in Article 7 is, essentially, a reiteration of the non-discrimination principle, aimed at ensuring equal treatment for other MS nationals in the host MS. With regard to Regulation 1612/68, where this provision was initially set out and later transported in the same wording into the succeeding Regulation 492/2011, the Court of Justice had held that it was adopted in implementation of the now Article 45 TFEU.[92]

The *Jobcenter Krefeld* case was also concerned with Article 10 of the Regulation, which stipulates that the children of a former worker in the host MS 'shall be admitted to that State's

[84] C Barnard, *EU Employment Law* (Oxford University Press 2012) 158-159.
[85] Case 222/86 *Heylens* [1987] ECR 4097, para 14; Case C-415/93 *Bosman* [1995] ECR I-4921, para 129.
[86] Articles 1, 2 and 5 of Regulation 492/2011, which reiterate the right of EU nationals to seek, to take up employment and perform contracts of employment in any EU MS.
[87] Article 7(2) of Regulation 492/2011, which refers to the principle of equal treatment with regard to reinstatement at work and re-employment, should the EU national become unemployed.
[88] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794.
[89] Ibid, para 45.
[90] Ibid, para 45.
[91] Ibid, para 43.
[92] Case C-207/78 *Even* [1979] ECR 1979-02019, paras 20-21.

general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'. Arguing that the objective of the Regulation to ensure free movement of workers 'requires the best possible conditions for the integration of the worker's family in the host Member State', the Court held that the clause set out in Article 10 'grants to a child […] an independent right of residence that does not depend on the fact that the parent or parents who care for the child should continue to have the status of migrant worker in the host Member State'.[93]

Thus, according to the Court's reasoning in *Jobcenter Krefeld*, the right to social advantages is retained by a former worker and, moreover, can be claimed by applicants who have a right of residence based upon Article 10 of Regulation 492/2011.

The Regulation also provides a brief but useful guidance on what types of provisions of the national laws can be considered discriminatory and, hence, inapplicable. These include provisions which (i) limit the applications for employment by other MS nationals and offers of employment to them, or (ii) limit the right of other MS nationals to take up and pursue employment. Provisions which (iii) subject the mentioned activities to conditions not applicable to the nationals of the host MS are also deemed inapplicable.[94] Finally, (iv) if the 'exclusive or principal aim or effect' of a given provision is 'to keep nationals of other Member States away from the employment offered', it is also deemed inapplicable.[95]

The only exception allowed from the first point mentioned above is related to the linguistic knowledge which is 'required by reason of the nature of the post to be filled'.[96] An example of the application of this exception clause is the case of *Groener v Minister for Education*[97], where the Court of Justice supported the requirement set out in the Irish legislation, according to which teachers in Ireland should be proficient in Irish as part of a public policy to maintain and promote the Irish language and culture. At the same time, the Court stressed that such restrictions should be proportionate for the pursuance of the given legitimate aim.

[93] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, paras 36-37.
[94] Article 3(1)(a) of Regulation 492/2011.
[95] Article 3(1)(b) of Regulation 492/2011.
[96] Ibid.
[97] Case 379/87 *Groener v Minister for Education* [1989] ECR-03967.

Overall, the Regulation states that other MS nationals shall be treated in line with the principle of equal treatment as concerns any conditions of employment and work, such as remuneration and dismissal (Article 7(1)), social and tax advantages (Article 7(2)), access to training in vocational schools and retraining centres (Article 7(3)), membership of trade unions and the exercise of rights attached thereto (Article 8), and all rights and benefits accorded to national workers in matters of housing (Article 9).

2.2.5. Directive 2004/38/EC (Citizenship Directive)

The main legislative act of secondary law of the Union regulating the area of free movement of persons in detail is Directive 2004/38/EC (or, the Citizenship Directive).[98] It has replaced most of the secondary law on the subject matter enacted previously and 'encapsulates much of the case law of the Court of Justice, which has often advanced legal rights prior to statutory change'.[99]

The Directive was adopted on the same day as Regulation 883/2004 discussed earlier, thus expanding in parallel 'the coordination system to all EU citizens covered by national social security law'.[100] It is of particular significance as it was drafted and is 'being implemented, applied and interpreted' after the establishment of the Union citizenship.[101] Striving from the concept of the Union citizenship being the fundamental status of all EU nationals when they exercise their right of free movement and residence, the Directive aims to 'simplify and strengthen the right of free movement and residence of all Union citizens'.[102] In terms of EU citizenship and the right to free movement stemming from the Treaties, the Directive notes that its provisions apply to all EU citizens 'who move to or reside in a Member State other than that of which they are a national', as well as to their family members accompanying or

[98] 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 [2004] OJ L 158/77.
[99] N Foster, *Foster on EU Law* (5th edn, Oxford University Press 2015) 314.
[100] T Erhag, 'Under Pressure? - Swedish Residence-Based Social Security and EU Citizenship' (2016) 18 European Journal of Social Security 207, 218.
[101] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 889-890.
[102] Directive 2004/38, Recital 3.

joining them. In other words, the Directive gives effect to the Treaty provisions on EU citizenship and prohibition of discrimination.

The Directive regulates issues related to the right of residence in Chapter III. With regard to short-term residence of EU nationals, the Directive stipulates that EU citizens shall have the right to reside in another MS for a period of up to 3 months, without any requirement of fulfilling any conditions or formalities and the only requirement being the possession of a valid identity card or passport.[103] This also covers family members of EU citizens who are not nationals of a MS but have a valid passport and are accompanying or joining him/her.[104] Nonetheless, this right of EU nationals to reside anywhere within the territory of EU MSs is not necessarily accompanied by a right to social assistance in the host MS, as per Article 24 discussed later in the text.

What is of utmost interest for the purpose of this research is the provision set out in Article 7 of the Directive. Unlike in cases of short-term residence, EU citizens have to meet certain conditions in order to exercise their right to reside in another MS for more than 3 months. Particularly, as per Article 7(1), they must:

(a) Be workers or self-employed persons in the host MS; or
(b) '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'; or
(c) - Be enrolled at a private or public establishment 'for the principal purpose of following a course of study, including vocational training; and
    - 'Have comprehensive sickness insurance cover' in the host MS and assure the relevant authority of the host MS, by means of a declaration or other equivalent means, 'that they 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'; or

[103] Article 6(1) of Directive 2004/38.
[104] Article 6(2) of Directive 2004/38.

(d) Be accompanying their family member (in case of non-EU national family members).

It has been argued that, through this provision, the Citizenship Directive essentially 'distil[s] a range of existing free movement rights into a general right of entry' for all those who possess sufficient resources.[105] In essence, if an economically non-active person is in possession of sufficient resources, his/her residence is deemed to be in compliance with the provisions of secondary law. The right to free movement, then, assumes a certain degree of financial self-sufficiency on the part of the economically non-active EU citizen. This is particularly relevant as, despite its initial broad interpretation,[106] the Court's case law later indicated that relying on the primary law provisions may not be enough to derive a right of residence, if the conditions in the secondary law (including that on sufficient resources) are not fulfilled.[107]

Article 7(2) of the Directive states that the abovementioned rights should also cover the right of residence of the family members of an EU citizen who is a national of a MS other than the one in which he/she is residing for the mentioned purposes, on the condition that the mentioned persons meet the criteria set out earlier in the Article. Article 7(3) adds another safeguard measure for the citizens, which is a crucial provision on the retaining of the status of a worker or self-employed person. An EU citizen who is no longer employed or self-employed retains the status of worker or self-employed person in the host MS in situations of being temporarily unable to work because of illness or accident, in certain situations of involuntary unemployment, or if embarking on vocational training. Notably, the Court of Justice has considered that the retention of worker's status is, in fact, not determined exhaustively by Directive 2004/38.[108] Moreover, the Court has explained that the rationale behind this provision is 'that the citizen is available and able to re-enter the labour market of the host Member State within a reasonable period'.[109] The CJEU's interpretation of the provision on former workers is aimed at ensuring the protection of this category of EU citizens.

---

[105] T Bekkedal, 'The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal' (2020) 7 Oslo Law Review 145, 153.
[106] See Case C-184/99 *Grzelczyk* [2001] ECR I-6229.
[107] See, eg, Case C-333/13 *Dano* [2014] OJ C16/05.
[108] Case C-507/12 *Saint Prix* [2014] EU:C:2014:2007, para 38.
[109] Case C-186/16 *Prefeta* [2018] EU:C:2018:719, para 37; Case C-483/17 *Tarola* [2019] EU:C:2019:309, para 40.

Article 8 of the Directive requires EU citizens to register in the host MS where they move with the aim of residing there, if they are intending to stay for a period longer than 3 months and if the host MS sets out such a requirement, and the deadline for such a registration should be at least 3 months from the date of arrival and the registration certificate should be issued immediately. Moreover, Article 8(2) states that failing to comply with this requirement of registering at the host MS can lead the person in question to be liable in a proportionate and non-discriminatory manner. The only conditions during the registration they would need to satisfy, according to Article 8(3), would be showing proof that they meet the requirements set out in the relevant provisions of the Directive which they should meet in order to be eligible for residence in the given MS. Article 8(4) briefly touches upon the question of what the term 'sufficient resources' implies[110] and it states that 'Member States may not lay down a fixed amount which they regard as "sufficient resources" but they must take into account the personal situation of the person concerned', and this amount cannot be higher for the nationals of other MSs than it is for the nationals of host MS for being eligible for social assistance or higher than 'the minimum social security pension paid by the host Member State'. In this way, Article 8(4) provides some guidance on what is to be understood under the term 'sufficient resources'. Later in the Directive, in Article 14 it is stated that EU nationals have the right of residence in another MS 'as long as they do not become an unreasonable burden on the social assistance system of the host Member State'. These notions of 'sufficient resources' and 'unreasonable burden' have been used also by the Court of Justice in its case law on various occasions, where the Court has tried to provide a more detailed explanation of what these terms should encompass.

The provision in Article 8(4) 'explicitly call[s] for an individual assessment' of the situation of economically non-active EU nationals.[111] This individual approach was distinctly supported in

[110] This issue has also occasionally been addressed in the academic literature and the case law of the Court. See, eg, Case C-140/12 *Brey* [2013] OJ C 344/43, para 67; S Carrera, 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?' (2005) 11 European Law Journal 699, 716; S Mantu, P Minderhoud, 'EU Citizenship and Social Solidarity' (2017) 24 Maastricht Journal of European and Comparative Law 703, 707; S Mantu, P Minderhoud, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens' (2019) 21 European Journal of Migration and Law 313, 316.

[111] D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17, 31.

Dano, where the emphasis was put on the goal to prevent economically non-active citizens from accessing the welfare systems of the host MSs.[112] However, 'setting aside these rules in favour of a purely systemic approach' would have potentially led the Court to a different outcome,[113] whereas in that time period the focus of the CJEU was the protection of MSs' interests rather than of economically non-active EU citizens. Further details of this time period are discussed in the next Chapter of the thesis.

The term 'unreasonable burden' leaves room for interpretation and it should be applied by the competent authorities of the Member States on a case-by-case basis. Notably, any conclusions on what constitutes an unreasonable burden must be drawn based on 'an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned'.[114]

The possession of sufficient resources was referenced by the CJEU in several judgments. In *Dano*, for instance, the Court ruled that other MS nationals are entitled to equal treatment in respect of access to social benefits in the host MS only if their residence complies with the conditions set out in Directive 2004/38, including the condition on possession of sufficient resources and not becoming a burden on the welfare system of the host MS.[115] However, a shift in this approach was recorded several years later in relation to the right of residence of workers or former workers under Article 10 of Regulation 492/2011, as the CJEU held in *Jobcenter Krefeld* that the right of residence of children who are in school in the host MS and of their parent (the parent that is their primary caregiver) are not subject to the provisions of the Citizenship Directive, which would include provisions on the requirement on possession of sufficient resources and comprehensive sickness insurance.[116]

---

[112] Case C-333/13 *Dano* [2014] OJ C16/05, para 76.
[113] D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17, 31.
[114] Case C-140/12 *Brey* [2013] OJ C 344/43, paras 64, 77.
[115] Case C-333/13 *Dano* [2014] OJ C16/05, para 68.
[116] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, para 30. See also Case C-310/08 *Ibrahim* [2010] EU:C:2010:80; Case C-480/08 *Teixeira* [2010] EU:C:2010:83.

What comes to the specific requirement to be in possession of comprehensive sickness insurance for a right of residence under the Directive, it 'predominantly affects citizens who move to a country which operates a residence-based healthcare system', which, despite the clear indications of the Commission, do not consider the reliance on public healthcare system to be fulfilling the condition on comprehensive sickness insurance.[117] Nic Shuibhne argues that this requirement 'has left an enduring imprint on citizenship law', as it was to be satisfied by economically non-active citizens.[118]

The notion of unreasonable burden is applicable also to the short-term right of residence of EU citizens who derive it on the basis of Article 6 of the Directive, since Article 14(1) stipulates that such EU nationals retain their right of residence 'as long as they do not become an unreasonable burden' on the host MS's social assistance system. With regard to the medium and long-term residence,[119] Article 14(2) gives the host MS the right to verify whether the person concerned meets the required conditions (including, in case of Article 7(1), the requirement on the possession of sufficient resources), if there is reasonable doubt in this regard. However, the provision also stresses that such verifications cannot be carried out systematically.

To guarantee another layer of protection for economically non-active EU nationals, the Directive prohibits the adoption of an expulsion measure as an automatic consequence of the fact that the other MS national or his/her family member have had recourse to the social assistance system of the host MS.[120] This provision, essentially, codifies the principle that was

[117] A Valcke, 'EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law' (2019) 21 European Journal of Migration and Law 289, 304; referring to European Commission, 'Communication on guidance for better transposition and 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 (2009) 313 final, 9-10.
[118] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 893.
[119] This residence is based on Articles 7, 12 and 13 of Directive 2004/38. Article 7, as discussed earlier in the text, concerns the right of residence of EU nationals for more than three months, whereas Articles 12 and 13 cover the cases of family members retaining their right of residence in the event of death or departure of the Union citizen (Article 12) or in the event of divorce, annulment of marriage or termination of registered partnership (Article 13). Notably, both contain a clause stating that before acquiring a *permanent* residence, EU nationals covered by these provisions must meet one of the conditions laid down in Article 7(1).
[120] Article 14(3) of Directive 2004/38.

set out in *Grzelczyk*.[121] Besides, expulsion measures cannot be adopted against an EU citizen or his/her family member in the case where: (i) the EU citizen is a worker or a self-employed person; or (ii) the EU citizen has entered the host MS with the aim of seeking employment there.[122] Moreover, in such a situation the EU citizen, as well as their family members cannot be expelled as long as they show proof of the fact that they are still seeking employment and that 'they have a genuine chance of being engaged' (Article 14(4)(b)). However, it should be noted that the above provisions are without prejudice to the applicability of restrictions on the right of residence on grounds of public policy, public security or public health, as set out in Chapter VI of the Directive. In other words, expulsion measures can be adopted against EU nationals if that is required on grounds of public policy, public security or public health. Nonetheless, these grounds cannot be relied upon for serving economic ends[123] and measures adopted on these grounds must comply with the principle of proportionality and must be 'based exclusively on the personal conduct of the individual concerned'.[124] Moreover, the personal conduct of the person concerned should meet certain requirements. Particularly, it should represent 'a genuine, present and sufficiently serious threat', which would be affecting one of the fundamental interests of the society.[125] In addition, justifications which are detached from the particulars of the case or are reliant upon 'considerations of general prevention' will not be accepted. This means that the justifications presented by the MSs should have a legitimate aim of protecting public policy, security or health and should be proportionate to the legitimate aim pursued.

Moreover, 'in order to ascertain whether the person concerned represents a danger for public policy or security' the host MS can request the MS of origin or other MSs to provide information concerning any previous police record the person concerned may have (Article 27(3)). Nevertheless, such enquiries should not be carried out as a matter of routine.

---

[121] Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 43, which states that in no case may measures to withdraw an EU national's residence permit or not to renew it 'become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system'.
[122] Article 14(4) of Directive 2004/38.
[123] Article 27(1) of Directive 2004/38.
[124] Article 27(2) of Directive 2004/38.
[125] Ibid.

Chapter IV of the Citizenship Directive concerns the issue of the right of permanent residence. The general clause set out in Article 16 provides that an EU citizen, who has legally resided in the host MS for a continuous period of 5 years, as well as his/her non-EU citizen family members who have resided with him/her legally in the host MS, shall enjoy the right of permanent residence there. Furthermore, this continuity of residence cannot be affected (i) by temporary absences from the host MS not exceeding a total of 6 months in one year; or (ii) or by absences of a longer duration for compulsory military service, or (iii) by one absence of a maximum of 12 consecutive months for important reasons (such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another MS or a third country).[126] Besides, the acquired right of permanent residence can be later lost only in case the person concerned has been absent from the host MS for a period exceeding 2 consecutive years.

On the issue of permanent residence, the Court of Justice ruled in *Dias*[127] that since the applicant was unemployed and did not comply with the requirement of having sufficient resources so as not to become a burden on the social assistance system of the host MS, that period of her residence in the host MS could not be regarded 'as having been completed legally for the purposes of the acquisition of the right to permanent residence under Article 16(1) of Directive 2004/38'.[128] The CJEU noted that '[T]he integration objective which lies behind the acquisition of the right of permanent residence […] is based not only on territorial and time factors but also on qualitative elements'.[129] The approach on the mandatory requirement to first satisfy the conditions for having a right of residence in the host MS in order to gain permanent residence there was upheld also later in *Alarape and Tijani*.[130] Moreover, in *Onuekwere*, the Court held that the time periods spent in imprisonment cannot be calculated towards the acquisition of a right of permanent residence.[131] This conditional framework used for determining the right to permanent residence 'confirms the ascension of

[126] Article 16(3) of Directive 2004/38.
[127] Case C-325/09 *Dias* [2011] EU:C:2011:498.
[128] Ibid, para 55.
[129] Ibid, paras 63-65.
[130] Case C-529/11 *Alarape and Tijani* [2013] EU:C:2013:9, para 50.
[131] Case C-378/12 *Onuekwere* [2014] EU:C:2014:13, para 22.

implied duties', which Nic Shuibhne defines as 'what emerges when we reverse expressions of conditions or limits as instances of obligation or responsibility'.[132]

Article 24 of the Citizenship Directive, which concerns the equal treatment in the EU and also codifies the non-discrimination clause in the secondary law of the EU, has been part of the discussion in a number of crucial cases before the Court of Justice.[133]

Article 24(1) starts out by saying that all Union citizens, who are residing in the host MS on grounds set out in the Directive, shall enjoy equal treatment along with the nationals of the host MS. Moreover, this also concerns the family members of the EU national in question, even in cases when they are not EU citizens themselves. Nevertheless, Article 24(2) provides for a derogation from the principle set out in the previous paragraph, as it states that the host MSs do not have an obligation of providing social assistance to other MS nationals for the first three months of their residence in the host MS or, 'where appropriate', for longer periods in case the other MS nationals have entered the host MS to seek employment (ie jobseekers).In addition, the host MS is not obliged to provide maintenance aid, such as student grants or student loans for studies (including for vocational training) to other MS nationals who are not workers, self-employed persons or former workers and their family members before such EU citizens acquire a right of permanent residence. The latter provision creates some ambiguity: it can be interpreted as granting full-spectrum social assistance rights to other MS nationals conditional upon their permanent residence in the host MS, which can be at odds with the idea of social solidarity.[134] Nevertheless, the need to balance (at least to some extent) the interests of EU MSs and of EU citizens cannot be denied. In fact, during the drafting of the Citizenship Directive, the Commission had initially proposed that Union citizens have the right to reside in other MSs without any formalities for up to six months. However, due to pressures from other institutions and, particularly, from the Council, this period was reduced to three months and

[132] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 918-919.
[133] See, eg, Case C-209/03 *Bidar* [2005] ECR I-2151; Case C-140/12 *Brey* [2013] OJ C 344/43; Case C-333/13 *Dano* [2014] OJ C16/05; Case C-67/14 *Alimanovic* [2015] OJ C 371/10.
[134] S Mantu, 'Concepts of Time and European Citizenship' (2013) 15 European journal of Migration and Law 447, 455.

several other draft provisions were tightened.[135] Nevertheless, if the need to protect MSs' interests prevails over the rights of EU citizens, it can lead to a dangerous imbalance and, potentially, a deterioration of the concept of EU citizenship. Whether the Court of Justice has retained this balance throughout its jurisprudence is a separate question and is analysed in detail in Chapter 3 of this thesis.

While in *Collins* the Court stated that due to the establishment of the Union citizenship, 'a benefit of a financial nature intended to facilitate access to employment in the labour market' of the host MS could no longer be excluded from the scope of the right to equal treatment set out in the primary law provisions,[136] in *Vatsouras* the legitimacy of the abovementioned derogation aimed at jobseekers was, nonetheless, affirmed.[137] The derogation in Article 24(2) was viewed as a provision that must be interpreted narrowly, until the *Dano* judgment materialised, where the Court 'declines to review the legitimacy of legislative limits vis-à-vis the Treaty'.[138]

Article 7 of the Directive, essentially, makes a distinction between economically active (Article 7(1)(a)) and economically non-active citizens, with the latter falling particularly under Article 7(1)(b), (c) and potentially, (d)[139]. The freedom of movement of persons has undergone considerable changes since its establishment and, throughout time, has expanded in scope to include economically non-active nationals, moving beyond economic aims. In this context, the notion of social solidarity has emerged within the Union. It has been argued that even if there is no one 'clear organizing concept' of the idea of social solidarity, it 'can no longer be treated as a national or local monopoly'.[140] Nonetheless, despite this expansion of the scope of free movement principles, 'a crucial distinction is still being made between different groups of EU

[135] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 895-896.
[136] Case C-138/02 *Collins* [2004] ECR I-2733, para 63.
[137] Joined Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-4585, para 46.
[138] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 909-910; Case C-333/13 *Dano* [2014] OJ C16/05.
[139] Article 7(1)(d) states: 'are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points *(a)*, (b) or (c)' (emphasis added). This means that family members of a Union citizen can also be economically active if they are employed or self-employed, whereas the other two categories certainly fall under the concept of economically non-active citizens.
[140] M Dougan, E Spaventa, '"Wish You Weren't Here…" New Models of Social Solidarity in the European Union' in E Spaventa, Michael Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 181.

citizens according to their status as workers or self-employed persons, or as jobseekers or economically inactive citizens',[141] the latter of which includes students, first-time jobseekers, jobseekers who do not have a genuine chance of being engaged, otherwise unemployed persons, and pensioners.[142] In other words, a distinction between economically active and non-active EU citizens exists. The access of economically non-active nationals to social assistance is, essentially, 'based on their integration into the host society in a social rather than an economic context'.[143] The most encompassing right to equal treatment is enjoyed by workers and self-employed persons and includes 'access to social benefits from their first day of employment', whereas jobseekers' rights to social assistance may be limited to social benefits which are aimed at facilitating labour market access.[144]

Through its case law of the early 2000s, the CJEU enabled all EU nationals, including those who were economically non-active, to enjoy the same treatment in terms of access to social assistance in the host MS, subject to such exceptions as are expressly provided for. The Court built its conclusions on the reasoning that the Union citizenship is 'destined to be the fundamental status' of EU nationals.[145] It can be argued that the interpretation of the Court of Justice implies that long-term (and more than three months') residence of economically non-active citizens in a host MS can be 'sufficient to establish a link with the host community that justifies access to social assistance'.[146] At the same time, the Court has recognised that 'transnational solidarity as regards Community citizens who are economically non-active cannot but remain conditional and, in particular, can only be affirmed to the extent that it does not jeopardize the vitality of national welfare systems'.[147] This position of the Court was particularly strengthened in *Dano*, where the Court found that the MSs can exclude

[141] M Blauberger, SK Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 Research & Politics 1, 2.
[142] EM Poptcheva, *Freedom of Movement and Residence of EU Citizens: Access to Social Benefits*, European Parliamentary Research Service (European Union 2014) 12.
[143] Ibid.
[144] M Blauberger, SK Schmidt, 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) 1 Research & Politics 1, 2-3.
[145] See, eg, Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 31; Case C-138/02 *Collins* [2004] ECR I-2733, para 61; Case C-209/03 *Bidar* [2005] ECR I-2151, para 31.
[146] E Spaventa, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in P Koutrakos, N Nic Shuibhne, P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016).
[147] S Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 European Law Journal 360, 375.

economically non-active EU nationals from access to special non-contributory cash benefits if they do not possess a right of residence based on the provisions of Directive and, in particular, do not have sufficient resources in order not to become a burden on the social assistance system of the host MS.[148] Although the Court reminded in its judgment that EU citizenship is destined to be the fundamental status of EU MS nationals, it did not stop the Court from relying on provisions of secondary law to restrict the rights of economically non-active citizens in terms of access to social assistance in the host MSs.

Finally, it should be noted that Article 35 of the Directive overtly entitled 'Abuse of rights' stipulates that MSs are allowed to adopt necessary measures 'to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud'. While the example it mentions in this regard is marriages of convenience, it is certainly not the only case where the provision can be employed, as the Article stresses that it refers to *any* right set out in the Directive. This is a clear example of EU law acknowledging potential abuse of rights and providing MSs with the necessary fundament to address it.

The Citizenship Directive is a crucial legislative act regulating free movement of persons and aspects of their access to social assistance. It has been the subject matter of various cases on which the CJEU has ruled. While the Directive reiterates the fundamental principles upon which the right to free movement is based and sets out practical clauses for regulating the subject matter, it also attempts to strike a balance between the rights of EU citizens and the legitimate interests of EU MSs, particularly through the provisions requiring EU nationals moving to another MS to be in possession of sufficient resources so as not to become a burden on its social assistance system and by allowing MSs to refuse the provision of social assistance to other MS nationals in certain cases.

[148] Case C-333/13 *Dano* [2014] OJ C16/05, para 82.

3. Conclusion

This Chapter examined how free of movement of persons in connection with access to social benefits is regulated by the primary and secondary law of the EU, as well as how it is implemented through the case law of the Court of Justice.

The Chapter provided a detailed analysis of the EU legal framework and demonstrated that this is based on a balance between, on the one hand, the rights of the EU citizens in terms of access to social assistance in MSs other than that of their nationality, and on the other hand the legitimate interests of EU MSs in protecting their social assistance systems from abuse. It can be observed that the EU legislation throughout time has attempted to achieve such a balance between the interests of MSs and the rights of EU citizens.

EU nationals have the possibility to rely on a number of EU legislative acts for claiming social benefits in the host MS. Specific provisions are set out in Directive 2004/38, as well as Regulation 883/2004. More general provisions (the idea of EU citizenship, the principle of equal treatment and non-discrimination) are both laid down in the TFEU and reinstated in several pieces of secondary law.

However, as noted, EU law does not consist only of the legislative acts discussed above but has a unique component, the case law of the Court of Justice of the EU, which also plays a vital role in the interpretation of EU law and in determining whether a further expansion and/or limitations need to be implemented on various issues, including the issue of free movement of persons in relation to social benefits. Therefore, given the significant importance the CJEU as an actor plays in EU law, the forthcoming Chapter will focus on the case law of the Court on the issues in question.

Chapter 3

CJEU Case Law

1. Introduction

The purpose of this Chapter is to examine the case law of the Court of Justice on free movement of persons and access to social benefits. This analysis is necessary for understanding whether and how the Court's position has changed throughout time, and thus to reflect on the factors that may explain this development.

This Chapter analyses in detail a number of cases covering the issues in question. The number of cases related to the questions of interest is rather large: 632 cases as of November 2022[1]. These include cases on the right of EU citizens to avail of their free movement rights in general, ie a category of cases that does not fall under any of the specific groups (19 cases)[2] and cases concerning the rights of workers[3] and social security[4] in particular (182 and 431 Court cases respectively).

---

[1] 'Classification scheme before the Lisbon Treaty', Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/browse/directories/case-law.html?root_default=RJ_1_CODED%3DB,RJ_2_CODED%3DB-04#arrow_B-04> accessed 2 November 2022; 'Systematic classification scheme after the Lisbon Treaty', Directory of case-law, Official website of European Union law <http://eur-lex.europa.eu/browse/directories/new-case-law.html?root_default=RJ_NEW_1_CODED%3D4,RJ_NEW_2_CODED%3D4.04,RJ_NEW_3_CODED%3D4.04.05#arrow_4.04.05> accessed 2 November 2022. The search was performed in the 'Directory of case-law' on the official website of European Union Law, where the cases are divided into categories based on their subject matter. Next to each category, it is mentioned how many cases are contained in that category. For the purpose of this thesis, the categories 'General' (19 cases), 'Workers' (182 cases), and 'Social security for workers' (431 cases) were included in the calculation. The time period includes 1956-2022.

[2] 'Free movement of persons: General' (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Acase-law&RJ_3_CODED=B-04.00&RJ_1_CODED=B&RJ_2_CODED=B-04&type=named&qid=1630592421515> accessed 2 November 2022; 'Free movement of persons: General' (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Anew-case-law&RJ_NEW_3_CODED=4.04.00&type=named&qid=1630571680579&RJ_NEW_1_CODED=4&RJ_NEW_2_CODED=4.04> accessed 2 November 2022.

[3] 'Free movement of persons: Workers' (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?type=named&name=browse-by:case-law&RJ_1_CODED=B&RJ_2_CODED=B-04&RJ_3_CODED=B-04.02> accessed 2 November 2022; 'Free movement of persons: Workers' (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <http://eur-lex.europa.eu/search.html?qid=1516032658404&RJ_NEW_2_CODED=4.04&RJ_NEW_1_CODED=4&type=named&RJ_NEW_3_CODED=4.04.01&name=browse-by:new-case-law> accessed 2 November 2022.

[4] 'Free movement of persons: Social security' (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Acase-law&RJ_3_CODED=B-04.06&RJ_1_CODED=B&RJ_2_CODED=B-04&type=named&qid=1630592828065> accessed 2 November 2022; 'Free movement of persons: Social security' (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <http://eur-

For this Chapter I have chosen a sample of cases which I regard as particularly significant, in light of the overall case law on the matter. In particular, 12 cases have been selected for analysis, covering an extended period of CJEU judgments, spanning from 1998 up until 2020. The cases have been chosen on the basis of their relevance, as acknowledged in the academic debate, and 10 of them have in fact been decided by the Grand Chamber of the Court.

From a quantitative point of view, as mentioned above, there are over 600 judgments issued on the topic at hand by the CJEU. Therefore, the analysis in the thesis had to be limited to a sample of those. To select the relevant cases from this large pool, from a qualitative point of view I carried out an overview of these cases – not only through the search engine described above but also through other engines and means available throughout the official EU and CJEU websites and beyond – distinguishing the cases focused on crucial aspects of the topic and, notably, identifying cross-references to the cases made by the Court across its jurisprudence. Furthermore, I conducted thorough research of the abundant academic literature, examining the key legal scholarship analysing the topic, and identified a number of judgments which are recognised in the literature as seminal and foundational.[5] Combining the

---

lex.europa.eu/search.html?qid=1516032662656&RJ_NEW_2_CODED=4.04&RJ_NEW_1_CODED=4&type=named&RJ_NEW_3_CODED=4.04.05&name=browse-by:new-case-law> accessed 2 November 2022.

[5] See, eg, N Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 Common Market Law Review 731; N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889; C O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 European Law Review 643; S Coutts, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Tights' (2019) 21 Cambridge Yearbook of European Legal Studies 318; U Neergard, 'Europe and the Welfare State—Friends, Foes, or . . .?' (2016) 35 Yearbook of European Law 341; S O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 European Law Review 68; A Iliopoulou-Penot, 'The Construction of a European Digital Citizenship in the Case Law of the Court of Justice of the EU' (2022) 59 Common Market Law Review 969; 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' (2009) 46 Common Market Law Review 2021; C Barnard, 'Case C-209/03, *R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*' (2005) 42 Common Market Law Review 1465; D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17; E Spaventa, 'Earned Citizenship – Understanding Union Citizenship through Its Scope' in D Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press 2017); 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: The Role of Rights* (Cambridge University Press 2017); J Shaw, 'A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in LM Poiares Pessoa 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* (Hart Publishing 2010).

results of the investigation of the Court's case law and the academic literature, I identified the judgments which are regularly cross-cited by the Court and identified what can be described as a consensus among the scholars regarding the significance of these cases. These cases, in essence, constitute a canon of the Court's case law on free movement of persons and access to social benefits. Due to their pivotal nature, these cases are illustrative of the Court's approach and provide valuable material for assessing the shifts in the position of the CJEU.

In terms of temporal coverage, I selected cases ruled in the period between 1998 and 2020. This timeframe is sufficiently sizeable to allow to identify any shifts happening in the position of the Court. Moreover, as this thesis aims to contextualise the approach of the CJEU in light of several dynamics occurring throughout time, it is crucial that the cases encompass the same time periods as the developing dynamics discussed in the thesis. Therefore, I selected cases which, in temporal terms: (i) preceded or followed the 2004 'big bang' enlargement of the EU, (ii) were ruled in times of an increased intra-EU migration in the MSs and, particularly, in the UK, (iii) were ruled in times of a distinct uprise of right-wing populist parties across the EU and, most notably, in the UK, and (iv) preceded or followed the Brexit referendum or, remarkably, were ruled nine days before the referendum[6]. This sequential approach allows to observe the developments of the Court's jurisprudence in light of the socio-political dynamics of a given time period.

The selected cases are analysed and presented below in a chronological order, to elucidate the development of the Court's jurisprudence in time and in parallel with the dynamics which, I argue, generated the context for this development. I have proposed grouping them in 4 groups or 'periods', as the judgments within each group have several common features in terms of the Court's approach to the issues at hand. Moreover, investigating the jurisprudence of the Court in a chronological manner and based on the different approaches adopted in *several* cases within a given time period, any developments in the position of the Court become more evident and help to illustrate the evolution of the Court's case law throughout time.

[6] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.

2. Cases

The cases discussed below on free movement of persons and social benefits reach the CJEU through the preliminary ruling procedure -- with one exception, *Commission v UK* which is an infringement proceeding. According to Article 267 TFEU, the Court of Justice can give preliminary rulings based on a request from a court or tribunal of a MS, if the latter is dealing with the interpretation of the Treaties or 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'. The reference for a preliminary ruling is considered to be 'a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.'[7] The inclusion of this 'mandatory and *exclusive* forum for adjudication' is a characteristic that 'sets the Community apart' from other international organisations.[8]

It should be noted that the CJEU has actively employed the preliminary reference system to engage 'with judiciaries from across all the Member States'.[9] The Court can make use of the preliminary reference procedure to extend the coverage of 'its judicial review functions to scrutinise de facto the validity of Member State measures against the Treaty framework'.[10] Below, the cases will be discussed and analysed in detail.

2.1. First Period: EU Citizenship as a Fundamental Status (1998-2004)

My argument is that in the cases of the first period the Court took a more citizen-friendly approach and provided an expansive interpretation of EU citizens' rights. In this period, the CJEU heavily emphasised the role of EU citizenship as the fundamental status of all EU nationals. It focused on the entitlement of EU citizens to rely on that status for exercising their rights to free movement and to access social benefits. This approach enabled the Court to extend the scope of the right to access social benefits in the host MS to economically non-

[7] Court of Justice of the European Union, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2012) OJ C 380/01, para 1.
[8] J HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2419 (emphasis in original).
[9] G Butler, 'Standing the Test of Time: Reference for a Preliminary Ruling' (2017) 20 Irish Journal of European Law 103, 115.
[10] T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018) 125.

active EU nationals. Arguably, in this way the Court was enhancing the significance of the EU citizenship, which was established in the not-too-distant past. Here, I consider four cases (*Martínez Sala*, *Grzelczyk*, *Collins* and *Trojani*) which reflect the Court's early approach to free movement of persons and access to social benefits.

2.1.1. Martínez Sala

The first case to be examined is *Martínez Sala*[11], which concerns a Spanish national residing in Germany. Through this case, the Court laid the foundation for allowing EU nationals to rely on their status of EU citizenship to avail of free movement rights and to access social benefits. During a period when she did not have a formal residence permit, Ms Sala applied for a child-raising allowance for her newly born child but was refused access to it on the ground that she did not have either German nationality or a residence entitlement or a residence permit. She brought an appeal to the Higher Court of Bavaria which, in its turn, referred several questions to the CJEU.

The German Court was asking whether a child-raising allowance is to be considered a family benefit within the meaning of Article 4(1)(h) of Regulation 1408/71 and/or a social advantage within the meaning of Article 7(2) of Regulation 1612/68. The former provision stipulates that the Regulation applies to, inter alia, family benefits, and the latter provision stipulates that a migrant worker shall enjoy the same social and tax advantages as national workers in the host MS.

A family benefit, according to Article 1(u)(i) of Regulation 1408/71, includes 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II'. The concept of 'social advantages', on the other hand, has been defined by the CJEU (at that time) in a rather broad sense. The Court has 'linked social advantages to the facilitation of mobility' but has considered certain other measures to be social advantages even though they could instead be considered as facilitating 'the integration of the worker in the host State'.[12] A social

[11] Case C-85/96 *Martínez Sala* [1998] ECR I-2708.
[12] E Berry, MJ Homewood, B Bogusz, *Complete EU Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2015) 449.

advantage, according to the Court's case law, includes all the advantages which are granted to national workers either for having a status as workers or simply for residing in the national territory. It also includes advantages granted to workers of other MS nationality with the aim of facilitating their mobility within the Community.[13] A distinction between 'social advantages' and 'social security benefits' should be drawn: social advantages are not capable of being exported, whereas social security benefits can be exported in many cases.[14] The Court restates that a benefit such as the child-raising allowance in question, which is 'automatically granted to persons fulfilling certain objective criteria' and which is 'intended to meet family expenses' is to be considered both a family benefit and a social advantage[15].

The German Court was also inquiring whether the Community law bars a MS to require other MS nationals to show a formal residence permit for being granted a child-raising allowance, when no such requirement is imposed on the nationals of the host MS. The CJEU believes that a provision of national law which links 'benefit eligibility to a residence permit' constitutes a direct discrimination on the grounds of nationality[16] and, thus, cannot be justified in any circumstances. Consequently, the host MS cannot impose such a requirement on other MS nationals. In other words, the Court found that being denied a national residence permit did not prevent Ms Sala's residence from being considered lawful.[17] It is argued that 'the Court is implicitly using an idea that benefits are conditional upon membership of society' which can be earned in different ways (not only through employment but also through residence).[18] Building upon a lawful residence, the other MS national was able to rely directly on his/her status of Union citizenship and on the general principle of non-discrimination.

Craig argues this approach of the Court used in *Martínez Sala* to be one of the 'juridical techniques' that it used for expanding 'the reach of the citizenship provisions' and of the non-

[13] Case 249/83 *Hoeckx* [1985] ECR 00973, para 20.
[14] M Horspool, M Humphreys, *European Union Law* (7th edn, Oxford University Press 2012) 361.
[15] Case C-85/96 ***Martínez*** *Sala* [1998] ECR I-2708, paras 25-28.
[16] C O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v. United Kingdom*' (2017) 54 Common Market Law Review 209, 233; referring to Case C-85/96 *Martínez Sala* [1998] ECR I-2708.
[17] Ibid.
[18] G Davies, 'Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students Not Previously Resident?' (2005) 12 Maastricht Journal of European and Comparative Law 227, 231.

discrimination clause, as in order to 'trigger' the latter, the discrimination should fall within the scope of the Treaty.[19] With this judgment, the Court extended the principle of non-discrimination to include also other MS nationals who are economically non-active. Essentially, it can be derived from the judgment that any EU national who found himself/herself in a comparable situation is to be treated equally.[20]

The judgment delivered by the Court of Justice in *Martínez Sala* is argued to be 'quintessential for the frame of reference' since it lays the foundation of the general rule that when an EU citizen cannot avail of his/her right to free movement under any other provision of Community law, he/she can rely on Article 18 EC (now, Article 21 TFEU) in that situation with regard to the right to free movement and residence, as well as on Article 12 EC (now, Article 18 TFEU) with regard to equal treatment irrespective of nationality 'in all situations which fall within the scope *ratione materiae* of Community law'.[21] This can be derived from the fact that in its judgment the Court refers to (the now) Articles 18 and 21 TFEU. In other words, the EU national was allowed to rely directly on the provisions on freedom of movement and non-discrimination. *Martínez Sala* represented 'the beginning of a new phase of EU incursion into national welfare sovereignty'[22] and a 'paradigm shift'.[23]

An important point set by the Court in this case is that 'the residence right is tied to a citizenship right', save for in cases of 'limitations and conditions which are placed on it when it is exercised as an immigration right'.[24] This way although the Court 'did not find that the residence right was inherent in the citizenship right', it is argued that with a wording as the one in question 'it took the first step' towards such a future interpretation.[25] This brought

[19] P Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 413.
[20] F de Witte, 'The End of EU Citizenship and the Means of Non-Discrimination' (2011) 18 Maastricht Journal of European and Comparative Law 86, 92-93.
[21] O Golynker, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration* (Intersentia 2006) 60.
[22] S Fries, J Shaw, 'Citizenship of the Union: Steps in the European Court of Justice' (1998) 4 European Public Law 533.
[23] 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: The Role of Rights* (Cambridge University Press 2017) 162.
[24] E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 57.
[25] Ibid.

about a tighter connection between residence rights and citizenship rights. Essentially, EU citizenship was interpreted to be so fundamental that it was sufficient to rely on provisions set out in the primary law of the Union, including those on prohibition of discrimination and on free movement rights.

It has also been argued that the judgment in *Martínez Sala* has had a 'symbolic importance' evidenced by the fact that 'it has become a jurisprudential authority even on aspects of free movement of persons', an area that had been addressed in detail by the case law even before *Martínez Sala*.[26] The fact that the latter has been referred to in a number of various cases both by the Advocates General and the Court itself[27] suggests that *Martínez Sala* has become such a 'reference ruling' on the issue of free movement of persons and social benefits, that 'Advocates General and even the Court have come to see the legal force of elements of the case law predating *Martínez Sala* and *Baumbast* dependent on the previously mentioned causes confirming them',[28] a feature characteristic of landmark cases.

2.1.2. Grzelczyk

In *Grzelczyk*[29], the Court made use of the fruitful soil provided in *Martínez Sala* and established a strengthened interconnection between EU citizenship and residence (and associated) rights of EU nationals. This case involved a French national, Mr Grzelczyk, who, while studying in Belgium, was covering his maintenance, accommodation and study costs himself. However, when applying to CPAS (Public Social Assistance Centre for Ottignies-Louvain-la-Neuve) in his last year of studies for a minimum subsistence allowance in Belgium, the minimex, CPAS first decided to grant him the study grant but had to withdraw that decision later, since the Belgian authorities refused to reimburse the payment of minimex to Mr Grzelczyk on the ground of him not meeting the nationality requirement. Mr Grzelczyk

[26] AJ Menendez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in LM Poiares Pessoa 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* (Hart Publishing 2010) 384.
[27] See, eg, Case C-184/99 *Grzelczyk* [2001] ECR I-6229; Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-138/02 *Collins* [2004] ECR I-2733; Case C-158/07 *Förster* [2008] ECR I-08507.
[28] AJ Menendez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in LM Poiares Pessoa 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* (Hart Publishing 2010) 384.
[29] Case C-184/99 *Grzelczyk* [2001] ECR I-6229.

challenged the decision before the Labour Tribunal in Nivelles which then referred several questions to the Court of Justice for a preliminary ruling.

The first question referred to the CJEU was in essence asking whether it would be contrary to the non-discrimination principle to make the provision of non-contributory social benefits (including the minimex) to other MS nationals, who are residing in that State legally, conditional upon them falling within the scope of Regulation 1612/68, in case when such a requirement is not imposed on the nationals of that State.

The Court firstly refers to its case law from 1985, *Hoeckx*[30], where it held that 'a social benefit providing a general guarantee of a minimum subsistence allowance' is a social advantage within the meaning of Regulation 1612/68.[31] Returning to the case in question, CJEU notes that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[32] This wording is used by the Court also in its judgments in the future. Thus, EU citizens shall enjoy equal treatment in all MSs, regardless of their nationality, which also implies the prohibition of discrimination on grounds of nationality.

The Court afterwards recalls another change in the case law by pointing out that in *Brown*[33] social assistance to students for maintenance and training was outside the scope of the Community law, whereas at the time of *Grzelczyk* the EU citizenship has been established which strengthens the idea of equal treatment during the exercise of their rights, including the right to education and vocational training across the Union. The CJEU emphasises here that there is no ground in the relevant provisions of the EC Treaty to suppose that EU citizen students lose the rights conferred on them by the Treaty when they move to another MS for the main purpose of studying. Furthermore, the Court mentions Article 1 of Directive 93/96[34], according to which 'the Member States shall recognise the right of residence for any student who is a national of a Member State', if the student fulfils certain criteria, particularly:

[30] Case 249/83 *Hoeckx* [1985] ECR 973.
[31] Ibid, para 25.
[32] Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 31.
[33] Case 197/86 *Brown* [1988] ECR 3237.
[34] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59.

1. is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there; and
2. is covered by sickness insurance in respect of all risks in the host MS; and
3. has sufficient resources to avoid becoming a burden on the social assistance system of the host MS, which should be demonstrated to the relevant national authority by a declaration or other means at least equivalent to it.

Here, the concept of 'sufficient resources' is brought up in a landmark CJEU judgment. The Court stresses that Directive 93/96 does not put down a requirement of a specific amount of sufficient resources and instead refers simply to a declaration or a document proving the possession of such resources.[35] This marks a difference from Directives 90/364[36] and 90/365[37] earlier in force[38], a difference which is explained 'by the special characteristics of student residence' compared to that of persons who fall within the scope of the mentioned Directives.[39] The Court emphasises that the right of residence in the host MS is not automatically lost once a national of another EU MS needs to apply for social assistance there.

Based on the aforementioned, the Court of Justice ruled that Articles 12 and 17 TEC (currently, respectively Article 18 TFEU and Article 20 TFEU) do not allow making conditional the entitlement to non-contributory social benefits, inter alia the minimex to other MS nationals upon the latter falling within the scope of Regulation 1612/68, in the cases where no such requirement is imposed on the nationals of that State. In this way, the Court

[35] Directive 93/96 sets out that the Member States shall recognise the right of residence of any EU national who is 'enrolled in a recognized educational establishment for the principal purpose of following a vocation training course there' and who is covered by sickness insurance and possesses 'sufficient resources to avoid becoming a burden on the social assistance system of the host Member State' (Article 1).
[36] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26.
[37] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28.
[38] Directives 90/364 and 90/365 stipulated that the right of residence should be granted to other MS nationals who do not have this right based on other provisions of Community law, provided that they are covered by sickness insurance and 'have sufficient resources to avoid becoming a burden' on the social assistance or social security system of the host Member State. This provision is set out in Article 1 of Directive 90/364 without a specific reference to worker or self-employed status (or absence thereof) and in Article 1 of Directive 90/365 with relevance for workers and self-employed persons. These Articles also contain details on the minimum amount necessary to consider the available resources sufficient.
[39] Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 41; Case C-424/98 *Commission v Italy* [2000] ECR I-4001, para 45.

points out that making the access to social advantages conditional upon certain requirements only for other MS nationals, is contrary to the idea of non-discrimination within the meaning of the Community law. Moreover, the Court judicially constructed the notion that 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' is to be ensured, the basis for which was laid in *Martínez Sala* and was developed further in *Grzelczyk*.[40]

It should be noted that despite the generally welcomed attitude towards the Court's expansive approach in *Grzelczyk*, the judgment simultaneously faced some criticism. In particular, the scholarship saw the wording of 'a certain degree of financial solidarity' (paragraph 44) as a potentially worrying sign.[41] While the Court employed the notion of EU citizenship 'to justify the creation of a sense of *transnational* solidarity' between the nationals of host MSs and other MS nationals residing there, the reference to only 'a certain degree of financial solidarity' is understood to indicate the limited nature of that transnational solidarity and its dependence on the degree of integration.[42] It has been suggested that this may have been the Court's way of acknowledging MSs' concerns regarding the protection of their finances, all the while retaining 'a citizen-centred argument'.[43] Interestingly, in some of the future cases the CJEU made use of the wording in question, focusing on the requirement of only a *certain* degree of financial solidarity between MSs in its balancing attempt of EU citizens' rights and Member States' financial interests.[44]

Nonetheless, the overall approach of the Court of Justice in *Grzelczyk* is often considered to be a fundamental and landmark one, thanks to its key takeaway where the CJEU acknowledged

[40] Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 44; S Mantu, P Minderhoud, 'EU citizenship and social solidarity' (2017) 24 Maastricht Journal of European and Comparative Law 703, 704.
[41] See, eg, C Barnard, 'Case C-209/03, *R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*' (2005) 42 Common Market Law Review 1465; A Gago, F Maiani, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261.
[42] C Barnard, 'Case C-209/03, *R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*' (2005) 42 Common Market Law Review 1465, 1477.
[43] N Nic Shuibhne, '"What I Tell You Three Times is True": Lawful Residence and Equal Treatment after *Dano*' (2016) 23 Maastricht Journal of European and Comparative Law 908, 920.
[44] See, eg, Case C-209/03 *Bidar* [2005] ECR I-2151, para 56; Case C-158/07 *Förster* [2008] ECR I-08507, para 48; Case C-140/12 *Brey* [2013] OJ C 344/43, para 72.

for the first time that 'citizenship contains a positive element' by enabling other MS nationals to gain access to social advantages 'beyond existing secondary Community law'.[45] The *Grzelczyk* judgment is deemed 'a milestone of the "expansive" phase' of the evolution of the CJEU case law in question.[46]

It is noteworthy that both *Grzelczyk* and *Martínez Sala* concerned cases of direct discrimination, ie access to the social assistance systems of the host MSs in both cases was denied merely based on the specific nationality of the applicant.[47] This demonstrates that the Court of Justice remained consistent in ruling that MSs cannot impose unreasonable criteria which their own nationals are not required to meet in order to obtain social benefits. The Court upheld this position also later, in 2004, in *Trojani*[48] which will be discussed later below.

With its 'progressive reading of the legislation'[49] *Grzelczyk* was, indeed, a vital case in the interpretation of the EU law on the free movement of persons and social benefits. Nevertheless, it is *Martínez Sala* that is often considered to having delivered the most 'ground-breaking' judgment on the issues in question, and the succeeding cases, inter alia *Grzelczyk*, as well as *Collins*[50] and *Bidar*[51] are seen as 'exploiting in different ways the space opened upon in *Martínez Sala* for the interpretation of Articles 17-22 EC (now, Articles 21-25 TFEU) as conferring freestanding rights, which are arguably of constitutional status, upon the nationals of the Member States'.[52] Moreover, it has been noted that despite the absence of 'a complete consistency of approach' by the CJEU, 'the citizenship cases can perhaps best be seen […] as a package'.[53] This perception was, indeed, true in 2001: the Court was interpreting the free

[45] N Reich, C Goddard, K Vasiljeva, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Intersentia 2005) 76.
[46] A Gago, F Maiani, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261, 265.
[47] S Currie, 'The Transformation of Union Citizenship' in M Dougan, S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 374.
[48] Case C-456/02 *Trojani* [2004] ECR I-7595.
[49] A Gago, F Maiani, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261, 265.
[50] Case C-209/03 *Bidar* [2005] ECR I-2151.
[51] Case C-138/02 *Collins* [2004] ECR I-2733.
[52] J Shaw, 'A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union' in LM Poiares Pessoa 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* (Hart Publishing 2010) 357.
[53] Ibid.

movement legislation in similar cases rather broadly and was giving much importance to the notion of EU citizenship. However, as later the Chapter will discuss, this 'package' interpretation underwent changes in the period following from 2010s. Thus, in spite of 'the strict terms of the secondary legislation', in *Grzelczyk* the Court essentially concluded also that having had recourse to the social assistance system in the host MS cannot 'in and of itself justify automatic expulsion', by which the Court was relying upon 'its willingness in *Martínez Sala* to take a broad view of the lawfulness of the applicant's residence'.[54] Essentially, the CJEU's judgment in *Grzelcyzk* became a vital point reinstating the importance of EU citizenship and of the free movement of persons closely connected with it.

2.1.3. Collins

The case of *Collins*[55] is the continuation of the citizen-friendly approach adopted earlier by the CJEU, whereby the latter upheld the rights of jobseekers with regard to access to social benefits in the host MSs. It involved a dual Irish and US citizen, Mr Collins, who applied for a jobseeker's allowance in the UK but was refused on the ground of not being habitually resident in the UK. He appealed to the Social Security Commissioner who referred several questions to the Court of Justice for a preliminary ruling.

The question of interest for this research is the last one of those referred to the CJEU, by which the UK Social Security Commissioner is asking whether there is a provision or principle in the Community law based on which a national of another MS can claim a jobseeker's allowance in the host MS, if he/she is genuinely seeking employment there. Since the national legislation in question put a requirement of being habitually resident in the State, the Court considered it necessary to decide whether the principle of equal treatment implies that such a residence requirement for granting jobseeker's allowance is contrary to the principle of equal treatment.

First of all, the CJEU states that the principle of equal treatment covers also such a benefit as jobseeker's allowance, as it is no longer possible to exclude it because of the Union citizenship and the recent case law. The Court believes that since the abovementioned requirement 'is

[54] Ibid 359.
[55] Case C-138/02 *Collins* [2004] ECR I-2733.

capable of being met more easily by the State's own nationals', it puts other MS nationals, who exercise their right of free movement for the purpose of seeking employment, at a disadvantage.[56] Such a requirement, however, can be justified by 'objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'.[57] It should also not go beyond what is necessary for being ascertained that the person is genuinely seeking work there. The Court, thus, considers the residence requirement to be, in principle, appropriate for the purpose of ensuring a connection between the persons claiming entitlement to a jobseeker's allowance and the employment market of the host MS.

It can be seen that the Court stresses that the principle of equal treatment is applicable to jobseeker's allowance. Nonetheless, the MSs are allowed to set a requirement of being habitually resident to be eligible for the allowance but that requirement would have to be justified, as it equals to indirect discrimination. Even if with a certain limitation, the *Collins* judgment established a broadened interpretation of coverage of free movement of persons and social benefits, by including jobseekers in the list of beneficiaries based on the principles of equal treatment and non-discrimination. The requirement of being habitually resident, the Court found, is a legitimate limitation put upon the potential beneficiaries, inasmuch as this helps to protect the welfare systems from potential abuses, something that host MSs are often concerned about.[58] Moreover, this helps the CJEU in striking a balance between the rights of EU citizens and the interests of (host) MSs.

It is noteworthy that the Opinion of AG Ruiz-Jarabo Colomer[59] differs from the Court's stance. The Advocate General concludes that Community law does not require host MSs to provide 'an income-based social security benefit intended for jobseekers' to nationals of other MSs who moved to the host MS 'with the purpose of seeking employment while lacking any connection with the State or link with the domestic employment market'.[60] Moreover, in his reasoning the AG notes that host MSs can choose to refuse social benefits to jobseekers, as it

[56] Ibid, para 65.
[57] Ibid, para 66.
[58] See Chapter 4.
[59] Case C-138/02 *Collins* [2004] ECR I-2733, Opinion of AG Ruiz-Jarabo Colomer.
[60] Ibid, para 77.

'may be justified in order to avoid what has come to be known as "benefit tourism"', and that the national legislation in question does not go 'beyond what is necessary to attain the objective pursued'.[61] It is important to consider this Opinion, as it is the first case among the selected ones where the Advocate General proposes a more MS-friendly approach, even though the Court took a different position on the issue in question.

The judgment in *Collins* was the result of the development of the Court's reasoning from an earlier case, *D'Hoop*[62], where the Court had ruled that in theory it might be 'possible to justify a refusal to grant a tideover allowance to an EU citizen on the basis' of the lack of 'a sufficient link between the jobseeker and the host State'.[63] However, the specific condition which the host MS in question (Belgium) had set out was disproportionate, 'since it did not represent the real and effective degree of connection between the applicant and the Belgian job market'.[64] In comparison, in *Collins* the host MS (UK) was required to justify 'the terms of its residence test as the basis for access to social benefits'.[65]

Moreover, this judgment erased the distinction between EU migrant workers who became jobseekers and those who were migrating in search of work. While earlier the latter were not entitled to protection from direct discrimination in terms of unemployment benefits, by merging the two groups in *Collins* the Court subjected both groups 'to real link tests' and held that it 'was legitimate to find some link between the claimant and the employment market'.[66] By merging these groups, the Court allowed the jobseekers who were moving to the host MS in search of work to be protected against discrimination and entitled to unemployment benefits. In this way, the CJEU essentially changed the scope of Article 45(2) TFEU on the non-discrimination as regards employment, remuneration and other conditions of work, including jobseekers moving to the host MS within the scope of the provision.

---

[61] Ibid, para 75.
[62] Case C-224/98 *D'Hoop* [2002] ECR I-06191.
[63] P Craig, G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2008) 866.
[64] Ibid.
[65] J Shaw, 'A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in LM Poiares Pessoa 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* (Hart Publishing 2010) 360.
[66] C O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 European Law Review 643, 5-6.

The Court of Justice was adjusting the balance between EU citizen jobseekers' rights to social benefits and EU host Member States' interests of protecting their social assistance systems by allowing to impose legitimate and proportionate conditions for the granting of social benefits to other MS nationals. It is argued that '[T]he proportionality of obstacles to free movement and limitations upon residence are the *leitmotiv* here, with the Court reading its approach across from the other free movement principles'.[67] It can be seen that in *Collins* the CJEU 'readjusted its focus sharply to rule that work-seeking EU migrants would have much greater access to social benefits and advantages in other host Member States',[68] ie the idea of the principle of non-discrimination was expanded further to include also jobseekers under its coverage. While earlier it did not consider jobseekers in the right to equal treatment regarding social and tax advantages, in *Collins* the Court 'changed its interpretation of Article 45 TFEU in the light of the introduction of Union citizenship'.[69] Essentially, through this widening of the personal scope of EU law provisions the CJEU visibly safeguarded the right to free movement and to access to social benefits for economically non-active EU citizens. It is particularly noteworthy that this case of an EU citizen who had never lived in the EU was found to fall within the scope of EU primary law, based solely on the fact that he was an EU citizen looking for work in another EU MS.[70] In this way, the Court once more emphasised the significance of the notion of EU citizenship. It should be noted that, however, the Court did not elaborate on what can be deemed to be 'objective considerations that are independent of the nationality of the persons concerned' justifying the restrictions set out in national legislation. This question was brought up later by a UK national court in the case of *Bidar*, which is discussed later in the Chapter. At the end, it should be acknowledged that due to the further developments in the Court's case law as will be seen below, *Collins* has been, in

[67] J Shaw, 'A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union' in LM Poiares Pessoa 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* (Hart Publishing 2010) 360 (emphasis in original).
[68] P Larkin, 'A Policy of Inconsistency and Hypocrisy: United Kingdom Social Security Policy and European Citizenship' (2009) 31 Journal of Social Welfare and Family 33, 36.
[69] C O'Brien, E Spaventa, J De Corninck, 'Comparative Report 2015 - The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (European Union 2016) <https://dro.dur.ac.uk/18690/1/18690.pdf>, accessed 22 March 2022, 19.
[70] A Tryfonidou, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to one of (Almost Complete) Independence' (2014) 33 Yearbook of European Law 385, 397.

essence, overruled. This, nonetheless, does not diminish the significance of the judgment, as at the time it was certainly formative and was assisting the CJEU in its expansive approach towards EU citizenship interpretation.

2.1.4. Trojani

The case of *Trojani*[71] was an important step in the CJEU case law development, as it put an emphasis on the residence rights for both economically active and non-active citizens. The case concerned a French national residing in Belgium. Here, he was provided with accommodation at a Salvation Army hostel, where he performed various jobs for about 30 hours a week as part of a personal social occupational reintegration programme. These jobs were performed in return for board and lodging and some pocket money. Mr Trojani applied for a minimex grant but was refused on the ground that neither was he a Belgian national nor did Regulation 1612/68 apply to his case. The Labour Court in Brussels, before which the refusal was challenged, referred several questions for a preliminary ruling to the CJEU.

Of interest to this research is the question whereby the Belgian Court was inquiring if the host MS can 'refuse an application for minimex or for social assistance (non-contributory benefits)', by inhibiting his right of residence on the ground that the applicant lacks sufficient resources.[72]

The CJEU argues that when the national legislation does not allow the granting of social assistance benefits to other MS nationals, without taking into account that they reside there lawfully and satisfy the criteria host MS nationals are required to meet, such a situation gives rise to discrimination based on nationality. Therefore, once it is established that another MS national possesses a residence permit, that person 'may rely on Article 12 EC [now, Article 21 TFEU] in order to be granted a social assistance benefit such as the minimex'.[73] This once again emphasises the possibility for EU citizens to rely on the relevant provisions of EU primary law for receiving social assistance in a host MS. The grant of the social assistance in question would have not been achieved by relying 'on either Belgian or Community law

[71] Case C-456/02 *Trojani* [2004] ECR I-7595.
[72] Ibid, para 12.
[73] Ibid, paras 44-46.

alone'. Rather, here the 'national permissiveness on the individual's residence was crossed with Community protection against nationality discrimination',[74] which provided sufficient basis for receiving the minimex.

Interestingly, the Opinion of AG Geelhoeld regarding the *Trojani* case has some contrast with the Court's judgment and is therefore worth mentioning. The Advocate General suggests that a Union citizen 'cannot claim a right of residence on the basis of Article 18 EC [now Article 21 TFEU], if and insofar as he does not have his own means of subsistence'[75], which entails that such a person will also not be entitled to social benefits in the host MS. This approach, in Advocate General's opinion, is justified because of the 'risk of social tourism, ie moving to a Member State with a more congenial social security environment'.[76] This comes on contrary to the opinion of the Court, which states that with regard to social benefits, even economically non-active EU citizens can rely on the now Article 18 TFEU if they have been residing lawfully in the host MS for a certain period of time or if they possess a residence permit.[77] This situation of differing views of the AG and the CJEU is rather similar to the one described in *Collins*: in both cases the AG supported a more restrictive stance for EU nationals' rights to social benefits, while the Court promoted an expansive approach.

From the difference between the two, a discrepancy in approaches to the issue of access to social benefits in host MSs is already seen. Along with the use of the term 'social tourism'[78] by the Advocate General, this situation can be considered to indicate that at the time of the case, EU MSs might have already been showing concerns about the broad interpretation of the provisions on free movement of persons and social benefits, as well as of the stronger protection offered by the Court of Justice to relevant beneficiaries.[79] In addition, the Opinion

[74] N Nic Shuibhne, 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?' (2006) 8 Cambridge Yearbook of European Legal Studies 187, 217.
[75] Case C-456/02 *Trojani* [2004] ECR I-7595, Opinion of AG Geelhoeld, para 77.
[76] Ibid, para 18.
[77] Case C-456/02 *Trojani* [2004] ECR I-7595, para 43.
[78] The notion of 'social tourism' or 'benefit tourism' is discussed in detail in Chapter 4, Subsection 2.1.
[79] See, eg, 'EU migrants face benefit curbs' *BBC* (23 February 2004) <http://news.bbc.co.uk/2/hi/uk_news/politics/3514199.stm> accessed 11 April 2022; C Brown, 'Blair calls crisis meeting over EU migrants' *The Telegraph* (15 February 2004) <https://www.telegraph.co.uk/news/uknews/1454380/Blair-calls-crisis-meeting-over-EU-migrants.html> accessed 11 April 2022; P Wintour, I Black, 'UK may tighten benefit controls to deter new EU immigrants' *The Guardian* (5 February 2004) <https://www.theguardian.com/uk/2004/feb/05/eu.immigration>

of the AG could have even provided fruitful soil for the concerned MSs to further highlight their possible dissatisfaction with CJEU's judgments. Nevertheless, the Court, with its divergence from AG's Opinion, reinstated its commitment to upholding (at least at the time of *Trojani*) the rights of EU citizens to the extent established by its previous case law. The connection between some EU Member States' dissatisfaction and Court's case law on free movement of persons and social benefits is further elaborated in the following Chapters of the thesis.

It should be noted that the refusal to grant a right of residence if the person lacks sufficient means to support his/her subsistence has been argued to have been justified in the academic literature. It is argued that there is a possibility that EU citizens can 'attach so much importance to these benefits' that they might move to reside in another MS solely for 'obtaining these benefits'.[80] Besides, such public benefits become vulnerable if there is a drastic increase in the number of beneficiaries, and a huge influx of 'non-nationals or non-residents claiming such benefits could affect the States' ability to develop and maintain the systems'.[81] This does not mean that other MS nationals would not be able to access the social assistance system of the host MS in the future but they should be able to support themselves at least at the start of their residence in the host MS. This will also prevent the social assistance system of the State from becoming overwhelmed by the granting of social benefits.

It should be noted that the *Trojani* judgment did face some criticism regarding its failure to clarify 'the relationship between applying for welfare assistance and the right of residence' which was dependent on the possession of sufficient resources by the EU national.[82] This adds to the criticism mentioned earlier in the text on the legal certainty and clarity that the Court at times fails to provide.

---

11 April 2022; 'Full text: Blair's migration speech' *The Guardian* (27 April 2004) <https://www.theguardian.com/politics/2004/apr/27/immigrationpolicy.speeches> accessed 11 April 2022.

[80] AP Van Der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 17.

[81] Ibid.

[82] S Coutts, 'The Absence of Integration and the Responsibilisation of Union Citizenship' (2018) 3 European Papers 761, 768.

Nonetheless, the CJEU judgment in *Trojani* put forward an important point by setting down 'a new precedent' by the Court on the issues in question, according to which 'residence, and not employment status, determines the current right of EU citizens in other European countries to claim benefits to the same extent as nationals' of that host MS.[83] This once more indicates that the right to access to social benefits by EU citizens who have exercised their right to free movement encompasses not only economically active but also economically non-active citizens. The importance placed on the residence becomes clear in the Court's wording. The Court states that where the EU national possesses a residence permit or has been residing in the host MS for a certain period of time, then he/she can rely directly on the principle of non-discrimination. Through this, the *Trojani* judgment indicates that if directly invoking Article 18 EC (now, Article 21 TFEU) is not possible for an EU citizen, then Article 12 EC (now, Article 18 TFEU) 'can be of such avail'.[84]

It can be concluded from the aforementioned that in *Trojani* the Court has demonstrated a citizen-friendly approach by allowing EU citizens to be granted social benefits in the host MS without facing additional obstacles as compared to the nationals of the host MS but rather on the same conditions as the nationals are required to meet and, accordingly, it has put all EU citizens on the same level as regards the access to the social assistance system of the host MSs.

2.2. Second Period: A Balancing Attempt (2005-2013)

In this subsection, the cases of *Bidar, Förster* and *Brey* are examined. In these cases the first shifts in the Court's expansive approach towards the right to free movement and social benefits are observed. While the Court did not abandon the protection of EU citizens' rights, it stepped away from the generous position adopted in the cases of the first period. During the second period, the CJEU not only chose to soften its emphasis on EU citizens' rights but also gave more weight to the protection of the social assistance systems of the host MSs. This was done, for instance, by highlighting that the granting of social assistance to other MS nationals

[83] J Gerhards, H Lengfeld, *European Citizenship and Social Integration in the European Union* (Routledge 2015) 143.
[84] C Timmermans, '*Martínez Sala* and *Baumbast* Revisited' in LM Poiares Pessoa 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* (Hart Publishing 2010) 352.

should not make them an 'unreasonable burden' and have consequences for the overall level of assistance which may be granted by the host MS. Furthermore, conditions imposed on economically non-active citizens for receiving social benefits in the host MSs were deemed in compliance with EU law. This can be argued to be justified as an attempt at balancing the interests of EU MSs and the fundamental rights of EU citizens. Yet, this approach of protecting the interests of the MSs was, in fact, developed even further at a later stage. This, however, will be discussed in the next Section.

2.2.1. Bidar

The *Bidar*[85] case concerned a French national, Mr Bidar, pursuing university studies in the UK, who received assistance with respect to his tuition fees but was refused a student loan to cover his maintenance costs on the ground that 'he was not settled in the United Kingdom'.[86] In other words, Mr Bidar did not satisfy the requirements of the habitual residence test in use in the UK. He appealed this decision to the High Court of Justice of England and Wales which referred several questions to the CJEU. The national court, inter alia, sought to establish what criteria are to be applied in determining whether the conditions of granting assistance to students are 'objective considerations independent of the nationality of the persons concerned', which was one of the requirements to be met for justifying indirect discrimination against other MS nationals. In *Bidar*, the Court upheld the EU citizen's viewpoint but also opened a door to further MS-friendly positions. This case is considered part of the second period of CJEU case law development, since here the Court focused on the requirement of 'a certain degree of integration', a subtle shift from the Court's position in the cases of the previous time period.

As explained by O'Neill, the habitual residence test applies to those 'who have recently arrived in the UK and who claim certain means-tested social security benefits'.[87] Notably, it is pointed out that this test 'was introduced into UK statutory law on 1 August 1994 as a

[85] Case C-209/03 *Bidar* [2005] ECR I-2151.
[86] Ibid, para 22.
[87] R O'Neill, 'Residence as a Condition for Social Security in the United Kingdom: A Critique of the UK Right to Reside Test for Accessing Benefits and How It Is Applied in the Courts' (2011) 13 European Journal of Social Security 226, 228.

response to concerns about "benefit tourism"'.[88] However, this test may have been introduced at the time also to protect the welfare system from the returning British citizens, not only from other nationals. In any case, this indicates the concerns around social/benefit tourism that were present in the UK already in 1990s, a matter discussed later in the thesis.

In *Bidar*, the Court of Justice recites its *Grzelczyk* judgment where it stated that 'in the organisation and application of their social assistance systems' EU MSs must 'show a certain degree of financial solidarity with nationals of other Member States'.[89] Nonetheless, it also notes that the MSs are allowed to ensure that the assistance granted to students from other MSs to cover maintenance costs does not turn into an 'unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State', therefore it is legitimate to require students applying for such assistance to show 'a certain degree of integration into the society' of the host MS.[90] With its focus on the requirement of only a *certain* degree of financial solidarity and its emphasis on the need to prevent other MS nationals from becoming an unreasonable burden for the social assistance system of the host MS, a shift can be noticed whereby the Court becomes subtly 'more accommodating of the interests of the state'.[91] It is noteworthy that for this particular reasoning the Court, in fact, was able to rely on the wording from *Grzelczyk*, the case which is widely regarded as a milestone of the Court's expansive approach on the topic. In this regard, the Court seems to be accepting of MSs adopting certain (limiting) measures for ensuring that 'their educational systems will not be threatened in their viability by the pressure exercised on them by students from other Member States'.[92]

In other words, the CJEU stated that it may be in compliance with Community law to require economically non-active EU citizens to show that they are integrated into the host MS to a certain extent in order to receive there, inter alia, maintenance grants as a student. This

[88] Ibid. The national law in question is the Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232.
[89] Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 44.
[90] Case C-209/03 *Bidar* [2005] ECR I-2151, paras 56-57.
[91] N Nic Shuibhne, '"What I Tell You Three Times is True": Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908, 920.
[92] O de Schutter, 'Fundamental Rights and the Transformation of Governance in the European Union' (2007) 9 Cambridge Yearbook of European Legal Studies 133, 152.

requirement can be evidenced through the fact that the student has resided there for a certain length of time, which can indicate the adoption of a '"quantitative" approach to equality' by the Court, as the longer term of residence in the host MS is deemed to mean a deeper integration and opens doors to more benefits for other MS nationals.[93]

The Court believes that the requirement of 'being settled' in the UK could correspond to the legitimate aim of ensuring a degree of integration. However, since such rules usually hinder any possibility for other MS nationals from obtaining a settled status as a student, they make it impossible for such citizens to meet that requirement, despite the actual degree of integration and, consequently, gaining access to the social assistance system of the host MS.[94] Therefore, the Court concludes that the imposition of such a requirement cannot be justified by the mentioned legitimate aim.

Essentially, the Court states that the MSs are allowed to put certain criteria for granting assistance for maintenance costs to students, implying that a requirement of being settled in the host MS can be put in place. Given that such a situation amounts to indirect discrimination, it has to be justified based on 'objective considerations independent of the nationality of the persons concerned', as well as has to be 'proportionate to the legitimate aim of the national provisions'.

It has been argued that *Bidar*, in fact, gave rise to new uncertainties in the Court's case law by finding that EU mobile citizens can receive student grants in the host MSs but at the same time allowing MSs to require 'a certain degree of integration'.[95] Perhaps, in this way the CJEU aimed to introduce a more balanced and less expansive approach to the implementation of provisions on free movement of persons and social benefits, attempting to take note of the protection of the finances of the MSs.

Based on Article 12 EC (now, Article 18 TFEU on non-discrimination), in the case of *Bidar* the specific requirement in question was considered to be precluded by EU law as the

[93] C Barnard, 'Case C-209/03, *R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*' (2005) 42 Common Market Law Review 1465, 1478.
[94] Case C-209/03 *Bidar* [2005] ECR I-2151, para 61.
[95] A Gago, F Maiani, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261, 265.

condition of being settled was not possible to fulfil for students even when the student had 'established a genuine link with the society of that State'.[96] The *Bidar* case is yet another example 'demonstrating the possible added value' of focusing on an approach based on Article 12 EC'[97] and comes to prove that since *Baumbast*[98] the Court has made use of the idea of Union citizenship for expanding 'the traditional moulds for crafting freedom of movement and residence'.[99]

Nonetheless, the Court here attempts to draw a balance between the protection of EU citizens' rights and the interests of the MSs. Referring to its previous case law from the end of the 1980s,[100] the Court notes that at the time the assistance in the form of maintenance grants to students fell outside the scope of Article 12 EC. However, since then the EU citizenship has been introduced, as well as the derogation in Article 24(2) of the Citizenship Directive, which states that maintenance grants to students can be restricted by Member States. According to the Court, this indicates that the maintenance grants for students fall within the scope of the Treaty.[101] Thus, in this situation the Court interprets Article 24(2) in favour of the EU citizen (unlike its further case law, such as *Dano* or *Alimanovic*), even though that provision is aimed at the protection of the MSs' interests in the first place. Nevertheless, at the same time, the Court allows the imposition of certain criteria for the grant of such assistance. The analysis of the Court's judgment in *Bidar* shows that the Court 'accepted that Member States have an interest in safeguarding the financial balance of their social security system' and thus, may require the applicant to demonstrate sufficient integration into the society.[102] In putting its reasoning in this way, the Court of Justice attempts to strike the balance between the rights of

[96] Case C-209/03 *Bidar* [2005] ECR I-2151, paras 62-63.
[97] C Timmermans, '*Martínez Sala* and *Baumbast* Revisited' in LM Poiares Pessoa 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 (Hart Publishing 2010) 352.
[98] Case C-413/99 *Baumbast* [2002] ECR I-07091.
[99] C Closa Montero, '*Martínez Sala* and *Baumbast*: An Institutionalist Analysis' in LM Poiares Pessoa 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 (Hart Publishing 2010) 400.
[100] Case 39/86 *Lair* [1988] ECR-03161; Case 197/86 *Brown* [1988] ECR-03205.
[101] Case C-209/03 *Bidar* [2005] ECR I-2151, paras 38-42.
[102] J Snell, 'Economic Justifications 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* (Hart Publishing 2016) 22.

EU citizens and the interests of EU MSs. For these reasons, the *Bidar* case falls in the second group of the selected cases.

However, in that very attempt the Court of Justice paved the way for the advancement of the MSs' interests in the future case law. The judgment of the Court in this case is a first step towards adopting a more MS-friendly approach in cases on free movement of persons and social benefits. While the Court does not mention the wording of 'social tourism' or 'benefit tourism' anywhere in the case, it echoes the core of the Opinion of AG Geelhoeld in *Trojani* on the importance of satisfying national law requirements, albeit doing it in a considerably milder manner. The rather evident contrast put forward by the Court, when it mentions and stresses the weight of the 'certain degree of financial solidarity with nationals of other Member States' noted in *Grzelczyk*, is a further indication of the Court's intention to change its approach.

2.2.2. Förster

In *Förster*[103], the CJEU continued to uphold the right of EU citizens to directly rely on the non-discrimination clause for access to social benefits while attempting to emphasise also the protection of host Member States' social assistance systems. The case concerned a German national residing in the Netherlands, Ms Förster, who was a student there and was involved in various types of paid employment. She was also granted maintenance aid from the first year of her residence in the Netherlands. However, she was later required to repay an excess amount of assistance she had received, since she had not been 'gainfully employed' for 6 months. She appealed this decision to the Higher Social Security Court of the Netherlands which referred several questions for a preliminary ruling to the Court of Justice. While the circumstances of this case took place after the adoption of the Citizenship Directive which codified the possibility of refusing social benefits to other MS nationals, its discussion is nevertheless important, as here the Court employs comparisons with a judgment from the first period discussed above.

The Court of Justice examined whether a student, being a national of one MS and traveling to

[103] Case C-158/07 *Förster* [2008] ECR I-08507.

another MS with the purpose of studying there, can rely on the non-discrimination clause set out in Article 12 EC (now, Article 18 TFEU) for obtaining a maintenance grant. The Court also examined whether the clause set out in paragraph 43 of the *Trojani* judgment covers also assistance in the form of maintenance costs for students.[104] The national court was also seeking to ascertain whether it is in compliance with Community legislation and the principles of Community law by the host MS to impose a duration requirement of residing in the host MS for a certain period of time (including that of five years as in this case) on other MS nationals when no such requirement is imposed on their own nationals.

The Court starts its examination of the case by recalling its own case law, according to which an EU citizen who is lawfully residing in the host MS 'can rely on Article 12 EC [on non-discrimination] in all situations which fall within the scope *ratione materiae* of Community law'.[105] This is somewhat similar to the rule set out in the *Trojani* judgment, the differences between them being the following:

- The *Trojani* rule emphasises that economically non-active citizens can also rely on Article 12 EC (no such specific clause can be found in the case law brought up by the Court in *Förster*); and
- The case law mentioned by the Court in *Förster* encompasses a broader area by covering all situations falling within the scope of Community law (whereas the *Trojani* rule puts limitations in the form of the requirement of residing for a certain time period or of having a residence permit).

The CJEU points out that the situations in which EU citizens can rely on the non-discrimination clause of Community law also cover the exercise of the free movement rights, including the movement of a MS national to another MS with the purpose of studying there. It is noteworthy that the Court, nonetheless, emphasises that an economically non-active EU citizen has the right to rely on Article 12 EC only in those cases where he/she 'has been

[104] Case C-456/02 *Trojani* [2004] ECR I-7595. The Court stated in para 43 in *Trojani* that economically non-active EU citizens can rely on Article 12 EC if they have been residing lawfully in the host Member State for a certain period of time or if they possess a residence permit.
[105] Case C-85/96 *Martínez Sala* [1998] ECR I-2708, para 63; Case C-209/03 *Bidar* [2005] ECR I-2151, para 32.

lawfully resident in the host Member State for a certain time'[106] or possesses a residence permit (according to the *Trojani* judgment). In this regard the Court concludes that a student lawfully residing in another MS falls within the scope of Article 12 EC as regards the entitlement to a maintenance grant.[107] In other words, a student who is a national of another MS can rely on the principles of equal treatment and non-discrimination for applying for a maintenance grant in the host MS if he/she has been lawfully residing there for a certain period of time.

The Court afterwards compares the case with the situation in the case of *Bidar*[108]. In *Bidar*, the national legislation required students of a nationality other than that of the host MS 'to be established' or 'to be settled' there. The Court established in that case that such a requirement is not possible to be met by other MS nationals, resulting in the lack of possibility to avail of the right to get access to the social assistance system of the host MS. At the same time, however, the CJEU reminds that in *Bidar* it put an emphasis on the fact that a MS was allowed to safeguard that the granting of assistance to other MS nationals 'does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.[109] The Court ruled in *Bidar* that the existence of a certain degree of integration can be proven by the fact that a person had resided in the host MS 'for a certain length of time'.[110] Finally, in *Förster* it ruled that Community law allows to make the right of students from other MSs to receive a maintenance grant 'subject to the completion of periods of residence which occurred prior to the introduction of that requirement'.[111] In this regard, however, it should be noted that the *Bidar* case concerned provisions which were in force before Directive 2004/38 itself entered into force. In this light, *Bidar* may not be considered overruled by *Förster*, which was a case from 2007, several years after the adoption of the Directive.

The judgment of the Court of Justice in the case of *Förster* has been considered to be

[106] Case C-158/07 *Förster* [2008] ECR I-08507, para 39.
[107] Ibid, para 41.
[108] Case C-209/03 *Bidar* [2005] ECR I-2151.
[109] Ibid, paras 56-57.
[110] Ibid, para 59.
[111] Case C-158/07 *Förster* [2008] ECR I-08507, para 71.

representing 'a purely formal approach to a "real link" on the basis of a length of residence'.[112] Furthermore, it has been argued that through this formalistic approach the Court has not paid sufficient attention to the issue of whether any other factors could be indicating a substantial degree of integration.[113] The requirement of national law in question makes the 'length of residence the sole and decisive criterion' for determining that the required degree of integration has been achieved, and it can be considered to constitute 'a non-rebuttable presumption of non-integration'.[114] Such an approach indicates that the Court's position started undergoing changes already in the times of the *Förster* case. Essentially, the CJEU once again used a quantitative rather than qualitative 'test that assumes a sufficient level of integration only after' a residence of a certain period of time (in this case, five years).[115]

This is a crucial point, inasmuch as the five-year residence requirement permitted in the case 'mechanically excludes migrant citizens who are highly integrated in the host State before the expiry of that period', a requirement that was 'precisely the criticism issued by Advocate General Mazák in his Opinion in *Förster*, later echoed in the scholarship'.[116] Particularly, according to the AG Opinion, it is possible that students establish 'a substantial degree of integration into society well before the expiry of that period', especially if they have additionally 'pursued occupational activities'.[117] The Advocate General agrees that this may result in discrimination in relation to social allowances against those EU nationals who move to another MS for the principal purpose of studying.[118]

The CJEU's gentle reminder about its judgment in *Bidar*, along with its conclusion on allowing the existence of the national legislation in question, are indicators of its shifting position with regard to free movement of persons and access to social benefits. While the Court in *Förster* is continuing to uphold the rights of economically non-active EU citizens, it

[112] PJ Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing 2016) 74.
[113] Ibid.
[114] AP Van Der Mei, 'Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid' (2009) 16 Maastricht Journal of European and Comparative Law 477, 487.
[115] D Carter, M Jesse, 'The "*Dano* Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3 European Papers 1179, 1189.
[116] A Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing 2014) 207.
[117] Case C-158/07 *Förster* [2008] ECR I-08507, Opinion of AG Mazák, para 130.
[118] Ibid.

is limiting the extent to which it safeguarded them in comparison with its earlier case law. Notably, the Court also stresses the importance of preventing other MS nationals from becoming an unreasonable burden on the social assistance systems of the host MSs. Overall, *Förster* is yet another step by the CJEU towards a MS-friendly approach.

2.2.3. Brey

Another noteworthy case is that of *Brey*[119] where the CJEU retained its position of protecting Member States' interests while ensuring the protection of EU citizens' rights. The case involved a German national whose request for social assistance was rejected by the Austrian authorities. In this case, Mr Brey and his wife (both German nationals) moved to Austria, where they applied for compensatory supplement to Mr Brey's invalidity pension. However, the Austrian Pensions Insurance Institution refused the application on the ground that Mr Brey did not possess sufficient resources to establish a lawful residence in Austria. Mr Brey brought an action before the Higher Regional Court in Graz, which satisfied the claim. However, the Pensions Insurance Institution appealed this decision to the Supreme Court, which referred a question to the Court of Justice through the preliminary ruling procedure. In this case, the Court essentially aimed to clarify how to determine whether an economically non-active citizen has become an undue burden on the host MS, and 'how it would operate in tandem with the right to residence under Directive 2004/38'.[120]

Here, the Court ruled that Community legislation precludes the existence of provisions of national legislation which automatically, without taking account of personal circumstances, reject the grant of social benefits to other MS nationals who are not economically active and who are residing in the host MS. Such provisions are not in compliance with Community law as they reject access to social benefits for the mentioned nationals on the ground that they do not meet necessary requirements for obtaining the legal right to reside there for more than 3 months (despite having been issued with a residence certificate), since obtaining such a right is conditional upon having sufficient resources so as not to apply for the benefit in question.[121] In

[119] Case C-140/12 *Brey* [2013] OJ C 344/43.
[120] CE O'Sullivan, 'Social Assistance for Economically-Inactive Citizens within the EU's Market State Model' (2016) 19 Irish Journal of European Law 64, 67.
[121] Ibid, para 80.

other words, the Court states that an automatic refusal to grant social benefits to an economically non-active EU national in the host MS does not comply with EU law. These arguments presented by the Court are not necessarily indicative of a MS-friendly position. Rather, they reflect an approach more beneficial to EU citizens. However, as will be seen below, this stance includes a hint at the significance of 'sufficient resources' and in this fashion is already a decrease in the importance given to the notion of EU citizenship.

Apart from the reasoning of the Court, the judgment also provides the summary of important definitions which are laid down in the Citizenship Directive and have also been used in the Court's case law. Particularly, the Court recalls why the compensatory supplement in question was classified as a 'special' and 'non-contributory' benefit in *Skalka*[122]. The arguments put forward by the Court in that case can be deemed as a definition for the mentioned concepts. Thus, to be considered a 'special benefit', the social assistance must be 'intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, and entitlement is dependent on objective criteria defined by law', and in order to be considered 'non-contributory', its costs must be borne, as a final result, by the host MS and at no time shall 'the contributions of insured persons form part of this financing arrangement'.[123]

In *Brey*, the CJEU reminds that in principle nothing can prevent making the grant of social assistance to economically non-active EU citizens conditional upon satisfying certain criteria required for obtaining a legal right of residence in the host MS. This statement was made by the Court in several cases.[124] Such criteria, however, should be consistent with EU law.

Importantly enough, the Court also ascertains that MSs cannot stipulate a fixed amount to be considered as 'sufficient resources'. Rather, they should take account of the personal situation of the applicant for social benefits. Besides, as mentioned in the Citizenship Directive, 'the amount ultimately regarded as indicating sufficient resources may not be higher than the

[122] Case C-160/02 *Skalka* [2004] ECR I-5613.
[123] Ibid, paras 26, 29-30.
[124] Cited in case C-140/12 *Brey* [2013] OJ C 344/43, para 44; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paras 61-63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paras 32-33; Case C-456/02 *Trojani* [2004] ECR I-7573, paras 42-43; Case C-209/03 *Bidar* [2005] ECR I-2119, para 37; Case C-158/07 *Förster* [2008] ECR I-8507, para 39.

threshold below which nationals of the host Member State become eligible for social assistance' or may not be 'higher than the minimum social security pension paid by the host Member State'.[125]

Another crucial point made by the Court in *Brey* is that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State'.[126] Furthermore, the CJEU provides guidance to MSs by mentioning that the competent authorities of the host MS, when examining whether another MS national has the right to access to social benefits there, must take into account, inter alia:

- The amount and the regularity of the income which he receives,
- The fact that those factors have led those authorities to issue him/her with a certificate of residence,
- The period during which the benefit applied for is likely to be granted to him, and
- The proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another MS.[127]

These points are helpful in showing the MSs a path of what should be taken into account when determining the right of access to social benefits for other MS nationals. While these factors do not by themselves provide a solution to all issues relating to social benefits, they certainly provide a guidance for host MSs.

It has been argued that while the Court reinstates in *Brey* 'the "fundamental status" mantra from paragraph 31 of *Grzelczyk*', it is, nonetheless, drawing more significant attention 'to the final phrase of paragraph 31: "subject to such exceptions as are expressly provided for."'[128] Such a conclusion was the automatic result of the Court mentioning in the judgment that the Citizenship Directive is not only intended to 'facilitate and strengthen the exercise of the primary and individual right' to move and reside freely but also to stipulate the conditions

[125] Article 8(4) of Directive 2004/38/EC.
[126] Case C-140/12 *Brey* [2013] OJ C 344/43, para 75.
[127] Ibid, para 78.
[128] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013) 332.

which govern the exercise of that right, including 'the requirement for the non-economically active to have sufficient resources, and the possibility for host states not to provide social assistance for the first three months', a condition which is based on the idea that the exercise of the Union citizen's rights of residence is capable of being 'subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances'.[129] Thus, the range of social benefits which could be denied to other MS nationals residing in the host MS was extended.[130] The approach 'in which limitations and conditions are constitutive of the right to equal treatment' is an approach that seems to have been carried on since the delivery of the judgment in *Brey*'.[131]

In sum, the Court ruled that automatic refusal of social benefits to other MS nationals is not in compliance with EU law. However, it also acknowledged that host MSs can set out conditions which other MS nationals would be required to fulfil in order to gain access to social benefits. While such an approach can be argued to be striking a balance between EU citizens' rights and Member States' interests, the following cases indicate a shift in the approach of the CJEU.

2.3. Third Period: Member States' Interests at the Forefront (2014-2016)

This subsection will discuss three cases from the period (*Dano, Alimanovic* and *Commission v UK*) in which the Court of Justice took a MS-friendly stance and focused on the protection of host Member States' social assistance systems. This period contrasts with the previous one and, even more dramatically, with the first period, in the Court's very clear and remarkably strong emphasis on the protection of the social assistance systems of the host MSs. Building on its approach developed in the cases of the previous period, the Court took a step further and 'generously' allowed MSs to restrict access of other MS nationals to their social assistance systems. Moreover, the CJEU constructed its analysis of the principle of equal treatment on secondary law provisions, rather than relying on the non-discrimination principle laid down in

[129] Ibid.
[130] C O'Brien, 'The ECJ Sacrifices EU citizenship in Vain: *Commission v. United Kingdom*' (2017) 54 Common Market Law Review 209, 210.
[131] C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 44.

Article 18 TFEU. This was an abrupt shift from the protection of EU citizens' rights to the protection of the interests of the MSs to limit the access of other MS nationals to their social assistance systems.

2.3.1. Dano

A crucial case to consider is the case of *Dano*[132] from 2014. It emphasised the Court's intention to support Member States' interests as regards their social assistance systems. This case concerns a Romanian national, Ms Dano, and her son who had been residing in Germany for several years, during which Ms Dano was supported financially and with accommodation by her sister and was also receiving child benefits from the German authorities. However, from a certain point of time the German authorities refused to grant her social assistance, the decision on which was challenged by Ms Dano in front of the Leipzig District Court, which in its turn referred several questions to the Court of Justice for a preliminary ruling.

In this case the CJEU states that by its first question the Leipzig Court is aiming to find out whether special non-contributory benefits fall within the scope of Article 4 of Regulation 883/2004. In this regard, the Court, first of all, mentions that persons who wish to claim special non-contributory benefits do fall within the scope *ratione personae* of Article 4 of Regulation 883/2004.

The brief mention of this Article by the CJEU has been argued to be 'odd' since merely 'finding that because the regulation allows special non-contributory benefits to be claimed in the state of residence "in accordance with its legislation", there was nothing to prevent the grant of such benefits being made subject to a right to reside condition'.[133] This has been argued to mean that EU MSs would have a large possibility and would 'be free to set discriminatory eligibility criteria'.[134]

The second and third questions were asking whether EU MSs should be allowed to refuse,

[132] Case C-333/13 *Dano* [2014] OJ C16/05.
[133] C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 50.
[134] Ibid.

partially or fully, to grant access to EU citizens to certain social benefits with the aim of the refusal being the prevention of the creation of an 'unreasonable recourse to non-contributory social security benefits'. With regard to this question, the Court of Justice starts by restating that the status of being a Union citizen is the fundamental status of EU nationals which entitles them to the right to equal treatment in other MSs by relying on Article 18 TFEU when exercising their right to free movement, in accordance with certain limitations and conditions provided for in the EU legislation.[135]

Afterwards, the CJEU notes that special non-contributory cash benefits are covered also by Article 24 of the Citizenship Directive and consequently do fall within the concept of 'social assistance' provided therein. It then provides the definition of this concept from its judgment in *Brey,* according to which the term 'social assistance' covers:

> all assistance schemes introduced by the public authorities, whether at national, regional or local level, that can be claimed 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 become a burden on the public finances of the host Member State during his period of residence, which could have consequences for the overall level of assistance which may be granted by that State.[136]

From this wording it becomes clear that 'the public finance defence features centrally' in the Court's definition of social assistance, and this was the case even in the earlier case of *Brey*.[137] The CJEU stresses that other EU nationals can be entitled to equal treatment along with host MS nationals only if their residence in the host MS complies with the criteria laid down in the Citizenship Directive, such as 'the requirement that the economically non-active Union citizen must have sufficient resources for himself and his family members'.[138] Essentially, this reasoning tries to send a 'message', according to which 'only moving citizens who have

[135] Case C-333/13 *Dano* [2014] OJ C16/05, paras 57-60.
[136] Case C-140/12 *Brey* [2013] OJ C 344/43, para 61; Case C-333/13 *Dano* [2014] OJ C16/05, para 63.
[137] Case C-140/12 *Brey* [2013] OJ C 344/43, para 61; N Nic Shuibhne, '"What I Tell You Three Times is True": Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908, 920-921.
[138] Case C-333/13 *Dano* [2014] OJ C16/05, para 73.

sufficient resources deserve equal treatment'.[139] Importantly enough, the Court of Justice notes that accepting that persons not possessing a right of residence can be eligible to social benefits under the same conditions as those applicable to nationals of the host MS would contradict with one of the aims of the Directive, ie it would potentially lead to those people becoming an unreasonable burden on the social assistance system of the host MS.[140] However, it is not yet defined when a person not possessing sufficient resources turns into an 'unreasonable burden'.[141]

In its judgment in *Dano* the Court of Justice also touches upon the difference between two groups of EU citizens who exercise their right to free movement and the right to reside in a MS other than that of their nationality. The CJEU, particularly, makes a distinction between:

1. Persons who are working in the host MS, ie economically active Union citizens and
2. Persons who are not working in the host MS, ie economically non-active Union citizens.

The first group of Union citizens, according to the Court, as well as according to Directive 2004/38, have the right to reside in the host MS with no conditions whatsoever, save for the formality of being in possession of a valid identity card or passport, whereas the second group of citizens has to demonstrate the possession of sufficient resources of their own, with which they can provide for their own livelihood. According to the Court of Justice, such a provision has the aim of preventing the economically non-active citizens from 'using the host Member State's welfare system to fund their means of subsistence'.[142] Consequently, the host MS may be able to refuse access to certain social benefits for the second group of citizens mentioned above, if they 'exercise their right solely in order to obtain' the social assistance of another MS without having sufficient resources to support themselves, ie without having the right to

[139] A Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?' (2020) 22 Cambridge Yearbook of European Legal Studies 279, 287.
[140] Case C-333/13 *Dano* [2014] OJ C16/05, para 74.
[141] D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17, 26
[142] Case C-333/13 *Dano* [2014] OJ C16/05, para 76.

residence.[143]

Based on the abovementioned considerations, the Court concludes that Article 24(1) and Article 7(1)(b) of the Citizenship Directive allow the existence and enforcement of national legislation which excludes other MS nationals, who do not have a right to residence under the same Directive, from entitlement to certain special non-contributory benefits in that MS. The Court adds that this also holds true for Article 4 of Regulation 883/2004. This marks a rather differing approach compared to the earlier judgments of the CJEU. Particularly, as mentioned earlier, in the previous cases the Court ascertained that EU citizens can rely directly on Treaty provisions in order to claim social benefits in the host MSs. However, in *Dano* a stronger emphasis was put instead on the possession of sufficient resources for economically non-active EU citizens, thus indicating a big step towards changing its approach with regard to free movement of persons and access to social benefits. Thus, the secondary law provisions set out in the Citizenship Directive and Regulation 883/2004 took 'precedence over the general prohibition of discrimination of Article 18 TFEU'.[144]

It can be observed from the judgment of the Court of Justice in *Dano* that EU citizens' rights to enjoy equal treatment depends on their right of residence based on EU law.[145] It can also be seen that in this case the Court is taking a more State-friendly approach by allowing the MSs to refuse to grant social benefits in more cases. This approach has led to certain concerns in the academic field regarding the issue of whether this undermines the idea of free movement of persons and the access of EU citizens to social benefits. As Spaventa argues, in *Dano,* the right to equal treatment enjoyed by EU citizens is 'subsumed in the rights granted by Article 24' of the Citizenship Directive.[146] Furthermore, it has been argued that in its ruling in *Dano,* which was entirely focused on the regulation of equal treatment as it is done in secondary law, the Court of Justice 'casts serious doubt on the continuing force of equal treatment as a

[143] Ibid, para 78.
[144] A Gago, F Maiani, '"Pushing the boundaries": a dialogical account of the evolution of European case-law on access to welfare' (2022) 44 Journal of European Integration 261, 267.
[145] PJ Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing 2016) 55.
[146] E Spaventa, 'Citizenship: Relocating Welfare Responsibilities to the State of Origin' in P Koutrakos, N Nic Shuibhne, P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016) 50.

primary right for Union citizens'.[147] Essentially, in the *Dano* ruling, the Court 'beats a retreat'[148] and simply withdraws from the deeper discussion of crucial notions. In particular, the Court did not refer to 'the principle that exceptions to the right to equal treatment enshrined in primary EU Law must be narrowly construed'[149] Moreover, it has been argued that if the approach set out in *Dano* is generalised, it would 'greatly curtail the scope of EU fundamental rights review',[150] as economically non-active EU citizens will have little (if any) protection under the reasoning in *Dano*.

The alteration of the Court's approach to the issues in question will be discussed in more detail later in the text. As of now, it suffices to note that in *Dano* the CJEU placed less importance on the Treaty provisions on non-discrimination as basis for receiving social benefits than it had done in its earlier case law and adopted an approach aimed at the protection of social assistance systems of host MSs.

2.3.2. Alimanovic

The position of the Court of Justice in *Dano* was upheld a year later, in the judgment in *Alimanovic*[151]. Following the Court's clarification in *Dano* according to which other MS nationals who are not and do not intend to be economically active are not entitled to social assistance, the Court had to address whether that would hold true for those who have been economically active for a relatively short period of time. The *Alimanovic* case concerned a Swedish national, Nazifa Alimanovic, and her children, who were also Swedish nationals. They were residing in Germany and receiving social assistance from the German authorities. In particular:

1. Ms Alimanovic was receiving:
    a. family allowances for her two younger children;

[147] N Nic Shuibhne, 'The Developing Dimensions of Union Citizenship' in A Arnull, D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 499 (emphasis in original).
[148] 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: The Role of Rights* (Cambridge University Press 2017) 360.
[149] Ibid 361.
[150] D Düsterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 658.
[151] Case C-67/14 *Alimanovic* [2015] OJ C 371/10.

b. subsistence allowance for the long-term unemployed; and
c. social allowances for beneficiaries unfit to work, ie for her two younger children; and

2. her eldest daughter was receiving subsistence allowance for the long-term unemployed.

However, later they were denied access to these benefits. The case was referred to the Social Court of Berlin, which, in its turn, referred several questions for a preliminary ruling to the Court of Justice.

First of all, the German court was speculating whether the principles of equal treatment and non-discrimination on the grounds of nationality can be applied also to the cases of entitlement to special non-contributory benefits. The Court starts by pointing out that the benefits in question are not 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation 883/2004, since they do not possess a financial nature envisioned for facilitating access to the labour market. Instead, they fall under the concept of 'social assistance' according to Article 24(2) of Directive 2004/38.

Afterwards, the Court engages in a discussion on national legislation which excludes jobseekers who are other MS nationals from receiving special non-contributory cash benefits. The CJEU, building upon its judgment from *Dano*[152], stresses that equal treatment can be claimed by a national of another MS only if the residence is in compliance with Directive 2004/38.[153] In other words, similar to *Dano*, the right of access to social benefits is being based upon EU secondary law, rather than being derived from TFEU provisions on non-discrimination, EU citizenship and free movement. By basing its reasoning on the Directive, the Court, perhaps, tries to indicate 'the progressive (and thus presumably proportionate) nature of the system of allocation of rights under Directive 2004/38'.[154] The Court recalls its statement from *Vatsouras* according to which 'Union citizens who have retained the status of

[152] Case C-333/13 *Dano* [2014] OJ C16/05.
[153] Case C-67/14 *Alimanovic* [2015] OJ C 371/10, para 49.
[154] 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' (2018) 3 European Papers 1353, 1377.

worker on the basis of Article 7(3)(c) of Directive 2004/38 have the right to social assistance'.[155] However, in *Alimanovic* the CJEU adds that in such a situation the host MS can rely on the derogation provision laid down in Article 24(2) of the same Directive and not grant a Union citizen social assistance, if his/her right of residence is based solely on the fact that he/she has entered the host MS with the aim of seeking employment, as mentioned in Article 14(4)(b).[156] As the applicant did not have sufficient resources, she (and her children) could not derive right of residence based on Articles 7(1)(b) and 7(2) of the Citizenship Directive.

Eventually, the Court of Justice states that provisions of national legislation barring other MS nationals who are seeking employment in the host MS from being entitled to 'special non-contributory cash benefits' are in compliance with Community law, even if the same benefits are granted to the nationals of the host MS who are in the same situation as non-nationals. In other words, the Court of Justice provides a possibility for MSs to refuse social benefits to jobseekers who are nationals of other MSs. This finding resulted in serious implications for jobseekers who are other MS nationals. They had gained importance by coming under the umbrella of EU citizenship when the notion of 'market citizenship' was being transformed, and so the evolution of the status of a jobseeker 'owes a lot to Union citizenship'.[157] Perhaps, then, it should not come as a surprise that when the CJEU decided that in order to access social assistance in host MSs other MS nationals cannot rely on the Treaty provisions on EU citizenship, jobseekers were essentially left out of this paradigm.

In *Alimanovic* the Court essentially chose to classify the special non-contributory cash benefits in question covered by Article 70 of Regulation 883/2004 as social assistance, which allowed it to apply the derogation provision in Article 24(2) of Directive 2004/38. By characterising these benefits under the derogation provision, the CJEU was able to interpret EU law as not prohibiting the national legislation which excluded the grant of these benefits. This classification of jobseeker's allowance as social assistance contrasts particularly with the classification in *Vatsouras*, where the Court held that the benefits which 'are intended to

[155] Joined Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-4585, para 32.
[156] Case C-67/14 *Alimanovic* [2015] OJ C 371/10, paras 57-58.
[157] A Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 Common Market Law Review 1007, 1009.

facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38'.[158] This is a remarkable shift within the jurisprudence of the Court and a clear indication that the position of the Court had moved from being citizen-friendly to one focused on protecting the interests of the MSs.

The judgment in *Alimanovic* indicates that the 'connection to the labour market using the principle of proportionality was no longer of importance' to the Court[159] and was not duly taken into consideration in the reasoning. It has also been argued that the Court did not engage in 'substantive equality review' in the case,[160] leaving one of the core principles of EU law out of the discussion. This judgment comes in a stark contrast with the earlier case law of the Court, whereby the interconnection between EU citizenship and residence rights (*Grzelczyk*), the protection of rights to social benefits for economically non-active EU nationals (*Collins*) and the possibility to rely on the non-discrimination clause directly (*Förster*) were reversed. Notably, in this case the Court does not mention even *en passant* the 'fundamental status' of Union citizenship so strongly emphasised in its own earlier case law. This is argued to be more than a matter of 'symbolism or rhetoric', and rather an indication that 'the rationale and outcome of *Alimanovic* do not support that conviction'.[161] Overall, *Alimanovic* was added to what Iliopoulou-Penot calls 'the *Dano* judicial chain', as well as introduced the dangerous development of refusing individual assessment.[162] In *Alimanovic*, the CJEU significantly focused on ensuring the protection of Member States' social assistance systems, a direction which was alleviated only several years later through *Bogatu* and *Jobcenter Krefeld* discussed later in this Chapter.

[158] Joined Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-4585, para 45.
[159] N Absenger, F Blank 'Social Rights, Labour Market Policies and the Freedom of Movement: Contradictions within the European Project?' in F Pennings, M Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar 2018).
[160] J Croon-Gestefeld, *Reconceptualising European Equality Law: A Comparative Institutional Analysis* (Hart Publishing 2017) 114.
[161] A Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 Common Market Law Review 1007, 1016.
[162] Ibid, 1015.

2.3.3. Commission v UK

Similar reasoning was later held up by the Court in another case, *Commission v UK*[163], where the European Commission was requesting the CJEU to declare that the UK had failed to comply with its obligations set out in Article 4 of Regulation 883/2004[164] by imposing a requirement for having a right to reside in the State in order to be eligible for child benefit or child tax credit in the UK. The Court here took, once again, a more MS-friendly approach, as will be seen below.

In this case, the CJEU firstly drew a distinction between the notions of 'social assistance' and 'social security benefits'. Stressing that the child benefit and child tax credit in question are not 'special non-contributory cash benefits', it stated they are universal social benefits 'granted to any person claiming it'.[165] It also mentioned that since the benefits in question are automatically granted 'to families that meet certain objective criteria', they should be deemed social security benefits.[166]

The main criticism from the Commission that the Court had to address was that the UK made the grant of the social benefits in question conditional on the habitual residency requirement. Clarifying that Regulation 883/2004 does not intend 'to lay down the conditions creating the right to social security benefits', the CJEU states that, in principle, it is left to 'each Member State to lay down those conditions'.[167]

Therefore, EU law does not preclude provisions of national law which make entitlement to certain social benefits 'conditional upon the claimant having a right to reside lawfully in the Member State concerned'.[168] Moreover, recalling its own case law, particularly its judgments in *Brey* and *Dano,* the Court reminds that, in principle, the grant of social benefits to other MS nationals who are economically non-active can be subjected to the requirement of 'possessing

[163] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.
[164] According to Article 4 of Regulation 883/2004, 'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof'.
[165] Case C-308/14, *Commission v UK* [2016] OJ C 305/05, paras 56, 58.
[166] Ibid, paras 60-61.
[167] Ibid, para 65.
[168] Ibid, para 66.

a right to reside lawfully in the host Member State'.[169] This effectively becomes the basis upon which the findings of the judgment are formulated.

The CJEU also agrees with the UK that 'legality of the claimant's residence in its territory is a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue'.[170] Furthermore, while it states that the requirement constitutes indirect discrimination, it also finds that 'the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted' particularly to economically non-active nationals, so far as 'such grant could have consequences for the overall level of assistance which may be accorded by that State'.[171] Once again, a greater emphasis is put on the need of ensuring the protection of host Member States' finances rather than on granting social assistance to other MS nationals. It appears that the Court considers this a sufficient justification for allowing host MSs to confirm the lawfulness of the residence of other MS nationals, particularly those who are economically non-active.[172] It can be argued that the Court seems to be disregarding the crucial issue of discrimination, which is, in fact, at the core of this case, and it declines 'to examine the legal provisions at issue' and abandons 'any attempt at methodical legal construction'.[173] Moreover, as rightly pointed out by O'Brien, under the UK procedures at issue, if an EU national is applying for social benefits, he/she may, essentially, never be considered to have the right to reside there,[174] and the acceptance of this situation by the Court is an indication of a clear shift in the approach of the CJEU from its earlier judgments.In sum, the action brought by the Commission against the UK was dismissed entirely by the Court on the basis that the prerequisite of having lawful residence in the host MS for gaining access to social benefits in question did 'not amount to discrimination prohibited under Article 4 of Regulation No

[169] Ibid, para 68; Case C-140/12 *Brey* [2013] OJ C 344/43, para 44; Case C-333/13 *Dano* [2014] OJ C16/05, para 83.
[170] Case C-308/14, *Commission v UK* [2016] OJ C 305/05, para 72.
[171] Ibid, paras 76, 78, 80.
[172] C Barnard, S Fraser Butlin, 'Free movement vs. fair movement: Brexit and managed migration' (2018) 55 Common Market Law Review 203, 215.
[173] C O'Brien, 'The ECJ Sacrifices EU citizenship in Vain: *Commission v. United Kingdom*' (2017) 54 Common Market Law Review 209, 218.
[174] Ibid, 212.

883/2004'.[175] The CJEU once again stressed the importance of protecting the social assistance systems of the host MSs. Furthermore, for that purpose it justified the restrictions on economically non-active EU citizens' rights to access social benefits. Thus, the Court maintained here its stance based on *Dano* and *Alimanovic* rulings. In this case dealing with the issue of 'transnational solidarity', it is argued that the CJEU 'sent a clear signal to the UK' less than ten days before the Brexit referendum that Regulation 883/2004 'permits discriminatory Member State legal requirements on access to residence-based social security benefits',[176] an issue which is explored in the further Chapters of the thesis. Essentially, the Court once again ruled that EU nationals shall rely on their right reside in the host MSs rather than on their EU citizenship when claiming social benefits. It continued to stretch and generalise the belief that 'migrant European citizens cannot become a burden on the finances of the host Member State' and may be required 'to demonstrate a genuine link' in order to access social benefits.[177]

This case is particularly crucial in light of the socio-political context in which it was decided, which was one of tensions over the rights of intra-EU migrants in the UK following the 2004 enlargement. The case in this context will be discussed also in the upcoming Chapters.

2.4. Fourth Period: A Cautious Return? (2019-present)

Despite the significant change in the approach of the Court of Justice in the previous period as regards the protection of EU citizens' rights to free movement and access to social benefits, the case law of the CJEU signalled a potential back shift in the recent years. If in the cases discussed earlier the Court felt comfortable to significantly limit the access of EU citizens (and, particularly, of economically non-active EU citizens) to social assistance in the host MSs, in the cases of the fourth period it emphasised again that the rights of EU citizens to claim social assistance in the host MSs have expanded to include economically non-active EU nationals. Allowing, for instance, a former worker to receive social assistance, the CJEU case law developed, this time indicating a potential to cautiously return to the protection of EU

[175] Case C-308/14, *Commission v UK* [2016] OJ C 305/05, para, para 86.
[176] J Paju, 'On the Lack of Legal Reasoning in Case C-308/14, *European Commission v United Kingdom*' (2019) 48 Industrial Law Journal 117, 119.
[177] F Strumia, ME Hughes, 'A Momentary Blip or a Step Forward in Revisionist Free Movement? - Case C-308/14 European Commission v. United Kingdom of Great Britain and Northern Ireland' (14 June 2016)' (2017) 23 European Public Law 723, 732.

citizens' rights to free movement and access to social assistance. Below, the *Bogatu* and *Jobcenter Krefeld* cases will be examined, where once again a citizen-friendly approach is adopted by the CJEU, similar to its earlier case law.

2.4.1. Bogatu

The *Bogatu*[178] case marked an interesting recent *revirement* in the Court's reasoning, as the rights to access social benefits in host MSs were once again reiterated for economically non-active EU citizens. *Bogatu* is a crucial case to consider and important for supporting the argument of the thesis, as it was an encouraging ruling for EU citizens which came after a rather restrictive period of the Court's case law and after the Brexit referendum of the UK (which is elaborated in the further Chapters). The case concerned a Romanian national, Mr Bogatu, who had been living in Ireland for over 10 years and who had two children living in Romania. He was employed for around 6 years after moving to Ireland. After that he lost his job and had been receiving various benefits at different times (contributory unemployment benefit, non-contributory unemployment benefit and sickness benefit) provided by the Ministry for Social Protection.[179] He had also applied for family benefits but was refused because he was not pursuing an activity as an employed person in Ireland or receiving contributory benefits there, a pre-condition for the receipt of those benefits according to the Irish legislation.

Mr Bogatu brought a claim before the High Court of Ireland, which referred two questions for a preliminary ruling to the CJEU, asking:

1. Whether Article 67 of Regulation 883/2004, along with Article 11(2), set out a requirement for a person to be employed in the host MS or to be in receipt of cash benefits mentioned in Article 11(2) in order to be eligible to receive family benefits in the host MS, and
2. Whether the reference to 'cash benefits' in Article 11(2) refers only to a period during which the claimant is actually receiving cash benefits or refers to any period during

[178] Case C-322/17 *Bogatu* [2019] OJ C131/5.
[179] Information on the Irish legislation on benefits here is provided as in paras 11-13 of the *Bogatu* judgment. Further information can be found on the official website of the Department of Employment Affairs and Social Protection of Ireland, <http://welfare.ie/en/Pages/home.aspx> accessed 20 April 2022.

which 'a claimant is covered for a cash benefit in the future', regardless of the fact whether that benefit has been claimed at the time of application for family benefit.

The CJEU started by analysing the relevant EU legislation. In this regard the CJEU stated that the reference to a 'person' in the wording of Article 67 of Regulation 883/2004[180] is not referring to the possession of any specific status, including the status of an employed person and also mentioned that the eligibility of the person concerned for family benefits is determined according to the legislation of the host MS.[181] Therefore, the Court examined the Article and interpreted it in the light of its context and the objectives that it pursued,[182] one of which was extending 'the personal scope of the entire coordination regime to include not only workers but also economically inactive persons'.[183]

The Court stressed that the interpretation of Article 67 had to be carried out by taking into account also the provision in Article 68(1)(a) of the same Regulation. According to the latter, the grounds based on which an EU national can apply for family benefits are prioritised as follows:

1. Rights available on the basis of an activity as an employed or self-employed person,
2. Rights available on the basis of receipt of a pension,
3. Rights obtained on the basis of residence.[184]

Given that the above provision indicated more than one grounds which gave rise to an entitlement to family benefits, including activity as an employed person, the Court stated that Article 67 of Regulation 883/2004 'cannot be considered to apply exclusively to entitlement

[180] Article 67 of Regulation 883/2004 states: 'A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension'.
[181] Case C-322/17 *Bogatu* [2019] OJ C131/5, paras 21-22.
[182] Ibid, para 23.
[183] AP van der Mei, P Melin, 'Overview of Recent Cases before the Court of Justice of the European Union (February 2019-June 2019)' (2019) 21 European Journal of Social Security 272, 277.
[184] Case C-322/17 *Bogatu* [2019] OJ C131/5, para 24.

on the basis of' activity as an employed person,[185] ie eligibility for receiving family benefits cannot be made conditional on the person falling within one of the abovementioned grounds.

The Court afterwards discussed the objective that Article 67 is intended to pursue, by comparing it to provisions set out in an earlier Regulation, Regulation 1408/71[186], since Mr Bogatu argued that the Article of the current Regulation 883/2004 should be interpreted in the same way as the provisions from the earlier piece of legislation. According to the CJEU, the adoption of Article 67 into Regulation 883/2004 was meant 'to extend the scope of that regulation' to include also categories other than just employed persons (who were the only ones covered by Regulation 1408/71) and one of such categories would be the economically non-active persons who were left out from the previous Regulation.[187] The Court mentioned that this objective becomes apparent when considering Article 2(1) of Regulation 883/2004, which lists 'nationals of a Member State who are or have been subject to the legislation of one or more Member State' as one of the categories covered by this Regulation. Regulation 1408/71, in contrast, specifically stated that it applied only to 'employed or self-employed persons who are or have been subject to the legislation of one or more Member States'.[188]

The Court emphasised that this intention is reflected also in the fact that Article 67 of the newer Regulation uses the word *persons*, whereas the predecessor provision from the previous Regulation, Article 73 of Regulation 1408/71, referred to *employed persons* only. In conclusion, the Court stated that 'Article 67 of Regulation 883/2004 reflects the intention of the EU legislature no longer to restrict the entitlement to family benefits to employed persons, but to extend it to other categories of person'.[189]

Based on the abovementioned, the Court concluded that the correct interpretation of Article 67 of Regulation 883/2004 is that it does not require that a given person pursues an activity as an employed person in the host MS for being eligible for family benefits there.

---

[185] Ibid, para 25.
[186] Council Regulation (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed 416.
[187] Case C-322/17 *Bogatu* [2019] OJ C 131/5, para 26.
[188] Ibid, para 27.
[189] Ibid, para 28.

Afterwards, the Court referred to Article 11(2) of Regulation 883/2004 and stated that it can be derived from the provision that when the source of the cash benefits 'is the fact of having pursued [an activity as an employed person] in the past', then the person concerned must be considered to be pursuing such activity 'for the purpose of determining the legislation applicable to that person'.[190] Therefore, the Court ruled that to be eligible to receive family benefits in the host MS another MS national cannot be required to be pursuing an activity as an employed person there or to be receiving cash benefits there because or as a consequence of such activity.

In sum, the Court of Justice stressed that an EU citizen, who is residing in a MS of which he is not a national, is entitled to family benefits for his/her family members who reside in the home MS in the same way as if they were residing in the host MS, according to Article 67 of Regulation 883/2004. The ruling in *Bogatu* was once again an expansive (albeit cautious) approach adopted by the Court, whereby the rights of economically non-active EU citizens were broadened.[191] By clarifying that economically non-active EU nationals can be entitled to receive child benefits in the host MSs for children living abroad, ie that family benefits can be exported,[192] the Court is once again giving importance to the rights of EU citizens in terms of free movement of persons and access to social benefits. By essentially stipulating that parents can receive 'child benefits for their children abroad even without being economically active'[193] the Court is reiterating the rights to free movement and to social benefits for other MS nationals who are not economically active.

2.4.2. Jobcenter Krefeld

The case *Jobcenter Krefeld*[194] concerned JD, a Polish national and his two daughters, who had settled and were residing in Germany for approximately 6 years (at the time of the preliminary ruling referral), with the daughters attending school in Germany. JD was employed for most of

[190] Ibid, para 30.
[191] F de Witte, 'The Liminal European: Subject to the EU Legal Order' (2021) 40 Yearbook of European Law 56, 71.
[192] M Blauberger, A Heindlmaier, C Kobler, 'Free Movement of Workers under Challenge: The Indexation of Family Benefits' (2020) 18 Comparative European Politics 925, 927.
[193] Ibid.
[194] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794.

his time residing in the country, with some breaks over the course of his residence. The case particularly concerns the receipt of subsistence benefits for JD's daughters during a time when he was not employed. He submitted an application to continue the payment of the mentioned subsistence benefits while he was unemployed, which was refused. JD (and his daughters) then brought an action before the Social Court of Düsseldorf, and the latter annulled the decision. Nonetheless, this decision was appealed to the Higher Social Court of North Rhine-Westphalia, which eventually referred the case for a preliminary ruling to the Court of Justice.

The Court firstly recalls its own case law and states that the child of a former or current migrant worker possesses an independent right of residence in the host MS, based on which the parent who is the primary caretaker of the child has a corresponding right of residence, therefore the child continues to have the independent right of residence regardless of whether the parent retains his/her worker status.[195] In addition to this reasoning, the Court adds a crucial point, according to which Article 10 of Regulation 492/2011[196] in question 'should be applied independently of the provisions of EU law', including independently from the Directive 2004/38.[197] The CJEU reminds that the Directive is not the sole piece of legislation regulating the right of residence in the EU, and suggests that the abovementioned Regulation and the Directive are not mutually exclusive.[198] Thus, from the outset of the case the Court suggests that these two pieces of EU secondary law can apply independently. This construct is maintained and explored further throughout the case.

The CJEU stresses that the child of a former or current worker can reside in the host MS even solely on the basis of Regulation 492/2011 and without a need to satisfy the conditions of Directive 2004/38.[199] Evidently, in this situation the requirement of possessing sufficient resources becomes irrelevant, as the child does not depend on whether the parent has or has

[195] Ibid, paras 35, 37.
[196] Article 10 of Regulation 492/2011 states: 'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'.
[197] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, para 38.
[198] C Jacqueson, 'A Resisting Enclave of Social Rights – Protecting the Children of Former Workers: C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD*' (2021) 28 Maastricht Journal of European and Comparative Law 731, 735.
[199] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, para 39.

had the status of a worker. Such an approach, however, raises questions as to what would be the interpretation of EU law provisions in case the parent has not worked previously in the host MS. In this regard, two possibilities exist: the potential interpretation could be strictly limited to former or current workers who possess residence rights (conservative interpretation) or it could include 'all former workers regardless of the existence of an EU right of residence' (extensive interpretation).[200] If the latter interpretation is employed, that would indicate that even former workers without any children in education can benefit from social assistance in host MSs, as they would not need to possess residence rights.

The CJEU then reminds that rights of an EU citizen with a worker status in the host MS can be retained even after the end of the employment, and as residence rights of his/her children may also 'continue to exist beyond the loss of that status', therefore the child's residence rights will continue if the parent's right is based on Article 10 of Regulation 492/2011.[201]

Following this determination, the Court starts a discussion with frequent referrals to previous case law. However, interestingly, rather than building upon the case law, it often talks about the differences between the current case and the referred cases. Particularly, on several occasions the Court stresses the dissimilarities of the circumstances between the cases. Recalling its ruling in *Alimanovic*[202], the CJEU notes that the derogation set out in Article 24(2) of the Citizenship Directive was applicable as it concerned a person whose residence was based solely on being a jobseeker.[203] In comparison, the Court then finds that derogation inapplicable in the *Jobcenter Krefeld* case, as according to the Court here the applicants did not reside in the host MS *solely* on the basis of Directive 2004/38 but rather on Article 10 of Regulation 492/2011. It can be implied from the Court's reasoning that had their right of residence been based *only* on the Directive, the derogation would have applied to them.[204]

[200] C Jacqueson, 'A Resisting Enclave of Social Rights – Protecting the Children of Former Workers: C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD*' (2021) 28 Maastricht Journal of European and Comparative Law 731, 736.
[201] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, paras 48-50.
[202] Case C-67/14 *Alimanovic* [2015] OJ C 371/10.
[203] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, paras 58-59.
[204] Ibid, paras 62, 67, 69.

Continuing its search for differences in its own and more recent case law, the CJEU notes that the current case should be 'distinguished' also from the case of *Dano*[205], as the latter concerned economically non-active EU citizens who 'had exercised their freedom of movement with the sole aim of receiving social assistance' in the host MS.[206] It appears that a vital difference for the Court is the fact that in cases which were more restrictive for EU citizens' rights, the Citizenship Directive was at issue,[207] whereas in *Jobcenter Krefeld* the case relates mostly to Regulation 492/2011.

The Court, essentially, concludes that other MS nationals who are economically non-active but have an independent right of residence (based on Article 10 of Regulation 492/2011) cannot be excluded from 'entitlement to the subsistence benefits at issue'.[208] It should be noted that the Court stresses several times that the lawful residence of the applicants in question is based on the fact that they possess independent rights of residence. According to the Court, 'independent rights of residence' are the ones that do 'not depend on the fact that the parent or parents who care for the child should continue to have the status of migrant worker' in the host MS.[209]

From the examination of the judgment in *Jobcenter Krefeld* it can be observed that the distinguishments of this case from other cases are rather emphasised. In addition to the abovementioned references to dissimilarities, there are also clear notes about differing from cases of jobseekers[210] and cases involving abuse of rights[211]. Lying 'at the junction' of the case law on rights of primary carers and that on the right to social assistance of economically non-active EU citizens, *Jobcenter Krefeld* circles around 'distinguishing the claimant's situation from the situations' in *Dano* and *Alimanovic*, two rather 'rights-closing' precedents.[212] The Court is, evidently, actively trying to stress the differences between its previous case law and

[205] Case C-333/13 *Dano* [2014] OJ C16/05.
[206] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, para 68.
[207] C O'Brien, 'Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit' (2021) 58 Common Market Law Review 431, 459.
[208] Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794, para 77.
[209] Ibid, para 37.
[210] Ibid, para 75.
[211] Ibid, para 76.
[212] F Ristuccia, 'The Right to Social Assistance of Children in Education and Their Primary Carers: *Jobcenter Krefeld*' (2021) 58 Common Market Law Review 877, 897.

Jobcenter Krefeld. It can be assumed that, perhaps, by making very clear that the case in question is not building upon *Dano* or *Alimanovic* (ie cases of the third period discussed in this Chapter), the Court is indicating that it does not aim to return to the restrictive approach of its earlier case law. Nonetheless, it should be borne in mind that, as mentioned above, it is unclear how the CJEU would address a similar situation if it involved a MS national who had not previously worked in the host MS. Despite the strong protection for the specific category touched upon in *Jobcenter Krefeld*, the situation of those who are not both former workers and primary carers of children in education remains uncertain.

3. The Developments in the CJEU Case Law

The Court of Justice plays a vital role in the interpretation of EU law. As set out in Article 19 TEU, the Court 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Moreover, alongside other Union institutions, the Court is also expected to observe a 'duty of clarity', although it has been argued that the Court does not always follow up on its duty: for instance, it has 'explicitly overruled a previous judgment' while failing 'to provide clear reasoning for' the reversal.[213]

This Chapter has examined the case law of the CJEU highlighting its evolution over time. The Chapter has underlined how the CJEU has changed its stance from being EU citizen-friendly to a MS-friendly one, initially approaching the cases before it from the point of view of protection EU nationals based on their fundamental status of EU citizenship but later emphasising and focusing on the protection of the interests of EU MSs. However, interestingly the Court to some extent has been returning to the citizen-centric approach in its recent cases. These changes in the Court's position are at the core of the development of its jurisprudence over the last two decades.

[213] Referring to the *Metock* judgment overruling the *Akrich* judgment from less than five years before. 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?* (Hart Publishing 2011) 291-292; Case C-127/08 *Metock* [2008] ECR I-06241; Case C-109/01 *Akrich* [2003] I-09607.

In the first case discussed in this Chapter, *Martínez Sala*[214], the CJEU ruled that a requirement to produce a formal residence permit put on other MS nationals in order to be granted a child-raising allowance (which, it noted, constitutes a social advantage) was a case of direct discrimination on the grounds of nationality and, thus, could not be expected to be fulfilled by other MS nationals, when no such requirement was imposed on the nationals of the host MS. This was a crucial step in ensuring the prohibition of any discrimination on grounds of nationality as regards access to the social assistance systems of the host MSs by other MS nationals. *Martínez Sala* effectively laid the foundation allowing EU nationals to rely directly on their status of EU citizenship when applying for social benefits in host MSs. De Witte argues that the very existence of the Union citizenship was seen as a sufficient justification for this novelty brought about by the Court.[215] By mobilising the EU citizenship 'in order to extend the scope *ratione personae* of EU law'[216], the Court was also boosting the importance of the newly established notion of EU citizenship. Notably, through its judgment in *Martínez Sala*, the Court limited the ability of host MSs 'to treat other Member State nationals differently in granting certain benefits', [217] an approach which carried out for several years and which (as will be seen in further Chapters) some MSs did not necessarily praise.

This logic was carried on in several further cases, including the landmark case of *Grzelczyk*[218], where the CJEU ruled that access to special non-contributory cash benefits for other MS nationals cannot be conditioned on the fact of them falling within the scope of Regulation 1612/68[219], when no such requirement is imposed on the nationals of the host MS. Instead, they can directly rely on the Treaty provisions. Building upon its judgment in *Martínez Sala*, the CJEU further advanced the interconnection between EU citizenship and residence rights.

[214] Case C-85/96 *Martínez Sala* [1998] ECR I-2708.
[215] F de Witte, 'The End of EU Citizenship and the Means of Non-Discrimination' (2011) 18 Maastricht Journal of European and Comparative Law 86, 92.
[216] E Dubout, 'The European Form of Family Life: The Case of EU Citizenship' (2020) 5 European Papers 3, 11.
[217] H Toner, 'Judicial Interpretation of European Union Citizenship - Transformation or Consolidation?' (2000) 7 Maastricht Journal of European and Comparative Law 158, 164.
[218] Case C-184/99 *Grzelczyk* [2001] ECR I-6229.
[219] Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed 475.

Grzelczyk is a notable example of how the Court interpreted Union citizenship as being the *fundamental* status 'rather than a *complementary* status to the national citizenship', an interpretation that was carried on later through future CJEU judgments.[220] Granting such a status to EU citizenship allowed EU nationals residing in other MSs to 'invoke the general prohibition of discrimination'[221] for situations in which earlier they would have not had the same level of protection. This is a clear indication of the expansive interpretation of EU nationals' rights by the Court, a strong basis for which was provided by the Maastricht Treaty.

It is correctly pointed out by Ziegler that before the Treaty of Maastricht of 1992 the main factor, determining whether an EU national was endowed with the right to stay and other rights emerging from his/her worker status, including the rights to social benefits, was whether he/she 'qualified as a worker' or not.[222] After the Maastricht Treaty this approach was changed to some extent by the introduction of EU citizenship but the requirement of having sufficient resources remained for economically non-active citizens. Nonetheless, this 'tidy arrangement was shaken in 1998' with the judgment in *Martínez Sala* and the new arrangement was further sustained by the Court in the *Grzelczyk* case in 2001, where the EU citizenship was referred to as being the fundamental status of all EU nationals. The CJEU 'started to derive rights other than the right to merely stay in the territory of another Member State from that status through the right of non-discrimination', as well as opened possibilities for non-workers to be entitled to certain social benefits under certain circumstances. Therefore, 'the categorisation as a worker became somewhat less important'.[223]

This is evident in *Collins*[224], where the Court, importantly enough, touched upon a jobseekers' allowance as a type of social benefit and emphasised that the requirement of being 'habitually resident' in the host MS can be met by its own nationals more easily than by other MS

[220] R Barbulescu, 'From International Migration to Freedom of Movement and Back? Southern Europeans Moving North in the Era of Retrenchment of Freedom of Movement Rights' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 22 (emphasis in original).
[221] J Bengoetxea, 'Text and Telos in the European Court of Justice: Four Recent Takes on the Legal Reasoning of the ECJ' (2015) 11 European Constitutional Law Review 184, 202.
[222] KS 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: A New General Principle of EU Law?* (Hart Publishing 2011) 298-299.
[223] Ibid.
[224] Case C-138/02 *Collins* [2004] ECR I-2733.

nationals, which, essentially, puts the latter at a disadvantage compared to the host Member State's own nationals. Hence, EU law precludes such a provision of national legislation. This is another judgment by the Court of Justice which demonstrates that the Court was aiming to ensure that jobseekers who are nationals of other MSs have equal access to the social assistance provided by the host MSs as its own nationals do. Interestingly, this approach was adopted in contrast with Advocate General's Opinion, where the latter argued for a restrictive interpretation of jobseekers' rights.

Thus, the idea of prohibition of any discrimination based on nationality was expanded even further by the Court and began to also include jobseekers, ie economically non-active EU nationals from other MSs. Through such an interpretation the CJEU strengthened the idea of EU citizenship and extended the coverage of free movement rights and social benefits to economically non-active EU nationals.

The CJEU continued to uphold the rights of economically non-active citizens in the case of *Trojani*[225] It is noteworthy that in his Opinion on the case, the AG talked about the 'risk of social tourism'.[226] The Court, however, did not follow this wording in its ruling and instead pointed out that both economically active and non-active EU citizens have the right to rely on Article 12 EC (now, Article 18 TFEU), provided that they fulfil the criteria set out in the relevant legislative acts of the Union.

It can be seen that the Court considered any other interpretation of the law as creating situations of discrimination between EU citizens based on their nationality. Thus, despite the recommendation of the Advocate General, here the Court gave priority to the residency of the EU nationals rather than the employment status per se. Since the right for EU citizens to reside in a MS other than that of their own nationality is first and foremost based on their fundamental status of being an EU citizen, it can be stated that the latter was upheld strongly by the Court of Justice in this case.

[225] Case C-456/02 *Trojani* [2004] ECR I-7595.
[226] Case C-456/02 *Trojani* [2004] ECR I-7595, Opinion of AG Geelhoeld, para 77.

All in all, the abovementioned four cases can be considered as setting the ground for a specific way of implementation of the issues of access to social benefits by the Court of Justice. Furthermore, the Court interpreted the EU law provisions in question in a rather wide-ranging manner and included not only those other MS nationals who would fall under the definition of a 'worker' according to the EU Regulations and Directives, but also those who had exercised their free movement rights and had moved to another EU MS with the aim of finding employment there. It became clear that the Court was actively 'shaping the concept of Union citizenship', particularly by declaring 'the status of Union citizenship to be fundamental'.[227] Moreover, the CJEU went beyond the protection of EU nationals' rights and confirmed that a new, social layer was added to the previously very economically focused Union, mitigating 'the instrumental nature of market citizenship' and removing the need of economic activity for implementing the principle of equal treatment.[228]

Such an interpretation of EU law is, certainly, corresponding with the principle of non-discrimination set out in EU Treaties and is underlying the general thought behind EU citizenship. Nevertheless, the Court of Justice did not fully maintain this approach throughout its judgments. Particularly, when considering the more recent case law of the CJEU, it can be observed that the Court has changed its interpretation of EU law provisions. These rulings were Treaty-based and protected 'mobile and vulnerable EU citizens' but they 'drew a rather unclear line between free movement rights and domestic control of social assistance systems'.[229] With time, the issue of other MS nationals becoming an 'unreasonable burden' became more pronounced in the judgments of the Court, and the protection of host MSs' social assistance systems gained more significance. This development was a gradual process and before the rather restrictive recent approach of the CJEU occurred, such a movement towards a different interpretation of the EU law could be seen earlier.

---

[227] HU Jessurun d'Oliveira, G de Groot, A Seling, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern: Case Note 1 Decoupling Nationality and Union Citizenship? Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7 European Constitutional Law Review 138, 151.

[228] S Douglas-Scott, 'In Search of Union Citizenship' (1998) 18 Yearbook of European Law 29, 39, 62.

[229] E Muir, 'Drawing Positive Lessons from the Presence of "The Social" Outside of EU Social Policy *Stricto Sensu*' (2018) 14 European Constitutional Law Review 75, 81.

It was not long until the Court began showing the first changes in its approach towards the issue of free movement of persons in relation to social benefits. In the case of *Bidar*[230], the Court talked about the necessity of ensuring that the granting of social assistance to other MS nationals does not make them an 'unreasonable burden' and does not, thus, have consequences for the overall level of assistance which may be granted by that State. Therefore, in *Bidar* the condition of demonstrating a certain degree of integration in that State's society was considered by the Court as being a reasonable requirement. The Court found the specific requirement of the domestic law challenged in the case to not be justified, as it made it almost impossible for other MS nationals to demonstrate their 'integration' and the existence of a 'genuine link' with the society of the host MS 'in any way other than three years' residence' required by the national law.[231] However, the reasoning and the wording of the Court demonstrated a potential trend towards supporting the interests of the MSs by giving them more leeway in refusing to grant social benefits access to other MS nationals.

Thus, *Bidar* is one of the initial cases where the Court noticeably starts shifting towards an approach which takes into full consideration the interests of EU MSs in limiting access to social benefits. In itself, such an aim is, certainly, not to be criticised, inasmuch as the MSs should also be protected from the abuse of their social assistance systems, whether it be abuse by their own nationals or nationals of other EU MSs. This alteration, however, created the possibility of taking the restrictive approach even further and resulting in judgments where other EU nationals are not treated on an equal footing with the nationals of the host MS with regard to issues of free movement of persons and social benefits.

As discussed in the Chapter, in a subsequent judgment, *Förster*[232], the Court referred to its judgment in *Martínez Sala*, as well as to the one in *Bidar*. Recalling *Martínez Sala*, it emphasised that other MS nationals in the host MS have the right to directly rely on Article 12 EC (current Article 21 TFEU on freedom of movement). Nonetheless, in *Förster* the CJEU ended up taking an approach different from that of *Martínez Sala* and instead took further its

[230] Case C-209/03 *Bidar* [2005] ECR I-2151.
[231] D Carter, M Jesse, 'The "*Dano* Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3 European Papers 1179, 1186.
[232] Case C-158/07 *Förster* [2008] ECR I-08507.

reasoning behind the *Bidar* judgment. In particular, the Court here reinstated that MSs have the right to ensure that providing social assistance to other MS nationals 'does not become an unreasonable burden' and does not 'have consequences for the overall level of assistance which may be granted by that State', and therefore, a certain degree of integration into the host MS society is a legitimate requirement to be put forward by the host MS.[233] Moreover, the requirement of a legal residence of five years in the Netherlands was, essentially, accepted to be 'the only way of proving a sufficient degree of integration',[234] without taking into account to other crucial aspects, such as a 'strong cultural attachment or moral commitment to the host state'.[235]

In other words, the Court allowed the existence of national legislation which imposes conditions for economically non-active citizens to receive social benefits, and thereby placed an additional emphasis on protecting the social assistance systems of host MSs. This is an advancement of the approach in *Bidar*, where three years' residence in the host MS was not necessarily the only accepted proof of a sufficient integration.[236]

Later in *Brey*[237], the Court pointed out that the MSs should have the right to refuse the granting of social benefits to economically non-active EU citizens, in line with the relevant conditions set out in the EU legislative acts. This has been interpreted by Verschueren as an endeavour by the CJEU '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'.[238] While Verschueren's ideas regarding 'unwanted intruders' and the concerns of host MSs being 'justified' can be contested, it cannot be denied that the noticeable shift in *Brey* is indicative of the Court's balancing play between EU citizens' rights and interests of MSs.

---

[233] Ibid, para 48; Case C-209/03 *Bidar* [2005] ECR I-2151, para 56.
[234] D Carter, M Jesse, 'The "*Dano* Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3 European Papers 1179, 1189.
[235] F de Witte, 'The End of EU Citizenship and the Means of Non-Discrimination' (2011) 18 Maastricht Journal of European and Comparative Law 86, 106.
[236] Ibid.
[237] Case C-140/12 *Brey* [2013] OJ C 344/43.
[238] H Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015) 22 Maastricht Journal of European and Comparative Law 10, 30.

In this judgment, the Court also provided some guidance on the definition and coverage of the notions of 'sufficient resources' and 'unreasonable burden'. It should be noted that the meaning of the term 'sufficient resources' used in the Citizenship Directive has never been fully well-defined and has often 'been criticised for lacking clarity'.[239] As pointed out by Minderhoud and Mantu, while it allows economically non-active nationals to avail of their free movement rights 'if they have the necessary resources', it also states that 'when inactive persons apply for a social assistance benefit, they should be able to get such a benefit without having to fear automatic expulsion due to a lack of sufficient resources'.[240] This situation even led to various debates in the negotiation process of the Directive. Particularly, the issue of the 'the contradiction between prohibiting the use of a fixed amount of money to define sufficient resources and the use of the level of social assistance benefit as an indication of (a lack of) sufficient resources' was often discussed, an uncertainty seen clearly from the fact that various MSs chose to rely on certain fixed amounts as a threshold for sufficient resources.[241]

Overall, the three cases discussed above (*Bidar*, *Förster* and *Brey*) indicate that throughout time the Court of Justice started giving more weight to the protection of the social assistance systems of EU MSs. As noted above, this could certainly be considered a reasonable and legitimate goal being pursued by the CJEU with the purpose of preventing the welfare systems of the MSs from possible abuse. However, in the future cases the Court took this reasoning much further, and the protection of social assistance systems of the host States gained a prevailing importance over the protection of the rights of EU nationals deriving from their fundamental status as EU citizens.

The Court changed its stance more abruptly in its further case law. In the landmark decision of *Dano*[242] the Court of Justice ruled that other MS nationals who do not possess a right of residence in the host MS according to EU legislative acts, particularly according to the Citizenship Directive and Regulation 883/2004, can be refused the grant of social benefits in

[239] 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* (Hart Publishing 2017).
[240] Ibid.
[241] Ibid.
[242] Case C-333/13 *Dano* [2014] OJ C16/05.

that MS. Here, the CJEU took its position in *Förster* 'one step further' through the 'new doctrine' of EU secondary law provisions taking precedence over the Treaty ones.[243]

Thus, the Court decided that EU citizens may 'lose the right' of being granted certain social benefits, when after the first 3 months of their stay in the host MS they fail to 'fall under the categories protected by the Citizenship Directive: workers (be they dependent or self-employed), former workers or jobseekers'.[244] In this case the CJEU shifted its approach even more sharply and expanded the possibilities for refusing other EU MS nationals access to the social assistance systems of the host MSs. Building on its earlier approach from *Brey* on the significance of sufficient resources, the Court held in *Dano* that host MSs can require economically non-active EU nationals to produce proof of having sufficient resources and thereby advanced the importance of being in possession of those.

The *Dano* judgment adopts an approach which fully contrasts the earlier expansive interpretation of EU law. It does not support the notion of 'borderless social justice based on transnational social solidarity' (which had been crucial for establishing a Union going beyond economic aims) and re-establishes the notion of 'market citizenship' instead of promoting a 'social citizenship'.[245]

Based on the specific circumstances in *Dano,* the step taken in it by the Court of Justice could be justified, given that the applicant in question had not been working and the facts of the case showed that she had not been trying to find employment in the host MS. However, the Court took it even further from here in a judgment that came only a year after *Dano*: it examined a similar issue in *Alimanovic*[246]. There was, however, one clear distinction between the facts of the two cases: while in *Dano* the applicant could have not been considered a jobseeker, in *Alimanovic* the applicant had, in fact, worked for some period before claiming social benefits

[243] A Gago, F Maiani, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261, 267.
[244] R Barbulescu, 'From International Migration to Freedom of Movement and Back? Southern Europeans Moving North in the Era of Retrenchment of Freedom of Movement Rights' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 22.
[245] U Neergaard, 'Europe and the Welfare State—Friends, Foes, or . . .?' (2016) 35 Yearbook of European Law 341, 364.
[246] Case C-67/14 *Alimanovic* [2015] OJ C 371/10.

in the host MS. Despite these differences, the CJEU ruled in the latter case that even jobseekers can be rejected access to the social advantages provided by the host MSs, in cases where the right of the EU national to reside in that State is based solely on the fact of him/her seeking a job there. In other words, the Court limited the rights of economically non-active EU citizens to receive social benefits in the host MSs. This was a big jump for the Court, who had earlier (in *Collins*) ruled that 'a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State' for jobseekers ought to be covered by the principle of equal treatment enshrined in the Treaty, as long as a genuine link between the national in question and the employment market of the host MS exists.[247]

By delivering such a ruling on the issue of the right to access to social benefits, a right deriving from the exercise of the free movement of persons of EU citizens, the Court of Justice treated two different situations in the same way. Moreover, it extended the discretion of EU MSs to deny other MS nationals access to their social assistance systems also for jobseekers. This was a reflection of the provision set out in Article 24 of the Citizenship Directive, according to which the MSs are allowed to refuse other MS nationals such access in the first three months of their residence in the host MS. However, given the ruling in *Alimanovic,* it can be stated that the Court took it much further by extending the possibility to refuse jobseekers, possibly regardless of whether they had been residence in the host State for three months or more. In this way, effectively, the MSs gained a possibility to significantly limit the access of other MS nationals to their welfare systems for more than the three-month period envisaged in Directive 2004/38.

Finally, in *Commission v UK*[248] the CJEU continued to emphasise the need to protect the social assistance systems of host MSs and found that economically non-active citizens can be required to demonstrate that they possess a right of residence in order to receive social benefits. Interestingly, the reasoning of this case often relies on the *Brey* judgment[249] but, of course, takes it much further and is employed to enthusiastically confirm the limitations which

[247] Case C-138/02 *Collins* [2004] ECR I-2733, paras 63, 69.
[248] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.
[249] Case C-140/12 *Brey* [2013] OJ C 344/43, para 44: '[…] there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State'.

can be imposed by host MSs. The *Commission v UK* judgment seems to extend 'the automatic exclusion from benefits' to any other MS national 'who fails a right to reside test, regardless of their residence/work history or degree of integration'.[250]

Generally, these three cases indicate that the approach of the Court shifted, especially dramatically when compared to the initial cases discussed above. The CJEU took a stance which was more inclined to take care of the interests of MSs. These cases indicate that 'a conceptual shift in the CJEU's approach to Union citizenship' took place, as the cases in this time period 'support the assumption that there is a stronger focus on the last part of the *Grzelczyk* formula, namely the "exceptions expressly provided for"'.[251] In other words, the Court places more emphasis on the derogations upon which MSs can rely and deny social assistance to other MS nationals residing there, which is a major turn from the expansive interpretation that it had adopted in the earlier stages of its case law development on free movement of persons and social benefits.

One of the more recent cases discussed in this Chapter, *Bogatu*, can provide insight into the some of the latest developments in the approach of the Court of Justice towards the issue. It can particularly explain how the Court's position might be returning to the one it had in 2000s, as compared to the approach it took in 2010s. As the summary of the judgment reveals, the CJEU in *Bogatu* interpreted the provisions of Regulation 883/2004 in a way so as to include not only economically active but also economically non-active EU nationals. By drawing the distinction between the previous and current Regulations, the Court, essentially, pointed out how the scope of EU law has changed throughout time and how the rights of EU citizens to gain access to the social assistance systems of the host MS have expanded.[252] Furthermore, through this stance the Court validated that EU law has evolved from being concentrated

[250] C O'Brien, 'The ECJ Sacrifices EU citizenship in Vain: *Commission v. United Kingdom*' (2017) 54 Common Market Law Review 209, 235.
[251] K Hamenstädt, 'The Impact of the Duration of Lawful Residence on the Rights of European Union Citizens and Their Third-Country Family Members' (2017) 24 Maastricht Journal of European and Comparative Law 63, 64-65; Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 31; Case C-333/13 *Dano* [2014] OJ C16/05, para 58.
[252] D Sindbjerg Martinsen, 'Who Has the Right to Intra-European Social Security? From Market Citizen to European Citizens and Beyond' in RA Miller, PC Zumbansen (eds), *Annual of German and European Law*, vol 2-3 (Berghahn Books 2007) 218; J Gerhards, H Lengfeld, *European Citizenship and Social Integration in the European Union* (Routledge 2015) 143; R Ball, *The Legitimacy of The European Union through Legal Rationality: Free Movement of Third Country Nationals* (Routledge 2013) 72.

mostly on the economically active persons and now aims to guarantee the protection of rights also for those who are not economically active, particularly by granting them access to social benefits in the host MSs where they reside.

In *Bogatu*, the Court of Justice interpreted the relevant provisions on the access to social benefits in the host MS for other MS nationals in favour of EU citizens, in essence by not allowing the MSs to set out certain additional requirements or pre-conditions for EU citizens to be eligible for family benefits. Such an interpretation of EU law by the Court is different from the way it ruled in some of its previous cases on social benefits, especially in the recent years, which signals a possible change in the approach of the CJEU on issues in question. In addition and interestingly, a question arises whether this change entails that the Court of Justice will return to the original interpretation that it provided for the rights of EU nationals to access to social benefits in the host MSs of the EU.

The vital takeout from the *Bogatu* case, especially in light of the previous case law of the Court, is that the CJEU seems to be aiming again to protect the social assistance rights of EU citizens more strongly and to limit the discretion that EU MSs can have on regulating those issues. However, it should also be noted that the judgment in *Bogatu* is a Chamber ruling, as compared to the cases of *Dano* and *Alimanovic* where the rulings were delivered by the Grand Chamber. As the latter usually deals with cases which are 'particularly important or difficult',[253] they may have an outreach to different extent. Finally, however, the case of *Jobcenter Krefeld* indicated a change towards a less restrictive interpretation of the issues in question, not least through its clear attempt to distinguish the case from *Dano* and *Alimanovic*, and raised some vital points regarding the possible direction of the future development of the Court's jurisprudence.

In sum, the discussed judgments and the overall development of EU law regulating the issues of free movement of persons and social benefits show that the right to reside for an EU citizen in a MS other than that of his/her own nationality has become more limited, inasmuch as some of the possible incentives for EU nationals for availing of their free movement rights (such as

[253] S Saurugger, F Terpan, *The Court of Justice of the European Union and The Politics of Law* (Macmillan International 2016) 63.

access to social assistance in the host MS in case of necessity) have become more restrictive. As summarised by Thym, the aspirational motive of enlarging EU citizenship rights 'gained the upper hand' in earlier cases (for instance, in *Martínez Sala* and *Grzelczyk*), with the Court shifting 'towards emphasis on the restrictive Treaty text in judgments like *Förster* and, most recently, *Dano* and *Alimanovic*'.[254]

It can be observed that throughout time the Court of Justice significantly changed its approach with regard to free movement of persons and access by EU nationals to the social assistance systems of host MSs. As pointed out by Davies, in the beginning of the evolution of its jurisprudence on the free movement of persons and social benefits, 'the Court bent over backwards to find exceptions to these restrictions, and then suddenly it stopped and embraced strict enforcement.[255] As it was discussed above, these developments did not happen overnight: on the contrary, they took place through a relatively long period of time. Such gradual developments and alterations are indicators of the changes in the interpretation of the issues in question by the CJEU did not happen in isolation and were not separated from the socio-political context in the EU provided by several institutional, social and political dynamics.

4. Conclusion

This Chapter examined how the Court of Justice of the European Union interpreted the freedom of movement of persons and their access to social benefits in 1998-2020.

From the initial examination of the relevant case law of the CJEU, it can be observed that in its earlier judgments the Court seemed more willing to protect citizens applying for social assistance in the host MS, by stating that requirements for gaining access to the social assistance system of the host MS cannot be put on other MS nationals, if such requirements are not enforced on the nationals of the host MS. Moreover, it was rather supportive of EU citizens relying on Treaty provisions for the protection of their rights to free movement and to

[254] D Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 718.
[255] G Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 European Public Policy 1442, 1447.

access to social benefits. However, as time moved ahead, the Court changed this position by finding that there can be certain requirements enforced on citizens exercising free movement rights, as long as they are in compliance with the Community law, are based on objective considerations and are not biased towards the specific nationality of the EU citizen. Moreover, it opened the door for the interpretation of EU citizens' rights based on secondary law provisions, rather than the ones set out in the Treaty. In other words, it became more accepting of potential limitations on the rights in question. Taking the latter approach further, the Court also stated that the exclusion of other MS nationals (especially of economically non-active citizens) from access to the social assistance systems of the host MSs can, in fact, be acceptable under EU law. In this way, the CJEU allowed more leeway for the MSs and expanded their scope of discretion when regulating the sphere through national legislation. However, it should be acknowledged that recently, through *Bogatu* and *Jobcenter Krefeld*, the CJEU showed a possibility of changing again the interpretation of the issues in question and returning to a more citizen-friendly approach, the development of which will be seen with time.

To explain this evolving case law on free movement and access to social benefits, it is crucial to understand the socio-political context in which this change of the Court's approach occurred. The necessity for this is especially strengthened by the fact that the legal changes do not occur in isolation but rather are closely connected with the institutional, social and political phenomena happening at the same time. Therefore, the next Chapter will analyse the dynamics that shaped the underlying political matrix of the time period in question.

Chapter 4

The CJEU Case Law in Context

1. Introduction

The previous Chapter discussed several crucial judgments from the case law of the Court of Justice of the EU on the freedom of movement of persons and access to social benefits in the EU. In addition, it offered a detailed and critical analysis of those cases with the aim to examine the changing approach of the Court with regard to the issues in question. It showed that the CJEU approach initially was more citizen-friendly and focused on ensuring a supportive implementation of EU citizens' rights, whereas later it steadily shifted towards a more MS-friendly approach, whereby the interests of EU MSs in restricting access to their social assistance systems for other MS nationals were given more weight.

This detailed analysis of the developments that have taken place in the interpretation of EU law on free movement of persons and social benefits should be followed by an examination of the socio-political context related to these developments. Such an analysis is crucial for understanding the underlying dynamics interconnected with these shifts in the Court's jurisprudence. Therefore, this Chapter will endeavour to analyse several institutional, socio-economic and political dynamics which constitute the context in which the CJEU case law developed and which were particularly articulated in the UK.

The Chapter identifies and examines 3 dynamics, which can be regarded as relevant in this framework. First, at institutional level it analyses the 2004 'big bang' enlargement of the EU whereby 10 new countries joined the Union. Secondly, at the social level, it analyses the dynamics of intra-EU migration. Thirdly, at the political level, it maps the upsurge in the support for those parties in EU MSs, whose ideologies are closer to the Eurosceptic right wing of the political spectrum, and which also follow populist ideologies. In addition, concerns related to the issue of benefit tourism are also addressed in the Chapter. Furthermore, the UK is analysed as a crucial case study supporting the arguments of this thesis. In particular, it involves an analysis of the intra-EU migration landscape in the UK with regard to the 2004 enlargement of the EU. Moreover, Euroscepticism, the outlook of the public towards intra-EU migration (including in light of austerity) and the overall political scene shaping the position

of the UK are discussed. Finally, the discussion also presents the build-up to the Brexit process and the renegotiation of the UK-EU relationship.

Before commencing on the discussion of the phenomena, it would be useful to give a short introductory explanation on what each of them is concerned with and how they are discussed in the text below, as well as to explain the reasons behind the choice of the UK as a case study.

It should be borne in mind that there is an interconnection between the CJEU interpretation of EU law via its judgments, on the one hand, and the developments in EU law, on the other hand. This interconnection flows from the fact that the way in which the CJEU interprets the provisions of EU law are often formulated into new EU law provisions, accommodating to the possible need of changes brought up by the Court. Not only are 'legislative responses to EU case law' common at the EU level, but also often the legislative responses on the national level are often 'directly triggered by case law'.[1] This is also an indicator that the Court does not operate in isolation and that there is an interconnection between the case law of the CJEU and broader socio-political developments.

The intra-EU migration is the migration or movement of EU citizens within the EU, whereby EU nationals of one MS move to reside in other MSs by virtue of the right to free movement bestowed upon them. The discussion of intra-EU migration has been present not only in the academic literature but has also had a big presence and has caught attention in the political and public debates. Thus, given that it is a social, political and legal significant phenomenon, it is worth considering in order to see its part in providing the context for the development of CJEU position on free movement of persons and social benefits.

It should be noted that the thesis discusses not only economic but also non-economic intra-EU migration. In other words, the information and data provided below does not focus on one of these two types of migration but rather takes a comprehensive approach towards migration, unless a particular section of the discussion specifies it is concerned with only one type. This is explained by the facts (i) that the case law discussed in the thesis involves a range of

[1] SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018) 219.

individual circumstances and reasons for migration (both for economic or non-economic purposes), and (ii) that the focus of the negative outlook and Euroscepticism in the UK, a factor crucial for the argument of the thesis, was the control over general intra-EU migration (not only a specific type of it). Thus, the discussion below covers both economically active and non-active EU citizens moving across the EU and to the UK particularly.

The 'big bang' enlargement of 2004 is another phenomenon which is important to consider for several reasons. First and foremost, it is closely connected with the abovementioned issue of intra-EU migration, as the enlargement added 10 new MSs to the Union, whereby the free movement rights, albeit somewhat gradually, were extended to additional 74.1 million EU nationals (approximately 19,52% more people)[2]. Such a large increase in the number of EU citizens raised concerns regarding a mass influx of people from the newly accessed MSs into the EU15 (the already existing EU MSs). In addition, these concerns were circulated in parallel with issues of the lower development level of the newly accessed Central and Eastern European (CEE) States. Consequently, the 2004 enlargement was a significant phenomenon which formed part of the context around the development of the Court's stance on the rights to free movement and social benefits and will be discussed below.

With regard to the mentioned two issues, it should be noted that at times it is difficult to draw a clear line between them due to the fact that the two phenomena are very closely connected. Therefore, while the structure of this Chapter implies a division of the two matters into two separate sections, it should be borne in mind that it would not be possible to achieve a complete separation of the discussion of these two issues due to their tight interconnection.

Finally, the discussion of the possible upswing of the radical right-wing populist parties in the EU MSs is crucial mostly due to the fact that the right-wing and populist ideologies often include Eurosceptic positions and a strict stance on migration, not only on international but also on intra-EU migration. Therefore, it is important to take into consideration in terms of understanding its role in the context around the Court's shifting position.

[2] Luxembourg: Office for Official Publications of the European Communities, *Population Statistics 2006* (European Communities 2006), <https://ec.europa.eu/eurostat/documents/3217494/5685052/KS-EH-06-001-EN.PDF/1e141477-9235-44bb-a24b-a55454c2bc42?version=1.0> accessed 2 July 2021, 39.

It should be noted that the issue of intra-EU migration and of EU citizens gaining access to the welfare systems in several MSs has often been a problematic one and has at times resulted in strong disagreements between the MSs and the EU. Most notably, the UK has had disagreements with the EU on this (and various other) issues. While the UK was certainly not the only MS raising concerns on the regulation of freedom of movement of persons and access to social benefits, it is the first country that triggered Article 50 TEU and started the unprecedented process of leaving the EU. The latter phenomenon is one of the critical reasons for the choice of this MS in the further discussion of the issue of free movement of persons and social benefits. This also shows that the factors of intra-EU migration on one hand and of the UK position on the issues in question on the other hand are interwoven and tightly interconnected and prove the necessity of discussing the situation regarding intra-EU migration in the present Chapter.

First and foremost, the UK case is relevant because, as is well known, it decided to leave the EU. The UK withdrawal – a process known as Brexit – has raised enormous attention on both the causes and the consequences of this historic process. In addition, since the UK is the first state in the history of European integration to leave the EU, it gives the country a special characteristic and can even be argued to potentially act as a precedent for future withdrawals. Besides, it was the MS which undertook a renegotiation process of its membership in the Union and secured it in the form of the New Settlement Deal (discussed in the Chapter).

It should be noted the UK was not the only MS disagreeing with the Union on issues of free movement of persons and social benefits. Denmark, for instance, has also demonstrated its dissatisfaction on various occasions. The *Metock* judgment was received with strong criticism in Denmark in 2008,[3] as the Court ruled that MSs cannot require prior lawful residence as a condition to make use of free movement rights of one's partner to settle in a MS[4] (even though the CJEU also emphasised the possibility to use the notion of 'abuse of rights' as a justification for restrictions). 10 years later, the then Danish Prime Minister Lars Løkke Rasmussen stated in the European Parliament that the EU must guarantee the freedom of

[3] 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?* (Hart Publishing 2011) 292.
[4] Case C-127/08 *Metock* [2008] ECR I-06241, para 80.

movement but that it 'must also be fair and […] not be abused'.[5] Overall, the 'judicial activism' of the Court (including on the issues of free movement of persons and social benefits) was not accepted willingly also in the Danish academic sphere even in 1980s. Rasmussen, for instance, believed that the Court provides national courts with answers to preliminary reference questions which leave 'only little discretion and flexibility' for the national judges[6] and considered the Court's judicial policy-making at times 'unacceptable' and 'uncontrolled'.[7] Nonetheless, despite the disagreements from MSs such as Denmark, the UK will be discussed as the case study for this thesis due to Brexit, as well as for the reasons outlined below.

On a more specific note, the UK also reveals in the period up until Brexit many of the trends concerning the dynamics, which are identified in this Chapter.

Firstly, the wish to reduce intra-EU migration was nothing less than a truly 'major factor in the Brexit referendum', so much so that voters were willing to pay potential economic costs for the 'perceived noneconomic benefits' of Brexit, such as cutback on immigration.[8] The Leave campaign continuously drew attention to the negative effects of free movement of persons: Brexit received its strongest support in communities where 'higher rates of ethnic change' had occurred in the years prior to 2016, which led not only to hostility towards immigration but also to a general desire of the public in those communities to 'regain control' over immigration.[9] The vote to leave the EU was perpetuated by the Leave campaign as '[t]he only way to take back control of immigration' and the lack of control of intra-EU migration was propagated as an equally threatening phenomenon.[10] The foresight of 'more and more young

[5] Danish Prime Minister Lars Løkke Rasmussen's speech to the European Parliament (28 November 2018) <http://stm.dk/_p_14759.html> accessed 18 December 2018.
[6] H Rasmussen, 'Why is Article 173 Interpreted Against Private Plaintiffs?' (1980) 5 European Law Review 112, 125.
[7] H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986) 8-9, 30.
[8] J Van Reenen, 'Brexit's Long-Run Effects on the U.K. Economy' (2016) 2 Brookings Papers on Economic Activity 367, 376, 378.
[9] M Goodwin, C Milazzo, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit' (2017) 19 The British Journal of Politics and International Relations 450, 452.
[10] See, eg, B Johnson, 'Statement by Boris Johnson on immigration statistics: the only way to take back control of immigration is to Vote Leave on 23 June' (*Vote Leave*, 26 May 2016)

people' from Southern Europe[11] or further 'low skilled labour and convicted criminals from the EU'[12] heading to the UK to seek work was considered inevitable and another factor revealing the need to control intra-EU migration (even though these claims were not necessarily based on evidence, as will be seen below).

In addition, as will be seen in this Chapter, migration is often associated with causing changes and even threats in the identity of a given population. Therefore, the concerns over the economic impacts of intra-EU migration were complemented by the concerns over the potential threat to identity of the existing UK population.

Secondly, coupled with the 2004 enlargement, which was bound to create an increase in the free movement of persons, this atmosphere led to deep-rooted fears in the public over intra-EU migration. A possibility was offered to the EU15 to impose certain restrictions on the inflow of nationals of 8 out of the 10 new MSs. However, the UK did not avail of this opportunity and opened its market to the EU8 nationals. Predictably, the consequent records of high migration numbers only contributed to the abovementioned fears and concerns.

In this setting, it was inevitable that intra-EU migration would become a salient issue in the UK. It has even been argued that the 'EU immigration dimension of political competition' emerged only following the opening of UK borders to CEE MSs and started 'the process required for its increased salience'.[13]

Thirdly, it is in this environment that the issue of 'uncontrolled' free movement of persons was effortlessly picked up by an emerging right-wing populist and Eurosceptic party, the United Kingdom Independence Party (UKIP). UKIP managed to claim ownership of the salient issue

---

<http://www.voteleavetakecontrol.org/boris_johnson_the_only_way_to_take_back_control_of_immigration_is_to_vote_leave_on_23_june.html> accessed 18 March 2021.

[11] L Fox, 'Memories of Green? The cost of uncontrolled migration' (*Vote Leave*, 2 June 2016) <http://www.voteleavetakecontrol.org/rt_hon_liam_fox_mp_memories_of_green_the_cost_of_uncontrolled_migration.html> accessed 18 March 2021.

[12] 'Leave looks like…: What happens when we vote leave?' (*Vote Leave*) <http://www.voteleavetakecontrol.org/briefing_newdeal.html> accessed 29 June 2022.

[13] G Evans, J Mellon, 'Immigration, Euroscepticism, and the Rise and Fall of UKIP' (2019) 25 Party Politics 76, 77.

of intra-EU migration which was pushed from the 'margins and towards the mainstream'.[14] Not surprisingly, the issue of a changing identity of the British population was also taken up by the right-wing populists and Eurosceptics, and a distinction between 'us' (the UK population) and 'them' (other EU nationals) was employed in order to add further salience to the issue.

Finally, the right-wing populists also demonstrated their dissatisfaction with the jurisdiction of the Court of Justice over the free movement of persons. Overall, throughout years various British governments were 'considered to have been in opposition to the supranational powers of […] the Court of Justice'.[15] This was specifically evident in the build-up to the Brexit referendum. For instance, as part of the Leave campaign Boris Johnson stated that it is impossible to take control of intra-EU migration when the CJEU 'has ultimate control over our immigration policy'.[16]

In addition to the abovementioned reasons, several other and more general ones should be noted. Particularly, the UK has developed a crucial economic relationship with the EU, being one of the top net contributors to the EU budget (the fourth largest for the total contributions in the period between 2014-2020),[17] and the EU being the largest trading partner for the UK.[18] Besides, the significance of the UK lies also in the political weight that it adds to EU on the

---

[14] J Dennison, M Goodwin, 'Immigration, Issue Ownership and the Rise of UKIP' (2015) 68 Parliamentary Affairs 168, 169.

[15] U Puetter, 'Brexit and EU Institutional Balance How Member States and Institutions Adapt Decision-making' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 249.

[16] B Johnson, 'Statement by Boris Johnson on Immigration Statistics: the only way to take back control of immigration is to Vote Leave on 23 June' (*Vote Leave*, 26 May 2016) <http://www.voteleavetakecontrol.org/boris_johnson_the_only_way_to_take_back_control_of_immigration_is_to_vote_leave_on_23_june.html> accessed 18 March 2021. For further examples see, eg, M Gove, B Johnson, P Patel, G Stuart, 'Restoring public trust in immigration policy - a points-based non-discriminatory immigration system' (*Vote Leave*, 1 June 2016) <http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html> accessed 18 March 2021; 'EU referendum: Vote Leave sets out post-Brexit plans' *BBC* (15 June 2016) <https://www.bbc.com/news/uk-politics-eu-referendum-36534802> accessed 18 March 2021.

[17] S Amaro, 'Here's how important the UK is to the European Union' *CNBC* (27 March 2017) <https://www.cnbc.com/2017/03/27/european-union-uk-important-brexit.html> accessed 3 March 2021.

[18] 'EU trade relations with the United Kingdom. Facts, figures and latest developments' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-kingdom_en> accessed 29 June 2022.

international arena. These elements indicate the importance of the UK in the EU structure and vice versa.

For the abovementioned reasons, the UK sets the institutional, social and political context sought in this research and has been selected as the case study for the argument of this thesis.

2. Institutional, Social and Political Dynamics

This Section will discuss three dynamics with the purpose of explaining the general context of the development of the CJEU case law: the 2004 'big bang' enlargement of the EU (institutional), the intra-EU migration (social) and the rise of right-wing populist parties (political). As mentioned above, the 'big bang' enlargement, as an unprecedented phenomenon in itself and closely connected with the developments in the intra-EU migration, is crucial to address here, particularly in connection with the rise of right-wing populist parties, which used these developments for the creation and advancement of an anti-immigrant sentiment. These dynamics will then be examined in the case study of the UK.

2.1. Institutional Factor: The 2004 Enlargement

Enlargement has been one of the cornerstones of the EU, starting from the early stages of European integration through the establishment of the European Coal and Steel Community (ECSC). Article 98 of the Treaty of Paris from 1951 establishing the ECSC stated that 'any European State may apply to accede' to the Treaty and further set out the procedure for the accession. Similar provisions were later stipulated in 1957 in the Treaty of Rome establishing the European Economic Community and Treaty establishing the Euratom (in Articles 237 and 205 respectively, the latter of which was later repealed). Finally, a similar provision was set out in Article 49 TEU. Thus, possibilities have been made available for the European States to become members of all European integration projects since the beginning of the process.

Ever since the creation of the European Communities, seven enlargements have taken place. The founding members (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) were joined by the UK, Ireland and Denmark in 1973, followed by Greece in 1981. The third enlargement of 1986 saw the accession of Spain and Portugal and in the fourth enlargement in

1995 Austria, Finland and Sweden became EEC members. During the fifth and biggest enlargement so far in 2004, a large number of Eastern European States accessed the Union: 10 new countries became EU members (Lithuania, Latvia, Estonia, Malta, Cyprus, Poland, Czech Republic, Hungary, Slovakia and Slovenia). The sixth enlargement following this 'big bang' enlargement saw the accession of Bulgaria and Romania in 2007. The latest enlargement included Croatia in 2013.[19] The table below shows a chronological summary of the enlargements since 1973.

Table 1
Chronological summary of EU enlargements since 1973

Year	Enlargement phases	Accessed Member States
1973	1st enlargement	United Kingdom, Ireland, Denmark
1981	2nd enlargement	Greece
1986	3rd enlargement	Spain, Portugal
1995	4th enlargement	Austria, Finland and Sweden
2004	5th enlargement	Lithuania, Latvia, Estonia, Malta, Cyprus, Poland, Czech Republic, Hungary, Slovakia, Slovenia
2007	6th enlargement	Bulgaria, Romania
2013	7th enlargement	Croatia

Source: 'EU Enlargement Factsheet' (Official website of the European Commission) <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/publication/factsheet_en.pdf> accessed 27 May 2019

None of these enlargements was free of concerns and difficulties around it. For instance, in the case of the UK accession to the EEC, initially a veto was put forward by France in 1963 which resulted in the refusal of accession of the country. However, 10 years later the UK application was successful, and the country joined the Community. In the case of Denmark, there was a need to find a solution for the special situations of Faroe Islands and Greenland, as Denmark was seeking regional exemptions for those territories.

[19] 'EU Enlargement Factsheet' (Official website of the European Commission) <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/publication/factsheet_en.pdf> accessed 27 May 2019.

The residence of EU citizens in MSs other than those of their nationality in general and their access to the social assistance systems of the host MSs in particular have long been an issue of concern and controversy in the EU. A discussion arose in 1981 when Greece joined the EU, and different levels of controversy have always surrounded the issue with each accession of a new member. More specific concerns about the rise of 'social or benefit tourism' became more significant and gained much attention even as early as in the beginning of the 1970s, in the period when the Court started interpreting the Community provisions on freedom of movement for workers rather broadly. The concerns began to be discussed even more with the launch of plans for the establishment of a general right of residence for all citizens of the then European Community. It should, however, be noted that 'the level of opposition to free movement' has always varied 'considerably across EU member states'.[20] For instance, the Northern MSs (Denmark and the Netherlands) in 1980s and early 1990s were speculating that the expansion of EU law on social security would have a strong possibility of resulting in a huge influx into their countries of Southern European nationals from newly accessed MSs, who would 'take advantage of these countries' generous welfare model'.[21] Hence, 'the conflict between the goal of realising a free movement of persons, on the one hand, and the need to protect social assistance schemes, on the other hand, came to the surface'.[22] Another example is the fact that in 1990 the GDP per capita in France was higher than in Greece by 80%, by 70% than in Portugal and by 44% compared to Spain. This difference in economic development, as well as in social assistance systems was certainly raising issues about the recently established membership of those States. All in all, previous research has, in fact, shown that richer countries which 'tend to receive more EU migrants and where the question

[20] S Vasilopoulou, L Talving, 'Opportunity or Threat? Public Attitudes towards EU Freedom of Movement' (2019) 26 Journal of European Public Policy 1, 809.
[21] R Cornelissen, 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy' in S Carrera, K Eisele, E Guild (eds), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013) 82.
[22] AP Van Der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 117.

of EU mobility is more salient' are overall more inclined towards perceiving the free movement of persons in the EU 'as a threat'.[23]

Thus, a similar controversy surfaced also after 'the big bang enlargement' of the EU in 2004, and later the accession of Bulgaria and Romania to the Union in 2007 only fuelled the debate even further. The Union was already placing a rather big importance on the freedom of movement in early 2000s, a phenomenon which can be noticed also through the CJEU case law discussed earlier. Taking into consideration this significance, the 'big bang' enlargement certainly added up to the debate surrounding the free movement of persons and the overall intra-EU migration. The fact that 10 new countries were becoming members of the Union naturally gave rise to concerns that there could be an influx of nationals from the new MSs into the EU15.

There were several reasons or, rather, justifications for the perceptions of the threats associated with the 2004 enlargement. Firstly, the fact that the economic development levels of newly accessing CEE countries were lower than those of countries which had acceded to the EU in the past was a crucial issue for consideration. In addition to that, the division between the older MSs on one hand and the newly accessing CEE MSs on the other hand, was often intensified when considering that those two parts of Europe represented 'different types of democratic community'.[24] These differences in terms of economic development and democratic background were fruitful soil for concerns to arise regarding the membership of the EU10 (the CEE countries becoming EU members).

Particularly serious concerns were raised regarding the so-called social or benefit tourism, 'the vicious practice of moving from one Member State to another for the sole purpose of obtaining access to the latter's social assistance system'.[25] It was an important topic and matter

[23] S Vasilopoulou, L Talving, 'Opportunity or Threat? Public Attitudes towards EU Freedom of Movement' (2019) 26 Journal of European Public Policy 1, 819.
[24] D Fuchs, HD Klingemann, 'Eastward Enlargement of the European Union and the Identity of Europe' (2002) 25 West European Politics 19, 52.
[25] EM Poptcheva, *Freedom of Movement and Residence of EU Citizens: Access to Social Benefits,* European Parliamentary Research Service (European Union 2014) 1.

of concern, particularly, in the British legal and political arenas. This aspect of the issue, however, will be discussed later in the text.

Nevertheless, the biggest enlargement in the EU history so far was described by the then President of the European Commission, Romano Prodi, as 'a unique historical opportunity which is in our joint political and economic interest'.[26] It has been named 'the most complex' of all the enlargements the EU had faced by the European Commission itself, which stated in 2009 that the difficulties were in place due to the fact that the enlargement brought countries into the Union 'whose economic, social and political backgrounds had been very different'.[27] In terms of its size and scope (geographic, political or economic), the 2004 enlargement differed significantly from the previous accession waves.

Taking into consideration the mentioned issues and foreseeing the possibility of new migration from the EU10, the Treaty of Accession (signed in 2003)[28] with the 10 future MSs included a clause on the transitional arrangements, according to which the EU15 were allowed to temporarily restrict the free movement of workers from 8 of the MSs (excluding Malta and Cyprus) into their labour markets for a period of maximum 7 years.[29] This period was, in its turn, divided into 3 different phases. The goal of the '2+3+2' format was to allow the MSs to evaluate the state of play and to review their positions after the accession. Moreover, it could help to lift the restrictions imposed on the CEE nationals early. Only 3 of the 15 EU MSs did not take advantage of this possibility: the UK, Ireland and Sweden. Naturally, the flows of the intra-EU migration to these countries increased following the EU's enlargement to Central and Eastern Europe.[30]

[26] R Prodi, 'Shaping the New Europe' (European Parliament, Strasbourg, 15 February 2000).
[27] European Commission, Directorate General for Economic and Financial Affairs, 'Five years of an enlarged EU: Economic achievements and challenges' (European Economy 1, 2009) 19.
[28] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236.
[29] As set out in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the Treaty of Accession, 2003.
[30] S Vasilopoulou, L Talving, 'Opportunity or Threat? Public Attitudes towards EU Freedom of Movement' (2019) 26 Journal of European Public Policy 1, 807.

Each of the phases was carefully monitored and reports on the functioning of the transitional arrangements were provided by the European Commission after each of the periods.[31] These reports, inter alia, contained explanations and clarifications of the nature of the transitional arrangements, as well as data on the mobility of EU citizens in the enlarged EU and on employment rates both in pre-enlargement and post-enlargement periods. The reports of the Commission on the functioning of the transitional arrangements can certainly serve as a good source for understanding the impact of the 2004 enlargement on the free movement of persons with the help of the detailed information presented in them. This issue, however, will be touched upon later, as it is more relevant to discuss in the next section which will be focusing on and presenting detailed data on intra-EU migration.

The European Commission Memo from 2014 on the strategic benefits and impact of the 'big bang' enlargement noted 4 strategic benefits from it: prosperity, improvement of life quality, safety and EU influence in the world.[32] In addition, the Memo also considered the economic impact the enlargement had made. Particularly, according to the Commission the extension of the internal market as a result of the enlargement had opened 'trade and financial flows', provided further opportunities to various firms within the EU and increased the trade between the EU15 and the EU10 almost three times and the trade among the EU10 five times.[33] The growth in the number of jobs in both old and new MSs, as well as an increase in foreign direct investment was highlighted, too.[34]

An analysis of other documents authored by the Commission indicates that overall the enlargement the EU had undergone was deemed to be a success. In 2008, only 4 years after the enlargement, the income per capita in the EU15 MSs had increased from the 40% average

[31] See European Commission, 'Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006)' (Communication) COM (2006) 48 final; European Commission, 'The impact of free movement of workers in the context of EU enlargement: Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty' (Communication) COM (2008) 765 final.
[32] European Commission, '10th Anniversary of the 2004 Enlargement – Strategic Benefits, Impact and the Current Enlargement Agenda' (Memo 14/325, 30 April 2014) 2.
[33] Ibid.
[34] Ibid.

'in 1999 to 52% in 2008'.[35] Moreover, the new MSs had developed 'functioning market economies and the capacity to cope with competitive pressures and market forces within the Single Market'.[36] Summarising the evidence the Commission collected in relation to the free movement of labour post-enlargement, it states that while there have been some 'economic and social costs', the experience 'suggests that instead of restricting labour market access of EU nationals, alternative solutions may be a better and more effective way to address these costs' and that intra-EU mobility after the 2004 enlargement had not led and was unlikely to lead 'to serious labour market disturbances'.[37]

The overall impact of the 2004 enlargement, as well as the EU mobility that followed, is considered to be positive by various sources.[38] The benefits or gains from geographic and job mobility, such as the one seen in the EU after the 2004 enlargement are argued to be derived 'from the relocation of labour from regions with a surplus of workers to regions with labour shortages' and are also due to 'a more efficient allocation of labour to activities and regions where they are (likely to be) more productive'.[39]

Nevertheless, despite the success attributed to the 2004 'big bang' enlargement, similarly to any other enlargement, various concerns and fears were associated with it, one of which (social or benefit tourism) will be discussed below.

2.1.1. Economic Disparity

In connection with the concerns that were raised by various MSs in light of the fifth enlargement, a discussion of the issue of 'social or benefit tourism' should be provided. Around the time of the accession of the new CEE MSs, there was much warning circulating regarding the possible high influx of not only jobseekers but also of so-called 'welfare

[35] European Commission Directorate General for Economic and Financial Affairs, 'Five years of an enlarged EU: Economic achievements and challenges' (European Economy 1, 2009) 3.
[36] Ibid 4.
[37] Ibid 138.
[38] See, eg, A Constant, 'Sizing It Up: Labor Migration Lessons of the EU Enlargement to 27' (2011) Institute for the Study of Labor Research Paper Series, 6119 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965136#> accessed 11 June 2022.
[39] D Fouarge, P Ester, 'Understanding Migration Decisions in Eastern and Western Europe: Perceived Costs and Benefits of Mobility' in H Fassmann, M Haller, DS Lane (eds), *Migration and Mobility in Europe: Trends, Patterns and Control* (Edward Elgar 2009) 51.

scroungers'.[40] The debate on the pressures on MSs' welfare systems intensified and became more salient after the 2004, as well as the 2007 enlargements.[41]

It should be noted that no clear legal definition of the term 'social or benefit tourism' exists. Moreover, according to the academic literature on the issue, the term is often wrongly used to merely refer to the very exercise of the rights to free movement according to EU law provisions.[42]

A number of reasons why EU citizens might wish to move to another EU MS solely in order to avail of the social advantages in that State can be established through a detailed analysis of the issue. A rather obvious reason is the fact that in some MSs the level of social benefits is higher than in others. However, the difference in levels of the social assistance an EU national can receive should be put against the deviation in prices for products and services provided in the States with higher levels of social advantages, which should also be taken into consideration.

Despite the constant discussion and debate around the idea of 'benefit tourism', the opponents of the view argue that there is no evidence to prove that 'social tourism' actually exists. Given the situation and the controversy around the issue, in 2013 the European Commission authorised a study, analysing data for 27 MSs (it did not consider the newly accessed Croatia).[43] This study assessed whether benefit tourism truly exists and whether it is truly harmful, as several MSs were concerned. The report concluded that an overwhelming majority of those who move from one EU country to another do it for work and not to receive social

[40] JE Dølvik, 'European Movements of Labour: Challenges for European Social Models' in G Brochmann, E Jurado (eds), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility* (Bloomsbury 2013).
[41] D Sindbjerg Martinsen, H Vollaard 'Implementing Social Europe in Times of Crises: Re-established Boundaries of Welfare?' (2014) 37 West European Politics 677, 683.
[42] JM Lafleur, M Stanek, 'Restrictions on Access to Social Protection by New Southern European Migrants in Belgium' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 99.
[43] European Commission DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, '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' (Final report submitted by ICF GHK in association with Milieu Ltd, 14 October 2013, revised on 16 December 2013) 40.

benefits'.[44] It also emphasised that 'economically non-active and mobile EU citizens account for a very small proportion of beneficiaries and that the budgetary impact of the claims of this group on national welfare budgets is very low' (above 5% in 2 MSs (Belgium and Ireland), 1-5% in 5 MSs (Germany, Finland, France, the Netherlands and Sweden), and less than 1% in the other 20 MSs).[45] Besides, the 'expenditure associated with healthcare provided to non-active EU migrants is very low relative to total health spending (0.2% on average)'.[46]

The academic literature also has indicated that the debate on 'benefit tourism' is exaggerated. The majority of EU citizens who make use of their mobility rights are workers and qualifying them as 'benefit tourists' can even be considered 'misnomer'.[47] In the context of the UK, for instance, it has been argued that restricting access to or decreasing social benefits for other EU nationals would not help with stopping their immigration.[48]

Based on the abovementioned data, it can be argued that while the possibility of 'social/benefit tourism' exists, it is not easy to find convincing arguments for its overwhelming impact on the social assistance systems of host MSs. Social tourism would certainly be a vicious practice and an abuse of the right to free movement of persons. However, it is rather crucial to emphasise that the issue of 'social/benefit tourism' is a fairly complex one and not so clear-cut, not least due to the fact that the very existence of it is often questioned and not always sufficient evidence is presented to prove that it, in fact, exists among the EU MSs.

It is noteworthy that Article 35 of Directive 2004/38, a Directive codifying pre-existing case law, in effect, explicitly acknowledges the concept of abuse of rights, as mentioned earlier in

---

[44] Ibid 177. H Jacobsen, '"Benefits tourism" in the EU is a myth, report says' *Euractiv* (17 October 2013) <http://www.euractiv.com/section/social-europe-jobs/news/benefits-tourism-in-the-eu-is-a-myth-report-says/> accessed 18 December 2018.

[45] European Commission DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, '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' (Final report submitted by ICF GHK in association with Milieu Ltd, 14 October 2013, revised on 16 December 2013) 40.

[46] Ibid.

[47] S Fernandes, 'Access to Social Benefits for EU Mobile Citizens: "Tourism" or Myth?' (2016) Jacques Delors Institute Policy Papers, 168 <https://institutdelors.eu/en/publications/access-to-social-benefits-for-eu-mobile-citizens-tourism-or-myth/> accessed 17 June 2022, 8.

[48] See, eg, J Springford, 'Is immigration a reason for Britain to leave the EU?' (Centre for European Reform 2013), <https://www.cer.eu/sites/default/files/publications/pb_imm_uk_27sept13.pdf> accessed 17 June 2022.

Chapter 2. Moreover, in its judgment in the *Metock* case,[49] the Court allowed the use of 'abuse of rights' for applying limitations on the rights deriving from the Directive alongside 'the classic derogation clauses' on grounds of public policy, security and health.[50] This means that the principle of 'abuse of law' is established in EU secondary law in relation to the freedom of movement and it, essentially, puts it in the same line with the justifications for MSs by which they can derogate from the application of EU rights in some circumstances. This is particularly visible from the fact that the Court has established that the concept of 'abuse of law is subject to the proportionality test.[51] In short, EU secondary law in the form of the Citizenship Directive, acknowledges the potential abuse of provisions on access to social benefits and therefore, along with the CJEU, sets out a possibility for MSs to safeguard against it.

In order to address the fears arising among their states' populations on welfare tourism, MSs attempted to solve the issue in different ways. For instance, Belgium introduced the measure of the removal of residence permits from unemployed EU citizens considered to represent an unreasonable burden on the Belgian public finances, and this measure affected mostly migrants from CEE MSs,[52] even though such a measure was often criticised by the European Commission.[53] Another example is when, in order to fight against the concerns of the Irish public about welfare tourism, the government in the country introduced a Habitual Residence Condition, 'which meant that EU8[54] citizens would not be entitled to claim social welfare for at least two years from the date of their arrival in Ireland'.[55] This condition was amended later in 2007 to comply with the judgments of the Court of Justice on the matter of habitual

[49] Case C-127/08 *Metock* [2008] ECR I-06241.
[50] KS 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: A New General Principle of EU Law?* (Hart Publishing 2011) 295.
[51] Case C-127/08 *Metock* [2008] ECR I-06241, paras 75, 97.
[52] JM Lafleur, M Stanek, 'Restrictions on Access to Social Protection by New Southern European Migrants in Belgium' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 100.
[53] See, eg, European Commission Directorate General for Internal Policies, 'Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Belgium' (European Union 2016) <http://www.europarl.europa.eu/supporting-analyses> accessed 8 July 2021.
[54] EU8 refers to 8 newly accessing Member States of the 2004 'big bang enlargement': Lithuania, Latvia, Estonia, Poland, Czech Republic, Hungary, Slovakia, Slovenia.
[55] J Heyes, M Hyland, 'Supporting, Recruiting and Organising Migrant Workers in Ireland and the United Kingdom: A Review of Trade Union Practices' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012) 212.

residence, including the necessity to establish criteria for determining whether a person is habitually resident. Nonetheless, 'there continues to be some inconsistency in how the conditions are applied'.[56] It should be noted that Ireland is a MS which had traditionally been a country of emigration and was developing into a receiving country only recently,[57] which may have contributed to the overall fear in the country towards the accession of new MSs and a possible large inflow of migrants.

As it can be seen, there have been many fears among the EU15 MSs that the influx of migrants from the EU10 could have negative consequences for their own nationals. However, it should also be borne in mind that the freedom of movement can 'sometimes come at significant costs' for those who are moving to other MSs, as these nationals can be exploited more easily compared to host MS nationals.[58] According to Walterskirchen, social security data in Austria indicates that 'the monthly wages of foreign blue-collar workers [were] about 15 per cent below the average'.[59] Moreover, as the numbers of migrants started increasing in the 3 MSs which did not impose transitional arrangements, 'so too did reports of ill-treatment of migrant workers by employers and employment agencies'.[60] Dølvik and Visser argue that the conflict over workers' rights and equality in the context of cross-border mobility has arisen since, unlike previous enlargements, there was 'no political deal on how to compensate increased heterogeneity with more regional and social cohesion' after the big bang enlargement.[61] The possible ill-treatment of other MS nationals is an important aspect to consider when discussing the freedom of movement of persons, as this in itself goes against the principle of non-discrimination enshrined in the Treaties.

---

[56] Ibid.

[57] T Korpi, 'Importing Skills, Migration Policy, Generic Skills and Earnings among Immigrants in Australasia, Europe and North America' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012) 264.

[58] M van Ostaijen, P Scholten, 'Conclusions and Reflection' in P Scholten, M van Ostaijen (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018) 253.

[59] E Walterskirchen, 'The Dimensions and Effects of EU Labour Migration in Austria' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009) 160.

[60] J Heyes, M Hyland, 'Supporting, Recruiting and Organising Migrant Workers in Ireland and the United Kingdom: A Review of Trade Union Practices' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012) 211.

[61] JE Dølvik, J Visser, 'Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?' (2009) 40 Industrial Relations Journal 513, 514.

Moreover, it is worth mentioning that a differentiation can be put between desirable and undesirable migrants. Such a division is particularly exploited by the radical right-wing populist parties. This categorisation, along with the imposition of transitional arrangements, at times resulted in the latter being seen by the EU10 nationals as a 'let-down, and as an indication that inhabitants of the accession countries were still regarded as secondary European citizens'.[62] Such debates occurred alongside the background discussion 'about the role of migrant labour in advanced economies and societies' and in some cases were fruitful soil for the rise of populism and xenophobia'.[63] Furthermore, since the mobility percentages within the EU were, in fact, lower than expected, it can be observed that it was the fear for mass migration from the East to the West that 'led most EU countries to close their borders at the time of the enlargement to labour migrants from central and eastern European countries'.[64] Such a fear of potentially 'undesirable migrants' both among political parties and the public was intensified by the differing democratic backgrounds between EU15 and EU10, given that many countries of the latter had been part of the Soviet-led socialist Eastern bloc not too long ago. In addition, the socio-economic conditions in the Central and Eastern countries were perceived to be potentially driving factors behind a large-scale migration from the new MSs. While such concerns should not be fully dismissed, it should be noted that this fear of a mass influx of other MS nationals is often the driving force behind the rhetoric of right-wing populist parties, as will be discussed in the upcoming Sections.

To sum up, the 2004 'big bang' enlargement brought about concerns in EU MSs that tend to always appear in times of new accessions to the Union. Moreover, the varying economic developments and democratic and social backgrounds, as well as the unprecedented event of 10 countries joining the EU all at once only added fuel to the heated discussion. The issue of social or benefit tourism made its way into the public and political debate, too. Due to this, the controversy and fears around the 2004 enlargement became more present and topical than

[62] Ibid, 519.
[63] B Galgóczi, J Leschke, A Watt 'Introduction' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009) 1.
[64] D Fouarge, P Ester, 'Understanding Migration Decisions in Eastern and Western Europe: Perceived Costs and Benefits of Mobility' in H Fassmann, M Haller, DS Lane (eds), *Migration and Mobility in Europe: Trends, Patterns and Control* (Edward Elgar 2009) 52.

ever. Despite the overall positive impact and the generally successful implementation of the enlargement, these concerns shaped a differing understanding of various issues connected with the EU, including free movement of persons and access to social benefits.

2.2. Socio-Economic Dynamics: Intra-EU Migration

This section will focus on one of the crucial aspects which shaped the dynamics in the social and political arena at EU and national levels in recent years: intra-EU migration. It will start by an analysis of statistical data on the migration of EU citizens within the Union. Afterwards, a discussion of the academic literature on the issue of intra-EU migration will be presented, with a focus on the aftermath of the 'big bang' enlargement of 2004. Finally, a discussion of the overall political atmosphere and governance surrounding the issues in question will be conducted.

2.2.1. Statistical Data

To grasp the intra-EU migration tendencies and the situation around it better, it is important to take into consideration some statistical data and to analyse its relationship with the overall intra-EU migration flows.

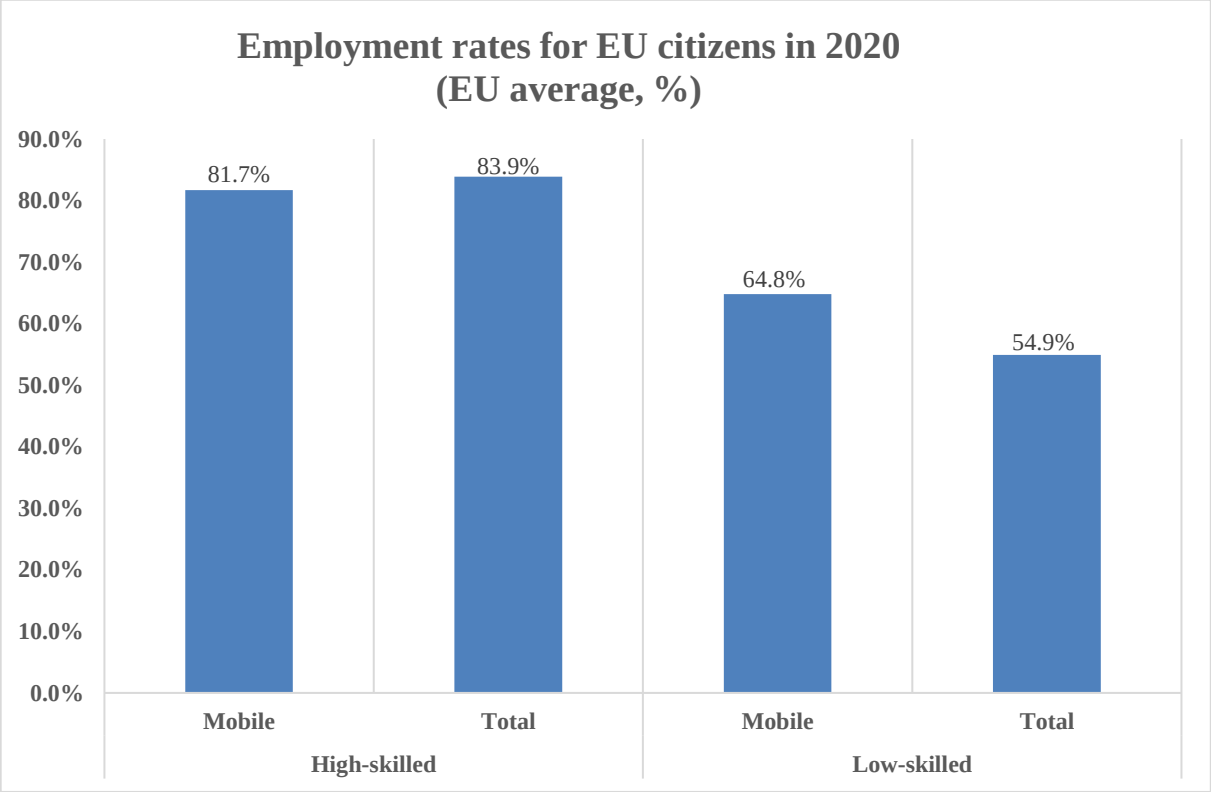
Statistical data of intra-EU migration contains information which can serve as an important starting point in forming an overall idea on the functioning of the free movement of persons within the EU. The EU has ensured a 'considerable expansion of available' migration data, which has particularly been safeguarded by the adoption of Regulation 862/2007,[65] making it mandatory for the MSs to provide comprehensive data on migration issues to Eurostat, the statistical office of the EU. Eurostat possesses a rather extensive set of information and data gathered from a broad range of resources provided by the MSs and is therefore a reliable source for looking at the migration flows within the EU. Below, several figures found on the official website of Eurostat are analysed. The data provided below is from 2020, as it is the latest year on which a wide-ranging amount of information is provided, and the data from later years is either unavailable or significantly more limited.

[65] Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] OJ L 199.

The statistical data is useful in identifying the advantages of the labour mobility for the workers themselves. The employment rates are usually 'higher for the highly skilled EU citizens' as compared to the lower-skilled nationals. However, the picture differed in 2020,[66] where the employment rate stood at 83,9% for mobile low-skilled workers and at 81,7% for mobile high-skilled workers. Nonetheless, in both cases the average for mobile citizens was higher than that for non-mobile citizens. Particularly, the EU average employment rate for the total population of highly skilled workers was 64,8% in 2020 (compared to the abovementioned 81,7%) and 54,9% for the total population of lower-skilled workers (compared to the 83,9% noted above). Therefore, considering the aforementioned figures on the comparison of employment rate between mobile and non-mobile citizens, it can be observed that the intra-EU labour mobility is rather beneficial for EU workers who aim to reside in MSs other than that of their nationality (see Figure 1).

[66] In order to ensure that the findings are based on most recent information, the data for 2020 is discussed, as it is the latest year on which official data is available for this question.

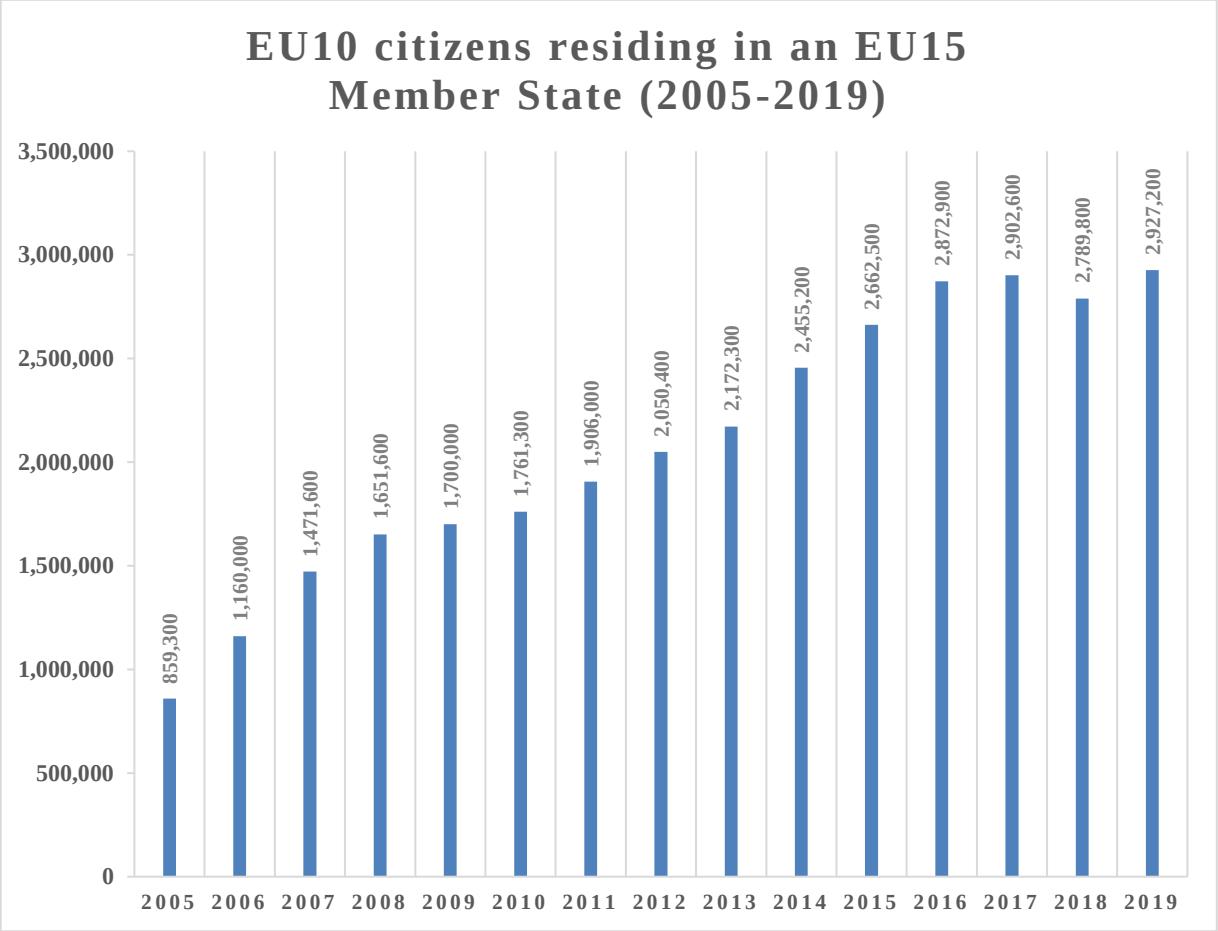
Figure 1
Employment rates among EU citizens in 2020



Source: 'EU citizens living in another Member State – statistical overview' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview#Who_are_the_most_mobile_EU_citizens.3F> accessed 25 October 2022.

As noted in the previous Section, the intra-EU migration increased after the 2004 enlargement, and the EU10 (and particularly the EU8) MSs were large contributors to the increase. In this light, it would be worthwhile to see the number of EU10 nationals who were residing in a MS other than that of their nationality after the 2004 enlargement. Since no sufficient data is available for the years before 2005 and after 2019, the graph below (Figure 2) represents the years 2005-2019. It can be observed from the graph that the number of EU10 citizens residing in other MSs clearly increased following the 2004 enlargement, which confirms the recorded increase in intra-EU migration. It is particularly interesting to observe the trend of intra-EU migration in the UK. This is covered later in the text.

Figure 2
EU10 citizens residing in an EU15 Member State in the period between 2005-2019



Source: 'Immigration by age group, sex and citizenship: customised dataset' (Official website of Eurostat, Eurostat Data Browser)
<https://ec.europa.eu/eurostat/databrowser/view/MIGR_IMM1CTZ__custom_3789042/default/table?lang=en> accessed 25 October 2022.

In the context of intra-EU mobility, it is worth to consider an interesting aspect regarding the issue of sending and receiving MSs. While there are several EU MSs that are often deemed to be receiving the largest share of immigrants, there are also some other MSs that are not taken into account in these dynamics. One such MS is Luxembourg, some statistical data on which is analysed below. Luxembourg is chosen as an example firstly due to the high immigration level, which will be shown below. It 'has a very high proportion of EU movers; four times

higher than the next highest country'.[67] Nonetheless, interestingly it does not have a strong opposition towards intra-EU migration. It is crucial to touch upon such an example to consider that high immigration levels into a MS do not have to always be seen as a significant problem in the country.

From the 28 MSs of the Union, Luxembourg had recorded one of the highest rates of net inward migration in the period between 2010 and 2015 (following only Spain and Ireland in first and second places respectively).[68] It should be noted that the country had, in fact, recorded the highest net inward migration also during the period between 2005-2010.[69] The metropolitan region of Luxembourg also 'recorded the highest rate of population growth during the period 2009–14'.[70] Overall, 'the share of the foreign-born population' in Luxembourg was 44.2% and 'the crude rate of population change' in Luxembourg was the highest in the EU, standing at '22.0 per 1 000 inhabitants'.[71] It should be noted that the majority of the migrants moving to this MS were 'people who had been born in other EU MSs, principally in Portugal, France, Luxembourg (returning to their home country), Belgium, Italy and Germany'.[72] In addition, Eurostat data demonstrates that almost one third of its population (31.4%) was 'born in another EU Member State', a rate which 'was considerably higher than in any other region'.[73] For comparison, the second highest share of a population being born in another EU MS was recorded in the Belgian region of the Arrondissement de Mouscron,

---

[67] European Commission, *Study on the Movement of Skilled Labour: Final Report* (European Union 2018) <https://ec.europa.eu/social/BlobServlet?docId=20453&langId=mt> accessed 5 May 2020.

[68] 'EU-ASEAN cooperation - key migration statistics' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU-ASEAN_cooperation_-_key_migration_statistics#Population_change_and_migration> accessed 28 May 2019.

[69] Ibid.

[70] 'Urban Europe — statistics on cities, towns and suburbs — foreign-born persons living in cities' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Urban_Europe_%E2%80%94_statistics_on_cities,_towns_and_suburbs_%E2%80%94_foreign-born_persons_living_in_cities#Migration_in_metropolitan_regions> accessed 28 May 2019.

[71] 'EU-ASEAN cooperation - key migration statistics' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU-ASEAN_cooperation_-_key_migration_statistics#Population_change_and_migration> accessed 28 May 2019.

[72] 'Urban Europe — statistics on cities, towns and suburbs — foreign-born persons living in cities' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Urban_Europe_%E2%80%94_statistics_on_cities,_towns_and_suburbs_%E2%80%94_foreign-born_persons_living_in_cities#Migration_in_metropolitan_regions> accessed 28 May 2019.

[73] Ibid.

situated next to the French-Belgian border. The share of such population here was 23.3%.[74] It should also be mentioned as comparison that, for instance, the population of EU citizens having been born in other EU MSs in Brussels or Inner London-West (both are regions with a rather large share of other MS nationals) was only 'between one sixth and one seventh of the total populations'[75] which is a considerably smaller percentage than that in Luxembourg.

This distribution of migrant flows demonstrates that Luxembourg was, perhaps, the EU MS with the highest rate of intra-EU migration within the period of 2010-2015, as well as of 2005-2010. Thus, while the 'net intra-EU mobility to Germany and the UK' was approximately four times larger in comparison with any other EU MS, Luxembourg (as well as Malta and Austria), had 'the highest shares of incoming movers compared to their total population'.[76] Labour migration is deemed to be one of the main 'demographic, social and economic characteristics of Luxembourg where massive immigration flows had slowed down the inflow only temporarily' and in the recent times, Luxembourg has been the EU MS in which 87% of foreign residents are nationals of another EU MS.[77]

It may be argued that the generally tolerant attitude of Luxembourg towards other EU nationals could be due to the prevalence of high-skilled migrants in the country, which is usually less 'problematic' for host states than the presence of low-skilled migrants. It is true that Luxembourg is host to a large number of highly skilled workers, as the proportion of high-skilled migrant workers has 'multiplied by three' while the proportion of low-skilled migrant workers has decreased since 1946,[78] and Luxembourg has continuously 'benefitted from a highly skilled labour force coming in from the Grand Region'.[79] Nevertheless, it should

---

[74] Ibid.
[75] Ibid.
[76] European Commission Directorate-General for Employment, Social Affairs and Inclusion, *2017 Annual Report on Intra-EU Labour Mobility: Final Report* (2nd edn, European Union 2018) 31.
[77] P Zahlen, 'Elderly Migrants in Luxembourg: Diversity and Inequality' in U Karl, S Torres (eds), *Ageing in Contexts of Migration* (Routledge 2015) 40.
[78] European Foundation for the Improvement of Living and Working Conditions, 'Luxembourg: the Occupational Promotion of Migrant Workers' (24 March 2009) <https://www.eurofound.europa.eu/publications/report/2009/luxembourg-the-occupational-promotion-of-migrant-workers> accessed 13 July 2021.
[79] European Migration Network, 'Satisfying Labour Demand through Migration in Luxembourg' (April 2011) <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/labour-

be noted that low-skilled migrants, in fact, 'benefit disproportionately from unemployment insurance and social programs, which is an indicator of both political inclusion and long-term economic exclusion, thus highlighting a seeming paradox'.[80] In other words, low-skilled migrants, too, have good possibilities of receiving social assistance in Luxembourg. Furthermore, in terms of high-skilled migrants, 'the foreign knowledge workers' tend to even be 'more skilled than their Luxembourgish counterparts'[81] and therefore have a more advantageous position in terms of potential employment. Yet, the public opinion in Luxembourg strikes as 'less xenophobic than in any other western European Union country'.[82] Thus, despite the high immigration rates of both high- and low-skilled EU migrants into Luxembourg, the latter does not have dramatically negative attitudes towards intra-EU migration.

There could be various reasons for such high migration rates in Luxembourg, not least a geographical one, as the country is surrounded by states with which it shares common languages (French and German). One can speculate what causes Luxembourg to not be Eurosceptic or against intra-EU migration: the reasons could range, and a separate research project could even focus solely on that topic, given its breadth. As for this thesis, it suffices to note that Luxembourg does not seem to be opposing intra-EU migration, despite its high immigration rate.

2.2.2. Intra-EU Migration

The intra-EU migration is, essentially, a result of the provisions of EU law on the freedom of movement in general and the free movement of persons in particular. The free movement of persons allows EU nationals across the Union to search for opportunities outside of their home MSs. It has been argued that the significance of the freedom of movement is rather broad and

---

demand/17a._luxembourg__national_report_satisfying_labour_demand_thru_migratio_final_version_11april2011.pdf> accessed 13 July 2021, 11.

[80] T Kolnberger, H Koff, 'Addressing Seeming Paradoxes by Embracing Them: Small State Theory and the Integration of Migrants' (2021) 9 Comparative Migration Studies <https://link.springer.com/article/10.1186/s40878-021-00222-8> accessed 13 July 2021, 12.

[81] L Graf, M Gardin, 'Transnational Skills Development in Post-Industrial Knowledge Economies: The Case of Luxembourg and the Greater Region' (2017) 31 Journal of Education and Work 1, 2.

[82] JS Fetzer, 'The Paradox of Immigration Attitudes in Luxembourg: A Pan-European Comparison' in GP Freeman, R Hansen, DL Leal (eds), *Immigration and Public Opinion in Liberal Democracies* (Routledge 2013) 78.

that seeing it merely as 'a component' of the internal market 'does not do justice to the legal and practical implications of the EU free movement regime'.[83] Given that the right to the freedom of movement within the Union for EU citizens is set out in the Treaties (Article 21 TFEU) and is closely linked with and derived from the principle of non-discrimination (Article 18 TFEU) and the idea of EU citizenship (Article 20 TFEU), it can be argued that the right to the freedom of movement is one of the fundamental rights of EU citizens stipulated in the Treaties.

Here, it would be a good idea to discuss some trends in (intra-EU) migration, in order to understand the issue more clearly.

It should be noted from the start that it has been argued that using the term 'migration' for describing the movement of EU citizens may not be correct.[84] However, most academic literature seems to prefer the use of the notion of 'intra-EU migration', therefore that term will be used below to describe the movement of EU citizens within the Union, where they move their residence to another MS.

Dølvik argues that since the migration research in Europe was mostly focused on studying the immigration into the EU from third countries, 'the scientific knowledge about intra-EU/EEA migration was scant, patchy and largely inadequate when the borders between eastern and western Europe were opened from 2004 onwards.'[85] While, as mentioned earlier, concerns and controversies have been present with every enlargement of the EU, none of those would have attracted as much attention as the accession of 10 new MSs. According to the summarising put forward by Sert, the free movement of persons in the academic literature is discussed from two different perspectives: one set of studies 'analyses the nature and type of intra-European movement', with its focus being the movement of nationals of CEE MSs, and the other group of studies sees 'the free movement as a form of socio-economic participation on the European

[83] E Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (Springer 2015) 2.
[84] See, eg, M Menghi, J Quéré, *Free Movement of Europeans Taking Stock of a Misunderstood Right* (Jacques Delors Institute 2016) 18.
[85] JE Dølvik, 'Introduction: Transnational Labour Mobility – Engine for Social Convergence or Divergence in Europe' in JE Dølvik, L Eldring (eds), *Labour Mobility in the Enlarged Single European Market* (Emerald Group Publishing 2016) 2.

labour market', with migrants being considered to be 'a key driver of economic integration' and focusing on the 'subsequent effects of free movement'.[86]

Notably, a large number of EU nationals who avail of their free movement rights move to other MSs temporarily. This is crucial to consider in light of the developments of CJEU case law. As it was discussed in Chapter 3, the position of the Court of Justice on free movement of persons and social benefits changed throughout time. One of the aspects regarding which the Court showed its changing position was the notion of having a genuine or real link with the host MS. The Court, particularly, approved the use of the concept of genuine or real link with the society of the host MS as a requirement to be met in order to gain access to social benefits.[87] Connecting this with the abovementioned concept of temporary migration, it can be observed that the Court, in essence, allowed EU MSs a broader margin of discretion in regulating the rights of EU citizens making use of the temporary migration possibility offered by the free movement of persons.

There have always been concerns about all types of migration. For the European countries, this has included both international migration (ie the immigration of non-EU nationals into EU MSs) and intra-EU migration. Regarding the migration within the Union, there have been fears that some of the migration flows will be particularly large. This relates to the migration from East to West and from South to North. The academic literature has touched upon these potential migration flows in separate volumes,[88] which shows the significance that is attached to this phenomenon.

---

[86] D Sert, 'The Diversification of Intra-European Movement' in P Scholten, M van Ostaijen (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018) 21-22.
[87] See, eg, Case C-209/03 *Bidar* [2005] ECR I-2151; Case C-158/07 *Förster* [2008] ECR I-08507.
[88] See, eg, R Layard, OJ Blanchard, R Dornbusch, P Krugman, *East-West Migration: The Alternatives* (United Nations University Press 1992); M Hoffmann, *Assessing East-West Labour Migration after EU-enlargement* (GRIN Verlag 2007); A Favell, 'The New Face of East–West Migration in Europe' (2008) 34 Journal of Ethnic and Migration Studies 701; C Wright, 'The Regulation of European Labour Mobility: National Policy Responses to the Free Movement of Labour Transition Arrangements of Recent EU Enlargements' (2010) 13 Journal for Labour and Social Affairs in Eastern Europe 157; R Black, G Engbersen, M Okólski, *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010); K Josifidis, N Supic, E Beker Pucar, S Srdic, 'Labour migration flows: EU8+2 vs EU-15' (2014) 15 Journal of Business Economics and Management 41; JM Lafleur, M Stanek, *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016); N Marinescu, *East-West Migration in the European Union* (Cambridge Scholars Publishing 2017).

It should be noted that the process of migration is often closely connected with various other reasons and particularly economic ones. Economic crises, as well as negative socio-economic developments generate a larger scale of emigration from countries which are more affected by it to more prosperous countries with a better labour market situation.[89] In addition, the immigration to these less prosperous countries decreases in parallel with the hitting of the crises.

Migration policies are often considered to be dealing with sensitive and at times controversial issues, which can arise in various circumstances and especially as a result of a (potential) large influx of nationals from other countries. In the case of the EU, this holds true not only for any third country nationals, but also for nationals moving to a host MS from another EU MS.

The issue of national or state identity certainly plays a role here, too. As explained by Buzan, national identity is often interwoven with the idea of societal security.[90] Since a given society 'is about identity, the self-conception of communities and of individuals identifying themselves as members of community', the notion in the societal sector around which members of the society are organised is identity.[91] The agenda of societal security (in relation to the concept of national identity) throughout different times and regions has been set by various actors and migration has been one of the 'most common issues' which has been viewed as a threat to societal security, whereby the given 'identity is being changed by a shift in the composition of the population'.[92] It is not surprising that parties with Eurosceptic and anti-migration stance easily employ the notions of such threats to societal security and identity in order to advance their ideology among voters, as discussed in detail in the next Section.

It has also been demonstrated that the feelings of the citizens of a given country of national attachment, in parallel with their perceptions of any threats to the nation-state, as well as the nation's interests are potential considerations when expressing support for the EU in general

[89] A Sipavičienė, V Stankūnienė, 'The Social and Economic Impact of Emigration on Lithuania', in OECD, 'Coping with Emigration in Baltic and East European Countries' (OECD Publishing 2013), 46.
[90] B Buzan, O Wæver, J de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998) 142.
[91] Ibid 119.
[92] Ibid 121.

and thereby for the freedom of movement in particular.[93] When looking at this in light of the 2004 eastward enlargement, it has been argued that the latter was 'likely to make it even more difficult to develop a European identity'.[94] The accession of 10 new MSs was, indeed, an additional reason for concern for MSs, the public and the political parties, as it could be perceived to increase the level of the mentioned threats.

As a complex phenomenon, migration processes can be difficult for policymakers to regulate and manage. To cope with this challenge, they tend to use simplifying policy narratives to 'steer' the regulation of migration. This can lead to 'short-circuiting' the complexity of migration processes, as a result of which the adopted policies 'may fail to rectify' or may even exacerbate the issues that were sought to be addressed.[95] Therefore, when formulating migration policies, it is crucial to consider in depth the particular interests and, perhaps, the aims of the state in relation to immigration.

Wollenschlager pointed out that the issue of 'transnational free movement rights of economically inactive persons', as well as their access to social assistance is, indeed, a rather 'controversial and politically sensitive' matter, due to the fact that it gives rise to the question of 'to what extent economically inactive Union citizens are entitled to social solidarity in the host Member State'.[96] He notes that this 'tension' can be noticed even from the mere legal framework, since although 'self-sufficiency is demanded as a residence criterion' for the prevention of other EU nationals from becoming an unreasonable burden on the social assistance systems of the host MSs, the fact of not being in possession of sufficient resources 'does not necessarily mean losing one's right to residence and to equal treatment', a challenging situation for defining the 'free movement rights of non-market actors under the

[93] S Kritzinger, 'The Influence of the Nation-State on Individual Support for the European Union' (2003) 4 European Union Politics 219.
[94] D Fuchs, HD Klingemann, 'Eastward Enlargement of the European Union and the Identity of Europe' (2002) 25 West European Politics 19, 20.
[95] C Boswell, 'Migration Control and Narratives of Steering' (2011) 13 The British Journal of Politics and International Relations 12, 13.
[96] F Wollenschlager, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017).

current EU rules'.[97] In other words, this indicates that the secondary law in question (the Citizenship Directive) is aiming to strike a balance and resolve the tension between the protection of EU citizens' rights and social assistance systems of host MSs.

In the early phase of the establishment and implementation of the freedom of movement, the idea of integration focused mostly on 'developing the economic advantages of the Union and on building the common market', and the free movement of workers merely 'complemented' the other freedoms, as well as 'added substance to the common market'.[98] It was also useful for fulfilling the political goals of the EU 'by creating a sense of unity, amongst the people of Europe, or a quasi-European demos', thus legitimising in its own way the newly established Union.[99] The European Communities did not necessarily start as an establishment to ensure the free movement of economically non-active persons. Rather, the freedom of movement was an economically driven notion where mostly employed persons participated. However, the intra-EU movement and migration in its current state is not a phenomenon which can be understood solely through the outlook of economic benefits but rather its broader social implications shall be taken into consideration as well. With time, the free movement of persons became an expansive concept involving economically non-active EU citizens, too. The possibility of receiving social benefits in other MSs is a result and good example of the expansion of the social aspects of the Union.

Already in 2001, ie before the fifth wave of the EU enlargement, it was recorded that the majority of the OECD MSs (including the EU15) were host to 'a significant number of immigrants' from the CEE countries.[100] Thus, the migration from the EU10 was not necessarily a new phenomenon. Furthermore, it should be borne in mind that the migration flows from the CEE MSs of the EU 'are much more complex than a straightforward westward

[97] Ibid.
[98] R Barbulescu, 'From International Migration to Freedom of Movement and Back? Southern Europeans Moving North in the Era of Retrenchment of Freedom of Movement Rights' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 21.
[99] Ibid.
[100] OECD, 'Trends in Migration Flows in Central and Eastern Europe' in OECD (ed), *Migration Policies and EU Enlargement: The Case of Central and Eastern Europe* (OECD Publishing 2001) 36.

flow towards the European Union'.[101] Research has also shown that 'cross-country mobility flows in the EU' are much lower than in other areas which are highly integrated (for instance, in the United States).[102] In addition to that, 'the stock of migrants from within the EU is also generally much lower than that from non-EU'.[103] As discussed in the next Chapter, the case study of the UK in particular indicated that the proportion of non-EU immigration to the UK was, in fact, higher than that of immigration from other EU MSs.

Nevertheless, this new trend of East-West migration was not always welcomed by some MSs. Many of them introduced restrictions on free movement from the newly accessed countries for an initial period of 7 years (which was in its turn divided into periods of two, three and two years, each of which was concluded by a review, as discussed earlier). As summarised by Van Ostaijen and Scholten, it triggered some 'national Ministers to call for attention that "this type of immigration burdens the host societies with considerable additional costs", to which the then Home Affairs Commissioner, Cecilia Malmström, replied that by such statements immigration and internal EU mobility are being mixed up'.[104]

Analysing the activities of the European Commission, it can be observed that in the two European Commissions before the current one (under the Presidency of Barroso and Juncker) similar topics have dominated the free movement agenda. Particularly, the 10 priorities of the Juncker Commission included, inter alia, 'supporting labour mobility and *tackling abuse* by means of better social security system coordination.'.[105] The focus on the potentially abusive aspect of the use of social security systems triggered by labour mobility indicates not only the salience this issue had gained but also the negative outlook through which intra-EU migration was framed, focusing on the potential (if not exaggerated) problems rather than on the fundamental status of EU citizens, as established by the Court of Justice. Interestingly, in the

[101] OECD, 'Trends in International Migration 2000: Continuous Reporting System on Migration: Annual Report' (OECD Publishing 2001) 61.
[102] A Arpaia, A Kiss, B Palvolgyi, A Turrini, *Labour Mobility and Labour Market Adjustment in the EU* (Economic Papers 539, European Union 2014) 32.
[103] Ibid.
[104] P Hansen, 'Undermining free movement: Migration in an age of austerity' *Eurozone* (6 February 2015) <https://www.eurozine.com/undermining-free-movement/> accessed 29 June 2022.
[105] E Bassot, W Hiller, 'The Juncker Commission's ten priorities: State of play in early 2018' (European Parliamentary Research Service 2018), 15. Emphasis added.

same time period, as discussed in the previous Chapter, the Court itself was gradually 'forgetting' the significance of its own case law on EU citizenship.

To sum up, intra-EU migration is a complex phenomenon which has the tendency to raise discussions in the political and social spheres both on national and EU levels. Moreover, the consideration of intra-EU migration often forms the political and social discourse in a given country. Based on the abovementioned, it can be observed that intra-EU migration has been a source of concerns throughout the history of European integration. It gained a stronger importance following the 2004 'big bang' enlargement. In connecting this with the case law of the Court, it should be borne in mind that this enlargement took place several years after the CJEU had provided a broad interpretation of EU citizens' rights to free movement and access to social benefits through the landmark judgments discussed earlier (such as *Martínez Sala* and *Grzelczyk*). Later, at the time when the Court of Justice started setting ground for its shifting approach (as noted in Chapter 3), the topic of intra-EU migration especially after the 2004 enlargement was widely discussed in the political and social arenas in the EU. This interconnection will be elaborated in the final Chapter of the thesis.

2.3. Political Dynamics: Right-Wing Parties and the Rise of Populism

Another factor to consider in addressing the context of development of the Court's jurisprudence on free movement of persons and social benefits is the increase in the support for radical right-wing populist and Eurosceptic parties, as these parties often tend to adopt Eurosceptic and anti-migration political discourse.

It should be stressed that the terms 'right wing' and 'populism' do not have the same meaning and are separate phenomena, thus the two concepts cannot be used interchangeably. Moreover, as correctly pointed out by various authors, populism can be present both in right-wing and left-wing parties. They differ in their definition of the concept of 'the people'[106] (which will be discussed below) but they share the view of separating the society 'into two antagonistic groups,' the people and the elite.[107] Nonetheless, in the academic literature the discussion on

[106] See, eg, L March, *Radical Left Parties in Contemporary Europe* (Routledge2011); C Mudde, 'The Populist Zeitgeist' in (2004) 39 Government and Opposition 542.
[107] C Mudde, 'The Populist Zeitgeist' in (2004) 39 Government and Opposition 542, 543.

(radical) right-wing populist parties is more widely covered. Besides, as will be seen below, the radical right wing and the populists do share several common features. Therefore, while an attempt is made in the text to draw a clear distinction between the two phenomena, the discussion mostly focuses on their joint examination due to the outlined reasons.

The phenomena of extreme or radical right wing and populism play a big role in formulating the political debate in Europe. However, there is a certain 'conceptual vagueness' around these concepts in the academic literature, which also is a consequence of the 'often incorrect use of these concepts in the media, journalism, politics and political science'.[108] This leads to disagreements and differences in the definitions of these concepts in the literature which cannot be concealed and which only intensify the overall confusion. In other words, the literature does not provide a specific definition of these terms.

The complexity of defining the abovementioned concepts is not surprising, given that these phenomena are continuously evolving at a fast pace.[109] Nonetheless, it is possible to identify certain notions which are commonly used by scholars to define the concepts of radical right wing and populism, thereby describing the main features of the concepts in question regarding which a certain level of consensus in the academic literature exists.

2.3.1. Definitions

Definitions of radical right-wing parties vary across the academic literature, and there is no commonly agreed set of criteria which can be used to categorise such parties. Hainsworth argues that the family of radical right-wing parties can be described as 'a political family whose constituent parts exhibit certain things in common, but that also may be divided into subtypes'.[110] Nativism, authoritarianism and populism can be considered as common characteristics for radical right-wing parties.[111] Moreover, it is argued that the 'new' radical right-wing parties in Europe are characterised by a single-issue orientation and by a 'defensive

[108] Ibid.
[109] Ibid.
[110] P Hainsworth, *The Politics of the Extreme Right: From the Margins to the Mainstream* (Bloomsbury 2000) 4-5.
[111] C Mudde, 'The Relationship between Immigration and Nativism in Europe and North America' (Migration Policy Institute 2012) <https://www.migrationpolicy.org/sites/default/files/publications/Immigration-Nativism.pdf> accessed 17 June 2022.

agenda' aimed at retaining the status quo ante 'as it was before mass migration, Europeanization and globalization'.[112] Akkerman et al provide a more detailed context for the definition by setting the following characteristics as specific to radical right-wing parties:

1. Programmatic profiles which are not centrist,
2. Programmatic profiles which evolve around sociocultural (and not socioeconomic) issues, and
3. An anti-establishment outlook on politics.[113]

Populism, according to Riker, is based on two standpoints: '[w]hat the people, as a corporate entity, want, ought to be social policy' and they are 'free when their wishes are law'.[114] Rooduijn, summarising the definitions from various scholars, contends that most of them agree that the definition of populism should see it as a set of ideas which concern 'the antagonistic relationship between the corrupt elite and the virtuous people'.[115] Overall, the populist rhetoric focuses on 'the power of the common people in order to challenge the legitimacy of the current political establishment'.[116]

Other authors, such as Grabow and Hartleb, summarise the general definition of populism 'as a technique or a style of political mobilisation that is based both on the creation of an identity between a leader and the "ordinary people"', as well as 'a fundamental critique of the ostensibly distant political establishment that has forgotten or ignored the problems of the "ordinary people"'.[117] Following its creation, such an identity can be exploited by the populist parties in order to draw attention to the threats for that (newly-created) identity. At the same time, the authors prefer defining it as 'an exclusionary and discriminating mobilisation

[112] A Pelinka, 'Right-Wing Populism: Concept and Typology' in R Wodak, M KhosraviNik, B Mral (eds), *Right-Wing Populsim in Europe: Politics and Discourse* (Bloomsbury 2013) 10.
[113] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 6.
[114] W Riker, *Liberalism against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (New York: Waveland Press, 1982) 238.
[115] M Rooduijn, 'State of the Field: How to Study Populism and Adjacent Topics? A Plea for Both More and Less Focus' (2018) 58 European Journal of Political Research 362, 363.
[116] K Abt, S Rummens, 'Populism versus Democracy' (2007) 55 Political Studies 405.
[117] K Grabow, F Hartleb, 'Mapping Present-day Right-wing Populists' in K Grabow, F Hartleb (eds), *Exposing the Demagogues: Right-wing and National Populist Parties in Europe* (Centre for European Studies 2013) 17.

strategy' which is used for exploiting 'either latent prejudices against strangers or the deep disappointment among parts of the electorate with the performance of the political elite for their own interests': moreover, the parties do this with the aim of gaining the attention of the public and the support of voters.[118]

Based on the abovementioned, some main features of populism can be observed, such as nationalism (including the claim and the need to defend a nation), non-centrist profiles and support for anti-political establishment. As will be shown below, these features, explicitly or implicitly, often overlap with the characteristics attributed to populism and populist parties. The main characteristic of radical right-wing parties, however, would be the fact that they adopt extreme positions on a given issue, usually a sociocultural one and distinguish themselves from other parties based on that extreme stance.

Accepting the difficulty of labelling the concept of populism, Mudde provides, instead, a minimal definition of populism. According to the author, populism can be defined as 'a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which holds that politics should be a manifestation of 'the volonté générale (general will) of the people'.[119] Two main concepts can be derived from this definition to which the author is referring: 'the people' and 'the establishment'. Mudde argues that most of the definitions of populism share a consensus on the fact that populism always suggests a confrontation between 'the people' on one hand and 'the establishment' or 'the elite' on the other hand.[120] The term 'ideology', in its turn, can be described as 'a relatively coherent set of normative, empirical beliefs and thoughts relating to the problems of human nature, the development of history and social and political dynamics'.[121]

It should be noted that offering a definition of populism goes beyond the realm of this dissertation. Therefore, the thesis will simply make use of and focus on the main features of populism agreed upon in the literature discussed above. Importantly, populism draws a

[118] Ibid 20.
[119] C Mudde, 'The Populist Zeitgeist' (2004) 39 Government and Opposition 542–563, 543.
[120] Ibid 9.
[121] R Eatwell, A Wright *Contemporary Political Ideologies* (Continuum 1999).

distinction between 'the people' and 'the elite', which, combined with radical right-wing ideologies, can turn into a distinction between 'us' (a homogenous group of people in a given country) and 'them' (migrants entering a given country and becoming a threat to the homogeneity of the population). In addition, radical right-wing populist parties share several characteristics, such as the anti-establishment outlook.

In the European political context, the presence of populism has been most expressed through the far right (often characterised by a nationalist ideology and an anti-immigrant agenda).[122]

The literature on the issues of the radical right wing and populism often provides a joint discussion of these phenomena and they are often studied through one prism. Moreover, it has been argued that both populism and the extreme right 'defy certain principles and values of contemporary Western democracies', even though they do so in different ways.[123] As a result, often these terms are defined jointly. The separate definitions discussed above are, certainly, helpful in understanding the concepts in depth. However, given that in the literature they are often seen together and are also strongly intertwined, below additional definitions will be provided where the concepts have been addressed through a single prism. This will be useful also in the further discussion, where an explicitly dividing line is difficult to draw due to the strong link between the two phenomena.

Akkerman et al define the term radical right-wing populism as representing a group of parties which are on the right wing of the spectrum, inasmuch as they reject individual and social equality.[124] According to Betz, such parties 'are radical in their rejection of the established socio-cultural and socio-political system' and they are populist 'in their appeal to the common man and his allegedly superior common sense'.[125]

---

[122] P Taggart 'Populism and Representative Politics in Contemporary Europe' (2004) 9 Journal of Political Ideologies 269, 270; S van Kessel, *Populist parties in Europe. Agents of discontent?* (Palgrave Macmillan 2015), 2.

[123] J Jamin, 'Two Different Realities: Notes on Populism and the Extreme Right' in A Mammone, E Godin, B Jenkins (eds), *Varieties of Right-Wing Extremism in Europe* (Routledge 2013).

[124] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij, (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 5.

[125] HG Betz, *Radical Right-Wing Populism in Western Europe* (Palgrave Macmillan 1994) 4.

It should be noted that populism and the extreme right are at times seen as referring to different realities: while populism focuses on a discourse which glorifies 'the honest people against the corrupt elite', the extreme right 'postulates racial and cultural inequality between peoples and nations' and hence emphasises the need for extreme nationalism 'as a form of political organization that can protect the people from their enemies'.[126] In other words, 'populism rejects the elite and the institutions they represent while the extreme right rejects the principles, values and foundations of democracy'.[127] Right-wing populism can threaten the institutions which are the basis of democracy.[128] Nonetheless, it is noteworthy that when the strategies and techniques of populism are being set use by the radical right-wing parties, 'the two tendencies evolve together because they are complementary'.[129]

As can be seen from the discussion above, the definitions for radical right-wing parties and populism have several features in common. Most importantly, a mention of two terms, 'the people' and 'the elite' (or 'the establishment'), is shared among all those definitions. This indicates that these two notions are an inseparable part of both right-wing parties and populist parties and their ideologies. In order to grasp the full understanding of these phenomena, a brief examination of the two terms would be useful.

It is apparent that people-centrism and anti-elitism are at the core of radical right-wing populism,[130] which establishes an antagonistic relationship between the two[131] as a necessary fundament for the right-wing populist parties. 'The people' are seen as a homogenous entity, who possess special characteristics: they are 'pure and uncorrupted' and 'morally good or

[126] J Jamin, 'Two Different Realities: Notes on Populism and the Extreme Right' in A Mammone, E Godin, B Jenkins (eds), *Varieties of Right-Wing Extremism in Europe* (Routledge 2013).
[127] Ibid.
[128] C Crouch, 'Post-Democracy and Populism' (2019) 90 The Political Quarterly 124, 132-133.
[129] Ibid.
[130] M Rooduijn, 'The Nucleus of Populism: In Search of the Lowest Common Denominator' (2014) 49 Government and Opposition 573.
[131] E Laclau, *On Populist Reason* (Verso 2005); F Panizza 'Introduction: Populism and the Mirror of Democracy' in F Panizza (ed), *Populism and the Mirror of Democracy* (Verso 2005); M Rooduijn, 'State of the Field: How to Study Populism and Adjacent Topics? A Plea for Both More and Less Focus' (2018) 58 European Journal of Political Research 362, 364; J Mansbridge, S Macedo, 'Populism and Democratic Theory' (2019) 15 Annual Review of Law and Social Science 59, 60.

oppressed', whereas 'the elite' is corrupt or otherwise morally in the wrong.[132] Nonetheless, as explained by Taggart, 'the people' does not usually refer to all the citizens of the country 'but rather an imagined 'heartland' of 'a virtuous and unified population'.[133] The vagueness attached to the concept of 'the people' facilitates the conceptual exclusion of immigrants or foreigners. After depriving immigrants from the possibility to be part of 'the people', deeming immigrants a threat becomes inevitable, and the right-wing populist parties are then ready to 'own' the 'problem of immigration' in the political discourse.

The literature on the concept of populism does provide a wide coverage and discussion of the term 'the people'. A discussion of the concept of 'the elite', on the other hand, as referred to in the political rhetoric of populist leaders or parties, is infrequent. Nevertheless, it is possible to identify certain characteristics of 'the elite'. For instance, Jamin holds that the features of the elite in the populist discourse 'are exactly opposite to the characteristics of the people': particularly, the elite are in the minority, are heterogenous and lazy (compared to the majority, homogeneity and hardworking nature of the people). That is to say, the elite will represent approximately a handful of individuals and this number will always be significantly smaller than the majority group. In addition, the exact meaning of the elite 'can change radically from one discourse to another, depending on who is the originator and who it is addressed to'.[134]

By drawing a line between the people on one hand and the elite or the (political) establishment on the other, populists manage to create a division between 'us' and 'them', a struggle between these groups and thereby manage to direct the fear and resentment of the people towards groups and institutions that they deem responsible.[135] Such a division is usually

[132] The features characteristic of 'the people' in the right-wing populist discourse are discussed widely in the literature. See, eg, S Otjes, T Louwerse, 'Populists in Parliament: Comparing Left-Wing and Right-Wing Populism in the Netherlands' (2015) 63 Political Studies 60, 61; M Rooduijn, 'The Nucleus of Populism: In Search of the Lowest Common Denominator' (2014) 49 Government and Opposition 57; C Mudde, 'The Populist Zeitgeist' (2004) 39 Government and Opposition 542–563, 543; T Akkerman, 'Populism and Democracy: Challenge or Pathology?' (2003) 38 Acta Politica 147; J-W Müller, 'The People Must Be Extracted from within the People: Reflections on Populism' (2014) 21 Constellations 483; S Rummens, 'Populism as a Threat to Liberal Democracy' in CR Kaltwasser, P Taggart, P Ochoa Espejo, P Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017).

[133] P Taggart, *Populism* (Open University Press 2000).

[134] Ibid.

[135] R Singh, *The Farrakhan Phenomenon: Race, Reaction, and the Paranoid Style in American Politics* (Georgetown University Press 1997) 184.

criticised and the right-wing populist parties are condemned for establishing a distinction between 'us' and 'them'. Mouffe argues, however, that populist parties have an appeal to the voters, as they provide collective forms of identification around the concept of the people, because 'politics always consists' in the creation of the notions of 'us' and 'them', so the creation of national identities is inevitable.[136] The void, which was created by the lack of collective identities offered by the traditional (ie mainstream) parties and by the 'incapacity of established democratic parties to put forward significant alternatives' to the anti-establishment rhetoric, is then filled by the right-wing populist parties.[137] In other words, it can be argued that what populist parties do is presenting to voters a form of identification, which is a necessity in politics. Thus, right-wing populist parties make use of the inevitable distinction between 'us' and 'them', claim ownership of the issue of migration and offer a 'solution' to the problems created by 'the elite' or 'the establishment'.

Building on the antagonism between 'the people' and 'the elite', right-wing populism claims to distinguish or protect 'the people' from threats.[138] This binary construction is particularly apparent in relation to the issue of migration, which 'is a core issue of radical right parties'.[139] When populism is blended with right-wing ideology, 'foreigners' become the primary recipient of criticism and potentially, even the primary enemy.[140] Right-wing populist parties see immigration as more than simply a phenomenon creating economic competition between the citizens and the immigrants but rather as a threat 'against the presumed (constructed) identity of the people and their traditional values'.[141] It is in this context that the notion of 'us' versus 'them' is used very effectively.

---

[136] C Mouffe, 'The "End of Politics" and the Challenge of Right-wing Populism' in F Panizza (ed), *Populism and the Mirror of Democracy* (Verso 2005) 55.
[137] C Mouffe, *On the Political* (Routledge 2005) 69.
[138] M Reisigl, R Wodak, *Discourse and Discrimination: Rhetorics of Antisemitism* (Routledge 2001).
[139] W van der Brug, J Berkhout, 'The Effect of Associative Issue Ownership on Parties' Presence in the News Media' (2015) 38 West European Politics 869, 873.
[140] C Crouch, 'Post-Democracy and Populism' (2019) 90 The Political Quarterly 124, 132; Y Stavrakakis, G Katsambekis, N Nikisianis, A Kioupkiolis, T Siomos, 'Extreme Right-Wing Populism in Europe: Revisiting a Reified Association' (2017) 14 Critical Discourse Studies 420, 15.
[141] T Greven, 'The Rise of Right-wing Populism in Europe and the United States: A Comparative Perspective' (Friedrich-Ebert-Stiftung, Berlin, May 2016) 5.

In light of intra-EU migration, these notions would revolve around EU nationals from other MSs, thereby turning other EU nationals in the host MSs into 'them', as compared to 'us'. Such a division is more likely to be promoted by an extreme right-wing populist party, since they do tend to focus on the issue of migration, as will be shown below. This division is, of course, likely to create tendencies in the state (both on the political and social levels) which are directed against intra-EU migration and which, in their turn, can lead to the discouragement and demotion of the free movement of persons, as well as to various restrictions of the rights of other EU nationals in that state, including rights on access to social benefits.

Moreover, this differentiation between EU nationals can create anti-EU sentiments and intensify the pre-existing feelings of Euroscepticism. These issues will be touched upon in more detail further in the text. However, it is worth mentioning here that if other MS nationals are seen as a contrasting group of people ('them') compared to the nationals of the same MS ('us'), the significance of the Union and the idea of EU citizenship can be compromised. All of this would certainly be fruitful soil for a rise in discrimination on the grounds of nationality and hence an undermining of the fundamental principle of non-discrimination.

2.3.2. Mainstreaming and Radical Right-Wing Populist Parties

As it was explained above, radical right-wing populist parties tend to adopt extreme positions on certain issues. This comes in contrast with the strategies that mainstream parties follow. A discussion of the features of mainstream parties, as well as the difference between those and radical right-wing populist parties would provide further insight into the strategies and ideologies of the latter.

Mainstream parties are parties which are not at the extreme ends of the left-centre-right political spectrum. While the term is used widely among scholars, there are no specific definitions available. Parties which 'usually lead or participate in national cabinets' and which refrain from adopting 'an overtly critical stance about established national political elites' can

be deemed mainstream.[142] A monumental work on this issue is provided by Akkerman, De Lange and Rooduij. Summarising some of the main features agreed upon by scholars, they look at the concept of mainstream parties as referring to:

1. Parties which 'have a centrist position on the classic left-right scale' and ascribe 'importance to socioeconomic issues', in contrast to radical parties, and/or
2. established parties, defined as such 'on the basis of their loyalty to the political system', thereby contrasted to those which are anti-establishment. [143]

Thus, the term mainstream 'can encompass programmatic and positional centrism, the high salience of socioeconomic issues, and behaviour and stances that show commitment to the principles of liberal democracy and to the formal and informal rules of the political game'.[144]

It can be derived from these definitions that the main difference between radical right-wing populist parties and mainstream parties is the lack of extremity in the political discourse of the latter. While radical right-wing populist parties tend to take extreme positions on certain issues, mainstream parties tend to focus on less extreme ideologies. Wagner suggests that parties have vote-seeking incentives for emphasising extreme positions on a given issue.[145] In other words, the necessity of gaining more support from voters is a strong reason for parties to try and distinguish themselves from others through the adoption of extreme viewpoints. One of the strategies for ensuring a differentiation between themselves and other parties is taking up a position which is 'relatively extreme compared to other parties', when such extreme stance can increase its distinctiveness and their public profile: this explains why the far-right parties tend to get attention, for instance, 'through controversial statements on immigration'.[146]

[142] E Hernández, 'Democratic Discontent and Support for Mainstream and Challenger Parties: Democratic Protest Voting' (2018) 19 European Union Politics 458, 468-467.
[143] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 6.
[144] Ibid.
[145] M Wagner, 'When Do Parties Emphasise Extreme Positions? How Strategic Incentives for Policy Differentiation Influence Issue Importance' (2012) 51 European Journal of Political Research 64, 64.
[146] Ibid 68.

In addition, the use of polarising positions is one of the ways for parties to use the salience of a given issue.[147]

Taking an extreme stance on a given issue is a means for parties to stand out from the others in the political scene and to claim issue ownership, in order to ensure that the raising of that problem (and, consequently, the solution) is being associated with that party, bringing them more support from the electorate. As Vasilopoulou sums up, one of the reasons why parties adopt a polarising position on a given issue compared to other (mainstream) parties is to allow them 'to ultimately claim ownership of these specific issues in the eyes of the voters and potentially attract new voters'.[148] Parties with certain features have particular incentives to emphasise their differences with other parties: smaller party size and the need to compete in a large party system are among those characteristics.[149]

Issue ownership, along with the salience of an issue in the political discussion, is 'a key determinant' of the voting trends.[150] As indicated by Petrocik, when casting their ballot, voters take into consideration the credibility of a given party to advocate for the issue they claim to 'own'.[151] Right-wing populist parties seem to have issue ownership of the topic of migration, therefore emphasising it and putting it on the political agenda is a good strategy for attracting voters. Not surprisingly, '[H]igher rates of immigration might cause radical right party success',[152] giving such parties an opportunity to add more salience to the issue they 'own' and to push forward their agenda as the solution to this problem.

---

[147] C de Vries, SB Hobolt, 'When Dimensions Collide: The Electoral Success of Issue Entrepreneurs' (2012) 13 European Union Politics 246, 248.

[148] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 122; JR Petrocik, 'Issue Ownership in Presidential Elections, with a 1980 Case Study' (1996) 40 American Journal of Political Science 825; M van de Wardt, C de Vries, SB Hobolt 'Exploring the Cracks: Wedge Issues in Multiparty Competition' (2014) 76 Journal of Politics 986.

[149] M Wagner, 'When Do Parties Emphasise Extreme Positions? How Strategic Incentives for Policy Differentiation Influence Issue Importance' (2012) 51 European Journal of Political Research 64, 70-71.

[150] S Walgrave, J Lefevere, M Nuytemans, 'Issue Ownership Stability and Change: How Political Parties Claim and Maintain Issues Through Media Appearances' (2009) 26 Political Communication 153, 153.

[151] J Petrocik, 'Issue Ownership in Presidential Elections, with a 1980 Case Study' (1996) 40 American Journal of Political Science 825.

[152] T Abou-Chadi, 'Niche Party Success and Mainstream Party Policy Shifts – How Green and Radical Right Parties Differ in Their Impact' (2016) 46 British Journal of Political Science 417, 426.

In the discussion on mainstream parties, of particular interest is the notion of 'mainstreaming', the phenomenon when radical right- or left-wing parties with time change and are brought into the mainstream or become more similar to mainstream parties.[153] In other words, 'a process of convergence between mainstream parties, on the one hand, and radical parties, on the other hand' takes place.[154] Mainstreaming is a process through which 'parties/actors, discourses and/or attitudes move from marginal positions on the political spectrum or public sphere to more central ones, shifting what is deemed to be acceptable or legitimate in political, media and public circles and contexts.'[155] This also means that mainstream parties can radicalise when they are put under pressure to maximise their support among the voters, especially after the electoral success of radical right-wing populist parties.

The mainstreaming of radical right-wing populist parties can occur as a consequence of the pursuit of the office, as well as of experience of being in office.[156] An example of this is how the participation in the government of the right-wing populist Freedom Party of Austria led them to being accepted 'in the "club"', but at the same time 'certainly "tamed"' them.[157] In other words, holding office can force the radical parties to change their attitude towards certain issues and take up less extreme stance.

This means that such parties might adopt more mainstream positions in order to increase their voting share and to enter the government or with the aim of reaching a compromise on certain issues, once already part of the government. However, external factors can also have an impact on these parties and be the starting point for the mainstreaming. For instance, the far right parties saw a rise in the 21st century, profiting electorally and politically 'from three

---

[153] B Moffitt, 'How Do Mainstream Parties 'Become' Mainstream, and Pariah Parties 'Become' Pariahs? Conceptualizing the Processes of Mainstreaming and Pariahing in the Labelling of Political Parties' (2022) 57 Government and Opposition 385, 390.

[154] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 6.

[155] K Brown, A Mondon, A Winter, 'The Far Right, the Mainstream and Mainstreaming: Towards a Heuristic Framework' (2021) Journal of Political Ideologies, published online <https://www.tandfonline.com/doi/full/10.1080/13569317.2021.1949829> accessed 29 June 2022, 9.

[156] Ibid 14-15.

[157] F Fallend, 'Populism in Government: The Case of Austria (2000–2007)' in C Mudde, CR Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012) 135.

"crises": the terrorist attacks of September 11, 2001 (and beyond), the Great Recession of 2008, and the "refugee crisis" of 2015'.[158] According to Mudde, this is the period when the mainstreaming of the far right took place on a larger scale and nowadays 'in more and more countries, populist radical right parties and politicians' are being seen as acceptable for coalitions 'by mainstream right, and sometimes even left, parties'.[159] This once again indicates that such parties have been becoming more significant with time. Consequently, their ideologies are beginning to have more influence and their positions are being further taken into consideration in the development of various policies.

Polyakova argues that another factor contributing to the mainstreaming of radical right-wing parties has been the slower response of mainstream political parties to the debate of a given issue. This, in parallel with the co-optation by the radical right parties of the immigration issue, has created sufficient basis for radical right parties to enter the mainstream politics.[160]

Generally, mainstream parties 'may have an incentive to de-emphasise' the issue of migration and avoid drawing attention to it,[161] compared to right-wing populist parties which highlight migration as a significant threat. As discussed above, they tend to claim ownership of the issue of migration and an anti-migration stance is one of the main features of such parties.

It is often noted that the appeal of right-wing populist parties 'diminishes once they become part of the government'.[162] Several radical right-wing populist parties across Europe have, indeed, managed to take up office. However 'entrance into office potentially has high costs in terms of policy and votes' for them: it can act as an incentive for parties to move into the mainstream, which, in its turn, can result in a loss in the number of supporters.[163] Thus, while being elected is certainly a goal any party aims for, for radical right-wing populist parties

[158] C Mudde, *The Far Right Today* (Wiley 2019).
[159] Ibid.
[160] A Polyakova, *The Dark Side of European Integration: Social Foundations and Cultural Determinants of the Rise of Radical Right Movements in Contemporary Europe* (Columbia University Press 2015) 64.
[161] W van der Brug, J Berkhout, 'The Effect of Associative Issue Ownership on Parties' Presence in the News Media' (2015) 38 West European Politics 869, 870, 881.
[162] C Mouffe, 'The "End of Politics" and the Challenge of Right-wing Populism' in F Panizza (ed), *Populism and the Mirror of Democracy* (Verso 2005) 70.
[163] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 9.

experience in the office may launch the process of mainstreaming and may result in the adoption of less extreme views, which can lead to a loss of votes in the next elections, as the voters prefer them exactly for their extreme viewpoints. Therefore, although mainstreaming of radical right-wing populist parties means they change their position on some matters, adopting a significantly different stance on certain issues is a more unlikely scenario. Particularly, this comes into play with regard to those issues regarding which the radical right-wing populist parties take an alternative approach and which distinguishes them from other parties.

Thus, if a radical right-wing populist party, undergoing a process of mainstreaming, holds a very strong negative position on the issue of intra-EU migration, it is unlikely to change that position abruptly, as it may come at the cost of losing the support of the electorate. These parties may change their position on issues considered less significant by them and by their voters, but it is rather unlikely that they will compromise on matters which are central to their ideology. In other words, rather than compromising on 'core issues like immigration and integration' during their negotiations with their coalition partners, these parties will instead 'try to shift the main policy costs to socioeconomic issues'.[164] Since, as explained below, the issues of migration and EU are usually at the core of the ideologies of the radical right-wing populist party family, it can be argued that they are less likely to change their extreme stance on these topics, even if other aspects of their ideology may shift to some extent as a result of mainstreaming.

2.3.3. Euroscepticism and Anti-Migration

As briefly mentioned earlier, radical right-wing parties tend to follow ideologies which are promoting a stance against migration, as well as against the EU or at the very least, some aspects of its policies or institutions. Below, a further examination of this issue is provided.

As stated by Mudde and summarised by Akkerman et al, radical right-wing parties which are at the same time populist adhere to an ideology that includes not only populist but also

[164] Ibid 16; S Alonso, L Cabeza, B Gomez, 'Parties' Electoral Strategies in a Two-Dimensional Political Space: Evidence from Spain and Great Britain' (2015) 21 Party Politics 851.

authoritarian and nativist elements.[165] Nativism is an ideology which holds that 'states should be inhabited exclusively by members of the native group ('the nation') and that non-native elements (persons and ideas) are fundamentally threatening to the homogenous nation-state'.[166] The establishment and promotion of such ideas, as a matter of fact, easily leads to anti-migration, as well as anti-EU stances. Overall, there is a general acceptance of the fact that 'the radical right party family has been one of the main opponents of European unification' and that some radical right parties have even openly called for their country's exit from the EU.[167]

Another common feature of radical right-wing populist parties is nationalism. The concept of nationalism is not fully agreed upon by the right-wing parties themselves and it is 'at times one of the elements that hinder collaboration between the various extreme-right parties in Europe': an ethnic-nationalist party, such as the Belgian Vlaams Blok, would sometimes find it difficult to collaborate with a state-nationalist party, such as the French Front National.[168]

Even though radical right-wing parties share several common aspects, they still can have dissimilar positions on European integration. Despite their similarities, there can be a large variation among the specific ideologies or aims of each radical right party in general and in their anti-EU argumentation in particular. Some of these parties have called for complete withdrawal of their country's membership from the EU (eg, British National Party, UKIP, the French Front National), whereas others support some aspects of their country's EU membership and call on amendments to those (eg, Golden Dawn in Greece, Hungarian Jobbik, Slovak National Party).[169] Thus, the radical right stance on European integration is full of

[165] C Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007); T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 5.
[166] C Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007).
[167] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 122.
[168] J Jamin, 'Two Different Realities: Notes on Populism and the Extreme Right' in A Mammone, E Godin, B Jenkins (eds), *Varieties of Right-Wing Extremism in Europe* (Routledge 2013).
[169] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 124-125.

variation and not all radical right parties put forward extreme Eurosceptic positions, with some even having a somewhat favourable EU stance on certain policies.[170]

Nevertheless, it can be argued that, in general, no radical right parties show enthusiastic and full support for the process of European integration. One of the aspects that often comes up in their rhetoric is the criticism addressed to the EU as a supranational institution which intervenes with the sovereignty of its MSs. This is where another common feature among the radical right-wing parties come to surface. Regardless of their specificities, the issue of sovereignty is particularly emphasised in the discourse of radical right-wing parties, and they often tend to formulate their anti-EU argument from a sovereignty perspective, since the multinationalism and multilevel institutional structure of the Union 'go against the very premise of radical right ideology, nationalism', a concept closely linked with the idea of sovereignty.[171] This comes as no surprise, given that the loss of sovereignty for them implies the loss of control over decision-making on various aspects of social and political life, including the issue of migration. Leibfried and Pierson argue that the development, according to which EU MSs have had to sacrifice some of the control over deciding who can be given social benefits and who cannot, 'has turned EU Member States "semi-sovereign" regarding their social policy' through several dimensions and, inter alia, due to the implication that 'access to social benefits and entitlement can no longer be limited to their own citizens'.[172] Such a situation can result in certain 'social unease and popular perception of European integration as an elite project'.[173] This can certainly serve as a good basis for the advancement of the ideologies of radical right-wing populist parties. One of the most successful right-wing populist parties in the EU, the Freedom Party of Austria (FPÖ), was classified as such

[170] Ibid 127, 131.
[171] Ibid 124.
[172] S Leibfried, P Pierson, *European Social Policy between Fragmentation and Integration* (The Brookings Institution 1995).
[173] JE Dølvik, J Visser, 'Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?' (2009) 40 Industrial Relations Journal 513, 526.

particularly after 1986, the election of Jörg Haider as the party chairman, since he actively made use of the concept popular sovereignty.[174]

In other words, radical right-wing populist parties tend to see the Union as reducing the sovereignty of the states, thereby taking away states' ability to make decisions fully by themselves. They often argue that giving away such powers has particularly significant outcomes when it is related to certain issues. Of course, one of the main issues they consider is migration, as this is one of the matters on which they tend to have a rather extreme stance, often disagreeing with the migration policy both on national and on EU level. Moreover, in this way these parties tend to undermine the advantages and benefits which a MS can obtain from being part of the European project.

Thus, the characteristic of radical right-wing populist parties, according to which they 'take radical, non-centrist positions' on certain issues which are essential for their ideology, covers also the topics of European integration and immigration, ie such parties first and foremost compete on the issues of the EU and the influx of immigrants and their subsequent societal integration.[175] In other words, radical right-wing populist parties often adopt an extreme attitude against the EU in general and the migration issues in particular, criticising the formation of the Union itself and/or certain ideas it promotes (inter alia, the free movement of persons). Such an attitude is often referred to by the term 'Euroscepticism'.

2.3.3.1. Euroscepticism

Given that 'nationalism stands at the core of the ideology of the radical right-wing party family' as was shown above, Euroscepticism is another expected feature of their political programme, inasmuch as cultural diversity along with supranational decision-making which are endorsed by the EU 'run counter to the radical right's mission of defending the nation'.[176] Euroscepticism is a term with its historical roots in the UK, which later spread and established

[174] F Fallend, 'Populism in Government: The Case of Austria (2000–2007)' in C Mudde, CR Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012) 117-118.
[175] T Akkerman, S de Lange, M Rooduij, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in T Akkerman, S de Lange, M Rooduij (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016) 8.
[176] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 122.

itself in other countries, especially after the Maastricht Treaty of 1992. It is a concept widely used in the scholarship which 'describes negative attitudes towards European integration'.[177] Taggart defines Euroscepticism as 'the idea of contingent or qualified opposition, as well as incorporating outright and unqualified opposition to the process of European integration'.[178]

In her landmark work covering Euroscepticism, Vasilopoulou notes that the definition provided by Taggart was later refined and a differentiation between hard and soft Euroscepticism was brought about.[179] According to Taggart and as summarised by Vasilopoulou, hard Euroscepticism is the 'principled opposition to the EU and European integration'. It also tends to support a given country's withdrawal from the EU. Soft Euroscepticism, on the other hand, 'relates to concerns over one or more EU policy areas, which lead to contingent or qualified opposition to the EU'.[180] The soft Eurosceptics, referred to simply as Eurosceptics by Vasilopoulou, tend to be pessimistic about the EU project but in favour of the ideas underlying the European integration. Meanwhile, the hard Eurosceptics, otherwise referred to as Eurorejects, tend to oppose both concepts.[181]

Furthermore, basing her definitions on recognised scholarship on the issue, Vasilopoulou has also conceptualised the nature of positions of the radical right-wing parties on the EU, as well as has observed their response to the issue. The author has categorised those positions in the following groups:

1. Rejectionist Eurosceptics, who condemn the multilateral cooperation, criticise EU policy and are against further European integration;
2. Conditional Eurosceptics, who, while being in favour of the idea of European cooperation, are opposed to EU policy and institutional practice; and

---

[177] S Vasiliipoulou, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223, 224-225.
[178] P Taggart, 'A Touchstone of Dissent: Euroscepticism in Contemporary Western European Party Systems' (1998) 33 European Journal of Political Research 363.
[179] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 123; A Szczerbiak, P Taggart, *Opposing Europe? The Comparative Party Politics of Euroscepticism* (Oxford University Press 2008).
[180] Ibid.
[181] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 124.

3. Compromising Eurosceptics, who accept the idea of EU cooperation but are against further European integration.[182]

This shows that there can be a wide variation among radical right-wing populist parties, depending on which aspects of the EU they disagree with. At the same time, it becomes clearer that, in general, radical right-wing populist parties tend to follow anti-EU ideologies and oppose multiple aspects of the EU policies and/or institutions, albeit to a different extent. Overall, Euroscepticism can be used by issue entrepreneur parties to claim ownership of the issue, thereby increasing their support among the voters.

It is not surprising that Euroscepticism may be found to have more support among radical right-wing populist parties. As was noted above, radical right-wing populist parties adhere to the ideologies of nativism and nationalism, with a strong focus on migration and, thus, free movement. However, it should also be noted that since the economic crisis which occurred in 2008, Eurosceptic attitudes 'have proliferated among mainstream political parties as well'[183]. This argument, in compilation with the phenomenon of mainstreaming, may be used to argue that Euroscepticism has been growing throughout recent years, since radical right-wing parties have been gaining more popularity and mainstream parties have also started following certain Eurosceptic concepts at times. Mainstream parties often need to adopt stricter positions on issues such as migration and European integration, under the pressure from radical right-wing populist parties, as they aim to maintain their voters' support. In this way, the phenomenon of Euroscepticism is growing and developing further on the social and political scenes of EU MSs.

Another contributing issue is that mainstream parties do not have many incentives to politicise EU-related themes, as emphasising a stance on a new matter might cost them their reputation. On the other hand, niche parties, which often include also radical right party family members, do have 'strong incentives to emphasize extreme positions on the EU issue', as this can bring

[182] Ibid 128-129; S Vasiliipoulou, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223, 232-235.
[183] A Polyakova, *The Dark Side of European Integration: Social Foundations and Cultural Determinants of the Rise of Radical Right Movements in Contemporary Europe* (Columbia University Press 2015) 65.

about advantages on the electoral part.[184] Thus, the so-called issue entrepreneurs have the possibility to exploit and fill in the gap which is left as a result of the lack of mainstream party polarisation,[185] whereas in the meantime 'Euroskepticism comes at no ideological cost' for radical right-wing parties and also promises high electoral returns.[186] This means that radical right-wing parties can exploit the fact that mainstream parties are not addressing the issues related to the EU and are not sufficiently politicising them. In this case radical right-wing parties can gain even further support by drawing attention to the lack of response from mainstream parties.

The main conclusion that can be reached from the above discussion is that regardless of their specific differences, radical right-wing parties tend to be doubtful of the benefits of the EU membership, as well as of notions connected to it (eg, intra-EU migration). They consider the supranational institution to be taking away sovereignty and decision-making on important aspects, including those on migration. Consequently, these parties have anti-EU sentiments and are not very enthusiastic about the European integration. Thus, Euroscepticism is a common characteristic of theirs, even though for different parties the scepticism is present to different degrees. It is clear that as radical right-wing parties are starting to hold office and gain more popularity and support among voters, their views are being implemented further at policy-making level.

Furthermore, the fact that the salience of EU-related issues has been steadily on the rise in the programmatic agendas of the radical right parties, along with the rise in the number of parties focusing on the EU, certainly helps these parties in promoting their ideology. This can be seen as an indication that the radical right 'is to some extent responsible for the rising levels of public Euroscepticism across the EU'.[187] Moreover, their positions are 'increasingly becoming harder and more extreme' and these parties 'have been strengthening their emphasis on the EU

[184] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 126.
[185] C de Vries, SB Hobolt, 'When Dimensions Collide: The Electoral Success of Issue Entrepreneurs' (2012) 13 European Union Politics 246.
[186] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 126.
[187] Ibid 133-134; S Vasiliipoulou, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223, 232-235.

issue over time'.[188] As 'populism can be influenced by regional and international context' and the rise of populism in one country is partly related to similar developments in neighbouring countries',[189] it is not surprising that the Brexit referendum in the UK contributed to some radical right parties across the EU to call for EU referendums in their respective countries.[190] This indicates that certain parties are starting to take tougher positions on the Union and 'the question of EU membership is becoming more prominent in their programmatic agenda'.[191] Such strategies of issue entrepreneur parties contribute to the 'increasing success of the radical right' and can certainly have implications for the future of the EU.[192] Thus, from the specific perspective of the free movement of persons, their Eurosceptic views can lead to stricter rules on intra-EU migration.

2.3.3.2. Anti-Migration

As mentioned earlier, migration is one of the issues which is often on the agenda of radical right-wing populist parties. They tend to have rather distrustful attitudes towards the way the issue is regulated and migration-related policies are established both on national and on EU levels. De Brug and Fennema correctly stress that immigration is at the core of the radical right family parties and is their 'unique selling point'.[193] They have even chosen to call the right-wing populist parties 'anti-immigrant parties' due to their strict and extreme stance on

---

[188] S Vasiliipoulou, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223, 232-235; S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 136.

[189] C Mudde, CR Kaltwasser, 'Populism: Corrective and Threat to Democracy' in C Mudde, CR Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012) 218.

[190] In the Netherlands, the leader of the Freedom Party made a promise in 2016, shortly after the British referendum, that a similar referendum on the EU membership would be a key component of the next year's general elections. See, eg, 'Dutch far-right MP to push "Nexit" despite Brexit woes' *Euractiv* (8 July 2016) <https://www.euractiv.com/section/future-eu/news/dutch-far-right-mp-to-push-nexit-despite-brexit-woes/> accessed 12 July 2022. In France, National Front's Marine Le Pen had made a promise of doing the same if elected President of the French Republic. See, eg, V Walt, 'France's Marine Le Pen on Brexit: "This Is the Beginning of the End of the European Union"' *Time* (28 June 2016) <https://time.com/4386695/brexit-france-q-and-a-marine-le-pen-national-front/> accessed 12 July 2022. However, she put aside this claim for the latest elections in 2022.

[191] S Vasilopoulou, 'The Radical Right and Euroskepticism' in J Rydgren (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018) 125-126.

[192] Ibid 136; S Vasiliipoulou, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223, 232-235.

[193] W Van Der Brug, M Fennema, 'What Causes People to Vote for Radical Right Party? A Review of Recent Work' (2007) 19 International Journal of Public Opinion Research 474, 474.

the issue.[194] As explained above, niche parties, such as radical right-wing populist parties, often provide an extreme position on a given issue, which is one of the ways for them to distinguish themselves from mainstream parties, and migration is one of such matters. It is a common feature of radical right-wing populist parties to question the policy on migration that is being implemented and followed by a given state. Moreover, once they start holding office, migration is one of the first topics on which the parties aim to promote their view and set stricter rules.

Research has shown that while economic decline is often associated with the rise of extremist political parties, ie in a worse performing economy extreme parties (including radical right-wing parties) gain more support as compared to other periods, however 'high immigration and political instability matter more than economic factors' for increasing support of voters for radical right parties. This also suggests that individuals may be turning to radical right-wing parties 'when they grow suspicious of others, including, perhaps, political representatives'.[195] In other words, a high immigration rate provides fruitful soil for right-wing parties to exploit the issue of migration, thanks to which they gain higher support from the voters.

The issue of migration certainly comes up in the rhetoric of most of the right-wing populist parties. Often by referring to 'the people', they draw attention to internal ('the elite') and external (migrants) threats.

While this does not address intra-EU migration specifically, it should be noted that radical right-wing populist parties do view and portray any migration as a threat or a phenomenon with negative associations at the very least. Considering that they tend to adopt Eurosceptic positions too, intra-EU migration would be another issue which they would oppose and on which they would adopt a strict stance. This was successfully used by the Freedom Party of Austria: the issue of immigration and the anti-EU agitation became part of the profile of the party in the beginning of the 1990s, and it started upholding the fight against 'the dangers of

[194] W Van Der Brug, M Fennema, 'Why Some Anti-Immigrant Parties Fail and Others Succeed: A Two-Step Model of Aggregate Electoral Support' (2005) 38 Comparative Political Studies 537.
[195] A Polyakova, *The Dark Side of European Integration: Social Foundations and Cultural Determinants of the Rise of Radical Right Movements in Contemporary Europe* (Columbia University Press 2015) 64.

globalization, European integration, and immigration'.[196] The latter was particularly used at regional (or provincial) level, when Jörg Haider mobilised 'the claims of the Slovene minority to bilingual local signs' in Carinthia (in Austria) in the 1999 and 2004 general elections.

Thus, an example of the rise of radical right-wing populism can be seen in the case of Austria. Walterskirchen studied the dynamics in this MS particularly in detail. As explained by the author, due to its geographical location, as well as its high wage differentials with the neighbouring new MSs (Czechia, Slovakia, Hungary and Slovenia), Austria saw 'not only a considerable inflow of migrants in general, but more particularly an inflow of cross-border commuters'.[197] In addition to this, Austria had 'the largest proportion of workers from the new member states in its labour force' in 2007 (about 2%).[198] As in the early 1990s in Austria the inflow of foreign workers was liberalised for an approximate period of 2 years,[199] a strong rise in nationalism was observed and 'the percentage of the vote for anti-foreigner parties increased to about 20 per cent'.[200]

This example of Austria may indicate that a high level of intra-EU migration can lead to the development of nationalism and therefore of populism and prevalence of right-wing parties in the election results.

Thus, while intra-EU migration assumes that other MS nationals can move and reside freely within the territory of all MSs (as set out in Articles 20 and 21 TFEU), the nativist and nationalist elements present in the ideologies of radical right-wing populist parties, if implemented at a policy development level, can potentially deem other MS nationals as non-native elements and threatening to the given MS. This would certainly render the

[196] F Fallend, 'Populism in Government: The Case of Austria (2000–2007)' in C Mudde, CR Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012) 118.
[197] E Walterskirchen, 'The Dimensions and Effects of EU Labour Migration in Austria' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009) 149-150.
[198] Ibid 149.
[199] To be sure, this does not refer to Austria as part of the EU, since Austria joined only in 1995. Rather, it refers to Austria's own policies towards non-Austrian nationals as an example of the interconnection between the inflow of migrants and the rise in nationalism in the country.
[200] E Walterskirchen, 'The Dimensions and Effects of EU Labour Migration in Austria' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009) 163-164.

implementation of the mentioned Treaty articles ineffective and may lead to the undermining of the concept of non-discrimination among EU nationals.

3. The UK as a Case Study

The UK was rather vocal in its dissatisfaction with the EU prior to the Brexit referendum. The public discontent with the intra-EU migration and access of other MS nationals to social benefits in the UK, triggered by the frustration with the EU in the political scene and efficiently manoeuvred by the right-wing populist parties, made the UK the unique case of the first ever country to withdraw from the EU in the history of the European integration. Since, as argued by Amtenbrink, the entirety of 'these wider contextual parts could well have induced the systemic spasm that has profoundly altered the legal trajectory of citizenship',[201] the analysis of the UK is crucial to illustrate the context generated for the developments of the CJEU case law.

3.1. EU-UK Relations in light of Intra-EU Migration and the 2004 Enlargement

The dynamics of intra-EU migration in light of the 2004 enlargement are tightly intertwined with the Brexit process, as this Section aims to demonstrate. The decision to leave the EU did not happen overnight. As Barnard states, 'the seeds of the Leave vote had been sown years before the start of the referendum campaign',[202] and intra-EU migration was a crucial issue in this situation. With intra-EU migration being one of the cores of European integration, it is important to examine the development of the discussion on and attitudes towards intra-EU migration in the UK, as well as certain aspects of its regulation.

It has been argued that restricting immigration was a goal of significant importance for the Leave campaign: targeted messages about immigration 'straining infrastructure and public services' and the threat of a continuous uncontrolled immigration from both current and

[201] F Amtenbrink, 'Europe in times of economic crisis: Bringing Europe's citizens closer to one another?' in M Dougan, N Nic Shuibhne, E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012).
[202] C Barnard, '(B)Remains of the Day: Brexit and EU Social Policy' in F Vandenbroucke, C Barnard, G de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 480.

prospective EU members were disseminated, '[d]eliberately mixing EU migration and the refugee crisis'.[203] Not surprisingly, immigration was one of the main reasons for the vote of the British public to leave the EU.[204] The concerns about the lack of control over migration were perpetuated by the British public, politicians and media rather strongly. Not surprisingly, access to social benefits by other MS nationals in the UK was also a crucial cause for concern. in light of the Brexit referendum. Eventually, the potential increased migration patterns that would follow the 2004 enlargement were often perceived as a threat for the British workers.

3.1.1. Intra-EU Migration Landscape in the UK

Historically, the UK has had a distinctive set of immigration patterns: the flows into the UK from its former colonies had been larger than those from Europe, especially when compared to the flows into some other European countries.[205] The European immigration into the UK, instead, started growing steadily since the 1980s. So did the salience of the issue, and immigration became a particularly salient political issue following the Eastern enlargement of 2004.[206]

Despite the controversies and concerns over the potential increase of intra-EU migration in the UK, there were also positive attitudes towards the expansion of the EU and willingness to see the benefits the UK can gain from it. It has been argued that these positive attitudes were mostly due to the UK seeing the enlargement 'as a useful countervailing power against

[203] S Gietel-Basten, 'Why Brexit? The Toxic Mix of Immigration and Austerity' (2016) 42 Population and Development Review 673, 674, 676, 678.
[204] C Barnard, '(B)Remains of the Day: Brexit and EU Social Policy' in F Vandenbroucke, C Barnard, G de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 478. See also M Goodwin, C Milazzo, 'Taking back control? Investigating the role of immigration in the 2016 vote for Brexit' (2017) 19 The British Journal of Politics and International Relations 450; J Portes 'Immigration, Free Movement and Brexit' (*DCU Brexit Institute*, 11 January 2021) <https://dcubrexitinstitute.eu/2021/01/immigration-free-movement-and-brexit/> accessed 16 July 2021; N Khomami 'Brexit is only way to control immigration, campaigners claim' *The Guardian* (25 April 2016) <https://www.theguardian.com/politics/2016/apr/25/brexit-is-only-way-to-control-immigration-campaigners-claim> accessed 7 February 2020; J Van Reenen, 'The Aftermath of the Brexit Vote – The Verdict from a Derided Expert' (*London School of Economics and Political Science Blogs*, 2 August 2016) <https://blogs.lse.ac.uk/politicsandpolicy/the-aftermath-of-the-brexit-vote-a-verdict-from-those-of-those-experts-were-not-supposed-to-listen-to/> accessed 7 February 2020.
[205] H Fassmann, R Munz, 'Patterns and Trends of International Migration in Western Europe' (1992) 18 Population and Development Review 457.
[206] R Ford, W Jennings, W Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391.

perceived dominance in Europe of Germany and France'.[207] The possibility of balancing a domination against some of the biggest MSs in the EU, whether perceived or not, could be argued to have an impact on the attitudes developing within the UK towards the 2004 enlargement. However, this possibility would not be necessarily perceived by the public as a crucial factor. Rather, the latter would recognise the increased migration and the access to social benefits by additional EU nationals in the UK as a more tangible consequence of the enlargement. Besides, an additional push from radical right-wing populist parties, as well as media could be much more effective in convincing the British population of the 'threats' of the enlargement. In other words, being a countervailing power against other Member States' dominance would be understood as less tangible and less important compared to the potential negative results of the enlargement. Nonetheless, the negative attitude towards the EU enlargement and intra-EU migration was not significantly negative initially (especially when compared to the attitudes developed in 2010s), which is evident in the UK's approach of refraining from the implementation of the transitional arrangements.

One of the new MSs that was joining the Union in 2004 was Poland. It is noteworthy that, following WWII, a Polish population had been present in the UK since 1951, albeit the numbers continuously decreased until 2001.[208] This migrant population led to the formation of migration networks. The existence of previous migration networks and communities of people within a receiving state coming from the same (sending) state would be beneficial for any future nationals of that sending country. It can imply broader employment possibilities for those nationals,[209] thereby ensuring a high employment rate, as well as the availability of necessary information for new migrants. This creates strong incentives for new migrants to follow already established migration networks. Thus, these migration networks may be (and may have been) potentially useful for Polish nationals moving to the UK, which can contribute to a higher immigration.

---

[207] M Canoy, A Horvath, A Hubert, F Lerais, M Sochacki, 'Post-Enlargement Migration and Public Perception in the European Union' in M Kahanec, KF Zimmermann (eds), *EU Labor Markets After Post-Enlargement Migration* (Springer 2009) 98.

[208] M Okólski, J Salt, 'Polish Emigration to the UK after 2004; Why Did So Many Come?' (2014) 3 Central and Eastern European Migration Review 11, 12.

[209] See, eg, M Hooghe, A Trappers, B Meuleman, T Reeskens, 'Migration to European Countries: A Structural Explanation of Patterns, 1980–2004' (2008) 42 International Migration Review 476, 497.

It was also suggested by the UK Home Office that up to 40% of EU8 workers registering for the Workers Registration Scheme (hereafter, also 'WRS', discussed below) in 2004 had already been in the country before the UK opened its labour markets.[210] In fact, it has been argued that the decision of the UK to not impose the restrictions allowed by the transitional arrangements for the CEE nationals, including Polish nationals, 'accepted the reality that, by 2003, a large number of Poles had already come to the UK for various purposes, with many working illicitly'.[211] This indicates that there were already migrants from the EU10 in the UK before the 'big bang' enlargement. Nonetheless, their presence in the country became a more salient issue in the period leading to the enlargement, as well as after it. Thus, more debates started circulating around this topic after 2004, and the public and political discourse became more concerned about them.

Acknowledging the concerns and likely difficulties related to the unprecedented EU expansion, the EU15 had designed the possibility of initially restricting the free movement of persons into their countries for 8 out of 10 new EU MSs for a period of 7 years (which was, in its turn, divided into 3 periods of two, three and two years respectively). Only three MSs did not make use of these transitional arrangements, including the UK (the other two being Ireland and Sweden). It has been argued by a number of scholars that the opening of borders to the new EU citizens, along with the imposition of transitional arrangements by 12 MSs of the EU15, contributed to the larger inflow of intra-EU migrants from the new MSs.[212] One of the reasons was the booming UK economy. The GDP per capita of the UK outperformed, inter alia, Germany, France and Italy in 1997-2007: not only was the British economy better off than that of its fellow MSs but also, due to the strong performance, it was in need of more

[210] UK Home Office, UK Department for Work and Pensions, UK Inland Revenue, UK Office of the Deputy Prime Minister, 'Accession Monitoring Report May-December 2004' (22 February 2005) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100408165414/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession_monitoring_report/report2/maydec04.pdf?view=Binary> accessed 20 May 2020, 1.

[211] S Drinkwater, J Eade, M Garapich, 'What's Behind the Figures? An Investigation into Recent Polish Migration to the UK' in R Black, G Engbersen, M Okólski (eds), *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010) 74.

[212] See, eg, S Drinkwater, J Eade, M Garapich, 'What's Behind the Figures? An Investigation into Recent Polish Migration to the UK' in R Black, G Engbersen, M Okólski (eds), *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010);

workers.[213] Another explanation for the refusal to make use of transitional arrangements by the UK is that the possibility of bringing in CEE intra-EU migrants was a 'means of reorienting migratory supply for low skilled labour away from traditional sources such as Bangladesh and Pakistan'.[214] As pointed out by Ciupijus, for British policy makers this new intra-EU migration was not necessarily 'about an exercise of pan-national citizenship rights but about filling the low-pay, low-status niche in the UK labour market', and the establishment of the Workers Registration Scheme is argued to be an indicator of that.[215] Additionally, the imposing of restrictions in the transitional period by the other 12 MSs may have also driven the new intra-EU migrants to the UK. Finally, this was also due to miscalculation (13.000 migrants were expected yearly but many more arrived), as later admitted by the then Foreign Secretary Jack Straw.[216]

It is not surprising, of course, that the accession of 10 new countries to the Union affected European migration patterns. The migration experience of the UK, as well as of Ireland and Sweden, would have been expected to change more than for the other 12 MSs of the EU, given that the latter imposed the transitional arrangements on EU8. However, it contributed to the fears over the significant inflow of new migrants, as well as to the overall Euroscepticism already present in the UK. The attitude of the British public towards the EU has not been linear over the decades[217] but has rather depended on and reflected the shifts in the self-perception of the British identity, the perceived differences between the UK and the rest of Europe and in the (potentially threatening) changes of the European integration process.[218]

---

[213] See, eg, D Corry, A Valero, J van Reenen, 'UK Economic Performance since 1997: Growth, Productivity and Jobs' (Centre for Economic Performance, London School of Economics & Political Science, November 2011); L McDowell, 'Old and New European Economic Migrants: Whiteness and Managed Migration Policies' (2009) 35 Journal of Ethnic and Migration Studies 19, 20.

[214] A D'Angelo, E Kofman, 'From Mobile Workers to Fellow Citizens and Back Again? The Future Status of EU Citizens in the UK' (2018) 17 Social Policy & Society 331, 333.

[215] Z Ciupijus, 'Mobile Central Eastern Europeans in Britain: Successful European Union Citizens and Disadvantaged Labour Migrants?' (2011) 25 Work, Employment and Society 540, 545.

[216] 'Jack Straw regrets opening door to Eastern Europe migrants' *BBC* (13 November 2013) <https://www.bbc.com/news/uk-politics-24924219> accessed 29 June 2022.

[217] See, eg, G Evans, S Butt, 'Explaining Change in British Public Opinion on the European Union: Top Down or Bottom Up?' (2007) 42 Acta Politica 173; J Rasmussen, '"What Kind of Vision is That?" British Public Attitudes Towards the European Community During the Thatcher Era' (1997) 27 British Journal of Political Science 111.

[218] M Haeussler, 'The Inward-Looking Outsider? The British Popular Press and European Integration, 1961-1992' in HA Ikonomou, A Andry, R Byberg (eds), *European Enlargement Across Rounds and Beyond Borders* (Routledge 2017) 78.

Generally, the British national identity and the idea of European integration have been formulated in the political discourse as an 'ideological backdrop' upon which the British public would construct discourses of threatening differences (be that between the British nationals and the immigrants, or between the UK and the EU), both virtually guaranteed to lead to a reluctance to support European integration.[219] However, there are strong arguments indicating that the EU (or the then European Communities) served as a particularly convenient scapegoat for many failures of internal British politics and various issues 'that were squarely British'.[220]

The intra-EU migration to the UK became particularly salient 10 years after the 2004 enlargement (following the UKIP victory in the 2014 European Parliament elections) and in the period leading to the Brexit referendum. However, it is argued that it was often a convenient topic where the public dissatisfaction was focused. In other words, the focus on this at times reflected the dissatisfaction with other, more real than perceived issues caused by, for instance, underinvestment in public services.[221] As explained by Barnard, governments tend to take an easy route and subtly or evidently blame 'immigration as a way of avoiding admitting their own responsibility for decades of failure to invest in these declining areas'.[222]

Thus, the underlying issues of the public dissatisfaction may have been much broader, as well as less connected with the EU and more connected with the British governments' internal policies. Nonetheless, the issue of intra-EU migration quickly became the main focus instead and attracted most of the attention that otherwise may have been addressed at the underlying problems in the UK. This holds true especially for 'those communities which witnessed a rapid increase in numbers of migrants'.[223]

---

[219] M Cinnirella, 'Towards a European Identity? Interactions between the National and European Social Identities Manifested by University Students in Britain and Italy' (1997) 36 British Journal of Social Psychology 19, 27.
[220] C Ketels, ME Porter, 'UK Competitiveness after Brexit' (2018) Harvard Business School Working Paper, No. 19-029, September 2018 (revised January 2019) <https://www.hbs.edu/faculty/Pages/item.aspx?num=55028> accessed 29 June 2022.
[221] C Barnard, '(B)Remains of the Day: Brexit and EU Social Policy' in F Vandenbroucke, C Barnard, G de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 478.
[222] Ibid 483.
[223] Ibid 480. See also M Goodwin, C Milazzo, 'Taking back control? Investigating the role of immigration in the 2016 vote for Brexit' (2017) 19 The British Journal of Politics and International Relations 450, 452; M Goodwin,

Such an attention from these communities is not surprising. As discussed previously, the sudden increase in the inflow of migrants can be perceived as a threat to the identity of a given society or a given group of people. In this case, those who already lived and worked in the UK assumed that their identity was challenged by the newly arriving CEE nationals.

Thus, while the genuine issues of the discontent of the UK population may have been within the UK itself, throughout time, migration was established as one of the most serious, if not the most serious, issue on which the British public, politicians and media focused their attention. This situation was related to various dynamics, inter alia the perception of the new intra-EU migrants on individual levels, the miscalculated rapid increase in certain areas, as well as the negative portrayal of the situation by British tabloids.

It should be noted that the specific arrangements that the UK government imposed in 2004 included the establishment of a formal way of registering migrants who take up employment in the country: the Workers Registration Scheme (WRS). This measure was introduced partially as a response to the fears of large and uncontrolled migration influx of workers from the newly accessed MSs.[224]

The WRS was developed to keep track of the persons moving to the UK after the 2004 enlargement and during the transitional period of 2004-2011. Nationals of the newly accessed EU8 MSs, who wanted to work in the UK for 1 month or more, were required to register with the Scheme. The self-employed did not have to go through this registration process.

In connection with the WRS, the issue of miscalculated increase in intra-EU migration is an important factor to consider. The WRS registered 932.000 applications between May 2004 and September 2008, and moreover this does not include the estimated 20-45% of migrants who refrained from registering with the WRS, despite the obligation to do so.[225] However, this was

---

O Heath 'Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities' (York, Joseph Rowntree Foundation, 2015) <https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities> accessed 29 June 2022.

[224] D Sriskandarajah, 'Enlarging Concerns: Migration to the UK from New European Union Member States' in K Clarke, T Maltby, P Kennett, (eds), *Social Policy Review 19: Analysis and Debate in Social Policy, 2007* (Bristol University Press 2007) 258.

[225] A D'Angelo, E Kofman, 'From Mobile Workers to Fellow Citizens and Back Again? The Future Status of EU Citizens in the UK' (2018) 17 Social Policy & Society 331, 333.

much higher than the initial official estimate of 5.000-13.000 yearly arrivals.[226] The miscalculation, expectedly, received significant attention and gave rise to (additional) fears regarding the 'threat' of migration from newly accessed MSs. Connecting this with the earlier discussion in this Chapter, it is clear that right-wing populist and/or Eurosceptic parties would be able to use this fear in their campaigns and gain additional support from the voters in general and during the elections in particular. It can also be safely assumed that the discrepancy between the expected and actual numbers of new intra-EU migrants had its toll on deciding to impose transitional arrangements for Bulgarian and Romanian nationals after their accession in 2007.[227]

Much like the negative or sceptical attitudes in the UK towards the EU and the European integration project present since the early days of the European Communities, the use of negative tone against the EU and its initiatives in the British media and especially in British tabloids was nothing new. Since 1980s, the British tabloids were often found to be depicting the Union as a threat to British interests and identity, and the idea of this threat was even further promoted during the coverage leading to the Brexit referendum.[228]

The tabloids continuously made use of the events which would contribute to the negative portrayal of intra-EU migration. For instance, as will be seen below, research suggests that after the fiscal crisis of 2008 a large number of CEE nationals in the UK returned to their home MSs. However, for the tabloids these were nothing more for than 'macro-numbers', which usually 'do not make tabloid headlines'.[229]

---

[226] C Dustmann, M Casanova, M Fertig, I Preston, CM Schmidt, 'The impact of EU enlargement on migration flows' (UK Home Office Online Report 25, 2003) 57.

[227] Only 2 Member States, Finland and Sweden, did not make use of transitional arrangements and opened their labour markets for Bulgarian and Romanian nationals from the accession date.

[228] S George, 'Britain: Anatomy of a Eurosceptic state' (2000) 22 Journal of European Integration 15, 27; D Jackson, E Thorsen, D Wring (eds), *EU Referendum Analysis 2016: Media, Voters and the Campaign Early reflections from leading UK academics* (The Centre for the Study of Journalism, Culture and Community Bournemouth University, June 2016) 12, 14, 47, 61; K Powell, 'Brexit Positions: Neoliberalism, Austerity and Immigration — The (Im)possibilities? of Political Revolution' (2017) 41 Dialect Anthropol 225, 231; S Gietel-Basten, 'Why Brexit? The Toxic Mix of Immigration and Austerity' (2016) 42 Population and Development Review 673, 674-675.

[229] M Canoy, A Horvath, A Hubert, F Lerais, M Sochacki, 'Post-Enlargement Migration and Public Perception in the European Union' in M Kahanec, KF Zimmermann (eds), *EU Labor Markets After Post-Enlargement Migration (*Springer 2009) 95.

The British tabloids promoted an overwhelmingly negative opinion of the intra-EU migrants, helped fuel a mistrust to a certain extent towards them and continuously used fearmongering by claiming that the new CEE migrants were taking British citizens' jobs, lowering wages and taking advantage of the UK's welfare system.[230] In addition, the overall atmosphere of concerns regarding the potential mass influx of other MS nationals and their access to social benefits contributed to the development and further deepening of scepticism towards the EU, its core principle of free movement of persons and an overall perception of the EU as being a threat to the British identity, values and sovereignty.

3.1.2. Intra-EU Migration Patterns

When discussing the issue of increased migration to the UK from CEE MSs after the 2004 enlargement, a noteworthy point to consider is whether the CEE nationals who moved to the UK following the 'big bang' enlargement were aiming to stay there for long-term or short-term. Research by Blanchflower and Shaforth suggests that many intra-EU migrants from the newly accessed MSs stayed in the UK only for short periods of time and returned to their home MSs afterwards.[231] Moreover, based on this the authors suggest that these intra-EU migrants should be primarily deemed temporary or guest workers, rather than being treated as migrants per se.[232] If the working arrangements of CEE nationals are to be considered temporary, it is important to note that temporary migration can effectively address short-term shortages of labour in the host countries (such as in the UK)[233] and temporary migrants tend to return to their home countries when 'the economic conditions become less favourable' in the host country.[234] While intra-EU migration following the 2004 enlargement did increase, it also declined afterwards (as will be seen below). This can indicate that a number of the initial new

[230] S Walter, 'Better off without You? How the British Media Portrayed EU Citizens in Brexit News' (2019) 24 The International Journal of Press/Politics 210; S Walter, Z Fazekas, 'Similar citizen portrayals? Converging media-based othering in tabloids and broadsheets' (2022) 0 Journalism 0 <https://journals.sagepub.com/doi/10.1177/14648849221116204> accessed 11 February 2020; M Johns, *The New Minorities of Europe: Social Cohesion in the European Union* (Lexington Books 2014) 112.
[231] D Blanchflower, C Shaforth, 'Fear, Unemployment and Migration' (2007) US National Bureau of Economic Research Working Paper Series, 13506 <https://www.nber.org/papers/w13506> accessed 9 March 2020, 1.
[232] Ibid 1, 9, 28.
[233] C Dustmann, 'Return Migration: The European Experience' (1996) 11 Economic Policy 213, 216.
[234] Ibid 240.

migrants from the EU10, indeed, did not intend to stay in the UK for a long period of time and intended to return to their home MSs.

A part of the abovementioned WRS application asked applicants how long they intend to stay in the UK, based on which conclusions could be drawn about their intentions. Between July 2007 and June 2008, 11% said they intended to stay for 1 year or more and 61% said their intention was to stay for less than 3 months.[235] While how to characterise and what definition to use for CEE nationals moving to another EU MS (particularly to the UK) would be an issue of a separate discussion, the mentioned approach of the definition can indicate that the potential impact the new intra-EU migrants could have had on the British labour market is not too significant. Moreover, it would have not been as significant as it was portrayed at the time by the public, political figures and media.

As mentioned above, mobility flows to the UK, which peaked in 2006, in fact afterwards showed an outward tendency, ie there were many migrants returning to their home MSs. As the financial market crisis of 2008 started affecting the British labour market, 'a drop in the net immigration rate in the United Kingdom' from the new MSs was observed.[236] The overall economic slowdown after the economic and fiscal crisis of 2008 resulted in a substantial reduction of new entries of intra-EU migrants in the UK and in an increase in return migration, ie other MS nationals returning to their home countries.[237] As of 2008, research showed that approximately half of the EU8 nationals who had moved to work in the UK after the 2004 enlargement, may have had already left the UK.[238]

---

[235] Migration Watch UK, 'Future Migration Flows from Eastern Europe' (1 August 2008) <https://www.migrationwatchuk.org/briefing-paper/40/future-migration-flows-from-eastern-europe> accessed 29 June 2022.

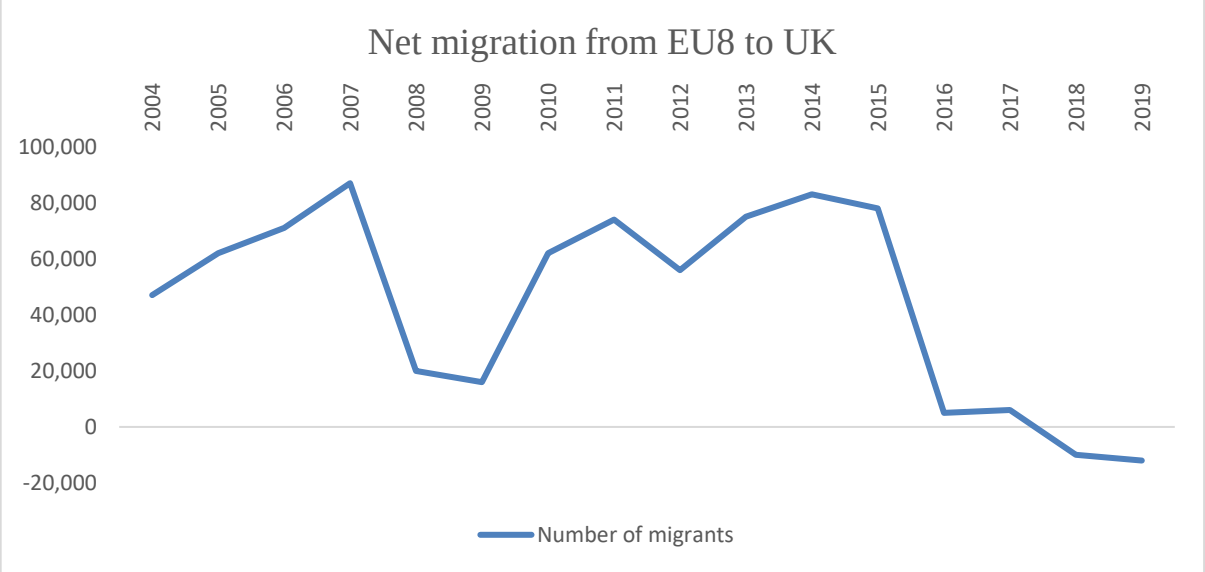
[236] T Baas, H Brücker, 'EU Eastern Enlargement: The Benefits from Integration and Free Labour Movement' (2011) 9 CESifo DICE Report 44, 47.

[237] European Commission, 'The impact of free movement of workers in the context of EU enlargement: Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty' (Communication) COM (2008) 765 final, 9.

[238] N Pollard, M Lattorre, D Sriskandarajah, *Floodgates or Turnstiles? Post Enlargement Migration Flows to (and from) the UK* (Institute for Public Policy Research 2008).

This is further supported by statistical data from The Migration Observatory at the University of Oxford.[239] As illustrated below in Figure 3, the immigration from EU8 to the UK has fluctuated at times rather significantly. Particularly, in the years of the economic and fiscal crisis, the number of EU8 migrants moving to the UK decreased by 67.000. Notably, in the year of the Brexit referendum and the following ones, in fact, an emigration of EU8 nationals from the UK has been recorded, with net migration eventually standing at -12.000 in 2019.

Figure 3
Net migration from EU8 to UK (2004-2019)



Source: The Migration Observatory at the University of Oxford, 'Net Migration to the UK' (29 July 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/long-term-international-migration-flows-to-and-from-the-uk/> accessed 25 May 2021

It is argued that such a development indicates how free labour mobility provides a flexibility in two directions, whereby EU nationals move to another MS when there is demand there for workers and they return when the employment conditions are less favourable.[240] This flexibility is one of the substantial benefits that the freedom of movement within the EU offers. It ensures that the demand for additional employment in a given MS is met, while

[239] The Migration Observatory at the University of Oxford, 'Net Migration to the UK' (29 July 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/long-term-international-migration-flows-to-and-from-the-uk/> accessed 25 May 2020.
[240] European Commission, 'The impact of free movement of workers in the context of EU enlargement: Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty' (Communication) COM (2008) 765 final, 9.

assuring the return of the new workers in times of crisis and economic decline. In fact, it has even been argued that the actual effect of the intra-EU migration from newly accessed CEE countries in the first 3 years after the enlargement should be 'determined by the extent to which such workers add to supply relative to demand', and the 'inflow of workers from Eastern Europe has tended to increase supply by more than it has increased demand in the UK', thereby reducing potential pressures of inflation and the natural rate of unemployment.[241] Thus, a flexible freedom of movement can also have a positive impact in terms of ensuring a relevant stability in prices in the country and preventing inflation.

It is noteworthy that intra-EU migration to the UK (particularly that of Central and Eastern Europeans) is controlled more by the market rather than the state, which creates 'a privatized migration regime, shaped by market forces and by migrants' agency'.[242] When taking into account the role of the labour market, it is important to consider its ability to absorb the increased migration. Generally, the literature indicates that receiving countries tend to 'absorb labor supply shocks' effectively – 'through shifts in production technologies' and not through changes in wages.[243] In other words, the wages in the receiving country are generally not affected by increased labour supply. Consequently, the intra-EU mobility flows following a 5-year period after the 'big bang' enlargement had not 'exceeded the absorption capacities of the labor markets' and both in the host and home MSs the wages of the local workers had risen, and unemployment had decreased.[244] Furthermore, the British labour market itself managed to adjust to it well, one of the reasons for which is that the new migrants from CEE States 'overwhelmingly compete[d] with low-skilled workers, and as these workers were protected

[241] D Blanchflower, C Shaforth, 'Fear, Unemployment and Migration' (2007) US National Bureau of Economic Research Working Paper Series, 13506 <https://www.nber.org/papers/w13506> accessed 9 March 2020, 29.
[242] Z Ciupijus, 'Mobile Central Eastern Europeans in Britain: Successful European Union Citizens and Disadvantaged Labour Migrants?' (2011) 25 Work, Employment and Society 540, 543.
[243] B Elsner, 'Emigration and Wages: The EU Enlargement Experiment' (2013) 91 Journal of International Economics 154, 163. Referring to GH Hanson, MJ Slaughter, 'Labor-Market Adjustment in Open Economies: Evidence from US States' (2002) 57 Journal of International Economics 3; N Gandal, GH Hanson, MJ Slaughter, 'Technology, Trade, and Adjustment to Immigration in Israel' (2004) 48 European Economic Review 403.
[244] M Canoy, A Horvath, A Hubert, F Lerais, M Sochacki, 'Post-Enlargement Migration and Public Perception in the European Union' in M Kahanec, KF Zimmermann (eds), *EU Labor Markets After Post-Enlargement Migration* (Springer 2009) 95.

by a concurrently increasing minimum wage, more adverse wage effects for competing workers may have been mitigated or offset'.[245]

An additional factor to consider is that CEE nationals often took up jobs which were below their skill levels, even though statistical data indicates an increase in the share of highly educated EU8 immigrants. According to data from The Migration Observatory at the University of Oxford, while in the period between 2007 and 2013 the overall number of highly skilled recent migrant workers decreased, there was an increase in the share of EU8 nationals in the group of highly skilled migrant workers. Particularly, that share recorded an increase from 36% to 47% in the years 2007 and 2013 respectively.[246]

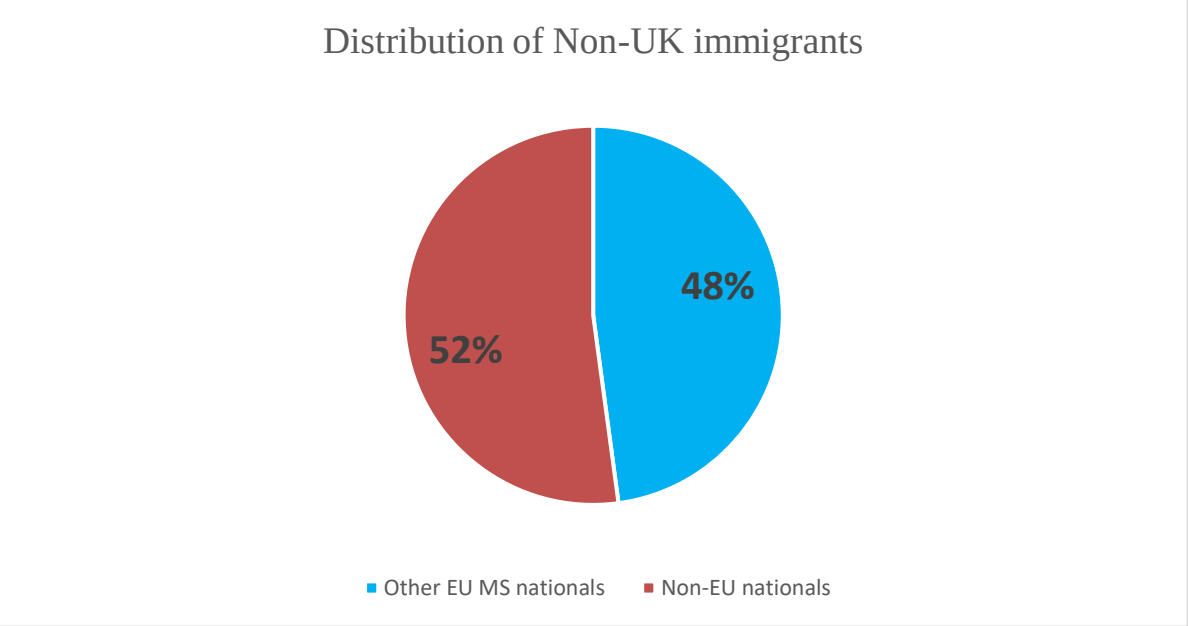
The overall employment rate for the EU10 nationals was rather high. The consensus on the employment rates of migrants, even for those with higher education levels, is that they are less likely to be employed, compared to nationals of a given state. However, the EU8 migrants in the UK, particularly those employed in London, had notably high employment rates, as research from 2007 suggests.[247] It is argued that the high employment of these EU citizens, particularly of the Polish nationals working in the UK, could also be a consequence of 'support from community institutions and informal networks built up by post war migrants', even if they tend to work in 'poorly paid jobs below their skill potential'.[248]

It is noteworthy that, according to the data available on Eurostat in 2014, immigration into the UK from non-EU countries was, in fact, higher than from other EU MSs. Particularly, the total number of non-UK national immigrants was 550.700, with 48% (or 263.604 migrants) of them being other EU MS nationals and 52% (or 287.136 migrants) being citizens of countries from

[245] S Lemos, J Portes, 'New Labour? The Impact of Migration from Central and Eastern European Countries on the UK Labour Market' (2008) Institute for the Study of Labor Discussion Paper Series, 3756 (2008) 31.
[246] The Migration Observatory at the University of Oxford, 'Highly Skilled Migration to the UK 2007-2013' (3 July 2014) <https://migrationobservatory.ox.ac.uk/resources/reports/highly-skilled-migration-to-the-uk-2007-2013/> accessed 25 May 2021.
[247] I Gordon, T Travers, C Whitehead, 'The Impact of Recent Immigration on the London Economy' (City of London 2007) 73.
[248] Ibid 65.

outside the EU (Figure 4 below).[249] Based on this it could be argued that if the UK was considering immigration an issue, then the immigration from non-EU countries should perhaps have been seen as a more serious one. However, it is understandable also that the issue of migration was not solely about the numbers. It was in the hands of the UK to decide how to tackle the immigration of non-EU citizens. In a contrast, the intra-EU migration and the provision of social benefits to other EU nationals could not be restricted without causing concerns about and even breaches of EU law implementation in the UK. Nonetheless, it is important to consider that the numbers of non-EU national migrants were not simply close to the number of intra-EU migrants but even exceeded them.

Figure 4
Distribution of Non-UK immigrants in 2014



Source: Eurostat, 'Immigration by age group, sex and citizenship' <https://ec.europa.eu/eurostat/databrowser/view/migr_imm1ctz/default/table?lang=en> accessed 25 May 2021

Concerns over a significantly large inflow of Bulgarian and Romanian nationals followed the fears around the 2004 enlargement, even though a number of studies concluded that the British labour market suffered no significant negative effects from the increased intra-EU migration.

[249] Eurostat, 'Immigration by age group, sex and citizenship' <https://ec.europa.eu/eurostat/databrowser/view/migr_imm1ctz/default/table?lang=en> accessed 25 October 2022.

A report conducted for the UK Home Office in 2003 analysed the impact of immigration in the UK on its labour market and already resident workers and found that there was 'no strong evidence of large adverse effects of immigration on employment or wages of existing workers' and that the international practice suggests that 'immigration enhances wage growth'.[250] In other words, the claims that immigration into the UK takes the jobs of those already resident in the country and causes reduction in the overall level of wages, is not well-evidenced. This research was carried out before the 2004 enlargement took place. However, a Working Paper by Blanchflower and Shaforth published later, in 2007, also argued that there was 'little or no evidence that immigrants have had a major impact on native labour market outcomes such as wages and unemployment'.[251] Another study carried out in 2008 also sustained that there is little evidence of migration from CEE countries adversely affecting 'wages or claimant unemployment in the UK between 2004 and 2006'.[252] In addition, a similar study was conducted by the Migration Policy Institute in 2009, which included research also on the UK experience of intra-EU migration. It is noteworthy that the study found that there had been no 'statistically significant effects on wages or employment [in the UK] from immigration'.[253] Canoy et al even argued in 2009 that 'practically all of the available evidence suggests' that the 2004 enlargement 'has not led to serious disturbances in the labor market, even in member states such as the UK', which saw a relatively larger migration from the newly accessed MSs.[254]

Even if the conducted research does not suggest any adverse effects on the British labour market, it has to be admitted that the UK did receive a large number of intra-EU migrants from the newly accessed CEE MSs. However, a factor that would often be overlooked in the public or political debates is that 'labour migration from (new) EU MSs arguably also contributed

[250] C Dustmann, F Fabbri, I Preston, J Wadsworth, *The Local Labour Market Effects of Immigration in the UK* (Research Development and Statistics Directorate, UK Home Office 2003) 48.
[251] D Blanchflower, C Shaforth, 'Fear, Unemployment and Migration' (2007) US National Bureau of Economic Research Working Paper Series, 13506 <https://www.nber.org/papers/w13506> accessed 9 March 2020, 3.
[252] S Lemos, J Portes, 'New Labour? The Impact of Migration from Central and Eastern European Countries on the UK Labour Market' (2008) Institute for the Study of Labor Discussion Paper Series, 3756 (2008) 30.
[253] W Somerville, M Sumption, *Immigration and the Labour Market: Theory, Evidence and Policy* (Migration Policy Institute 2009) 14.
[254] M Canoy, A Horvath, A Hubert, F Lerais, M Sochacki, 'Post-Enlargement Migration and Public Perception in the European Union' in M Kahanec, KF Zimmermann (eds), *EU Labor Markets After Post-Enlargement Migration (*Springer 2009) 94.

much to the UK's economic growth in the mid-2000s'.[255] In fact, the UK may 'have been the 'winner in the war for talent' as its population gain has been strongly skewed towards highly educated European citizens'.[256] Particularly, 'the net gain in university graduates amounts to over 800,000 in ten years' which is, in fact, 'four times more than the 200,000 people at the low end of the skill scale'.[257]

To sum up, the UK witnessed an increase in intra-EU migration after the 2004 enlargement. The arrival of a large number of EU citizens from the newly accessed 10 MSs was the result of, inter alia, the UK opting out of the transitional arrangements' option, as well as of the 12 EU MSs imposing the restrictions provided for by the transitional arrangements. Whether the extent of migration increased exponentially or not, research indicates that it had no adverse effects on the labour market of the UK. Moreover, the UK benefitted from the inflow of high-skilled workers, as well as other workers filling in a number of low-skill and low-paid jobs, thereby meeting the demands of the market. Nonetheless, the British public was overwhelmed by worries over the possibility of uncontrolled migration to the UK. The fears of the potentially increasing intra-EU migration were intensively broadcast by the eye-catching articles in the British tabloids. Right-wing populist parties, particularly UKIP, successfully exploited the perceived fears of the public in gaining strong support in the national, as well as European Parliament elections.

This was reflected later, after the accession of Bulgaria and Romania in 2007, when the UK decided to impose a transitional period for these newly accessed MSs, as other EU countries did. At the same time, the social benefits which could be accessed by the EU10 nationals were limited and further restrictions were attempted later, in 2010s and years after the accession of the EU10. Therefore, it is crucial to touch upon the issue of social benefits in light of the 2004 enlargement and the UK's approach to it.

---

[255] U Sedelmeier, *Europe after the Eastern Enlargement of the European Union: 2004-2014* (Heinrich Böll Stiftung, 10 June 2014) <https://eu.boell.org/en/2014/06/10/europe-after-eastern-enlargement-european-union-2004-2014> accessed 5 April 2021, 11.
[256] C Alcidi, D Gros, 'EU Mobile Workers: A Challenge to Public Finances?' (CEPS 2019) 11.
[257] Ibid.

3.1.3. UK Politics and Euroscepticism

The political dynamics concerning right-wing populist parties and their Eurosceptic and anti-migration stance are particularly visible in the example of the UK. As was seen earlier, the intra-EU migration following the 2004 enlargement was a salient issue in the British political arena. Since Euroscepticism and anti-migration positions are one of the cornerstones of the right-wing populist parties, and the British political discourse was full of fears over intra-EU migration after the 'big bang' enlargement, it only is logical now to turn to the discussion of the right-wing populist discourse in the UK.

A particularly salient issue for the right-wing populists (as well as the public) in the UK was that of 'benefit tourism'. Claims on the damaging extent of fraud on the British social assistance systems by other EU nationals were commonplace especially after the 2004 enlargement. The welfare system 'cheater' in the UK was portrayed as an individual with traits 'traditionally employed in news discourse to construct the criminal subject',[258] indicating the significance of the (perceived) abuse of the social assistance system in the UK.

However, the possibility to access social benefits in other MSs is the result of the evolution of EU law, as throughout time the EU has developed beyond its economic aims and now endeavours to pursue also social aims. Furthermore, as Spaventa notes, the Court of Justice has also continuously 'made clear that the free movement provisions pursued a social as well as an economic aim and should therefore be so interpreted'.[259] Since the establishment of EU citizenship and its proclamation as the fundamental status of EU nationals, the Court developed the right to free movement to become 'a free-standing social right'.[260] This has been made more evident by the Court in the earlier cases, as discussed in Chapter 3 of this thesis, whereby the access to social benefits was expanded to include economically non-active citizens. In other words, the EU does not operate as merely an economic project, as its social

[258] R Lundström, 'Framing Fraud: Discourse on Benefit Cheating in Sweden and the UK' (2013) 28 European Journal of Communication 630, 637.
[259] E Spaventa, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in P Koutrakos, N Nic Shuibhne, P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016).
[260] O Farkas, O Rymkevich, 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices' (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 369.

aims and features have been clearly developed through time. The access to social benefits for mobile EU citizens is a result of the development of the Union's social aims.

An important aspect to consider with regard to social benefits is that even if economically active intra-EU migrants access the social benefits of the host MSs, 'they also pay into it through general and ad hoc contribution'.[261] In addition to the lack of adverse effects on the British labour market, research has also found that the increased intra-EU migration and mobility flows following the 2004 enlargement had limited impact on public finances and on the welfare state.[262] In fact, data for the UK from 2008 showed that the number of EU8 nationals 'applying for tax-funded income-related benefits and housing support remain[ed] low'.[263] Given the importance that free movement of persons and access to social benefits carry, certain aspects of social assistance in the EU have become increasingly contested and intra-EU mobility is often perceived as an abuse rather than an exercise of rights enshrined in the Treaties,[264] with policy makers and political parties making claims about the dangers of 'benefit tourism' and calling on restrictions for other MS nationals' access to social benefits. This attitude was manifested in the UK particularly strongly. In light of the fears over 'benefit tourism', the UK adopted the 'habitual residence test' to strongly base access to social benefits on possessing a right of residence in the UK (as discussed in Chapter 3).

In 2005, presenting a five-year strategy on immigration to the British Parliament, the Secretary of State for the Home Department mentioned that they do 'welcome EU and EEA citizens coming to live and work' in the UK, but also stressed they may not come 'simply to claim

---

[261] E Spaventa, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in P Koutrakos, N Nic Shuibhne, P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016).

[262] European Commission, 'The impact of free movement of workers in the context of EU enlargement: Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty' (Communication) COM (2008) 765 final, 12.

[263] UK Border Agency, UK Department for Work and Pensions, HM Revenue and Customs and Communities and Local Government, 'Accession Monitoring Report May 2004 — March 2008: A8 Countries' (2009) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100408165414/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession_monitoring_report/report18/may04-dec08?view=Binary> accessed 20 May 2020, 23.

[264] S Mantu, P Minderhoud, 'Exploring the Limits of Social Solidarity: Welfare Tourism and EU Citizenship' (2016) 2 EU Law Journal 4.

benefits', relying on the provisions of Article 14 of Directive 2004/38.[265] This indicates that even just one year after the 2004 enlargement the UK was already officially arguing that 'benefit tourism' exists and is a serious issue for the country. Making such claims without presenting evidence and after a rather short period of time following the accession of the EU10 could be argued to be a somewhat reckless approach from an official figure.

To address the concerns of the public, as well as the concerns presented within the political sphere itself, the British government decided to put certain limitations on access to social benefits for CEE nationals moving to the UK. The strategy paper mentions that nationals from the newly accessed CEE MSs were 'only entitled to in-work benefits and only around 1% have been granted any'.[266] However, the examination of the overall discussion on free movement of persons and social benefits in the UK indicates that the limitations on claiming social benefits were rarely mentioned in the public and political debate, even though those restrictions are an important factor to take into consideration. Despite the lack of strong evidence, there was 'a widespread belief in the UK that the system is riddled with fraud', which was 'shared by the press, the public, politicians and administrators of the system'.[267] Notably, it is argued that '[t]he effect of the belief is powerful enough to change the way the system as a whole operates'.[268]

As the EU15 and, particularly, the UK continued to raise their concerns about benefit tourism, the EU10 continued to consider these unfounded. In light of this divergence of views, the division between the EU15 and the EU10 on the issues of freedom of movement and social benefits became more and more evident with time. D'Angelo and Kofman argue that intra-EU migration and the impact of EU migrants on various levels on the economy of the UK has long been a core issue in British political debates.[269]

---

[265] 'Controlling Our Borders: Making Migration Work for Britain: Five Year Strategy for Asylum and Immigration' Presented to UK Parliament by the Secretary of State for the Home Department (February 2005) 13.
[266] Ibid.
[267] P Spicker, *How Social Security Works: An Introduction to Benefits in Britain* (Policy Press 2016) 241.
[268] Ibid.
[269] A D'Angelo, E Kofman, 'From Mobile Workers to Fellow Citizens and Back Again? The Future Status of EU Citizens in the UK' (2018) 17 Social Policy & Society 331, 336.

The discussions and public and political debates on the issues of freedom of movement and social benefits further peaked immediately before summer 2016 when the Brexit vote took place, the issue of which will be addressed in a later section of this Chapter.

3.1.3.1. The Negative Outlook of the Public

It should be noted that negative and even hostile attitudes towards immigration (be that from Europe or elsewhere) were prevalent among the British public also before the large migration post-2004. Following an increase in the anti-migration attitudes in the 1970s, a relatively lenient position on immigration was present in the period between 1980s and 1997. This tolerance, however, was short-lived: the British public started turning increasingly hostile since 1997.[270] Moreover, with the 'big bang' enlargement taking place, the negative viewpoint spread even further, despite the restrictions that were being imposed on the social assistance rights of the new EU nationals.

The British public grew increasingly polarised on the issue of migration in the period between 2002 and 2012,[271] and both general and nativist opposition to immigration increased in the same period.[272] This indicates that the increase in the negative stance towards intra-EU migration developed in the period immediately before the 2004 enlargement and grew further afterwards.

A poll conducted by Gallup Europe in 2002, not long before the 'big bang' enlargement, found that approximately '6 in every 10 people (57%)' expressed concerns that 'British interests [would] be watered down' due to the enlargement.[273] Clearly, the issue of enlargement and, consequently, of intra-EU migration were raising concerns in the UK even before the event took place.

---

[270] R Ford, W Jennings, W Somerville 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391, 1396.
[271] A Park, E Clery, J Curtice, M Philips, D Utting, *British Social Attitudes: The 29th Report* (NatCen Social Research 2012) <https://bsa.natcen.ac.uk/media/38852/bsa29_full_report.pdf> accessed 4 April 2020, 32.
[272] A Bohman, M Hjerm 'In the Wake of Radical Right Electoral Success: A Cross-Country Comparative Study of Anti-Immigration Attitudes over Time' (2016) 42 Journal of Ethnic and Migration Studies 1729, 9.
[273] EOS Gallup Europe, 'European Union Enlargement, UK Opinion Poll' (2002) <https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl124_en.pdf> accessed 5 April 2020.

In this context, the accession of the CEE states to the EU took a central place in the discussion. The negative attitudes were aimed not only at the notion of intra-EU migration itself but also at specific MS nationals. For instance, in the UK public discourse Central and Eastern Europeans were at times even portrayed as 'temporary migrant workers taking jobs from British citizens',[274] even though the impact of their employment in the UK was rather market-driven and was meeting the demands of the labour market, as explained earlier.

It resembles situations taking place after similar unprecedented events, including financial crises and times of other substantial changes in a given society. If the economic contribution of migrants 'legitimises' their presence in the receiving countries, economic recession does the opposite and they start to be perceived on new political, economic and cultural terms.[275] As mentioned above, it can also be perceived as a threat to the identity of a given population. Intra-EU migrants were affected in a similar way, being seen as a threat especially after the 2004 enlargement of the EU. As mentioned earlier, this was successfully perpetuated especially by the British tabloids, talking about the 'threats' of the increased free movement. The fears which are portrayed by the media or the politicians 'may be extreme, fantastical and insubstantial' but they continue to possess the ability to 're-order identity'.[276]

3.1.3.2. Austerity and the Negative Outlook

In light of the negative outlook towards the increased intra-EU migration, it should be noted that the eurozone crisis of 2008 and the following austerity measures imposed by the British government contributed to the anti-migration attitudes in the UK. The austerity politics were executed in 2010 by the coalition government of Liberal Democrats and Conservatives and in 2015 by the Conservative government. The upsurge in intra-EU migration overlapped with the austerity and the lower spending on public services.[277] Unsurprisingly, this 'new era of austerity'[278] was characterised by a particularly heightened debate on the issue of intra-EU

[274] L McDowell, 'Old and New European Economic Migrants: Whiteness and Managed Migration Policies' (2009) 35 Journal of Ethnic and Migration Studies 19.
[275] D Schnapper, 'The debate on immigration and the crisis of national identity' (1994) 17 West European Politics 127, 128.
[276] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 70.
[277] J Portes, 'The Economic Impacts of Immigration to the UK' (*Centre for Economic Policy Research*, 6 April 2018) <https://cepr.org/voxeu/columns/economic-impacts-immigration-uk> accessed 16 July 2022.
[278] I Koch, 'What's in a Vote? Brexit beyond Culture Wars' (2017) 44 American Ethnologist 225, 226.

migration and the access of other MS nationals to the welfare system of the UK. In this light, the austerity politics became a useful tool in the hands of right-wing populist parties, directing the blame towards the intra-EU migrants' use of social benefits. These parties successfully put the austerity politics into the narrative on the abuse of the British welfare system and of free movement rights by intra-EU migrants, portraying other MS nationals as an additional pressure on the already tight welfare system.

In this light, the discrepancy between 'us' and 'them' was successfully employed also in the division of 'strivers and skivers' in light of the augmenting austerity in the UK: the 'sacrificial citizens', who were enduring the struggles of the austerity politics, were led to believe they were also carrying the burden of the 'needy and un-entitled immigrants'.[279] In November 2015, the British government published a report on the benefits claimed by EU nationals, which estimated that as of March 2013, 37-45% of the 'EEA nationals (excluding students) who were resident in the UK having arrived in the preceding 4 years were in households claiming either an in-work or out-of-work benefit or tax credit'.[280] This estimate, however, was later found to be considerably higher than other estimates due to the fact that children were included in the calculation as benefits recipients,[281] an approach clearly aimed at amplifying the alleged reliance of EEA citizens on the British welfare system. Nonetheless, the then Prime Minister David Cameron had almost immediately used this data to claim that 'at any one time, around 40 percent of all recent European Economic Area migrants are supported by the UK benefits system',[282] certainly fuelling further anxiety towards the abuse of the welfare system by intra-EU migrants.

---

[279] K Powell, 'Brexit Positions: Neoliberalism, Austerity and Immigration — The (Im)possibilities? of Political Revolution' (2017) 41 Dialect Anthropol 225, 230.

[280] UK Department for Work and Pensions, 'Benefit claims by EEA nationals: UK Benefit and Tax Credit claims by recently arrived EEA migrants' (November 2015), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475765/uk-benefits-and-tax-credits-eea-migrants.pdf> accessed 29 June 2022, 7.

[281] The Migration Observatory at the University of Oxford, 'EU Migration, Welfare Benefits and EU Membership (Pre-referendum)' (2 May 2016) <https://migrationobservatory.ox.ac.uk/resources/reports/eu-migration-welfare-benefits-and-eu-membership/> accessed 29 June 2022, 10.

[282] D Cameron, 'Speech on Europe' (Chatham House, London, 10 November 2015) <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe> accessed 28 June 2022.

Against this background, the policy of a 'hostile environment' for migrants was initiated. The concept of the 'hostile environment' was introduced in 2012 by the then Home Secretary Theresa May, who stated that her aim is 'to create, here in Britain, a really hostile environment for illegal immigrants'.[283] It has been argued that this term 'summarizes, echoes, and also reinvents a language of anti-immigrant sentiment' which was found in 'the post-war period of decolonization'.[284] The use of such an intensely negative terminology only accentuates the determination of the government to 'fight' the immigration by all available means. The purpose of such a policy was to make 'life impossible for migrants and refugees who do not have permission to live in the UK' and essentially to remove access to basic rights for such migrants.[285] Even though the hostile environment was arguably aimed at non-EU migrants in the first place, its effects on the fuelling of the anti-migration rhetoric also towards intra-EU migrants cannot be denied. Particularly, it is the EU citizens who were mostly associated with the abuse of the UK welfare system due to their entitlement and perceived free access to it as part of their free movement rights.

It should be noted that the creation of a 'hostile environment' went as far as the signing of a Memorandum of Understanding between the Home Office and NHS Digital ('the national digital, data and technology delivery partner for the NHS and social care system'[286]) to allow the Home Office to request non-clinical patient data with the purpose of immigration enforcement.[287] This initiative was not only publicly called out for its extreme nature but was also judicially challenged by the Migrants' Rights Network in the UK on the basis of, inter alia, breaches of 'privacy and data protection rights under the Convention and the Charter' and

[283] J Kirkup, 'Theresa May interview: "We're going to give illegal migrants a really hostile reception"' *The Telegraph* (25 May 2012) <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/> accessed 28 June 2022.
[284] H Wardle, L Obermuller, '"Windrush Generation"' and '"Hostile Environment"' (2019) 2 Migration and Society 81, 82.
[285] F Webber, 'On the Creation of the UK's "Hostile Environment"' (2019) 60 Race & Class 76, 78.
[286] NHS Digital, 'About Us' <https://digital.nhs.uk/about-nhs-digital/our-organisation/corporate-information-packs> accessed 28 June 2022
[287] (Withdrawn) Memorandum of Understanding between Health and Social Care Information Centre and the Home Office and the Department of Health, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774071/MoU_between_HSCIC__Home_Office_and_DH.pdf> accessed 28 June 2022.

discrimination against patients who are subject to immigration control.[288] The judicial challenge successfully created a strong pressure on the signatories and, eventually, the government announced that the deal was withdrawn and restricted only to 'those individuals convicted of more serious criminal offences, or who represent a risk to public security'.[289]

The austerity measures adopted by the UK government in the 2010s, along with the adoption of a 'hostile environment' towards immigration in general, were an essential contributor to the already negative outlook of the public towards intra-EU migration and the access of EU nationals to the British welfare system. These circumstances, in their turn, contributed to and facilitated the advancement of the right-wing populist parties in the UK.

3.1.3.3. The Rise of UKIP

This discussion on the negative outlook towards intra-EU migration in the UK is closely connected with the emergence and advancing success of British right-wing populist parties and leaders. As was discussed earlier in the Chapter, such parties tend to adopt a Eurosceptic and anti-immigration stance. The overall political discourse in the UK was fruitful soil for such parties in light of the 2004 expansion and increased free movement within the enlarged EU.

The large-scale migration to the Kingdom that took place after the accession of the new MSs in 2004 gave strong salience to the issue of intra-EU migration. This, in its turn, was ready to be picked up by a party with right-wing and populist ideologies. Thus, the salience of the issue of migration was reinforced by the uprise of a far-right party – the UK Independence Party (UKIP), which claimed ownership of the immigration issue'.[290]

---

[288] 'Migrants' Rights Network granted permission for judicial review of patient data-sharing agreement between NHS Digital and the Home Office' *Matrix Chambers* (1 March 2018), <https://www.matrixlaw.co.uk/news/migrants-rights-network-granted-permission-legally-challenge-data-sharing-agreement-nhs-digital-home-office/> accessed 28 June 2022.

[289] 'A statement from NHS Digital on the Memorandum of Understanding with the Home Office' *NHS Digital* (9 May 2018) <https://digital.nhs.uk/news/2018/a-statement-from-nhs-digital-on-the-memorandum-of-understanding-with-the-home-office> accessed 12 August 2022; 'Legal Victory against Government's Hostile Environment' *Liberty* (12 November 2018) <https://www.libertyhumanrights.org.uk/issue/legal-victory-against-governments-hostile-environment/> accessed 28 June 2022.

[290] A D'Angelo, E Kofman, 'UK: Large-Scale European Migration and the Challenge to EU Free Movement' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 175.

Generally, anti-migration attitudes tend to involve criticism of the EU freedom of movement, as well as Euroscepticism. Furthermore, the wordings used in the tabloids and their presentation of the numbers of intra-EU (and other) migrants were not published without an impact on the rise of right-wing (populist) Eurosceptic parties. Seeing the large immigration figures presented by the tabloids in parallel with a strong condemnation and negative attitude towards the inflows, the British public would, certainly, become more drawn to the parties whose ideology would imply their willingness to reduce the 'threatening' large-scale migration. Thus, this situation strongly contributed to the popularity of radical right parties with anti-immigrant stances and particularly of the UKIP, which was founded in 1993.

UKIP gained a big momentum in the 2013 British general elections, receiving 12,6% of the total vote and winning its first ever seat.[291] The party's success advanced further in the European Parliament elections of May 2014, where it received 27% of the votes in the UK and became the first party to surpass both the Conservatives and the Labour in a nation-wide election in the UK.[292] This success indicates the reach of this Eurosceptic party in the British public.

The large success of the UKIP in these elections was due to various reasons and those 'can be at least partly attributed to its successful appeal to public concerns about immigration from (new) EU Member States'.[293] Thus, it claimed ownership of the issue of intra-EU migration, at least to some extent, which ensured its popularity and the resulting success among the electorate. Furthermore, the UKIP developed the basis for support of its Eurosceptic propositions in the future.

It is noteworthy that even the pro-EU parties in Britain at times altered their approach to some of the core principles of the EU, including free movement of persons and access to social

[291] S Pilling, R Cracknell, 'UK Election Statistics: 1918- 2021: A Century of Elections' (House of Commons Library, 18 August 2021), <https://researchbriefings.files.parliament.uk/documents/CBP-7529/CBP-7529.pdf> accessed 12 August 2022, 12.
[292] Ibid, 62; P Wintour, N Watt, 'Ukip wins European elections with ease to set off political earthquake' *The Guardian* (26 May 2014), <https://www.theguardian.com/politics/2014/may/26/ukip-european-elections-political-earthquake> accessed 12 August 2022.
[293] U Sedelmeier, *Europe after the Eastern Enlargement of the European Union: 2004-2014* (Heinrich Böll Stiftung, 10 June 2014) <https://eu.boell.org/en/2014/06/10/europe-after-eastern-enlargement-european-union-2004-2014> accessed 5 April 2020, 11.

benefits. For instance, in 2014 the Labour Party's Shadow Work and Pensions Secretary Rachel Reeves strove to prove her party is 'tough on immigration' by extending from three months to two years the period during which 'EU migrants are prevented from claiming out-of-work benefits.[294]

A very vivid example of the mentioned phenomenon is the change in the attitude of the Liberal Democratic Party in 2014. Particularly, the then party leader and British Deputy Prime Minister Nick Clegg 'tone[d] down his reputation as the most Europhile pro-immigration political leader in Westminster' by calling for 'tighter rules on migrants coming to Britain from future EU accession countries'.[295] He particularly talked about the need to tackle 'benefit tourism' and insisted it could be curbed without challenging the core principle of freedom of movement within the Union.[296] Later, in a speech on immigration, Clegg noted that he was still pro-European and believed that freedom of movement is unequivocally a good thing. However, he believed that due to 'huge wealth discrepancies' in the EU, which had become a 28-member bloc, there was a need for free movement reform which would 'reflect these realities'.[297] Particularly, his suggestions were focusing on the necessity of removing the special treatment for the self-employed, as well as extending the 7-year transitional period further for any accessions to the EU in the future. This change of attitude was argued to be a sign that the Liberal Democrats 'had to rethink their approach to the EU after disastrous results for the party in May's European elections' where they managed to keep only 1 of their 12 European Parliament seats.[298]

This is a rather good example of a mainstream party changing its stance and converting into a more radical ideology. The Liberal Democratic Party was trying to appeal to more voters by

---

[294] P Wintour, 'Labour will curb tax credits for EU migrants, says Rachel Reeves' *The Guardian* (19 November 2014) <https://www.theguardian.com/politics/2014/nov/18/labour-clamp-down-in-work-tax-credits-eu-migrants> accessed 11 April 2022.
[295] J Pickard, 'Nick Clegg to Call for Tighter Migrant Controls' *Financial Times* (4 August 2014) <https://www.ft.com/content/99db869a-1b1d-11e4-b649-00144feabdc0> accessed 20 March 2021.
[296] 'Nick Clegg sets out plans to curb benefits to EU migrants' *The Guardian* (26 November 2014) <https://www.theguardian.com/politics/2014/nov/26/nick-clegg-benefits-eu-migrants> accessed 20 March 2021.
[297] 'Full Text: Nick Clegg's Speech on Immigration' *Prospect* (5 August 2014) <https://www.prospectmagazine.co.uk/politics/full-text-nick-cleggs-speech-on-immigration> accessed 20 March 2021.
[298] J Pickard, 'Nick Clegg to Call for Tighter Migrant Controls' *Financial Times* (4 August 2014) <https://www.ft.com/content/99db869a-1b1d-11e4-b649-00144feabdc0> accessed 20 March 2021.

taking a differing position on a salient issue. Mainstreaming of radical parties takes place in the political spheres along with the opposite phenomenon happening, as explained in this Chapter and as evidenced by this example of a British political party. Nonetheless, a further radicalisation of already radical (right-wing populist) parties based on a salient issue can occur too, as will be seen below. In addition to the change in the approach of pro-European political parties in the UK, other parties (or at least political figures thereof) which were usually adopting a strict stance on free movement of persons, were advancing their views even further. For instance, the then UKIP Member of Parliament, Mark Reckless, even had suggested that EU migrants who had been living in the UK might be asked to leave the country under certain conditions.[299] While this was later clarified to *not* be including other EU nationals,[300] the overall attitude towards migration was bound to translate into a stricter attitude towards intra-EU migrants, too. This could indicate how widespread the issue of intra-EU migration had become in the political debate and how it had penetrated the discussions.

This move, whereby the most pro-European British party and the coalition partner in the government at the time moved from their initial stance of supporting intra-EU migration to supporting restrictions on the free movement of persons indicates an overall shift in the political, as well as social and public sphere of the attitudes in the UK, since the political parties' position is also a reflection of the public concerns and demands. As mentioned earlier, the UK was never the most optimistic MS about EU integration and aspects related to it, including intra-EU migration. Nonetheless, the attitudes towards these issues started being viewed from an even further negative viewpoint. The wording and information presented in the British tabloids, the strong emergence of the far right and Eurosceptic UKIP, the growing fear from the influx of nationals of the newly accessed MSs, the claims made by political party leaders about intra-EU migration and its impact on the UK economy and the UK's population, all had their contribution to the development of a negative public attitude towards the EU in general and the free movement of persons within the EU in particular. A pro-European party beginning to use the expression of 'benefit tourism' and abruptly targeting one of the core

[299] R Mason, 'Mark Reckless sparks immigration row on eve of Rochester byelection' *The Guardian* (19 November 2014) <https://www.theguardian.com/uk-news/2014/nov/19/mark-reckless-immigration-row-rochester-byelection> accessed 20 March 2021.
[300] Ibid.

principles of the EU is an indicator of the strong anti-immigration (including intra-EU migration) attitudes in the country, regardless of whether it is a strategy of a mainstream party to gain more electoral support or a fundamental change in the party's ideology. These developments in the British social and political life provided Prime Minister David Cameron with further basis to bring up the renegotiation of the conditions of the UK's EU membership.

3.2. Brexit

The exit of the UK from the EU was, essentially, the culmination of the continuous active interconnections between the discussed dynamics: the fears of the intra-EU migration, especially following the 2004 Eastward enlargement and the uprise of right-wing populism in the UK. Arguably, the culmination of the notably MS-friendly approach of the Court of Justice on the issue of free movement of persons and social benefits (in the form of its judgment in *Commission v UK*[301]) also took place around the time of the Brexit referendum, specifically 9 days before it. Therefore, it is crucial to provide a discussion of the Brexit process and, particularly, the build-up to the 2016 referendum.

Brexit is a complex topic, and the academic literature has produced a number of impressive pieces of work in the relatively short amount of time of the Brexit process.[302] Since there is significant literature covering this topic and since the focus of this thesis is not the Brexit itself, this thesis does not aim to delve into too deep and detailed analysis on the issue. However, given the overall attitudes towards the free movement of persons and social benefits in the UK, a link may be drawn between the negativity surrounding these issues and the Brexit

[301] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.

[302] See, eg, E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016); F Fabbrini, *The Law and Politics of Brexit* (Oxford University Press 2017); M Dougan, *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017); E Spaventa 'Update of the Study on the Impact of Brexit in Relation to the Right to Petition and on the Competences, Responsibilities and Activities of the Committee on Petitions' Bocconi Legal Studies Research Paper, 3171414 (1 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171414> accessed 14 March 2020; K Alexander, C Barnard, E Ferran, A Lang, N Moloney, *Brexit and Financial Services: Law and Policy* (Hart Publishing 2018); E Spaventa 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 44 *European Law Review* 589; I Pernice, AM Guerra Martins, *Brexit and the Future of EU Politics: A Constitutional Law Perspective* (Nomos 2019); F Fabbrini, *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020); PJ Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (Kluwer Law International 2020); Publications by DCU Brexit Institute <https://dcubrexitinstitute.eu/> accessed 14 March 2020.

process. Therefore, it is important to take Brexit into account as a vital element in understanding the case of the UK in light of EU free movement of persons and social benefits.

3.2.1. The Build-Up to Brexit

Before David Cameron himself stepped onto the scene of what would later become known as Brexit, an additional foundation was laid by the Interior Ministers of 4 EU MSs, Austria, Germany, the Netherlands and the UK. There were debates circulating regarding social benefits for the nationals of the newly accessed CEE MSs not only in the UK, but also in the other mentioned MSs and the topic was 'politically volatile among parties on the right' in particular.[303]

These concerns and the overall negative attitude towards the notion of free movement and social benefits were legally materialised in 2013 in a letter addressed to the European Council Presidency of the time, Ireland. It was written by the interior ministers of these four MSs. They were stating that 'a number of municipalities, towns and cities in various Member States are under considerable strain by certain immigrants from other Member States'.[304] They claimed that '[t]hese immigrants avail themselves of the opportunities that freedom of movement provides, without, however, fulfilling the requirements for exercising this right'.[305]

According to the Letter, such an immigration adds a burden on the host MSs and generates 'considerable additional costs, in particular caused by the provision of schooling, health care and adequate accommodation'.[306] For Ministers, of particular concern is the issue of 'a significant number of new immigrants' accessing social assistance in the host MSs, as they claim 'frequently without a genuine entitlement, burdening the host countries' social welfare systems'.[307] This indicates the salience they believe the issue of benefit tourism has in the EU. Nonetheless, as discussed earlier, there are strong misconceptions about the actual numbers of such abusers, since the real percentage of people moving to other EU MSs solely for obtaining

[303] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 71.
[304] Letter to the President of the European Council from the Interior Ministers of Austria, Germany, the Netherlands and the UK (April 2013) <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 11 March 2020.
[305] Ibid.
[306] Ibid.
[307] Ibid.

social benefits there is rather low and barely affecting the social assistance systems of the host MSs.

In other words, the Letter presents the concerns of the four MSs on the free movement of persons (intra-EU migration) and directly (at times, indirectly) makes claims on the necessity of restricting the free movement of persons to certain categories of EU citizens, as well as of strictly limiting their access to social benefits in the host MSs. Retaining flexibility and adjusting to public and political realities (however, not perceived threats) is no wrongdoing, whereas blatantly calling on strict restrictions on these fundamental principles and, thereby, aiming for limitations on the EU citizenship as the fundamental status of EU nationals based on fearmongering is difficult to justify. Guild even considers this Letter 'the first serious attack on EU citizenship by four important Member States (or their interior ministers at least) since the citizenship's creation in 1993'.[308]

While the interior ministers confirm they are committed to the idea of free movement of persons, they state that they welcome EU citizens who exercise their free movement rights for the purposes of working, taking up professional training or university studies. In other words, they exclude from this list some economically non-active EU citizens, such as jobseekers, retired persons and other economically non-active (even if self-sufficient) nationals. The ministers further reinstate their ideas on this differentiation by stating later in the letter that the common goal is 'to promote the mobility of those European citizens wishing to work, study or set up a business in another Member State', as well as to 'strengthen the social cohesion in the host societies by integrating new immigrants'.[309] Thus, they believe the need to integrate new immigrants (ie nationals of newly accessed CEE MSs) is an additional and necessitated goal.

In this way, they essentially claim there are wrong types of immigrants, who 'place an excessive strain on the social systems of the receiving states thereby threatening the acceptance of the European idea of solidarity'.[310] The Letter, particularly, stresses the need for

[308] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 71.
[309] Letter to the President of the European Council from the Interior Ministers of Austria, Germany, the Netherlands and the UK (April 2013) <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 11 March 2020.
[310] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 73.

clear and effective legal tools for fighting abuse and fraud in this sphere. It, particularly, suggests banning re-entry for those who were expelled from the country, providing better defined rules about what measures can be taken against these abuses and against marriages of convenience. Most importantly for the topic of this thesis, the Letter also calls for enshrining a possibility of excluding those, who have not been employed or paid in the host MSs, from access to social benefits there.

Even the wording used by the Ministers, in crucial points talking of 'immigration' rather than 'intra-EU migration' or 'freedom of movement', highlights their outlook on what free movement of persons should be, ie an aspect of life of EU nationals that should be regulated with the main aim of promoting the interests of host MSs. These interests would be restricting access to their countries and especially restricting access to welfare for other EU nationals. Essentially, the Ministers were sharing a message that 'EU migrants' access to the welfare state is unwelcome'.[311]

Guild argues that by this Letter the four ministers demonstrate their belief that the nationals of other MSs should be perceived as immigrants rather than EU citizens with equal rights deriving from it and, consequently, the framework of their rights should be defined by the host MSs instead of the EU.[312] In other words, '[t]he entitlement to remain an EU citizen enjoying EU rights in a host Member State is outside this form of logic'.[313] Essentially, such an approach would leave out the EU (to the extent possible provided for by EU law) and particularly the Court of Justice from the equation. This would, in its turn, lead to MSs re-defining the free movement law and policy according to their own interpretation, a situation the Court has always avoided.

From the examination of the political and social dynamics in the UK, both before and after the Brexit process, it becomes clear that such a situation, whereby a difference was being put between other EU nationals and British nationals, was one of the aims of the UK: without EU

[311] N Ginsburg, 'Migration' in S Isaacs, D Blundell, A Foley, N Ginsburg, B McDonough, D Silverstone, T Young (eds), *Social Problems in the UK: An Introduction* (Routledge 2014).
[312] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 73-74.
[313] Ibid 74.

membership, EU nationals, including CEE nationals, would be simply third country nationals, who could be safely and legally perceived as immigrants. This would allow the UK to impose any restrictions that they may find necessary or desirable, as well as allowing to take control over migration.

Later, the European Commission provided detailed expertise rebutting the claims of the four Ministers.[314] Nonetheless, only 2 years after this communication, on 10 November 2015, the then British prime Minister David Cameron sent another letter to the President of the European Council. Having examined this Letter, Guild holds that this demonstrates that, essentially, evidence-based 'expertise and knowledge were rejected in favour of fear and scaremongering'.[315]

In this regard, it should be also recalled that the issue of identity is often taken into serious consideration by the public. Not surprisingly, this is a factor that can be used by political parties to attract the support of voters. Generally, a large inflow of migrants (especially, when it is larger than expected) can have consequences on the public perception of identity. As discussed earlier, changes in population composition can be perceived as threatening to the identity of a given population. Moreover, the need to maintain a homogeneous identity is a common call in the populist discourse. Therefore, it is not surprising that the movement of CEE nationals was largely perceived as a threat to the British national identity and played its role in the Brexit referendum.[316]

In sum, the Letter by the four Ministers (including the British Minister) is an indication that the UK socio-political sphere contained an atmosphere of dissatisfaction with the free movement of persons and social benefits, and the general fear over the mass influx of CEE nationals contributed to the UK's dissatisfaction.

[314] European Commission, 'Free movement of EU citizens and their families: Five actions to make a difference' (Communication) COM (2013) 0837 final.
[315] E Guild, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016) 75.
[316] R Ashcroft, M Bevir, 'Brexit and the Myth of British National Identity' (2021) 16 British Politics 117, 129.

3.2.2. Renegotiation of UK-EU Relationship

As it was noted earlier, the UK's dissatisfaction with EU policies and approaches did not develop overnight, particularly on the issues of free movement of persons and social benefits. Rather, it was a gradually built phenomenon. The opposition towards the EU reached 'its apex during the governments led by David Cameron'.[317] In November 2013, the then Prime Minister of the UK, David Cameron, wrote a featured article in Financial Times entitled 'Free Movement within Europe Needs to be Less Free',[318] which would then become the set of ideas he would aim for in renegotiating the UK's membership in the EU and which would later be realised even further than may have been expected through the withdrawal of the UK from the Union.

In 2013, David Cameron pledged that the Conservative manifesto expected in 2015 'will ask for a mandate from the British people for a Conservative government to negotiate a new settlement with our European partners in the next parliament'.[319] Cameron's statement on the intention to initiate a renegotiation of the terms of the UK's membership in the EU was followed by the promise to the electorate that, if elected into office, in the 2015 elections, he would arrange a referendum to be held on the UK's EU membership. This reminds of an interesting notion of 'UK-mentality' considered by De Schutter, which he defines as MSs looking at 'what they can get out of the EU and how the EU may benefit the national interest' and whereby a solidarity all across the Union is slowed down.[320] This is visibly materialised in the form of the requirement of renegotiation from the UK, which comes across as a cherry-picking on the part of the UK.

Thus, Cameron had promised since the beginning of 2013 that a victory in the 2015 elections would give him the opportunity to renegotiate UK's place and membership features in the EU.

---

[317] F Fabbrini, 'Introduction' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 3.
[318] D Cameron, 'Free Movement within Europe Needs to be Less Free' *Financial Times* (26 November 2013) <http://www.ft.com/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html#axzz4B0OQl8iL> accessed 18 December 2018.
[319] N Watt, 'EU referendum: In-out choice by end of 2017, Cameron promises' *The Guardian* (23 January 2013) <https://www.theguardian.com/politics/2013/jan/22/eu-referendum-2017-david-cameron> accessed 29 June 2022.
[320] H de Schutter, 'The Solidarity Argument for the European Union' in F Vandenbroucke, C Barnard, G de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 89.

He had suggested that the renegotiation would be followed by a referendum deciding whether the UK would remain in the EU or not. Meanwhile, he announced restrictions on other MS nationals' welfare rights, stretching EU law provisions as far as possible.[321]

'The Conservative-led Coalition government, elected in May 2010', had vowed that it would significantly bring down the net migration level: however, it did not have any 'room for manoeuvre' with EU nationals exercising their free movement rights, as Cameron himself admitted by noting that his immigration plans require Treaty change.[322] On this basis, in November 2015, the then Prime Minister Cameron submitted a letter to the President of the European Council, Donald Tusk.[323] The letter contained statements regarding the issues of economic governance, competitiveness, sovereignty and immigration. Talking about the latter, Cameron notes that despite its advantages, the free movement of persons brings pressures on schools, hospitals and public services, which indicates a need to 'be able to exert greater control on arrivals from inside the EU too'.[324] For future accessions, Cameron suggests that free movement should not automatically apply to the new MSs. It should not apply until after 'their economies have converged much more closely with existing Member States'.[325]

As expected, he also touches upon the need to 'crack down on the abuse of free movement', which should imply 'tougher and longer re-entry bans for fraudsters and people who collude in sham marriages'.[326] A noteworthy point made by the Prime Minister to consider is the necessity to address the judgments of the Court of Justice 'that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse'.[327] In this way,

---

[321] See, eg, P Wintour, 'EU migrants: David Cameron sets out more benefit restrictions' *The Guardian* (27 November 2013) <https://www.theguardian.com/politics/2013/nov/27/david-cameron-benefit-restrictions-eu-migrants> accessed 12 August 2022; A Osborn, 'UK rushes out welfare curbs to deter East European migrants' *Reuters* (18 December 2013) <https://www.reuters.com/article/uk-britain-eu-immigration-idUKBRE9BH00D20131218> accessed 12 August 2022.

[322] P Wintour, 'David Cameron admits immigration plan needs EU treaty change' *The Guardian* (28 November 2014) <https://www.theguardian.com/uk-news/2014/nov/28/david-cameron-immigration-eu-treaty-change> accessed 12 August 2022.

[323] Letter to the President of the European Council from the Prime Minister of the UK (10 November 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf> accessed 11 March 2020.

[324] Ibid.

[325] Ibid.

[326] Ibid.

[327] Ibid.

Cameron showed his direct disagreement and dissatisfaction with the expansion of EU citizens' rights as promoted by the CJEU. However, this letter came one year after the *Dano*[328] judgment and two months after the very recent *Alimanovic*[329] judgment, which, as discussed earlier in Chapter 3, were limiting the rights of EU citizens to access social assistance in the host MSs.

Finally, Cameron is proposing to restrict access to social benefits for other MS nationals even further. Particularly, the suggestion is to allow other EU nationals access to in-work social benefits and social housing in the UK only after they have lived there and contributed for a period of four years. Such a limitation of EU citizens' rights would have been an even more far-reaching step in putting strict boundaries for EU citizens. Arguably, it could have also resulted in a decrease in the overall freedom of movement.

Thus, by this letter addressed to the European Council, the UK was requesting a renegotiation of some of its membership terms in the EU. One of the aspects it wanted to be renegotiated and changed was the free movement of persons, as well as the access to social benefits by other MS nationals. Based on this Letter, negotiations were initiated between the UK and the EU.

Following negotiations of several months, in February 2016 a deal was concluded between the UK and the EU: a New Settlement for the United Kingdom within the European Union.[330] It was 'codified in a series of documents, including a decision of the heads of state and government of the EU Member States', which essentially turned it into an international treaty concluded by the EU MSs.[331]

The part of the deal of most interest for this thesis is the provision on the so-called emergency brake. Point 2 of Section D of the New Settlement stated that the Commission will submit certain proposals to amend the existing EU secondary law. The main amendment to the

[328] Case C-333/13 *Dano* [2014] OJ C16/05.
[329] Case C-67/14 *Alimanovic* [2015] OJ C 371/10.
[330] A New Settlement for the United Kingdom within the European Union: Extract of the conclusions of the European Council of 18-19 February 2016 [2016] OJ C 691/1.
[331] F Fabbrini, 'Introduction' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 3-4.

Regulation 492/2011 on freedom of movement of workers within the Union was aiming to 'provide for an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time'. The Deal set out procedural provisions on how the mentioned clause should be applied. It would be implemented in 'an exceptional situation' which would be of a 'scale that affects essential aspects' of host Member State's social security system, and the Council could authorise 'to restrict access to non-contributory in-work benefits to the extent necessary'. Furthermore, the Council could authorise to put limitations on 'the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment'.[332]

Thus, the New Settlement was essentially meeting all the critical requirements put forward by the UK. It was allowing an EU MS to put rather strict limitations on EU citizens' rights, and this was intended specifically in cases of significant inflows of workers from other MSs. All in all, the deal was addressing the main concerns of the UK related to the increased EU migration and to the issue of 'benefit tourism'.

In parallel to these changes, the Court of Justice adopted its judgment in the case *Commission v UK*[333], which was examined in more detail in Chapter 3.

In this case, the European Commission was asking the CJEU to find the UK in failure of complying with its obligations on social security for other MS nationals, since it had specified the possession of a right to reside there as a pre-condition for child benefit or child tax credit. In its judgment of 14 June 2016, less than ten days before the Brexit referendum, the CJEU held that the requirement of having a right to reside in the host MS as an eligibility condition for certain social benefits was compatible with EU law, particularly with the Regulation 883/2004. The Court reinstated, based on its earlier case law from 2010s, that while such a requirement would fall under the notion of indirect discrimination, it is, in principle, justified by the need to protect the host Member State's finances. The CJEU strongly emphasised the

[332] A New Settlement for the United Kingdom within the European Union: Extract of the conclusions of the European Council of 18-19 February 2016 [2016] OJ C 691/1.
[333] Case C-308/14, *Commission v UK* [2016] OJ C 305/05.

need of protecting the finances of host MSs and noted that it can serve as a justification for restricting access to social benefits, if the access 'could have consequences for the overall level of assistance which may be accorded by that State'.[334]

It can be observed that this landmark judgment by the Court, whereby it further established possibilities for host MSs (particularly the UK) to restrict access to social benefits for other EU nationals, came at a decisive time for the EU-UK relationship. The judgment would clearly appeal (whether intentionally or not) to the wishes of the British government to restrict access to social benefits. Along with the emergency brake set out in the New Settlement Deal, the Court's position assuring stronger control over social benefits for other EU nationals could have been a game-changer. It has been argued that the emergency brake reached by Cameron, in fact, demonstrated that the EU 'understood the concerns of those communities where the numbers of migrants have increased rapidly in a short space of time, areas which [later] voted resoundingly to leave'.[335] However, the strict approach to the indivisibility of the four freedoms taken by the EU, which was manifested in the New Settlement deal in February 2016, did not address the concerns of the British political figures. Responses within Cameron's own party 'ranged from lukewarm to hostile'.[336] and contributed to the referendum results of leaving the EU.[337]

Having reached what he considered a satisfying agreement with the EU, Cameron called the referendum for 23 June 2016 as he had vowed to do.

3.3. The Brexit Referendum and the Withdrawal Agreement

As the referendum date was announced, the campaigns both for staying in the EU and leaving it commenced. They took rather distinct approaches when portraying the importance of staying in or leaving the EU. The Remain campaign often depicted the EU membership

[334] Ibid, para 80; Case C-184/99 *Grzelczyk* [2001] ECR I-6229, para 44; Case C-209/03 *Bidar* [2005] ECR I-2151, para 56; Case C-140/12 *Brey* [2013] OJ C 344/43, para 61; Case C-333/13 *Dano* [2014] OJ C16/05, para 63.
[335] C Barnard, '(B)Remains of the Day: Brexit and EU Social Policy' in F Vandenbroucke, C Barnard, G de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 497.
[336] G MacLeod, M Martin Jones 'Explaining "Brexit Capital": Uneven Development and the Austerity State' (2018) 22 Space and Polity 111, 116.
[337] C Barnard, 'Brexit and the EU Internal Market' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 211.

through the lens of the UK's special status in it, involuntarily implying the non-ideal nature of the Union. The campaign, which was even dubbed 'unenthusiastic'[338], focused on the economic benefits of the membership. In comparison, the Leave campaign emphasised the anti-immigrant rhetoric via claims that the UK is unable to control its borders because of its membership in the Union. In other words, the Remain campaign put forward 'economic reasons in favor of the EU, while Leave astutely played the voters' emotions with arguments about sovereignty and control of migration'.[339]

Eventually, on 23 June 2016 the UK voted to leave the EU, with a small margin where 51,89% of votes were for leaving and 48,11% were for remaining. The result of the Brexit referendum was a shock for many. Despite all the disagreements around various issues, it was still unexpected for many that the British population would vote to leave the EU. Nonetheless, based on that vote, the process of the withdrawal started. The first step in this procedure was to invoke Article 50 TEU, which sets out provisions on the withdrawal of a MS from the Union. Article 50(1) stipulates the possibility of leaving the EU for EU MSs 'in accordance with its own constitutional requirements'.

Article 50(2) provides for some procedural rules on the withdrawal process, by stating that the MS must notify the European Council of its intention, and based on the guidelines provided by the latter, 'the Union shall negotiate and conclude an agreement with that State'. This agreement should set out the withdrawal arrangements, taking into consideration the framework of the future relationship between the EU and the withdrawing MS. Once the concluded withdrawal agreement enters into force, the former MS is not bound by the Treaties, according to Article 50(3). The same Article also includes a clause for an alternative situation where the Union and the leaving State do not reach an agreement. In that case, the Treaties cease to apply to that state '2 years after the notification' of withdrawal is invoked. An exception to this has to be provided by the European Council unanimously in the form of

[338] See, eg, A Menon, B Fowler, 'Hard or Soft? The Politics of Brexit' (2016) 238 National Institute Economic Review R4; B Donnelly, 'UK: Brexit—The Car That Keeps on Crashing' in M Kaeding, J Pollak, P Schmidt, (eds), *Euroscepticism and the Future of Europe* (Palgrave Macmillan 2021).
[339] F Fabbrini, 'Introduction' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 4.

an extension agreed on with the withdrawing State. This clause providing the possibility of an extension was used by the UK three times throughout the 3,5 years of withdrawal negotiations.

Finally, Article 50(5) states that a State that has withdrawn from the EU may apply to re-join it, and that request shall be reviewed and considered in the same procedures as for any state that requests to join the EU.

The UK invoked the provision set out in Article 50(2) TEU and notified the European Council of its intention to withdraw on 28 March 2017. Following this, the negotiations on the terms of the UK withdrawal, as well as on the future EU-UK relationship were initiated.

The process of the UK leaving the EU was not a straightforward path and was full of various obstacles on the way of ensuring a smooth withdrawal. It was expected that the Brexit negotiations would be complex and difficult, not least due to the contentious internal politics between the hard and soft Brexiteers. The process of negotiations was particularly complex, with many dead ends and three extensions required to finalise them into a Withdrawal Agreement.

Before the negotiations process started, a big misstep taken by the UK is argued to be its 'decision to trigger Article 50 TEU and launch formal negotiations with the EU before it had a coherent negotiating position'.[340] Indeed, the process of the Brexit negotiations demonstrated the surprisingly strong divisions in the UK and its inability to present itself as a cohesive and united negotiating party, while the diverse EU remained united throughout.

One of the core difficulties in the Brexit negotiations were 'background political pressures', particularly coming from hard Brexiteers who would have not accepted readily 'a solution that accords large numbers of recent EU citizens the right to stay in the UK, with access to social/health care benefits'.[341] Thus, despite the wish of both sides to come to a mutually acceptable solution on the issue of citizens' rights, there were many obstacles on the path of reaching such a consensus.

[340] E Jones, 'The Negotiations' in F Fabbrini (ed), *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020) 42.
[341] P Craig, 'The Process: Brexit and the Anatomy of Article 50' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 58.

The three extensions that the UK requested and was duly granted are argued to be the result of a gap in Article 50(3) TEU, which 'regulates extension in procedural terms' only. Therefore, it has been suggested that it would be 'appropriate for the European Council to attach conditions to an extension decision, provided they are not inconsistent with EU primary law'.[342] However, this is an issue of a separate discussion, therefore the thesis will not cover this issue in further detail.

In the updates on the progress of the negotiations, three main categories of issues were identified: the financial settlement, the issue of the border between Northern Ireland and Ireland and citizens' rights.[343] However, what the result of the negotiations would be still remained unpredictable.

An initial segment of the negotiations took nearly 2 years before an agreement was reached between the parties in November 2018. However, the agreement reached by the then Prime Minister Theresa May was rejected by the British Parliament three times. It is argued that the driving reason for this was the strong focus the May government put on securing an actual deal with the EU and the insufficient attention it paid 'to galvanizing support among UK Members of Parliament'.[344]

Following this defeat, a new Prime Minister came into play, Boris Johnson. In his short time of negotiations, Johnson took a rather Eurosceptic position in the negotiations, prorogued the British Parliament, called new general elections but was forced to deliver an implementable agreement with the EU. The Withdrawal Agreement between the UK and the EU[345] was eventually concluded in January 2020. On 31 January 2020 the UK left the EU, entering a transition period until the end of the year. Finally, the EU-UK Trade and Cooperation

[342] F Fabbrini, R Schmidt, 'The Extensions' in F Fabbrini (ed), *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020) 81.
[343] 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' TF50 (2017) 19.
[344] E Jones, 'The Negotiations' in F Fabbrini (ed), *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020) 38.
[345] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I/1.

Agreement[346] was sealed on 24 December 2020, just one week before the UK was due complete its withdrawal from the EU.

The Withdrawal Agreement contains a separate Part on citizens' rights, Part Two. It includes provisions ensuring continuity of residence (Article 11), general residence rights (Article 13), right to exit and entry (Article 14), right of permanent residence (Article 15), as well as issuance of residence documents in general and during the transition period (Articles 18 and 19). Chapter 2 regulates the rights of workers and self-employed persons, and Chapter 3 regulates the recognition of professional qualifications. The structure resembles the general provisions of EU law on the citizens' rights. It also contains a provision on non-discrimination (Article 12), according to which 'any discrimination on grounds of nationality' is prohibited 'in the host State and the State of work' in respect of the *ratione personae* of the Agreement.

The rights set out in Part Two on Citizens' Rights apply only to those EU and UK nationals who exercised their free movement rights before the end of the transition or withdrawal date. In other words, 'the scope of application of citizens' rights as codified in the Withdrawal Agreement is limited and in no way reflects the extent of free movement rights under EU law'.[347] Moreover, the crucial principles of EU law (for instance, the principle of equal treatment) will also apply only to the abovementioned categories of citizens. Thus, the relatively advantageous rights will be enjoyed only by a limited number of EU and UK citizens, who fall into one of the categories set out by the Withdrawal Agreement. Overall, it does not include any future free movement rights for either UK or EU nationals moving to reside between the Union and the Kingdom after the transition period.[348]

In sum, the Brexit referendum result led to a complex withdrawal process, with a number of extensions granted to the UK, government and Parliament changes and, eventually, a Withdrawal Agreement. Brexit, for the most part, belongs to history now, however the socio-

[346] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10.
[347] C Barnard, E Leinarte, 'Citizens' Rights' in F Fabbrini (ed), *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020) 115.
[348] Ibid 108.

political context it provided is a crucial aspect to consider in the discussion of the CJEU case law development on free movement of persons and social benefits.

4. Conclusion

This Chapter sought to identify several institutional, social and political dynamics which serve as the context for the changing CJEU approach on free movement and access to social benefits and to demonstrate how these dynamics unravelled in the specific circumstances of the UK.

Firstly, the issues of 2004 'big bang' enlargement and intra-EU migration were discussed. An increase in the latter was recorded in the same period as the fifth enlargement took place, which became an issue of a strong concern for some MSs. As a consequence, it was gaining much public attention and was often discussed in the political and legislative circles. In addition to the growing intra-EU migration, the 'big bang' enlargement of the EU towards the East saw 10 new MSs accessing the Union. The biggest enlargement in the EU history was certainly a matter of concern for several MSs, particularly in relation to the potential significant increase in the free movement of EU citizens. The different development levels of the newly accessing CEE countries as compared to the EU15 were further deepening the controversy around the fifth wave of EU enlargement, as well as the concerns of the existing MSs regarding a potential mass influx of other MS nationals. Given that there were many people migrating within the EU, particularly from the newer CEE MSs, immigration certainly became 'an important socioeconomic and public policy issue in all of the developed European economies'.[349] Finally, fears surrounding the issues of 'social/benefit tourism were also often discussed in light of the institutional, social and political dynamics.

Regarding the radical right and populism, it should be noted that while there is no one specific definition of the concepts, there are several characteristics upon which there is a consensus in the academic literature. As discussed above, both the radical right parties and populist parties have a common feature of drawing a difference between 'the people' and 'the elite'. In this

[349] A Adsera, BR Chiswick, 'Divergent Patterns in Immigrant Earnings Across European Destinations' in CA Parsons, TM Smeeding (eds), *Immigration and the Transformation of Europe* (Cambridge University Press 2006) 4.

way they tend to extremely simplify not only the challenges politics face, but also the 'number of players that could have an influence' on certain developments, ie the challenges presented to a given society (be that inequalities, economic crises or unemployment) are addressed 'through a simplifying prism that places two sole players in opposition to each other in an extremely tense relationship'.[350] This, consequently, excludes any other players and any other causes related to the field.[351] Furthermore, these parties have lately been recording further electoral support in Europe, which has led them to become part of governments and coalitions.

The issues of migration and Euroscepticism in light of free movement of persons and access to social benefits are tightly interwoven: intra-EU migration, as stressed earlier, is an inseparable manifest of free movement provisions. As right-wing populist parties tend to have anti-migration viewpoints and their opposition to lenient rules on free movement of persons is getting even stronger, these three dynamics formed the institutional, social and political context in which the CJEU case law was developed.

In terms of the CJEU position, it was shown earlier (in Chapter 3) that the Court's stance has changed throughout time, and it started interpreting its rules in a stricter manner, leaving much space of manoeuvre for MSs and less space for EU nationals to claim social benefits in MSs other than that of their nationality. As there was a wide level of debates among European countries on labour flows, which led to an even broader discussion on 'appropriate labour market rules and institutions' for the more integrated single market in the Union, social conflicts arose at national levels regarding the validity of national rules and practices, which 'led, at European level, to the European Court of Justice being called upon to rule on the legality of existing national labour and industrial relations laws and practices'.[352] This can indicate the importance of the role which the Court of Justice plays through its interpretation of provisions on free movement of persons.

[350] J Jamin, 'Two Different Realities: Notes on Populism and the Extreme Right' in A Mammone, E Godin, B Jenkins (eds), *Varieties of Right-Wing Extremism in Europe* (Routledge 2013).
[351] Ibid.
[352] B Galgóczi, J Leschke, A Watt, 'Introduction' in B Galgóczi, J Leschke, A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009) 2.

Furthermore, connecting the abovementioned with the fears which surrounded the 2004 enlargement, the rise in support of radical right-wing populist parties with their anti-migration and anti-EU ideologies, their entrance into office and overall fears around intra-EU migration among MSs, it can be argued that this is likely to have been perceived by the EU as a need to adopt stricter rules on the free movement of persons and EU nationals' rights deriving from it. As an EU institution, the Court of Justice may have attempted to provide its own 'assistance' in regulating this issue in the given context and may have implemented the rules on free movement of persons and access to social benefits in a stricter manner for EU citizens and adopted a more MS-friendly approach, thereby shifting its position on the issue. For a further and more detailed understanding of the issue, the example of the UK was analysed.

The case of the UK was used to exemplify the dynamics examined in this Chapter. In particular, the UK's position on intra-EU migration was examined, emphasising how the 2004 enlargement and the rise of intra-EU migration ultimately led to a negative attitude towards migration which was instrumentalised by right-wing populist parties. The Chapter explained how this development influenced the attempt by the UK to renegotiate its position within the EU and discussed the relevance of the migration issue in the Brexit process, which ultimately resulted in the UK withdrawal from the EU.

Following the 2004 'big bang' enlargement, an (expected) increase in the free movement of persons was recorded across the EU and particularly, in the UK. However, what was not expected is that the number of intra-EU migrants entering the UK would be much larger than calculated. Much research has been done in the field, finding that the increased free movement did not affect the UK adversely. Moreover, the British labour market even benefitted from it, which is one of the reasons why, in fact, the UK did not introduce transitional arrangements after the 2004 enlargement (in contrast to 12 other MSs). This indicates that, initially, the UK was rather welcoming towards CEE nationals.

Nevertheless, the large-scale movement of the nationals of the newly accessed MSs after the 2004 enlargement, whether real or perceived to some extent, 'progressively fed increased hostility towards immigrants and contributed to the popularity of curbs on free movements and

access to welfare' in the UK.[353] The decision to refrain from the transitional arrangements led to the rise of significant concerns in the UK about the negative impact of these dynamics. To further exacerbate the situation, austerity politics in the UK were simultaneously on the rise, which were employed by the right-wing and Eurosceptic populist parties to drive a negative outlook towards intra-EU migration in general and the (non-evidenced) high recourse by intra-EU migrants to the welfare system of the UK. In the last decade, therefore, migration became a specifically salient (if not the most salient) topic in the British socio-political discourse. This atmosphere provided fruitful soil for the rise of the radical right-wing populist and Eurosceptic parties. These issues were conveniently taken up by Eurosceptic British political parties, especially UKIP, who claimed ownership of these issues and gained unexpectedly strong electoral support. Moreover, even pro-European British political parties demonstrated a less pro-European approach, particularly with their calls to impose stricter rules on intra-EU migrants and to tackle 'benefit tourism'. Furthermore, the British tabloids contributed to the development of a fear from the enlargement event and the increased migration that followed it.

All the above led to the request by the UK to make changes in the EU. Firstly, the UK Home Secretary with 3 other Interior Ministers sent a Letter addressed to the European Council. Later, the then British Prime Minister David Cameron sought a renegotiation of the UK membership terms within the EU through his letter to the European Council President. The renegotiation of the UK's membership in the EU resulted in the adoption in February 2016 of the New Settlement deal between the EU and the UK. However, despite providing for the possibility of using an 'emergency brake' to control intra-EU migration in the UK, it did not succeed in drastically changing the Eurosceptic and negative attitudes in the UK towards free movement of persons and social benefits.

Less than 10 days before the Brexit referendum, the Court of Justice delivered its judgment in *Commission v UK*. In this very sensitive institutional, social and political context, the Court of Justice ruled in favour of the UK. Finding that the requirement of a right to reside in the host MS for obtaining social benefits is in compliance with EU law, the Court justified its

[353] A D'Angelo, E Kofman, 'UK: Large-Scale European Migration and the Challenge to EU Free Movement' in JM Lafleur, M Stanek (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016) 190.

reasoning based on the necessity of protecting the finances of host MSs. Thus, it once again avoided relying on the notion of EU citizenship and instead took a MS-friendly stance. In the delicate state of affairs of the upcoming Brexit referendum, the significance of such a judgment could not be underestimated. The judgment was, of course, effective not only for the UK but also had implications for the broader Union: it indicated that the Court, which had heavily been criticised by the UK, was willing to accept certain restrictions on free movement of persons and social benefits.

Nevertheless, eventually, in June 2016 the UK voted to leave the EU, which initiated the Brexit process. This ultimately resulted in the withdrawal from the EU, under the terms of the Withdrawal Agreement and now the EU-UK Trade and Cooperation Agreement.[354]

Thus, the institutional, social and political dynamics appeared highly influential in driving Brexit. This was also the context behind the CJEU case law. These developments indicate how the issue of free movement of persons and access to social benefits for other MS nationals was a crucial topic in the political and social dynamics within the UK. The salience of these issues led to a significant change of attitudes in the UK, whereby the welcoming approach towards intra-EU migration after the 2004 enlargement shifted towards a desire to limit the free movement of persons within the EU and the access of other MS nationals to the UK welfare system. These dynamics played a key role in the result of the Brexit referendum.

In connecting the analysis of this Chapter with the findings of Chapter 3 on the jurisprudence of the Court, it can be observed that timewise, these events were happening parallel to the Court's shifting stance on the issues in question. Particularly, in 2000s, when the UK was more welcoming of intra-EU migrants, the CJEU judgments were rather citizen-friendly. However, in 2010s the Court's judgments became much more restricting, as the example of *Commission v UK* indicates. This was happening in parallel with the ever present Eurosceptic and anti-migration attitudes in the UK. In other words, the restrictive approach of the CJEU was happening in the context of not only overall EU sensitivity towards the issues but also in

[354] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10.

the setting of the UK's strong dissatisfaction. In order to connect the analysis of this Chapter and the previous ones in a coherent and comprehensive way, the next and final Chapter will discuss this interconnection in a broader and more detailed perspective.

Chapter 5

General Conclusions

This thesis analysed the topic of EU free movement of persons and access to social benefits by EU citizens residing in a MS of which they are not nationals. The thesis, in particular, examined the development of the case law of the EU Court of Justice on the abovementioned issues with the aim to explain why the CJEU jurisprudence changed over time. The thesis embraced a law in context approach and shed light on several social, institutional and political dynamics – notably the 2004 'big bang' enlargement, the intra-EU migration and the rise of right-wing populist parties – arguing that these help to explain the evolutions in the Court's case law.

The thesis sought to answer the following research question: how and in what direction has the CJEU changed its approach with regard to free movement of EU citizens and their access to social benefits and how can we explain that?

To answer this broader research question, the thesis dealt with the following more specific issues:

- What is the EU legal framework on free movement and access to social benefits?
- How has the case law of the CJEU on the matter evolved?
- What factors provided the fundamental context for these developments?
- What role do social changes and political dynamics play in this evolution?

To address these questions, the thesis was structured as follows. Chapter 1 introduced the topic, providing an outline of the methodology and structure of the thesis. Chapter 2 set the scene, by overviewing the EU legal framework on free movement and access to social benefits. Afterwards, Chapter 3 analysed in depth the case law of the Court of Justice and its evolution in the time period between 1998 and 2020, shedding light on its changes over time. Chapter 4 examined the context, by identifying institutional, social and political dynamics which occurred below and behind the development of the case law and discussed their relevance. Finally, Chapter 5 concluded.

The thesis endeavoured to highlight that throughout time the CJEU has changed its approach on free movement of persons and social benefits, and that this shift did not occur in a legal vacuum. As confirmed by Mancini, 'it should come as no surprise that the Judges are aware of

the political, legal and economic contexts surrounding the cases brought before the Court'.[1] Rather, the gradual development of the Court's case law took place in the context of institutional, social and political dynamics of the time. Several dynamics provided the context for the Court: particularly, the 2004 'big bang' enlargement, the intra-EU migration and the rise of (radical) right-wing populist parties (especially in the UK).

This Chapter will summarise and conclude the thesis by bringing together the stream of research undertaken in the prior chapters. To this end, it will highlight the interconnection between the issues discussed in the previous Chapters and will present the main argument of the thesis. For this purpose, it will use a theoretical framework adopted by Weiler in his ground-breaking work 'The Transformation of Europe': the theory of EU 'law in context'.[2]

It should be noted that the significance of this thesis rests in the interdisciplinary discussion of the Court's case law in light of several institutional, social and political dynamics. The field of EU free movement law, including that on free movement of persons and social benefits, does, admittedly, rely on an impressive set of academic literature. However, this thesis has tried to present a broader discussion of the topic of free movement of persons and social benefits by bringing an interdisciplinary perspective into the discussion.

This approach is crucial given that the CJEU, as explained in the academic literature discussed below, does not operate in isolation but rules in light of a wider political context of a given time. Moreover, when the mutations carried out by the Court 'impinge on Member State jurisdiction', it assumes a role reactive 'to impulses coming from the political organs',[3] once again confirming that the CJEU develops its case law within the (socio-)political context of the time. The Court is argued to be reacting to the timing and specific characteristics of the cases before it, therefore its judicial role must be observed in the 'context of the political

[1] F Mancini, *Democracy and constitutionalism in the European Union: Collected Essays* (Hart Publishing 2000) xxiv.
[2] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.
[3] Ibid 2447.

power to change the rules of the game through treaty reform processes or legislative amendment'.[4]

Thus, to fully understand the developing position of the Court of Justice, the context in which CJEU judgments are given should be explored. By looking at the Court's jurisprudence beyond the legal vacuum and through the 'law in context' approach, methodologically, the case law is being interpreted through an interdisciplinary lens. The concept of law 'encompasses a discourse that is much wider than doctrine and norms',[5] ie law does not exist in a void. Rather, it possesses nuances that can be observed only with an interdisciplinary viewpoint. Weiler holds that 'a marriage' of the legal and political visions 'into a unified narrative' is necessary to truly understand the developments of a given period.[6]

As is the case with any research project, this thesis also has its limitations which should be acknowledged. The main limitation to be noted is that there are potentially other factors than only the selected ones which may have played a role in the changes in EU law and CJEU case law. For instance, a crucial factor worth mentioning is the economic one, the fiscal crisis. While its discussion may have provided additional input, the issues examined in this thesis are the key ones, as they are strongly connected with the broader notion of the EU integration project and with the advancement of EU free movement of persons and social benefits. The 2004 enlargement is directly associated with free movement of persons, as it led to extending intra-EU migration to nationals of 10 new MSs. Furthermore, the stance of radical right-wing populist parties stands out as being anti-migration and Eurosceptic, ie opposing the EU and the free movement of persons.

As this thesis underlined, the abovementioned dynamics have been particularly visible in the UK: since the UK has been an important component of the EU due to its economic and political weight, its dissatisfaction with the Union policies and with CJEU's jurisprudence are crucial for picturing the socio-political context around free movement of persons and social

[4] D Curtin, 'The Role of Judge-made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence' in M Dougan, N Nic Shuibhne, E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen: Modern Studies in European Law* (Hart Publishing 2012).
[5] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2409.
[6] Ibid 2431.

benefits. In addition, as noted in the thesis, intra-EU migration was a major driving reason for the Brexit vote. Therefore, these dynamics were selected to support the argument of this research.

In addition to the limitations, it should be noted that this dissertation does not include the Covid-19 crisis, as the latter would not produce quick changes in the CJEU case law within the limited period of 1 year (the timeframe during which this research overlapped with the Covid-19 pandemic).

Perhaps unsurprisingly, it would be a vital factor to consider in future research. Stricter border controls aimed at protecting the public health were introduced and followed, whereby even EU citizens needed to present documents when crossing borders (a negative Covid-19 PCR test). A strong commonly-agreed focus was developed on discouraging non-essential travel even for EU citizens within the Union, 'while avoiding border closures or blanket travel bans and ensuring that the functioning of the Single Market and supply chains remain uninterrupted'.[7] Additionally, the 'accelerated fall in total unemployment' in the EU put a significant emphasis on the 'essential role of strong social security'.[8] These events can be a substantial basis for conducting research in the future on the impact of the Covid-19 crisis on the free movement of persons and social benefits within the EU.

Returning to the discussion of the content of the thesis, it should be noted that the approach of considering EU law to be more than a purely legal phenomenon isolated from other disciplines began to materialise in the 1980s, and a new strand in the legal scholarship studying the then European Communities law started emerging. The distinctive nature of this scholarship lied in the research and analysis of EC law in its context rather than as a separate entity operating in a

[7] 'Coronavirus: Commission proposes update to coordinated approach on free movement restrictions' (Official website of the European Commission, 25 January 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_195> accessed 28 April 2021.
[8] S Spasova, D Ghailani, S Sabato, S Coster, B Fronteddu, B Vanhercke, *Non-Standard Workers and the Self-Employed in the EU: Social Protection during the Covid-19 Pandemic* (ETUI Brussels 2021) 5.

vacuum. In other words, instead of studying EC law as an autonomous[9] set of notions, legal scholars started conducting solid interdisciplinary research of the European legal system[10].

Snyder, for instance, advanced the thesis that conceptions of 'interests' and 'interest representation' underlie any study of law in society and are vital for understanding 'the causes and consequences of the creation, reproduction, or transformation of law'.[11] Armstrong, on the other hand, commenting how the Court of Justice 'mediates between law and its environment', posited that law as an institution 'contains normative visions concerning the mix of relationships […] between law and other social subsystems'.[12] He argued that the Court has been confronted with and has had to react to political developments by, for instance, extending the doctrine of direct effect to directives. In other words, '[T]he ECJ has had to make choices' in this complex interaction between law and politics and via its interpretation of the EU law, has mediated between the EU legal system and its environment throughout the process of institution-building.[13]

In this light, it can be observed that law is not perceived as a subject separated from other disciplines and a matter of interest solely for lawyers, but rather as 'one type of institution, or normative structure, that interacts with other rule systems (e.g. culture, social norms) to shape outcomes'.[14] In other words, law does not operate in a vacuum and is in a continuous interaction with phenomena and events around it. The use of this interdisciplinary method helps to deepen the understanding of EU law and by including a discussion of the essential elements of the wider context of law, the analysis is enriched by a new, broader perspective of understanding of legal concepts and developments.

---

[9] For a discussion of law as autonomous, see R Cotterrell, *The Sociology of Law* (2nd edn, Butterworths 1992).
[10] See, eg, JHH Weiler, 'The Court of Justice on Trial – A review of Hjalte Rasmussen: On Law and Policy in the European Court of Justice' (1987) 24 Common Market Law Review 555; M Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 European Law Review 311; AG Toth, 'On Law and Policy in the European Court of Justice by H. Rasmussen' (1987) 7 Yearbook of European Law 411; M Shapiro, 'On Law and Policy in the European Court of Justice' (1987) 81 American Journal of International Law 1007.
[11] F Snyder, 'Thinking about "Interests": Legislative Process in the European Community' in J Starr, JF Collier (eds), *History and Power in the Study of Law* (Cornell University Press 1989) 169-170.
[12] K A Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 Journal of Common Market Studies 155, 156.
[13] Ibid, 162-164.
[14] A Stone, Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 3.

As the academic literature discussed above suggests, to grasp the fundaments of the CJEU case law, the interaction between the law and its context is to be taken into account: the law shall be analysed within its context and not in a vacuum. In this view, observing the jurisprudence of the Court in its socio-political context provides a rationalisation for its tumultuous evolution.

In fact, the Court of Justice itself, through the interpretation of the provisions of EU primary and secondary law, shapes outcomes in spheres beyond the purely legal doctrine. As Stone Sweet explains, it has stepped in and shaped with its case law, inter alia, the market integration in the EU, the balancing of the 'power among the EU's organs of government' and 'thousands of policy outcomes great and small'.[15] Consequently, if the Court's jurisprudence shapes outcomes and interacts with the socio-political spheres, it should come as no surprise that this interaction is reciprocal. That is why the case law of the Court shall be analysed, to borrow Shapiro's words, in its 'living matrix'.

In 1980, Martin Shapiro wrote that the study of constitutional law (including that of the EC) without politics is 'arid' and constitutional law studies should not be 'oblivious to the context or living matrix' of the constitutions.[16] He noted that it is a 'myth of the founding years' of the Communities that juristic developments should be dealt with as if they are autonomous and avoid speaking about economic and political aspects.[17]

Following in these footsteps, in 1987 Francis Snyder described EC law as 'an intricate web of politics, economics and law' which shall be 'understood by means of a political economy of law or an interdisciplinary, contextual or critical approach'.[18] Snyder considered 'the overt interconnection between politics, policy and law-making' to be one of the distinguishing features of the EC legislative process.[19] Building on the example of common agricultural and foreign policy, which had been the strong focus of his work for years, he considered the Court

[15] A Stone Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5 Living Reviews in European Governance <https://www.europeangovernance-livingreviews.org/Articles/lreg-2010-2/download/lreg-2010-2Color.pdf> accessed 29 June 2022, 5.
[16] M Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California Law Review 537, 538.
[17] Ibid, 542.
[18] F Snyder, 'New Directions in European Community Law' (1987) 14 Journal of Law and Society 167, 167.
[19] Ibid, 171.

of Justice to be more than a mere interpreter of EC law but rather 'a major creative force in European Community law-making, policy-making and politics'.[20]

In 1991, building upon the ideas put forward by, inter alia, Shapiro and Snyder, Joseph Weiler set out to further develop and firmly establish the study of 'law in context'. Against the background established by other scholars, Weiler offered a deep dive 'into the politics and "geology" of EU law and its institutions.'[21]

In order to explain the interconnection between the developments and phenomena analysed in the thesis, the findings will be put into the theoretical framework constructed by Weiler. The work to be used for this purpose is 'The Transformation of Europe', which establishes the theoretical framework for the contextualisation of the evolution of the CJEU's jurisprudence.[22] Its significance lies not only in Weiler's conceptualisation of the elaborate frame for understanding EU law but is also deeply rooted in the underlying foundation of his work: the seminal legal scholarship on which he based his conceptualisation. Putting together the formative notions set out by the legal scholarship, Weiler notes the importance of the approach of 'Law in Context' and analyses 'Community constitutional order', making his conclusions by having 'particular regard to its living political matrix; the interactions between norms and norm-making, constitution and institutions, principle and practice, and *the Court of Justice and the political organs*'. [23]

It can be seen from the abovementioned that Weiler does not analyse the case law of the Court in isolation but instead places it within a political context, which is derived based on the political dynamics of a given time. To ascertain this theory, the author discusses an example from what he calls the Community's Foundational Period (1958 to mid-1970s). Particularly, he recalls the political crisis of the 1960s, when the Court of Justice 'stepped in to hold the [Community] construct together' in the face of 'declining political will' to follow the Treaty provisions and 'to develop a loyalty to the European venture'.[24] Particularly, the Court

[20] Ibid, 178.
[21] C Harlow, 'The EU and Law in Context: The Context' (2022) 1 European Law Open 209, 214.
[22] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.
[23] Ibid, 2409 (emphasis added).
[24] Ibid 2425.

'effectively "constitutionalized" the European treaty system' thus constructing the conditions necessary for judicialisation.[25] In other words, the '*legal* development was a response and reaction' to the '*political* development'.[26]

Weiler also explains how in the Foundational Period the CJEU established 'profound constitutional mutations' of Community law in a specific political climate,[27] ie the Court interpreted Community law provisions within the political context of the time, which was a demonstration of 'judicial empowerment'.[28] These supranational mutations took place in a political climate hostile to supranationalism. Yet, it functioned well thanks to the 'deep-seated legitimacy' of supreme courts.[29] Importantly, this indicates that the relationship between '(legal) cause and (political) effect' was a circular process.[30] Not surprisingly, the rulings of the Court of Justice are a strong tool of 'leverage in the pursuit of broader political goals', even though their utility depends on the capabilities of the actors who engage the law.[31] In other words, not only may the Court take into account the political context around the case before it but also the political dynamics may change as a result. This clearly indicates a strong interconnection between legal and political developments and the role the Court can play in those dynamics.

Based on the abovementioned, it can be observed that Weiler's framework, essentially, includes the following variables:

1. Time period,
2. Legal developments and
3. (Socio-)political developments.

---

[25] A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 153.
[26] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2425 (emphasis in original).
[27] Ibid 2428. Commenting on the doctrines of direct effect, supremacy, implied powers and human rights.
[28] Ibid, 2426. For CJEU role as the 'EU Supreme Court de facto', see, eg, A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); M Shapiro, A Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press 2002); T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018).
[29] J HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2428.
[30] Ibid.
[31] LJ Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002) 17.

The value of Weiler's work lies in the bridge it establishes between these variables. Weiler's theoretical framework, therefore, suits this thesis, as its aim is to contextualise the legal developments (evolution of CJEU case law) in light of socio-political developments of a certain timeframe, which is possible only through connecting the variables in question. In order to grind the findings of this research within the selected theoretical framework, the specific variables first should be identified. These are as follows:

1. Time period – 1998-2020,
2. Legal developments – the change in approach of CJEU case law,
3. Socio-political developments – the 2004 enlargement, intra-EU migration, rise of right-wing populist parties in the EU and, crucially, in the UK.

To finalise the connection between these variables and to apply Weiler's theoretical framework, the below discussion will simultaneously summarise the legal developments and institutional, social and political developments of a given time period and will clarify the contextualisation of the legal developments.

Applying the abovementioned theory of 'law in context' to the first group of cases analysed in this thesis, a similarity can observed: following the establishment of EU citizenship, the CJEU stepped in and reinforced the significance of the new concept by continuously declaring EU citizenship the fundamental status of EU nationals. It was also interpreting the rights of EU citizens broadly and providing them with a large pool of tools to rely upon for ensuring the protection of those rights. Following the adoption of the Maastricht Treaty, 'there was more emphasis on the limits and conditions on the exercise of free movement residence rights rather than on the status of a person as a European citizen'.[32] The political context implied a time when EU citizenship was a new-founded notion, which required strong backing and advancement from EU institutions. The Court, thus, established the significance of EU citizenship and qualified it through its case law.

[32] O Farkas, 'Free Movement and European Citizenship: Leaving Behind the Labour Supply Approach' in S Baroncelli, C Spagnolo, L Talani (eds), *Back to Maastricht: Obstacles to Constitutional Reform within the EU Treaty (1991-2007)* (Cambridge Scholars Publishing 2008) 365.

A similar application of the theory can be observed in the second group of cases. This time the context was the recent 2004 ‘big bang’ enlargement and the following increase in free movement of persons (intra-EU migration), along with the increasing support for radical right-wing populist parties. The 2004 eastward enlargement of the EU was a major institutional factor in the decade. Seeing the addition of 10 new countries to the EU raised growing concerns in some MSs. The latter were MSs with overall higher income, who were rather concerned that the discrepancy in both salary levels and social assistance levels between the EU15 and the EU10 would lead to a disproportionate interest in search of residence in those countries. This was closely linked with the issue of intra-EU migration. The concerns were often around the possible large influx of nationals from the new MSs into the older ones. This also fuelled the rise of right-wing populist parties with anti-migration and Eurosceptic attitudes. Altogether, these phenomena created fruitful soil for considerable changes in the social and political dynamics both on EU and national levels.

As discussed in the thesis, these 3 dynamics are tightly interwoven: the addition of 10 new MSs through the 2004 enlargement was bound to lead to concerns over intra-EU migration, and parties with Eurosceptic and anti-migration attitudes took advantage of that. Notably, strong concerns were raised regarding the issue of ‘social/benefit tourism’, contributing to fears over the abuse of host Member States’ social assistance systems. It is in this political context that the Court of Justice showed the first signs of its shifting approach by emphasising the importance of the protection of Member States’ social assistance systems.

The theory can be applied also to the third group of cases. The abovementioned 3 dynamics in the EU continued to form part of the overall socio-political matrix, and an additional factor became salient: the UK attitudes, where the salience those issues gained resulted in a domino of various events. While at first the UK pushed for enlargement and welcomed migration (avoiding setting any transitional period), this then caused overall dissatisfaction (both in the public and in the political sphere) fuelling the rise of Eurosceptic populist parties, opposing migration and even EU membership. Thus, in 2010s the general atmosphere in the British social and political spheres was becoming one of dissatisfaction. The concerns about the increased intra-EU migration as a consequence of the already-happened ‘big bang’ enlargement and the strict stance of right-wing populists became rather evident in the UK in

this time period. This led to the renegotiation of some aspects of the position of the UK in the EU, David Cameron's New Settlement Deal. At the same time, in 2010s the Court of Justice was fully exposing its shifted position on the issue of free movement of persons and social benefits. It allowed MSs to restrict access to social benefits for other MS nationals (especially, for the economically non-active) and furthermore based its approach strongly on the residence rights of EU nationals, rather than their EU citizenship. Thus, the socio-political context in which the Court of Justice ruled the cases of the third period discussed in the thesis was one of increase (in fears) of the discussed 3 dynamics in the UK.

Furthermore, the *Commission v UK* case of this group was ruled in a very specific context within the mentioned broader one. Particularly, the judgment of the Court came only 9 days before the Brexit referendum. The timing of the judgment was crucial and sensitive. The Court was ruling in the tense socio-political context of the potential British withdrawal from the Union. Here, the CJEU ruled in favour of the Kingdom on the topic of access to social benefits, rather sensitive at the time. Evaluating this case through the prism of a 'law in context' approach, it becomes evident that the Court was delivering it at the peak of British dissatisfaction for the EU, and just ahead of the upcoming Brexit referendum.

Symmetrically, the *Bogatu* case was ruled in a rather different setting, where the UK had already decided to leave the EU and the withdrawal process was ongoing (albeit chaotically). In this context, the Court took a different approach and returned to some extent to its earlier position of broad rights for EU citizens on the issues in question. The citizen-friendly position of the Court was upheld even more solidly in *Jobcenter Krefeld*, where the CJEU re-adjusted its focus towards a stronger protection of EU citizens' free movement rights. These two recent cases may indicate yet another shift in the CJEU stance following the establishment of the new socio-political context of a European Union without the United Kingdom.

It can be observed that each of the four groups of cases was ruled in a differing socio-political context. In parallel with changes in the socio-political dynamics in the period between 1998-2020, the stance of the Court was developing too. Thus, these *socio-political* developments in the EU in general and in the UK in particular provided the context for the *legal* development of free movement of persons and social benefits. Just like in the 1960s, the Court of Justice

stepped in, this time to rule on cases on free movement of persons and social benefits in a sensitive socio-political climate.

Based on the contextualisation of the evolution of CJEU case law, this thesis argues that there is a correlation between the broader political and social climate in the UK on one hand and the Court's jurisprudence on the other. The correlation lies in the fact that the Court's position on free movement of persons and social benefits did not occur in a detached reality but rather in the ever-changing socio-political environment of the 2004 enlargement, increasing intra-EU migration, rise of right-wing populism, as well as of growing Euroscepticism, anti-migration attitudes and overall EU-related dissatisfaction in the UK.

To summarise, the Court of Justice does not exist and operate in isolation. Rather, it is an institution which forms part of the broader organisation of the EU. Accordingly, it cannot be immune to the changes and developments taking place both at EU and at national levels. The Court's case law on free movement of persons and social benefits is not an exception from this. Summarising the findings of this research, it can be concluded that throughout time the Court of Justice has changed its stance on the issue of free movement of persons and social benefits, and that this has happened in the context of the institutional, social and political dynamics discussed in the thesis, which were taking place in many MSs of the EU and, particularly, in the UK.

What will the future of the CJEU case law on free movement of persons and social benefits be? While there has been an indication that the Court may be willing to soften its stance once again, it is too early to affirm whether *Bogatu* and *Jobcenter Krefeld* denote a return to the earlier expansive stance of the Court and strong reliance on EU citizenship (instead of residence rights). Consistent with the contextual approach adopted in this thesis, it is plausible that in the context of the absence of a dissatisfied UK, the Court may renew its support for a strong protection of the free movement of EU nationals and their access to social benefits. However, opposition to migration remains strong in some MSs. As discussed in the thesis, Danish Prime Minister's speech in the European Parliament in 2018 stressed that freedom of movement should not be abused. Overall, 'the domestic responses in Denmark to EU rules and

the CJEU's interpretations' of free movement right are usually restrictive.[33] Moreover, access to social benefits in Denmark continues to 'increasingly depend on citizenship and EU related worker status'.[34] Furthermore, while the embarrassing process of Brexit have decreased the appeal of Eurosceptic parties, populism remains a challenge across the EU and has the potential to remain in the political discourse for the time being.[35] Finally, at the time of writing, the Covid-19 pandemic continues to unfold, leaving a prospect of uncertainty on various levels. Having seriously disrupted the intra-EU movements and national economies, it may contribute to a strengthening of some degree of national interests. This may force the Court to avoid a return to a fully-fledged protection of the freedom of movement, but without fully abandoning its protection based on EU citizenship. As of now, it seems more plausible that the CJEU would prefer a cautious approach, allowing some room for stronger protection of EU citizens' rights discussed in the thesis but without enforcing a radical change upon a post-Brexit and post-Covid (or in-Covid) EU. While the future is as always unpredictable, the socio-political context of the near future would leave the Court of Justice in the position to uphold the rights to free movement and social benefits, with a cautious approach to reinstating their strength once again without potentially divisive and controversial abrupt changes.

[33] D Sindbjerg Martinsen, G Pons Rotger, J Sampson Thierry, 'Free Movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes' (2019) 29 Journal of European Social Policy 84, 91.
[34] D Sindbjerg Martinsen, 'Migrants' Access to Social Protection in Denmark' in JM Lafleur, D Vintila (eds), *Migration and Social Protection in Europe and Beyond* (Springer 2020) 133.
[35] See, eg, F Adam, M Tomšič, 'The Future of Populism in a Comparative European and Global Context' (2019) 18 Comparative Sociology 687.

Table of CJEU Cases

Case C-456/02 *Trojani* [2004] ECR I-7595, Opinion of AG Geelhoeld

Case C-209/03 *Bidar* [2005] ECR I-2151

Case C-244/04 *Commission v Germany* [2006] ECR-I-00885

Case C-127/08 *Metock* [2008] ECR I-06241

Case C-158/07 *Förster* [2008] ECR I-08507

Case C-158/07 *Förster* [2008] ECR I-08507, Opinion of AG Mazák

Joined Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-4585

Case C-73/08 *Bressol and Others* [2010] ECR I-02735

Case C-310/08 *Ibrahim* [2010] EU:C:2010:80

Case C-480/08 *Teixeira* [2010] EU:C:2010:83

Case C-34/09 *Zambrano* [2011] ECR I-01177

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

Case C-537/09 *Bartlett* [2011] ECR I-3417

Case C-140/12 *Brey* [2013] OJ C 344/43

Case C-529/11 *Alarape and Tijani* [2013] EU:C:2013:9

Case C-333/13 *Dano* [2014] OJ C16/05

Case C-378/12 *Onuekwere* [2014] EU:C:2014:13

Case C-507/12 *Saint Prix* [2014] EU:C:2014:2007

Case C-67/14 *Alimanovic* [2015] OJ C 371/10

Case C-308/14, *Commission v UK* [2016] OJ C 305/05

Case C-186/16 *Prefeta* [2018] EU:C:2018:719

Case C-322/17 *Bogatu* [2019] OJ C131/5

Case C-483/17 *Tarola* [2019] EU:C:2019:309

Case C-181/19 *Jobcenter Krefeld* [2020] EU:C:2020:794

Table of Legislation

Consolidated Version of the Treaty on European Union and Treaty on the Functioning of the European Union [2008] OJ C 115/13

Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236

Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed 475

Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed 416

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166

Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 [2005] OJ L 117

Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] OJ L 199

Regulation 987/2009 of The European Parliament and of The Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284

Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141

UK Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232

Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Spec Ed 117

Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ Spec Ed 485

Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26

Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59

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 [1996] OJ L 18

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 [2004] OJ L 158/77

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I/1

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10

A New Settlement for the United Kingdom within the European Union: Extract of the conclusions of the European Council of 18-19 February 2016 [2016] OJ C 691/1

Bibliography

Abou-Chadi T, 'Niche Party Success and Mainstream Party Policy Shifts – How Green and Radical Right Parties Differ in Their Impact' (2016) 46 British Journal of Political Science 417

Abt K, Rummens S, 'Populism versus Democracy' (2007) 55 Political Studies 405

Adam F, Tomšič M, 'The Future of Populism in a Comparative European and Global Context' (2019) 18 Comparative Sociology 687

Adsera A, Chiswick BR, 'Divergent Patterns in Immigrant Earnings Across European Destinations' in Parsons CA, Smeeding TM (eds), *Immigration and the Transformation of Europe* (Cambridge University Press 2006)

Akkerman T, 'Populism and Democracy: Challenge or Pathology?' (2003) 38 Acta Politica 147

— — 'The Relationship between Immigration and Nativism in Europe and North America' (Migration Policy Institute 2012) <https://www.migrationpolicy.org/sites/default/files/publications/Immigration-Nativism.pdf> accessed 17 June 2022

— — and De Lange S, 'Populist Parties in Belgium: A Case of Hegemonic Liberal Democracy?' in Mudde C, Kaltwasser CR (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012)

— — and De Lange S, Rooduij M, 'Inclusion and Mainstreaming? Radical Right-Wing Populist Parties in the New Millennium' in Akkerman T, De Lange S, Rooduij M (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (Routledge 2016)

Alcidi C, Gros D, 'EU Mobile Workers: A Challenge to Public Finances?' (CEPS 2019)

Alexander K, Barnard C, Ferran E, Lang A, Moloney N, *Brexit and Financial Services: Law and Policy* (Hart Publishing 2018)

Alonso S, Cabeza L, Gomez B, 'Parties' Electoral Strategies in a Two-Dimensional Political Space: Evidence from Spain and Great Britain' (2015) 21 Party Politics 851

Amtenbrink F, 'Europe in times of economic crisis: Bringing Europe's citizens closer to one another?' in Dougan M, Nic Shuibhne N, Spaventa E (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012)

Armstrong K A, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 Journal of Common Market Studies 155

Arpaia A, Kiss A, Palvolgyi B, Turrini A, *Labour Mobility and Labour Market Adjustment in the EU* (Economic Papers 539, European Union 2014)

Ashcroft R, Bevir M, 'Brexit and the Myth of British National Identity' (2021) 16 British Politics 117

Baas T, Brücker H, 'EU Eastern Enlargement: The Benefits from Integration and Free Labour Movement' (2011) 9 CESifo DICE Report 44

Barbulescu R, 'From International Migration to Freedom of Movement and Back? Southern Europeans Moving North in the Era of Retrenchment of Freedom of Movement Rights' in Lafleur JM, Stanek M (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016)

Barnard C, 'Case C-209/03, *R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*' (2005) 42 Common Market Law Review 1465

— — 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in Dougan M, Currie S (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009)

— — *EU Employment Law* (Oxford University Press 2012)

— — *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013)

— — '(B)Remains of the Day: Brexit and EU Social Policy' in Vandenbroucke F, Barnard C, De Baere G (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017)

— — 'Brexit and the EU Internal Market' in Fabbrini F (ed), *The Law and Politics of Brexit* (Oxford University Press 2017)

— — and Fraser Butlin S, 'Free movement vs. fair movement: Brexit and managed migration' (2018) 55 Common Market Law Review 203

— — and Leinarte E, 'Citizens' Rights' in Fabbrini F (ed), *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020)

Bassot E, Hiller W, 'The Juncker Commission's ten priorities: State of play in early 2018' (European Parliamentary Research Service 2018)

Bekkedal T, 'The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal' (2020) 7 Oslo Law Review 145

Bengoetxea J, 'Text and Telos in the European Court of Justice: Four Recent Takes on the Legal Reasoning of the ECJ' (2015) 11 European Constitutional Law Review 184

Betz HG, *Radical Right-Wing Populism in Western Europe* (Palgrave Macmillan 1994)

Birkinshaw PJ, *European Public Law: The Achievement and the Brexit Challenge* (Kluwer Law International 2020)

Blanchflower D, Shaforth C, 'Fear, Unemployment and Migration' (2007) US National Bureau of Economic Research Working Paper Series, 13506 <https://www.nber.org/papers/w13506> accessed 9 March 2020

Blauberger M, Heindlmaier A, Kobler C 'Free Movement of Workers under Challenge: The Indexation of Family Benefits' (2020) 18 Comparative European Politics 925

— — and Schmidt SK, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 Research & Politics 1

Bohman A, Hjerm M 'In the Wake of Radical Right Electoral Success: A Cross-Country Comparative Study of Anti-Immigration Attitudes over Time' (2016) 42 Journal of Ethnic and Migration Studies 1729

Boswell C, 'Migration Control and Narratives of Steering' (2011) 13 The British Journal of Politics and International Relations 12

Brown K, Mondon A, Winter A, 'The Far Right, the Mainstream and Mainstreaming: Towards a Heuristic Framework' (2021) Journal of Political Ideologies, published online <https://www.tandfonline.com/doi/full/10.1080/13569317.2021.1949829> accessed 29 June 2022

Butler G, 'Standing the Test of Time: Reference for a Preliminary Ruling' (2017) 20 Irish Journal of European Law 103

Buzan B, Wæver O, De Wilde J, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998)

Canoy M, Horvath A, Hubert A, Lerais F, Sochacki M, 'Post-Enlargement Migration and Public Perception in the European Union' in Kahanec M, Zimmermann KF (eds), *EU Labor Markets After Post-Enlargement Migration* (Springer 2009)

Cappelletti M, ‘Is the European Court of Justice “Running Wild”?’ (1987) 12 European Law Review 311

Carrera S, Carrera S, ‘What Does Free Movement Mean in Theory and Practice in an Enlarged EU?’ (2005) 11 European Law Journal 699

— — and Eisele K, Guild E, Parkin J, ‘The Myth of Benefit Tourists and Welfare Magnets: A Relationship between Social Welfare and Free Movement in the European Union?’ in Acosta Arcarazo D, Wiesbrock A (eds), *Global Migration: Old Assumptions, New Dynamics,* vol 1 (Praeger 2015)

Carter D, Jesse M, ‘The “*Dano* Evolution”: Assessing Legal Integration and Access to Social Benefits for EU Citizens’ (2018) 3 European Papers 1179

Cinnirella M, ‘Towards a European Identity? Interactions between the National and European Social Identities Manifested by University Students in Britain and Italy’ (1997) 36 British Journal of Social Psychology 19

Ciupijus Z, ‘Mobile Central Eastern Europeans in Britain: Successful European Union Citizens and Disadvantaged Labour Migrants?’ (2011) 25 Work, Employment and Society 540

Closa Montero C, ‘Martínez Sala and Baumbast: An Institutionalist Analysis’ in Poiares Pessoa Maduro LM, Azoulai L (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

Conant LJ, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002)

Constant A, ‘Sizing It Up: Labor Migration Lessons of the EU Enlargement to 27’ (2011) Institute for the Study of Labor Research Paper Series, 6119 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965136#> accessed 11 June 2022

Conway G, *EU Law* (Routledge 2015)

Cornelissen R, ‘EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy’ in Carrera S, Eisele K, Guild E (eds), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013)

— — and De Wispelaere F, ‘Sixty Years of European Social Security Coordination: Achievements, Controversies and Challenges’ in Vanhercke B, Ghailani D, Spasova S, Pochet P, (eds) *Social Policy in the European Union 1999-2019: The Long and Winding Road* (European Trade Union Institute 2020)

Corry D, Valero A, Van Reenen J, ‘UK Economic Performance since 1997: Growth, Productivity and Jobs’ (Centre for Economic Performance, London School of Economics & Political Science, November 2011)

Cotterrell R, *The Sociology of Law* (2nd edn, Butterworths 1992)

Coutts S, ‘The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Tights’ (2019) 21 Cambridge Yearbook of European Legal Studies 318

Craig P, ‘The ECJ and Ultra Vires Action: A Conceptual Analysis’ (2011) 48 Common Market Law Review 395

— — ‘The Process: Brexit and the Anatomy of Article 50’ in Fabbrini F (ed), *The Law and Politics of Brexit* (Oxford University Press 2017)

Croon-Gestefeld J, *Reconceptualising European Equality Law: A Comparative Institutional Analysis* (Hart Publishing 2017)

Crouch C, ‘Post-Democracy and Populism’ (2019) 90 The Political Quarterly 124

Currie S, ‘The Transformation of Union Citizenship’ in Dougan M, Currie S (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009)

Curtin D, ‘The Role of Judge-made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence’ in Dougan M, Nic Shuibhne N, Spaventa E (eds), *Empowerment and Disempowerment of the European Citizen: Modern Studies in European Law* (Hart Publishing 2012)

D’Angelo A, Kofman E, ‘UK: Large-Scale European Migration and the Challenge to EU Free Movement’ in Lafleur JM, Stanek M (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016)

— — ‘From Mobile Workers to Fellow Citizens and Back Again? The Future Status of EU Citizens in the UK’ (2018) 17 Social Policy & Society 331

Davies G, ‘Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication’ (2018) 25 European Public Policy 1442

De Schutter H, ‘The Solidarity Argument for the European Union’ in Vandenbroucke F, Barnard C, De Baere G (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017)

De Schutter O, ‘Fundamental Rights and the Transformation of Governance in the European Union’ (2007) 9 Cambridge Yearbook of European Legal Studies 133

De Vries C, Hobolt SB, ‘When Dimensions Collide: The Electoral Success of Issue Entrepreneurs’ (2012) 13 European Union Politics 246

De Witte F, ‘The End of EU Citizenship and the Means of Non-Discrimination’ (2011) 18 Maastricht Journal of European and Comparative Law 86

— — ‘The Liminal European: Subject to the EU Legal Order’ (2021) 40 Yearbook of European Law 56

Dennison J, Goodwin M, ‘Immigration, Issue Ownership and the Rise of UKIP’ (2015) 68 Parliamentary Affairs 168

Dølvik JE, ‘European Movements of Labour: Challenges for European Social Models’ in G Brochmann, E Jurado (eds), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility* (Bloomsbury 2013)

— — ‘Introduction: Transnational Labour Mobility – Engine for Social Convergence or Divergence in Europe’ in Dølvik JE, Eldring L (eds), *Labour Mobility in the Enlarged Single European Market* (Emerald Group Publishing 2016)

— — and Visser J, ‘Free Movement, Equal Treatment and Workers’ Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?’ (2009) 40 Industrial Relations Journal 513

Donnelly B, ‘UK: Brexit—The Car That Keeps on Crashing’ in Kaeding M, Pollak J, Schmidt P, (eds), *Euroscepticism and the Future of Europe* (Palgrave Macmillan 2021)

Dougan M, *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017)

— — and Spaventa E, '"Wish You Weren't Here…" New Models of Social Solidarity in the European Union' in Spaventa E, Dougan M (eds), *Social Welfare and EU Law* (Hart Publishing 2005)

Douglas-Scott S, 'In Search of Union Citizenship' (1998) 18 Yearbook of European Law 29

Drinkwater S, Eade J, Garapich M, 'What's Behind the Figures? An Investigation into Recent Polish Migration to the UK' in Black R, Engbersen G, Okólski M (eds), *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010)

Dubout E, 'The European Form of Family Life: The Case of EU Citizenship' (2020) 5 European Papers 3

Dustmann C, 'Return Migration: The European Experience' (1996) 11 Economic Policy 213

— — and Casanova M, Fertig M, Preston I, Schmidt CM, 'The impact of EU enlargement on migration flows' (UK Home Office Online Report 25, 2003)

— — Fabbri F, Preston I, Wadsworth J, *The Local Labour Market Effects of Immigration in the UK* (Research Development and Statistics Directorate, UK Home Office 2003)

Düsterhaus D, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in Kochenov D (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)

Eatwell R, Wright A, *Contemporary Political Ideologies* (Continuum 1999).

Elsner B, 'Emigration and Wages: The EU Enlargement Experiment' (2013) 91 Journal of International Economics 154

Engbersen G, 'Liquid Migration and Its Consequences for Local Integration Policies' in Scholten P, Van Ostaijen M (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018)

— — and Okólski M, Black R, Pantiru C, 'Introduction: Working Out a Way from East to West: EU Enlargement and Labour Migration from Central and Eastern Europe' in Black R, Engbersen G, Okólski M (eds), *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010)

— — and Leerkes A, Grabowska-Lusinka I, Snel E, Burgers J, 'On the Differential Attachments of Migrants from Central and Eastern Europe: A Typology of Labour Migration' (2013) 39 Journal of Ethnic and Migration Studies 959

Erhag T, 'Under Pressure? - Swedish Residence-Based Social Security and EU Citizenship' (2016) 18 European Journal of Social Security 207

Evans G, 'Euroscepticism and Conservative Electoral Support: How an Asset Became a Liability' (1998) 28 British Journal of Political Science 573

— — and Butt S, 'Explaining Change in British Public Opinion on the European Union: Top Down or Bottom Up?' (2007) 42 Acta Politica 173r

— — and Mellon J, 'Immigration, Euroscepticism, and the Rise and Fall of UKIP' (2019) 25 Party Politics 76

Fabbrini F, 'Introduction' in Fabbrini F (ed), *The Law and Politics of Brexit* (Oxford University Press 2017)

— — *The Law and Politics of Brexit* (Oxford University Press 2017)

— — *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020)

— — and Schmidt R, 'The Extensions' in Fabbrini F, *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020)

Fallend F, 'Populism in Government: The Case of Austria (2000–2007)' in Mudde C, Kaltwasser CR (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012)

Farkas O, 'Free Movement and European Citizenship: Leaving Behind the Labour Supply Approach' in Baroncelli S, Spagnolo C, Talani L (eds), *Back to Maastricht: Obstacles to Constitutional Reform within the EU Treaty (1991-2007)* (Cambridge Scholars Publishing 2008)

— — O Rymkevich, 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices' (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 369

Fassmann H, Munz R, 'Patterns and Trends of International Migration in Western Europe' (1992) 18 Population and Development Review 457

Faull J, 'Prohibition of Abuse of Law': A New General Principle of EU Law' in De La Feria R, Vogenauer S (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011)

Favell A, 'The New Face of East–West Migration in Europe' (2008) 34 Journal of Ethnic and Migration Studies 701

Fernandes S, 'Access to Social Benefits for EU Mobile Citizens: "Tourism" or Myth?' (2016) Jacques Delors Institute Policy Papers, 168 <https://institutdelors.eu/en/publications/access-to-social-benefits-for-eu-mobile-citizens-tourism-or-myth/> accessed 17 June 2022

Fetzer JS, 'The Paradox of Immigration Attitudes in Luxembourg: A Pan-European Comparison' in Freeman GP, Hansen R, Leal DL (eds), *Immigration and Public Opinion in Liberal Democracies* (Routledge 2013)

Ford R, Jennings W, Somerville W, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391

Foster N, *Foster on EU Law* (5th edn, Oxford University Press 2015)

Fouarge D, Ester P, 'Understanding Migration Decisions in Eastern and Western Europe: Perceived Costs and Benefits of Mobility' in Fassmann H, Haller M, Lane DS (eds), *Migration and Mobility in Europe: Trends, Patterns and Control* (Edward Elgar 2009) 51

Fries S, Shaw J, 'Citizenship of the Union: Steps in the European Court of Justice' (1998) 4 European Public Law 533

Fuchs D, Klingemann HD, 'Eastward Enlargement of the European Union and the Identity of Europe' (2002) 25 West European Politics 19

Fuster J L, 'Council Regulation 1612/68: A Significant Step in Promoting the Right of Freedom of Movement within the EEC' (1988) 11 Boston College International and Comparative Law Review 127

Gago A, Maiani F, '"Pushing the Boundaries": A Dialogical Account of the Evolution of European Case-Law on Access to Welfare' (2022) 44 Journal of European Integration 261

Galgóczi B, Leschke J, Watt A, 'Introduction' in Galgóczi B, Leschke J, Watt A (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009)

— — 'EU Labour Migration and Labour Markets in Troubled Times' in Galgóczi B, Leschke J, Watt A (eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012)

Gandal N, Hanson GH, Slaughter MJ, 'Technology, Trade, and Adjustment to Immigration in Israel' (2004) 48 European Economic Review 403

George S, 'Britain: Anatomy of a Eurosceptic state' (2000) 22 Journal of European Integration 15

Gerhards J, Lengfeld H, *European Citizenship and Social Integration in the European Union* (Routledge 2015)

Gietel-Basten S, 'Why Brexit? The Toxic Mix of Immigration and Austerity' (2016) 42 Population and Development Review 673

Ginsburg N, 'Migration' in Isaacs S, Blundell D, Foley A, Ginsburg N, McDonough B, Silverstone D, Young T (eds), *Social Problems in the UK: An Introduction* (Routledge 2014)

Giubboni S, 'Free Movement of Persons and European Solidarity' (2007) 13 European Law Journal 360

Golynker O, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration* (Intersentia 2006)

— — 'Case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008' (2009) 46 Common Market Law Review 2021

Goodwin M, Milazzo C, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit' (2017) 19 The British Journal of Politics and International Relations 450

Goodwin M, Heath O 'Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities' (York, Joseph Rowntree Foundation, 2015) <https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities> accessed 29 June 2022

Gordon I, Travers T, Whitehead C, *The Impact of Recent Immigration on the London Economy* (City of London 2007)

Grabow K, Hartleb, 'Mapping Present-day Right-wing Populists' in Grabow K, Hartleb F (eds), *Exposing the Demagogues: Right-wing and National Populist Parties in Europe* (Centre for European Studies 2013)

Graf L, Gardin M, 'Transnational Skills Development in Post-Industrial Knowledge Economies: The Case of Luxembourg and the Greater Region' in (2017) 31 Journal of Education and Work 1

Greven T, 'The Rise of Right-wing Populism in Europe and the United States: A Comparative Perspective' (Friedrich-Ebert-Stiftung, Berlin, May 2016)

Guild E, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004)

— — *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship* (Brill 2016)

Haeussler M, 'The Inward-Looking Outsider? The British Popular Press and European Integration, 1961-1992' in Ikonomou HA, Andry A, Byberg R (eds), *European Enlargement Across Rounds and Beyond Borders* (Routledge 2017)

Hainsworth P, *The Politics of the Extreme Right: From the Margins to the Mainstream* (Bloomsbury 2000)

Hamenstädt K, 'The Impact of the Duration of Lawful Residence on the Rights of European Union Citizens and Their Third-Country Family Members' (2017) 24 Maastricht Journal of European and Comparative Law 63

Hanson GH, Slaughter MJ, 'Labor-Market Adjustment in Open Economies: Evidence from US States' (2002) 57 Journal of International Economics 3

Harlow C, 'The EU and Law in Context: The Context' (2022) 1 European Law Open 209

Hernández E, 'Democratic Discontent and Support for Mainstream and Challenger Parties: Democratic Protest Voting' (2018) 19 European Union Politics 458

Heyes J, Hyland M, 'Supporting, Recruiting and Organising Migrant Workers in Ireland and the United Kingdom: A Review of Trade Union Practices' in Galgóczi B, Leschke J, Watt A (eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012)

Hoffmann M, *Assessing East-West Labour Migration after EU-enlargement* (GRIN Verlag 2007)

Hooghe M, Trappers A, Meuleman B, Reeskens T, 'Migration to European Countries: A Structural Explanation of Patterns, 1980–2004' (2008) 42 International Migration Review 476

Horsley T, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018)

Horspool M, Humphreys M, *European Union Law* (7th edn, Oxford University Press 2012)

Iliopoulou Penot A, 'The Transnational Character of Union Citizenship' in Dougan M, Nic Shuibhne N, Spaventa E (eds), *Empowerment and Disempowerment of the European Citizen: Modern Studies in European Law* (Hart Publishing 2012)

— — 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 Common Market Law Review 1007

— — 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 Common Market Law Review 1007

— — 'The Construction of a European digital Citizenship in the Case Law of the Court of Justice of the EU' (2022) 59 Common Market Law Review 969

Jackson D, Thorsen E, Wring D (eds), *EU Referendum Analysis 2016: Media, Voters and the Campaign Early reflections from leading UK academics* (The Centre for the Study of Journalism, Culture and Community Bournemouth University, June 2016)

Jacqueson C, 'A Resisting Enclave of Social Rights – Protecting the Children of Former Workers: C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD*' (2021) 28 Maastricht Journal of European and Comparative Law 731

Jamin J, 'Two Different Realities: Notes on Populism and the Extreme Right' in Mammone A, Godin E, Jenkins B (eds), *Varieties of Right-Wing Extremism in Europe* (Routledge 2013)

Jesse M, Carter DW, 'Life after the 'Dano- Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Cambien N, Kochenov D, Muir E (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff 2020)

Jessurun d'Oliveira HU, De Groot G, Seling A, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern: Case Note 1 Decoupling Nationality and Union Citizenship? Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7 European Constitutional Law Review 138

Johns M, 'A Problem by their Own Hands: Intra-EU Migration and its Implications for Europe' in Laursen F (ed), *The EU and Federalism: Polities and Policies Compared* (Routledge 2013)

— — *The New Minorities of Europe: Social Cohesion in the European Union* (Lexington Books, 2014)

— — 'The construction of a European digital citizenship in the case law of the Court of Justice of the EU' (2022) 59 Common Market Law Review 969

Jones E, 'The Negotiations' in Fabbrini F, *The Law and Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020)

Jorens Y, Van Overmeiren F, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 European Journal of Social Security 47

Josifidis K, Supic N, Beker Pucar E, Srdic S, 'Labour migration flows: EU8+2 vs EU-15' (2014) 15 Journal of Business Economics and Management 41

Ketels C, Porter ME, 'UK Competitiveness after Brexit' (2018) Harvard Business School Working Paper, No. 19-029, September 2018 (revised January 2019) <https://www.hbs.edu/faculty/Pages/item.aspx?num=55028> accessed 29 June 2022

Koch I, 'What's in a Vote? Brexit beyond Culture Wars' (2017) 44 American Ethnologist 225

Kolnberger T, Koff H, 'Addressing Seeming Paradoxes by Embracing Them: Small State Theory and the Integration of Migrants' in (2021) 9 Comparative Migration Studies, <https://link.springer.com/article/10.1186/s40878-021-00222-8> accessed 13 July 2021

Korpi T, 'Importing Skills, Migration Policy, Generic Skills and Earnings among Immigrants in Australasia, Europe and North America' in Galgóczi B, Leschke J, Watt A

(eds), *EU Labour Migration in Troubled Times: Skills Mismatch, Return and Policy Responses* (Routledge 2012)

Kritzinger S, 'The Influence of the Nation-State on Individual Support for the European Union' (2003) 4 European Union Politics 219

Laclau E, *On Populist Reason* (Verso 2005)

Lafleur JM, Stanek M, 'Restrictions on Access to Social Protection by New Southern European Migrants in Belgium' in Lafleur JM, Stanek M (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016)

— — *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016)

— — and Veira A, 'South-North Labour Migration within the Crisis-Affected European Union: New Patterns, New Contexts and New Challenges' in Lafleur JM, Stanek M (eds), *South-North Migration of EU Citizens in Times of Crisis* (Springer 2016)

Larkin P, 'A Policy of Inconsistency and Hypocrisy: United Kingdom Social Security Policy and European Citizenship' (2009) 31 Journal of Social Welfare and Family 33

Layard R, Blanchard OJ, Dornbusch R, Krugman P, *East-West Migration: The Alternatives* (United Nations University Press 1992)

Leibfried S, Pierson P, *European Social Policy between Fragmentation and Integration* (The Brookings Institution 1995)

Lemos S, Portes J, 'New Labour? The Impact of Migration from Central and Eastern European Countries on the UK Labour Market' (2008) Institute for the Study of Labor Discussion Paper Series, 3756 (2008)

Lhernould JP, 'New Rules on Conflicts: Regulations 883/2004 and 987/2009' (2011) 12 ERA Forum/Journal of the Academy of European Law 25

Lundström R, 'Framing Fraud: Discourse on Benefit Cheating in Sweden and the UK' (2013) 28 European Journal of Communication 630

MacLeod G, Martin Jones M 'Explaining "Brexit Capital": Uneven Development and the Austerity State' (2018) 22 Space and Polity 111

Maliszewska-Nienartowicz J, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?' (2014) III International Journal of Social Sciences 41

Mancini F, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart Publishing 2000)

Mansbridge J, Macedo S, 'Populism and Democratic Theory' (2019) 15 Annual Review of Law and Social Science 59

Mantu S, 'Concepts of Time and European Citizenship' (2013) 15 European journal of Migration and Law 447

— — and Minderhoud P, 'Exploring the Limits of Social Solidarity: Welfare Tourism and EU Citizenship' (2016) 2 EU Law Journal 4

— — and Minderhoud P, 'EU Citizenship and Social Solidarity' (2017) 24 Maastricht Journal of European and Comparative Law 703

— — and Minderhoud P, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens' (2019) 21 European Journal of Migration and Law 313

March L, *Radical Left Parties in Contemporary Europe* (Routledge2011)

Marinescu N, *East-West Migration in the European Union* (Cambridge Scholars Publishing 2017)

McConalogue J, *The British Constitution Resettled: Parliamentary Sovereignty Before and After Brexit* (Palgrave Macmillan 2020)

McDowell L, 'Old and New European Economic Migrants: Whiteness and Managed Migration Policies' (2009) 35 Journal of Ethnic and Migration Studies 19

Menendez AJ, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in Poiares Pessoa Maduro LM, Azoulai L (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

Menon A, Fowler B, 'Hard or Soft? The Politics of Brexit' (2016) 238 National Institute Economic Review R4

Minderhoud P, Mantu S, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive' in Thym D (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017)

Moffitt B, 'How Do Mainstream Parties 'Become' Mainstream, and Pariah Parties 'Become' Pariahs? Conceptualizing the Processes of Mainstreaming and Pariahing in the Labelling of Political Parties' (2022) 57 Government and Opposition 385

Mouffe C, *On the Political* (Routledge 2005)

— — 'The "End of Politics" and the Challenge of Right-wing Populism' in Panizza F (ed), *Populism and the Mirror of Democracy* (Verso 2005)

Mudde C, 'The Populist Zeitgeist' (2004) 39 Government and Opposition 542

— — *Populist Radical Right Parties in Europe* (Cambridge University Press 2007)

— — 'The Relationship between Immigration and Nativism in Europe and North America' (Migration Policy Institute 2012) <https://www.migrationpolicy.org/sites/default/files/publications/Immigration-Nativism.pdf> accessed 17 June 2022

— — *The Far Right Today* (Wiley 2019)

— — and Kaltwasser CR, 'Populism and (Liberal) Democracy: A Framework for Analysis' in Mudde C, Kaltwasser CR (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012)

Muir E, 'Drawing Positive Lessons from the Presence of "The Social" Outside of EU Social Policy *Stricto Sensu*' (2018) 14 European Constitutional Law Review 75

— — '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' (2018) 3 European Papers 1353

Müller J-W, 'The People Must Be Extracted from within the People: Reflections on Populism' (2014) 21 Constellations 483

Neergaard U, 'Europe and the Welfare State—Friends, Foes, or . . .?' (2016) 35 Yearbook of European Law 341

Neuvonen PJ, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing 2016)

Nic Shuibhne N, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 Common Market Law Review 731

— — ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52 Common Market Law Review 889

— — ‘The Developing Dimensions of Union Citizenship’ in Arnull A, Chalmers D (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015)

— — ‘“What I Tell You Three Times is True”: Lawful Residence and Equal Treatment after *Dano*’ (2016) 23 Maastricht Journal of European and Comparative Law 908

— — ‘Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?’ in Kochenov D (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)

O’Brien C, ‘Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's “Real Link” Case Law and National Solidarity’ (2008) 33 European Law Review 643

— — Spaventa E and De Corninck J, ‘Comparative Report 2015 - The concept of worker under Article 45 TFEU and certain non-standard forms of employment’ (European Union 2016) <https://dro.dur.ac.uk/18690/1/18690.pdf>, accessed 22 March 2022

— — ‘The ECJ Sacrifices EU Citizenship in Vain: *Commission v. United Kingdom*’ (2017) 54 Common Market Law Review 209

— — *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017)

— — O’Brien C, ‘Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit’ (2021) 58 Common Market Law Review 431

O’Keeffe D, ‘Equal Rights for Migrants: The Concept of Social Advantages in Article 7(2), Regulation 1612/68’ (1985) 5 Yearbook of European Law 93

Okólski M, Salt J, ‘Polish Emigration to the UK after 2004; Why Did So Many Come?’ (2014) 3 Central and Eastern European Migration Review 11

O'Leary S, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 European Law Review 68

—— 'Free Movement of Persons and Services' in Craig P, De Búrca G (eds), *The Evolution of EU Law* (Oxford University Press 2011)

O'Neill R, 'Residence as a Condition for Social Security in the United Kingdom: A Critique of the UK Right to Reside Test for Accessing Benefits and How It Is Applied in the Courts' (2011) 13 European Journal of Social Security 226

O'Sullivan CE, 'Social Assistance for Economically-Inactive Citizens within the EU's Market State Model' (2016) 19 Irish Journal of European Law 64

Otjes S, Louwerse T, 'Populists in Parliament: Comparing Left-Wing and Right-Wing Populism in the Netherlands' (2015) 63 Political Studies 60

Paju J, 'On the Lack of Legal Reasoning in Case C-308/14, *European Commission v United Kingdom*' (2019) 48 Industrial Law Journal 117

Panizza F 'Introduction: Populism and the Mirror of Democracy' in Panizza F (ed), *Populism and the Mirror of Democracy* (Verso 2005)

Pelinka A, 'Right-Wing Populism: Concept and Typology' in Wodak R, KhosraviNik M, Mral B (eds), *Right-Wing Populsim in Europe: Politics and Discourse* (Bloomsbury 2013)

Pennings F, 'Co-Ordination of Social Security on the Basis of the State-of-Employment Principle: Time for an Alternative?' (2005) 42 Common Market Law Review 67

Pernice I, Guerra Martins AM, *Brexit and the Future of EU Politics: A Constitutional Law Perspective* (Nomos 2019)

Petrocik JR, 'Issue Ownership in Presidential Elections, with a 1980 Case Study' (1996) 40 American Journal of Political Science 825

Phoa P, 'EU Citizens' Access to Social Benefits: Reality or Fiction? Outlining a Law and *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar 2018)

Pilling S, Cracknell R, 'UK Election Statistics: 1918- 2021: A Century of Elections' (House of Commons Library, 18 August 2021),

<https://researchbriefings.files.parliament.uk/documents/CBP-7529/CBP-7529.pdf> accessed 12 August 2022

Pollard N, Lattorre M, Sriskandarajah D, *Floodgates or Turnstiles? Post Enlargement Migration Flows to (and from) the UK* (Institute for Public Policy Research 2008)

Polyakova A, *The Dark Side of European Integration: Social Foundations and Cultural Determinants of the Rise of Radical Right Movements in Contemporary Europe* (Columbia University Press 2015)

Poptcheva EM, *Freedom of Movement and Residence of EU Citizens: Access to Social Benefits*, European Parliamentary Research Service (European Union 2014)

Powell K, 'Brexit Positions: Neoliberalism, Austerity and Immigration — The (Im)possibilities? of Political Revolution' (2017) 41 Dialect Anthropol 225

Puetter U, 'Brexit and EU Institutional Balance How Member States and Institutions Adapt Decision-making' in Fabbrini F (ed), *The Law and Politics of Brexit* (Oxford University Press 2017)

Rasmussen H, 'Why is Article 173 Interpreted Against Private Plaintiffs?' (1980) 5 European Law Review 112

— — *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986)

Rasmussen J, '"What Kind of Vision is That?" British Public Attitudes Towards the European Community During the Thatcher Era' (1997) 27 British Journal of Political Science 111

Recchi E, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (Springer 2015)

Reich N, Goddard C, Vasiljeva K, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Intersentia 2005)

Reisigl M, Wodak R, *Discourse and Discrimination: Rhetorics of Antisemitism* (Routledge 2001)

Riker W, *Liberalism against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (New York: Waveland Press, 1982)

Ristuccia F, 'The Right to Social Assistance of Children in Education and Their Primary Carers: *Jobcenter Krefeld*' (2021) 58 Common Market Law Review 877

Rogers N, Scannell R, Walsh J, *Free Movement of Persons in the Enlarged European Union* (2nd edn, Sweet & Maxwell 2012)

Rooduijn M, 'The Nucleus of Populism: In Search of the Lowest Common Denominator' (2014) 49 Government and Opposition 573

—— 'State of the Field: How to Study Populism and Adjacent Topics? A Plea for Both More and Less Focus' (2018) 58 European Journal of Political Research 362

Rummens S, 'Populism as a Threat to Liberal Democracy' in Kaltwasser CR, Taggart P, Ochoa Espejo P, Ostiguy P (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017)

Saurugger S, Terpan F, *The Court of Justice of the European Union and The Politics of Law* (Macmillan International 2016)

Saydé A, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing 2014)

Schiek D, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' in Kochenov D (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)

Schmidt SK, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018)

Schnapper D, 'The debate on immigration and the crisis of national identity' (1994) 17 West European Politics 127

Scholten P, Penninx R, 'The Multilevel Governance of Migration and Integration' in Garcés-Mascareñas B, Penninx R (eds), *Integration Processes and Policies in Europe: Contexts, Levels and Actors* (Springer 2015)

Sedelmeier U, *Europe after the Eastern Enlargement of the European Union: 2004-2014* (Heinrich Stiftung, 10 June 2014) <https://eu.boell.org/en/2014/06/10/europe-after-eastern-enlargement-european-union-2004-2014> accessed 5 April 2021

Sert D, ‘The Diversification of Intra-European Movement’ in Scholten P, Van Ostaijen M (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018)

Shapiro M, ‘Comparative Law and Comparative Politics’ (1980) 53 Southern California Law Review 537

— — ‘On Law and Policy in the European Court of Justice’ (1987) 81 American Journal of International Law 1007

— — and Stone Sweet A, *On Law, Politics and Judicialization* (Oxford University Press 2002)

Shaw J, ‘A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union’ in Poiares Pessoa Maduro LM, Azoulai L (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

Sindbjerg Martinsen D, ‘Who Has the Right to Intra-European Social Security? From Market Citizen to European Citizens and Beyond’ in Miller RA, Zumbansen PC (eds), *Annual of German and European Law*, vol 2-3 (Berghahn Books 2007)

— — ‘Welfare States and Social Europe’ in Neergaard U, Szyszczak E, Van De Gronden JW, Krajewski M (eds), *Social Services of General Interest in the EU* (Springer 2012)

— — ‘The European Social Union and EU Legislative Politics’ in Vandenbroucke F, Barnard C, De Baere G (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017)

— — ‘Migrants' Access to Social Protection in Denmark’ in Lafleur JM, Vintila D (eds), *Migration and Social Protection in Europe and Beyond* (Springer 2020)

— —and Vollaard H ‘Implementing Social Europe in Times of Crises: Re-established Boundaries of Welfare?’ (2014) 37 West European Politics 677

— — and Pons Rotger G, Sampson Thierry J, ‘Free Movement of People and Cross-Border Welfare in the European Union: Dynamic Rules, Limited Outcomes’ (2019) 29 Journal of European Social Policy 84

Singh R, *The Farrakhan Phenomenon: Race, Reaction, and the Paranoid Style in American Politics* (Georgetown University Press 1997)

Sipavičienė A, Stankūnienė V, 'The Social and Economic Impact of Emigration on Lithuania', in OECD, 'Coping with Emigration in Baltic and East European Countries' (OECD Publishing 2013)

Snell J, 'Economic Justifications and the Role of the State' in Koutrakos P, Nic Shuibhne N, Syrpis P (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016)

Snyder F, 'New Directions in European Community Law' (1987) 14 Journal of Law and Society 167

— — 'Thinking about "Interests": Legislative Process in the European Community' in Starr J, Collier JF (eds), *History and Power in the Study of Law* (Cornell University Press 1989)

Somerville W, Sumption M, *Immigration and the Labour Market: Theory, Evidence and Policy* (Migration Policy Institute 2009)

Spasova S, Ghailani D, Sabato S, Coster S, Fronteddu B, Vanhercke B, *Non-Standard Workers and the Self-Employed in the EU: Social Protection during the Covid-19 Pandemic* (ETUI Brussels 2021)

Spaventa E, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in Koutrakos P, Nic Shuibhne N, Syrpis P (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016)

— — 'What is Left of Union Citizenship?' in A Schrauwen, C Eckes, M Weimer (eds), *Inclusion and Exclusion in the European Union – Collected Papers* (2016) Amsterdam Centre for European Law and Governance Research Paper No. 2016-05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835345> accessed 14 March 2020

— — 'Earned Citizenship – Understanding Union Citizenship through Its Scope' in D Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press 2017)

— — ‘Update of the Study on the Impact of Brexit in Relation to the Right to Petition and on the Competences, Responsibilities and Activities of the Committee on Petitions’ Bocconi Legal Studies Research Paper, 3171414 (1 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171414> accessed 21 March 2021

— — ‘Mice or Horses? British Citizens in the EU 27 after Brexit as “Former EU Citizens”’ (2019) 44 European Law Review 589

Spicker P, *How Social Security Works: An Introduction to Benefits in Britain* (Policy Press 2016)

Springford J, ‘Is immigration a reason for Britain to leave the EU?’ (Centre for European Reform 2013), <https://www.cer.eu/sites/default/files/publications/pb_imm_uk_27sept13.pdf> accessed 17 June 2022

Sriskandarajah D, ‘Enlarging Concerns: Migration to the UK from New European Union Member States’ in Clarke K, Maltby T, Kennett P, (eds), *Social Policy Review 19: Analysis and Debate in Social Policy, 2007* (Bristol University Press 2007)

Stavrakakis Y, Katsambekis G, Nikisianis N, Kioupkiolis A, Siomos T, ‘Extreme Right-Wing Populism in Europe: Revisiting a Reified Association’ (2017) 14 Critical Discourse Studies 420

Stone Sweet A, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000)

— — *The Judicial Construction of Europe* (Oxford University Press 2004)

— — ‘The European Court of Justice and the judicialization of EU governance’ (2010) 5 Living Reviews in European Governance <https://www.europeangovernance-livingreviews.org/Articles/lreg-2010-2/download/lreg-2010-2Color.pdf> accessed 29 June 2022

Strumia F, Hughes ME, ‘A Momentary Blip or a Step Forward in Revisionist Free Movement? - Case C-308/14 European Commission v. United Kingdom of Great Britain and Northern Ireland’ (14 June 2016)’ (2017) 23 European Public Law 723

Sweeney J, 'The Fifth EU Enlargement and Ireland', (National Economic and Social Development Office of Ireland) <http://files.nesc.ie/nesc_background_papers/NESC_122h_bg_paper_6.pdf> accessed 27 May 2019

Szczerbiak A, Taggart P, *Opposing Europe? The Comparative Party Politics of Euroscepticism* (Oxford University Press 2008)

Taggart P, 'A Touchstone of Dissent: Euroscepticism in Contemporary Western European Party Systems' (1998) 33 European Journal of Political Research 363.

— — *Populism* (Open University Press 2000)

— — 'Populism and the Pathology of Representative Politics' in Mény Y, Surel Y (eds), *Democracies and the Populist Challenge* (Palgrave Macmillan 2002)

— — 'Populism and Representative Politics in Contemporary Europe' (2004) 9 Journal of Political Ideologies 269

Thym D, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17

— — 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in Kochenov D (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)

— — *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017)

Timmermans C, '*Martínez Sala* and *Baumbast* Revisited' in Poiares Pessoa Maduro LM, Azoulai L (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

Tobler C, Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law (Intersentia 2005) 307

Toner H, 'Judicial Interpretation of European Union Citizenship - Transformation or Consolidation?' (2000) 7 Maastricht Journal of European and Comparative Law 158

Torres Pérez A, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?' (2020) 22 Cambridge Yearbook of European Legal Studies 279

Toth AG, 'On Law and Policy in the European Court of Justice by H. Rasmussen' (1987) 7 Yearbook of European Law 411

Tryfonidou A, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to one of (Almost Complete) Independence' (2014) 33 Yearbook of European Law 385

Valcke A, 'EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law' (2019) 21 European Journal of Migration and Law 289

Van De Wardt M, De Vries C, Hobolt SB 'Exploring the Cracks: Wedge Issues in Multiparty Competition' (2014) 76 Journal of Politics 986

Van Der Brug M, 'Why Some Anti-Immigrant Parties Fail and Others Succeed: A Two-Step Model of Aggregate Electoral Support' (2005) 38 Comparative Political Studies 537

— — and Fennema M, 'What Causes People to Vote for Radical Right Party? A Review of Recent Work' (2007) 19 International Journal of Public Opinion Research 474

Van Der Brug W, Berkhout J, 'The Effect of Associative Issue Ownership on Parties' Presence in the News Media' (2015) 38 West European Politics 869

Van Der Mei AP, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003)

— — 'Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid' (2009) 16 Maastricht Journal of European and Comparative Law 477

— — and Melin P, 'Overview of Recent Cases before the Court of Justice of the European Union (February 2019-June 2019)' (2019) 21 European Journal of Social Security 272

Van Kessel, S, *Populist parties in Europe. Agents of discontent?* (Palgrave Macmillan 2015)

Van Ostaijen M, Scholten P, 'Conclusions and Reflection' in Van Ostaijen M, Scholten P (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018)

— — 'Between Mobility and Migration: The Consequences and Governance of Intra-European Movement' in Van Ostaijen M, Scholten P (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer 2018)

Van Reenen J, 'Brexit's Long-Run Effects on the U.K. Economy' (2016) 2 Brookings Papers on Economic Activity 367

Vasiliipoulou S, 'European Integration and the Radical Right: Three Patterns of Opposition' (2011) 46 Government and Opposition 223

— — 'The Radical Right and Euroskepticism' in Rydgren J (ed), *The Oxford Handbook of the Radical Right* (Oxford University Press 2018)

— — and Talving L, 'Opportunity or Threat? Public Attitudes towards EU Freedom of Movement' (2019) 26 Journal of European Public Policy 1

Verschueren H, 'Regulation 883/2004 and Invalidity and Old-Age Pensions' (2009) 11 European Journal of Social Security 143

— — 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ' (2009) 11 European Journal of Social Security 217

— — 'The EU Social Security Co-ordination System: A Close Interplay between the EU Legislature and Judiciary' in Syrpis P (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012)

Vinković M, 'Transformation of Employment Relations and Social Dumping in the Tomljenović V, Bodiroga-Vukobrat N (eds), *Transnational, European, and National Labour Relations: Flexicurity and New Economy* (Springer 2018)

Wagner M, 'When Do Parties Emphasise Extreme Positions? How Strategic Incentives for Policy Differentiation Influence Issue Importance' (2012) 51 European Journal of Political Research 64

Walgrave S, Lefevere J, Nuytemans M, 'Issue Ownership Stability and Change: How Political Parties Claim and Maintain Issues Through Media Appearances' (2009) 26 Political Communication 153

Walter S, 'Better off without You? How the British Media Portrayed EU Citizens in Brexit News' (2019) 24 The International Journal of Press/Politics 210

— — and Fazekas Z, 'Similar citizen portrayals? Converging media-based othering in tabloids and broadsheets' (2022) 0 Journalism 0 <https://journals.sagepub.com/doi/10.1177/14648849221116204> accessed 11 February 2020

Walterskirchen E, 'The Dimensions and Effects of EU Labour Migration in Austria' in Galgóczi B, Leschke J, Watt A (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Routledge 2009)

Wardle H, Obermuller L, '"Windrush Generation"' and '"Hostile Environment"' (2019) 2 Migration and Society 81

Webber F, 'On the Creation of the UK's "Hostile Environment"' (2019) 60 Race & Class 76

Weiler J HH, 'The Court of Justice on Trial – A review of Hjalte Rasmussen: On Law and Policy in the European Court of Justice' (1987) 24 Common Market Law Review 555

— — 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403

Wollenschlager F, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era' in Thym D (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017)

Wright C, 'The Regulation of European Labour Mobility: National Policy Responses to the Free Movement of Labour Transition Arrangements of Recent EU Enlargements' (2010) 13 Journal for Labour and Social Affairs in Eastern Europe 157

Zahlen P, 'Elderly Migrants in Luxembourg: Diversity and Inequality' in Karl U, Torres S (eds), *Ageing in Contexts of Migration* (Routledge 2015)

Zaslove A, Geurkink B, Jacobs K, Akkerman A, ‘Power to the people? Populism, democracy, and political participation: a citizen's perspective’ (2021) 44 West European Politics 727, 734.

Ziegler KS, ‘Abuse of Law’ in the Context of the Free Movement of Workers, in Prohibition of Abuse of Law: A New General Principle of EU Law?’ in De La Feria R, Vogenauer S (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011)

European Commission Publications

Communications

European Commission, ‘Proposal for a Council Regulation (EC) on coordination of social security systems’ COM (1998) 779 final

European Commission, ‘Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006)’ (Communication) COM (2006) 48 final

European Commission, ‘The impact of free movement of workers in the context of EU enlargement: Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty’ (Communication) COM (2008) 765 final

European Commission, ‘Communication on guidance for better transposition and 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 (2009) 313 final

European Commission, ‘Free movement of EU citizens and their families: Five actions to make a difference’ (Communication) COM (2013) 0837 final

Reports

European Commission, Directorate General for Economic and Financial Affairs, 'Five years of an enlarged EU: Economic achievements and challenges' (European Economy 1, 2009)

European Commission Directorate-General for Employment, Social Affairs and Inclusion, *2017 Annual Report on Intra-EU Labour Mobility: Final Report* (2nd edn, European Union 2018)

European Commission DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, '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' (Final report submitted by ICF GHK in association with Milieu Ltd, 14 October 2013, revised on 16 December 2013)

European Commission Directorate General for Internal Policies, 'Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Belgium' (European Union 2016)
<http://www.europarl.europa.eu/supporting-analyses> accessed 8 July 2021

European Commission, *Study on the Movement of Skilled Labour: Final Report* (European Union 2018)
<https://ec.europa.eu/social/BlobServlet?docId=20453&langId=mt> accessed 5 May 2020

European Commission, *2018 Annual Report on Intra-EU Labour Mobility* (European Union 2019)

Green Papers

Commission of the European Communities, 'European Social Policy: Options for the Union' (Green Paper) COM (93) 551 final

Memos

European Commission, '10th Anniversary of the 2004 Enlargement – Strategic Benefits, Impact and the Current Enlargement Agenda' (Memo 14/325, 30 April 2014)

Websites

— — ‘Classification scheme before the Lisbon Treaty’, Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/browse/directories/case-law.html?root_default=RJ_1_CODED%3DB,RJ_2_CODED%3DB-04#arrow_B-04> accessed 2 November 2022

— — ‘Coordination of Social Security Systems: Summary of Regulation (EC) No 883/2004’ (Official website of European Union law) <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32004R0883> accessed 27 May 2018

— — ‘Employment, Social Affairs & Inclusion’ (Official website of the European Commission) <http://ec.europa.eu/social/main.jsp?catId=1124&intPageId=2771&langId=en> accessed 3 May 2018

— — ‘EU-ASEAN cooperation - key migration statistics’ (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU-ASEAN_cooperation_-_key_migration_statistics#Population_change_and_migration> accessed 28 May 2019

— — ‘EU citizens living in another Member State - statistical overview’ (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview#Who_are_the_most_mobile_EU_citizens.3F> accessed 25 October 2022

— — ‘Free movement of persons: General’ (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Anew-case-law&RJ_NEW_3_CODED=4.04.00&type=named&qid=1630571680579&RJ_NEW_1_CODED=4&RJ_NEW_2_CODED=4.04> accessed 2 November 2022

— — ‘Free movement of persons: General’ (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Acase-law&RJ_3_CODED=B-04.00&RJ_1_CODED=B&RJ_2_CODED=B-04&type=named&qid=1630592421515> accessed 2 November 2022

— — ‘Free movement of persons: Social security’ (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <http://eur-lex.europa.eu/search.html?qid=1516032662656&RJ_NEW_2_CODED=4.04&RJ_NEW_1_CODED=4&type=named&RJ_NEW_3_CODED=4.04.05&name=browse-by:new-case-law> accessed 2 November 2022

— — ‘Free movement of persons: Social security’ (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?name=browse-by%3Acase-law&RJ_3_CODED=B-04.06&RJ_1_CODED=B&RJ_2_CODED=B-04&type=named&qid=1630592828065> accessed 2 November 2022

— — ‘Free movement of persons: Workers’ (post-Lisbon Treaty), Directory of case-law, Official website of European Union law <http://eur-lex.europa.eu/search.html?qid=1516032658404&RJ_NEW_2_CODED=4.04&RJ_NEW_1_CODED=4&type=named&RJ_NEW_3_CODED=4.04.01&name=browse-by:new-case-law> accessed 2 November 2022

— — ‘Free movement of persons: Workers’ (pre-Lisbon Treaty), Directory of case-law, Official website of European Union law <https://eur-lex.europa.eu/search.html?type=named&name=browse-by:case-law&RJ_1_CODED=B&RJ_2_CODED=B-04&RJ_3_CODED=B-04.02> accessed 2 November 2022

— — ‘Population and population change statistics’ (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_and_population_change_statistics#Population_change_at_a_national_level> accessed 28 May 2019

— — ‘Systematic classification scheme after the Lisbon Treaty’, Directory of case-law, Official website of European Union law <http://eur-

lex.europa.eu/browse/directories/new-case-law.html?root_default=RJ_NEW_1_CODED%3D4,RJ_NEW_2_CODED%3D4.04,RJ_NEW_3_CODED%3D4.04.05#arrow_4.04.05> accessed 2 November 2022

— — 'Urban Europe — statistics on cities, towns and suburbs — foreign-born persons living in cities' (Official website of Eurostat) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Urban_Europe_%E2%80%94_statistics_on_cities,_towns_and_suburbs_%E2%80%94_foreign-born_persons_living_in_cities#Migration_in_metropolitan_regions> accessed 28 May 2019

Data Explorer tool (Official website of Eurostat) <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do > accessed 28 May 2019

Eurostat, 'Immigration by age group, sex and citizenship: customised dataset' <https://ec.europa.eu/eurostat/databrowser/view/MIGR_IMM1CTZ__custom_3789042/default/table?lang=en> accessed 25 October 2022

Official website of European Union law <https://eur-lex.europa.eu> accessed 18 December 2018

Official website of the Department of Employment Affairs and Social Protection of Ireland, <http://welfare.ie/en/Pages/home.aspx> accessed 20 April 2022

Official website of the European Union <http://europa.eu/epic/countries/romania/index_en.html> accessed 3 May 2018

Official website of the German Federal Office for Migration and Refugees <http://www.bamf.de/EN/Willkommen/KinderFamilie/Kindergeld/kindergeld-node.html> accessed 3 May 2018

Official website of the UK Government <https://www.gov.uk/child-benefit-rates> accessed 3 May 2018

Newspaper articles and other media

— — 'Dutch far-right MP to push "Nexit" despite Brexit woes' *Euractiv* (8 July 2016) <https://www.euractiv.com/section/future-eu/news/dutch-far-right-mp-to-push-nexit-despite-brexit-woes/> accessed 12 July 2022

— — 'EU migrants face benefit curbs' *BBC* (23 February 2004) <http://news.bbc.co.uk/2/hi/uk_news/politics/3514199.stm> accessed 11 April 2022

— — 'EU referendum: Vote Leave sets out post-Brexit plans' *BBC* (15 June 2016) <https://www.bbc.com/news/uk-politics-eu-referendum-36534802> accessed 18 March 2021

— — 'Full text: Blair's migration speech' *The Guardian* (27 April 2004) <https://www.theguardian.com/politics/2004/apr/27/immigrationpolicy.speeches> accessed 11 April 2022

— — 'Full Text: Nick Clegg's Speech on Immigration' *Prospect* (5 August 2014) <https://www.prospectmagazine.co.uk/politics/full-text-nick-cleggs-speech-on-immigration> accessed 20 March 2021

— — 'Jack Straw regrets opening door to Eastern Europe migrants' *BBC* (13 November 2013) <https://www.bbc.com/news/uk-politics-24924219> accessed 29 June 2022

— — 'Nick Clegg sets out plans to curb benefits to EU migrants' *The Guardian* (26 November 2014) <https://www.theguardian.com/politics/2014/nov/26/nick-clegg-benefits-eu-migrants> accessed 20 March 2021

Amaro S, 'Here's how important the UK is to the European Union' *CNBC* (27 March 2017) <https://www.cnbc.com/2017/03/27/european-union-uk-important-brexit.html> accessed 3 March 2021

Brown C, 'Blair calls crisis meeting over EU migrants' *The Telegraph* (15 February 2004) <https://www.telegraph.co.uk/news/uknews/1454380/Blair-calls-crisis-meeting-over-EU-migrants.html> accessed 11 April 2022

Cameron D, 'Free Movement within Europe Needs to be Less Free *Financial Times* (26 November 2013) <http://www.ft.com/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html#axzz4B0OQl8iL> accessed 18 December 2018

Hansen P, 'Undermining free movement: Migration in an age of austerity' *Eurozone* (6 February 2015) <https://www.eurozine.com/undermining-free-movement/> accessed 29 June 2022

Jacobsen H, '"Benefits tourism" in the EU is a myth, report says' *Euractiv* (17 October 2013) <http://www.euractiv.com/section/social-europe-jobs/news/benefits-tourism-in-the-eu-is-a-myth-report-says/> accessed 18 December 2018

Khomami N 'Brexit is only way to control immigration, campaigners claim' *The Guardian* (25 April 2016) <https://www.theguardian.com/politics/2016/apr/25/brexit-is-only-way-to-control-immigration-campaigners-claim> accessed 7 February 2020

— — 'Mark Reckless sparks immigration row on eve of Rochester byelection' *The Guardian* (19 November 2014) <https://www.theguardian.com/uk-news/2014/nov/19/mark-reckless-immigration-row-rochester-byelection> accessed 20 March 2021

Mason R, 'Mark Reckless sparks immigration row on eve of Rochester byelection' *The Guardian* (19 November 2014) <https://www.theguardian.com/uk-news/2014/nov/19/mark-reckless-immigration-row-rochester-byelection> accessed 20 March 2021

Osborn A, 'UK rushes out welfare curbs to deter East European migrants' *Reuters* (18 December 2013) <https://www.reuters.com/article/uk-britain-eu-immigration-idUKBRE9BH00D20131218> accessed 12 August 2022

Pickard J, 'Nick Clegg to Call for Tighter Migrant Controls' *Financial Times* (4 August 2014) <https://www.ft.com/content/99db869a-1b1d-11e4-b649-00144feabdc0> accessed 20 March 2021

Walt V, 'France's Marine Le Pen on Brexit: "This Is the Beginning of the End of the European Union"' *Time* (28 June 2016) <https://time.com/4386695/brexit-france-q-and-a-marine-le-pen-national-front/> accessed 12 July 2022

Watt N, 'EU referendum: In-out choice by end of 2017, Cameron promises' *The Guardian* (23 January 2013) <https://www.theguardian.com/politics/2013/jan/22/eu-referendum-2017-david-cameron> accessed 29 June 2022

— — 'Boris Johnson to campaign for Brexit in EU referendum' *The Guardian* (21 February 2016) <https://www.theguardian.com/politics/2016/feb/21/boris-johnson-eu-referendum-campaign-for-brexit-david-cameron> accessed 29 April 2019

— — and Mason R, 'EU Deal: Cameron vows to put Commons sovereignty "beyond doubt"' *The Guardian* (3 February 2016) <https://www.theguardian.com/politics/2016/feb/03/eu-deal-david-cameron-uk-parliament-sovereignty-beyond-doubt-boris-johnson> accessed 29 April 2019

Wintour P, 'EU migrants: David Cameron sets out more benefit restrictions' *The Guardian* (27 November 2013) <https://www.theguardian.com/politics/2013/nov/27/david-cameron-benefit-restrictions-eu-migrants> accessed 12 August 2022

— — 'David Cameron admits immigration plan needs EU treaty change' *The Guardian* (28 November 2014) <https://www.theguardian.com/uk-news/2014/nov/28/david-cameron-immigration-eu-treaty-change> accessed 12 August 2022

— — 'Labour will curb tax credits for EU migrants, says Rachel Reeves' *The Guardian* (19 November 2014) <https://www.theguardian.com/politics/2014/nov/18/labour-clamp-down-in-work-tax-credits-eu-migrants> accessed 11 April 2022

— — and Black I, 'UK may tighten benefit controls to deter new EU immigrants' *The Guardian* (5 February 2004) <https://www.theguardian.com/uk/2004/feb/05/eu.immigration> accessed 11 April 2022

— — and Watt N, 'Ukip wins European elections with ease to set off political earthquake' *The Guardian* (26 May 2014), <https://www.theguardian.com/politics/2014/may/26/ukip-european-elections-political-earthquake> accessed 12 August 2022

Wright O, 'EU referendum: David Cameron and Nigel Farage face questions on sovereignty and the economy during live TV event' *The Independent* (7 June 2016)

<https://www.independent.co.uk/news/uk/politics/eu-referendum-david-cameron-and-nigel-farage-face-questions-on-sovereignty-and-the-economy-during-a7070016.html> accessed 29 April 2019

Blogs

DCU Brexit Institute <https://dcubrexitinstitute.eu/> accessed 14 March 2020

Portes J, 'The Economic Impacts of Immigration to the UK' (*Centre for Economic Policy Research*, 6 April 2018) <https://cepr.org/voxeu/columns/economic-impacts-immigration-uk> accessed 16 July 2022

—— 'Immigration, Free Movement and Brexit' (*DCU Brexit Institute*, 11 January 2021) <https://dcubrexitinstitute.eu/2021/01/immigration-free-movement-and-brexit/> accessed 7 February 2020

Van Reenen J, 'The Aftermath of the Brexit Vote – The Verdict from a Derided Expert' (*London School of Economics and Political Science Blogs*, 2 August 2016) <https://blogs.lse.ac.uk/politicsandpolicy/the-aftermath-of-the-brexit-vote-a-verdict-from-those-of-those-experts-were-not-supposed-to-listen-to> accessed 7 February 2020

Other media

—— 'Full Text: Nick Clegg's Speech on Immigration' (*Prospect* 5 August 2014) <https://www.prospectmagazine.co.uk/politics/full-text-nick-cleggs-speech-on-immigration accessed 20 March 2021> accessed 14 May 2018

—— 'Leave looks like…: What happens when we vote leave?' (*Vote Leave*) <http://www.voteleavetakecontrol.org/briefing_newdeal.html> accessed 29 June 2022

—— 'How important is the EU market to UK trade?' (*UK in a Changing Europe*, 1 July 2021) <https://ukandeu.ac.uk/the-facts/how-important-is-the-eu-market-to-uk-trade/> accessed 3 March 2021

Fox L, 'Memories of Green? The cost of uncontrolled migration' (*Vote Leave*, 2 June 2016) <http://www.voteleavetakecontrol.org/rt_hon_liam_fox_mp_memories_of_green_the_cost_of_uncontrolled_migration.html> accessed 18 March 2021

Gove M, Johnson B, Patel P, Stuart G, 'Restoring public trust in immigration policy - a points-based non-discriminatory immigration system' (*Vote Leave*, 1 June 2016) <http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html> accessed 18 March 2021

Johnson B, 'Statement by Boris Johnson on immigration statistics: the only way to take back control of immigration is to Vote Leave on 23 June' (*Vote Leave*, 26 May 2016) <http://www.voteleavetakecontrol.org/boris_johnson_the_only_way_to_take_back_control_of_immigration_is_to_vote_leave_on_23_june.html> accessed 18 March 2021

Kirkup J, 'Theresa May interview: "We're going to give illegal migrants a really hostile reception"' *The Telegraph* (25 May 2012) <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/> accessed 28 June 2022

Lee TB, 'Brexit: the 7 most important arguments for Britain to leave the EU' (*Vox,* 25 June 2016) <https://www.vox.com/2016/6/22/11992106/brexit-arguments> accessed 29 April 2019

Other

Reports

— — 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' TF50 (2017) 19

European Foundation for the Improvement of Living and Working Conditions, 'Luxembourg: the Occupational Promotion of Migrant Workers' (24 March 2009)

<https://www.eurofound.europa.eu/publications/report/2009/luxembourg-the-occupational-promotion-of-migrant-workers> accessed 13 July 2021

European Migration Network, 'Satisfying Labour Demand through Migration in Luxembourg' (April 2011) <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/labour-demand/17a._luxembourg__national_report_satisfying_labour_demand_thru_migratio_final_version_11april2011.pdf> accessed 13 July 2021

Luxembourg: Office for Official Publications of the European Communities, *Population Statistics 2006* (European Communities 2006), <https://ec.europa.eu/eurostat/documents/3217494/5685052/KS-EH-06-001-EN.PDF/1e141477-9235-44bb-a24b-a55454c2bc42?version=1.0> accessed 2 July 2021

OECD, 'Trends in International Migration 2000: Continuous Reporting System on Migration: Annual Report' (OECD Publishing 2001)

— — 'Trends in Migration Flows in Central and Eastern Europe' in OECD (ed), *Migration Policies and EU Enlargement: The Case of Central and Eastern Europe* (OECD Publishing 2001)

Park A, Clery E, Curtice J, Philips M, Utting D, *British Social Attitudes: The 29th Report* (NatCen Social Research 2012) <https://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-29/key-findings/introduction.aspx> accessed 4 April 2020

The Migration Observatory at the University of Oxford, 'Highly Skilled Migration to the UK 2007-2013', 3 July 2014 <https://migrationobservatory.ox.ac.uk/resources/reports/highly-skilled-migration-to-the-uk-2007-2013> accessed 25 May 2021

— — 'EU Migration, Welfare Benefits and EU Membership (Pre-referendum)' (2 May 2016) <https://migrationobservatory.ox.ac.uk/resources/reports/eu-migration-welfare-benefits-and-eu-membership/> accessed 29 June 2022

UK Border Agency, UK Department for Work and Pensions, HM Revenue and Customs and Communities and Local Government, 'Accession Monitoring Report May 2004 - March 2008: A8 Countries' (2009) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100408165414/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession_monitoring_report/report18/may04-dec08?view=Binary> accessed 20 May 2020

UK Department for Work and Pensions, 'Benefit claims by EEA nationals: UK Benefit and Tax Credit claims by recently arrived EEA migrants' (November 2015), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475765/uk-benefits-and-tax-credits-eea-migrants.pdf> accessed 29 June 2022, 7.

UK Home Office, UK Department for Work and Pensions, UK Inland Revenue, UK Office of the Deputy Prime Minister, 'Accession Monitoring Report May-December 2004' (22 February 2005) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100408165414/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession_monitoring_report/report2/maydec04.pdf?view=Binary> accessed 20 May 2021

Speeches

— — Danish Prime Minister Lars Løkke Rasmussen's speech to the European Parliament, 28 November 2018 <http://stm.dk/_p_14759.html> accessed 18 December 2018

Cameron D, 'Speech on Europe' (Chatham House, London, 10 November 2015) https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe accessed 28 June 2022.

Prodi R, *Shaping the New Europe* (European Parliament, Strasbourg, 15 February 2000)

Press releases

— — 'Coronavirus: Commission proposes update to coordinated approach on free movement restrictions' (Official website of the European Commission, 25

January 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_195> accessed 28 April 2021

Briefings

European Movement International, 'The consequences of a British exit from the European Union' <https://europeanmovement.eu/wp-content/uploads/2016/05/EMI_16_PolicyPosition_Brexit_17_VIEW_FINAL.pdf> accessed 18 March 2021

Migration Watch UK, 'Future Migration Flows from Eastern Europe' (1 August 2008) <https://www.migrationwatchuk.org/briefing-paper/40/future-migration-flows-from-eastern-europe> accessed 29 June 2022

The Migration Observatory at the University of Oxford, 'Net Migration to the UK' (29 July 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/long-term-international-migration-flows-to-and-from-the-uk/> accessed 25 May 2021

Other

— — 'A statement from NHS Digital on the Memorandum of Understanding with the Home Office' *NHS Digital* (9 May 2018) <https://digital.nhs.uk/news/2018/a-statement-from-nhs-digital-on-the-memorandum-of-understanding-with-the-home-office> accessed 28 June 2022

— — 'Controlling Our Borders: Making Migration Work for Britain: Five Year Strategy for Asylum and Immigration' Presented to UK Parliament by the Secretary of State for the Home Department (February 2005)

— — 'EU Enlargement Factsheet' (Official website of the European Commission) <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/publication/factsheet_en.pdf> accessed 27 May 2019

— — 'EU trade relations with the United Kingdom. Facts, figures and latest developments' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-kingdom_en> accessed 29 June 2022

— — ‘Legal Victory against Government’s Hostile Environment’ *Liberty* (12 November 2018) <https://www.libertyhumanrights.org.uk/issue/legal-victory-against-governments-hostile-environment/> accessed 28 June 2022

— — ‘Migrants’ Rights Network granted permission for judicial review of patient data-sharing agreement between NHS Digital and the Home Office’ *Matrix Chambers* (1 March 2018), <https://www.matrixlaw.co.uk/news/migrants-rights-network-granted-permission-legally-challenge-data-sharing-agreement-nhs-digital-home-office/> accessed 28 June 2022

Court of Justice of the European Union, ‘Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings’ (2012) OJ C 380/01

EOS Gallup Europe, ‘European Union Enlargement, UK Opinion Poll’ (2002) <https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl124_en.pdf> accessed 5 April 2020

Federal Ministry of Labour, Social Affairs and Consumer Protection of Austria, ‘The Austrian Welfare State: Benefits, Expenditure and Financing 2016’ (Social Affairs Ministry Vienna 2016) <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=371> accessed 21 March 2019

Letter to the President of the European Council from the Interior Ministers of Austria, Germany, the Netherlands and the UK (April 2013) <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 11 March 2020

Letter to the President of the European Council from the Prime Minister of the UK (10 November 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf> accessed 11 March 2020

NHS Digital, ‘About Us’ <https://digital.nhs.uk/about-nhs-digital/our-organisation/corporate-information-packs> accessed 28 June 2022

(Withdrawn) Memorandum of Understanding between Health and Social Care Information Centre and the Home Office and the Department of Health, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/

attachment_data/file/774071/MoU_between_HSCIC__Home_Office_and_DH.pdf> accessed 28 June 2022