THE FREE MOVEMENT OF THE POOR: THE LEGAL IMPLICATIONS OF A POLITICAL PROBLEM

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ABSTRACT[347]

Ever since the right to move and reside freely within the Union was extended to economically inactive Union citizens, the fear that such citizens would migrate in order to benefit from the social assistance system of the host state has emerged. This concern for 'benefit tourism' has become so forceful that it has led some Member States, to push for reform of the current rules regarding the Union's citizens access of the host state social assistance system.

This article examines the judgments of the Court of Justice of the European Union concerning the claims made by European citizens for social assistance in another Member State of which they are not nationals. It has been noted that, as opposed to older case law, the Court is more sensitive to Member State's recent political arguments which advocate against the conferment of such benefits. Yet, a difference in approach is noted depending on whether the EU citizen is a worker or a non-economically inactive individual.

N.B. This article was finalized prior to the delivery of Case C-308/14 ***Commission vs. United Kingdom****, dated 14 June 2016. It is for this reason that it has not been included in the article's text.*

KEYWORDS: EU LAW – FREE MOVEMENT – SOCIAL ASSISTANCE

[347] This article was reviewed by Dr. Anne Pieter van der Mei.

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1. Introduction

Ever since the right to move and reside freely within the Union was extended to economically inactive Union citizens, the fear that such citizens would migrate in order to benefit from the social assistance system of the host state has emerged. This concern for 'benefit tourism' or 'social tourism' has become so forceful that it has led some Member States,[348] to push for reform of the current rules regarding the Union's citizens access of the host state social assistance system.

The fear for social tourism has not been backed by evidence that 'the main motivation of EU citizens to migrate and reside in a different Member State is benefit related as opposed to work or family related.'[349] This focus on benefit tourism can be viewed as emanating from the more recent lifting of work ban on Romanians and Bulgarians, or as an instance of 'scapegoating inherent in many policy responses to migratory phenomena.'[350] It could also be viewed as a manner of extending the criticism directed towards the recent austerity measures, thereby requiring the re-evaluation of 'the legitimate locus of control over public spending.'[351] More generally it can be perceived as one of the various manners of expressing distrust in the European project, whether this is warranted or not,[352] or also, as another instance of putting the blame on the Union for problems which need to be addressed at 'home'. It has also been argued that the fear of benefit tourism is in fact merely a fear and that no such mass migration will take place to the extent that the sustainability of the host state's welfare system is jeopardised. Yet this possibility cannot be entirely ruled out since, though minimal, there has been an increase in the number of

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348 Meghan Benton, 'Reaping the benefits? Social security coordination for mobile EU citizens' (2013) Migration Policy Institute Europe <http://www.migrationpolicy.org/sites/default/files/publications/Benton-ReapingBenefits-FINAL.pdf> accessed 8 February 2016. This article provides examples which evidence public anxiety regarding intra-European migration.

349 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 413.

350 Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 17, 20.

351 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 889, 902.

352 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 249, 260.

economically inactive individuals living and claiming benefits in another Member State[353].

The right to move and reside freely within the Union is laid down in article 21 of the Treaty on the Functioning of the European Union (Hereinafter referred to as 'TFEU'). This right is further developed in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[354] The latter directive divides the Union citizen's stay in the host state into three stages: (i) up until three months (ii) from three months up to five years and (iii) from five years onwards. During the first temporal stage, the host state is not obliged to provide social assistance benefits to the Union citizen,[355] (unless he is a worker, which fact will be further explained in sections 1.1 and 2.1). On the other hand, once the Union citizen has resided legally for a continuous period of five years, he acquires the right to permanent residence. In obtaining such a right, the individual is deemed to have established a strong link,[356] with the host state, so much so that, if the need arises, he is entitled to the host state's social assistance benefits. It however remains unclear whether Union citizens can obtain these benefits during the second stage. This lack of clarity has garnered much discussion. On the one hand, if the Union citizen is allowed to gain access to such benefits during this stage, the right to move and reside freely could be much more easily put into practice. On the other hand, if access to such benefits is allowed so freely, then an unreasonable burden might be placed on the welfare system of the host state. The tension between the two opposing interests is reflected in Directive 2004/38, and is a recurring theme within this article.

Social assistance benefits, or as also referred to, minimum subsistence benefits, are non-contributory in nature. They are therefore provided to those who lack

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353 See in this regard Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 21 <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI(2014)140808_REV1_EN.pdf> accessed 10 January 2016. Reference is here also made to Michael Blauberger and Susanne K Schmidt 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) October-December 2014, Research and Politics 3 <http://rap.sagepub.com/content/sprap/1/3/2053168014563879.full.pdf> accessed 8 February 2016; and Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 207-208.

354 Council Directive (EC) 2004/38/EC concerning the right of EU citizens and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

355 ibid art 24(2).

356 The establishment of this link is discussed by Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 148.

the basic means of subsistence, whether or not the beneficiaries have contributed to society via the payment of taxes.[357] The issue of benefit tourism and in general terms the free movement of the poor concerns the very basic tenets of a welfare state. Having been developed within the context of the nation state, the conferment of social assistance benefits was seen to be dependent on the prospective beneficiary having the nationality of that very state. This is because a national is traditionally believed to have an inherent bond with his nation state. Non-nationals on the other hand, do not have this bond and would usually need to comply with additional criteria for them to be entitled to such benefits.[358] It is primarily due to the absence of such a bond that the provision of social assistance benefits to non-nationals is considered to be 'unnatural' and therefore controversial.

With regards to coordination of social security, Regulation 883/2004 on the coordination of social security systems,[359] needs to be mentioned. The Union has enacted this regulation so as to facilitate the exportability of benefits when Union citizens move from one Member State to another. However, this regulation does not cover social assistance. Nevertheless, by basing itself on the concept of Union citizenship,[360] the right to free movement[361] and the principle of non-discrimination,[362] the Court of Justice of the European Union (Hereinafter referred to as the 'Court' or the 'CJEU') in the late 1990s, early 2000s provided a pathway through which Union citizens could attain access to the social assistance system of the host state. The Member States could no longer discriminate between nationals and non-nationals. This older case law (as analysed in section 1) was more recently followed by less progressive case law (as analysed in section 2). This article aims to analyse these judgments, especially the more recent ones, in order to give an account of how the Court changed its approach. It will attempt to pin-point the various factors which brought this change and consequently discuss whether such change can be justified.

2. Old Case Law

2.1 *Workers*

[357] Anne Pieter van der Mei, 'Regulation 1408/71 and Co-ordination of special non-contributory benefit schemes' (2002) 27 European Law Review 551, 553.

[358] Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 6.

[359] Council Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L 166/1

[360] Treaty on the Functioning of the European Union [2012] OJ C326/47, art 20.

[361] ibid art 21.

[362] ibid art 18.

With economic integration being the cornerstone of the European Economic Community, it is not surprising that the free movement of workers was first to be developed. Initially, the Member States did not even favour such a movement, but the Commission[363] cunningly made use of its right of legislative initiative during the 1960s at a time when, the Member States were no longer too concerned that such movement would constitute a threat to their markets. The enacted Regulation No. 1612/68 spoke of the 'right of freedom of movement'[364] and laid out the rights which non-nationals working in host states could benefit from.[365] Yet it did not specifically tackle the workers' recourse to social assistance. Having moved in order to obtain employment, it was presumed that social assistance would not be resorted to.[366]

Prior to further defining the rights in question, the CJEU first devised a test which would determine whether the individual is to be considered a worker. It established that the 'worker' status had its own Community meaning, as otherwise national law could easily frustrate the application of Community rules.[367] The individual was to engage in 'effective and genuine activities'[368] in order to obtain such status. The Court never clearly defined what constitutes such activities. Yet, from a reading of the judgments, it is clear that the Court adopts a broad interpretation as the definition thereof provides the contours of 'the field of application of one of the fundamental freedoms guaranteed by the Treaty.'[369]

In ***Levin***,[370] the Court held that part-time work which provided the individual with remuneration lower than the established minimum wage, still constituted 'effective and genuine' work, even if such remuneration was to be supplemented with other means. In ***Kempf***,[371] the CJEU added that 'financial assistance drawn from the public funds' of the host state could also constitute the additional means. Had it been otherwise, the rights emanating from the free movement of workers would be forfeited once such assistance is requested. In this manner the CJEU confirmed that stated in ***Hoeckx***,[372] that is that the term 'social advantage'

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363 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 26.

364 Council Regulation (EEC) 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community [1968] OJ L257/2, Preamble.

365 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 126.

366 ibid.

367 Case C-53/81 *D.M. Levin vs. Staatssecretaris van Justitie* [1982] ECR I-1035.

368 ibid para17.

369 ibid.

370 ibid para 16.

371 Case C-139/85 *R. H. Kempf vs. Staatssecretaris van Justitie* [1986] ECR I-1741.

372 Case C-249/83 *Vera Hoeckx vs. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR I-973, paras 22.

as used in Regulation No. 1612/68 included social assistance benefits. This meant that, as per article 7(2) of Regulation No. 1612/68, these non-national workers could not be deprived of such benefits. Clearly, the Member States' fear that too big a burden would be imposed on their welfare system when providing non-national workers with social assistance benefits, was disregarded. Despite such a fear the Court, as just explained, still adopted an expansive interpretation of article 7(2).[373]

Therefore, this early case law clarified that once the non-national is carrying out effective and genuine work, he is entitled to all social advantages,[374] including social assistance. There is no waiting period for such entitlement, as claims can be made once employment starts.[375] Nevertheless, the non-national would need to satisfy the criteria set out by the host state law, just like any other host state national. Furthermore, the CJEU[376] has held that the individual's 'true' motive for seeking work in the host state was irrelevant. All that mattered was that 'effective and genuine' work was being carried out; 'they were not required to demonstrate their integration into the host society.'[377]

Van der Mei[378] rightly argues that the 'genuine and effective' test may be considered as the Court's manner of ensuring that Member States' concerns about the possible negative effect on their welfare system are addressed. It may be counter-argued that the broad manner adopted to interpret such a phrase, evidences that these concerns are being largely disregarded. The Court clearly considers the free movement of workers as an opportunity for individuals to improve their living conditions[379] and has strived to put into practice the objective (of free movement of workers) laid out in the Treaty (now article 45

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373 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245, 1246. See also Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 170-171.

374 The Court has given the following definition of social advantages: 'all those [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'. See for instance Case C-249/83 *Vera Hoeckx vs. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR I-973 para 20.

375 Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 7-12.

376 Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.

377 O'Leary Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 171.

378 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 130-131, 177, 452-454. O'Leary Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 172.

379 Case C-53/81 *D.M. Levin vs. Staatssecretaris van Justitie* [1982] ECR I-1035, para 15.

TFEU) and Regulation No. 1612/68 (now replaced by Regulation 492/2011[380]).[381] Therefore, the test and the manner in which it is applied seeks to ensure that whilst Member States are not obliged to confer social assistance benefits on any non-national who carries out employment activities in their territory, if that non-national is in fact carrying out genuine and effective work, he must be provided with financial assistance from the same welfare system to which he is contributing. In this manner, the conflicting interests are taken into consideration and attempt is ensured to balance them out.

2.2 *Economically Inactive*

The non-national workers, through their employment and payment of taxes, contribute to the social security system of the host state. They do not necessarily contribute as much as they actually obtain in benefits,[382] but at least this 'contribution' element is present. It is upon such basis that one can understand why this 'market citizenship', as largely developed by the CJEU, did not (at least at that time) raise too much concern.[383] A more controversial development has been that concerning economically inactive citizens.

In the early 1990s, three directives[384] (to be later on referred to as the 1990s directives) were adopted. Most importantly, Directive 90/364/EEC[385] on the right of residence, signified that Member State nationals had the right to reside within other Member States, subject to conditions. The fear of benefit tourism led the Member States to restrict this right to individuals covered by health

380 Council Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

381 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 451.

382 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 420.

383 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1246. Hailbronner holds that Member States accepted the expansive method of interpretation adopted by the Court with regards to free movement of workers because the initial claim that such freedom would constitute a considerable burden on the welfare system of the host state.

384 These directives are the following: (1) 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; (2) Council Directive 90/364/EEC of 28 June 1990 on the right of residence; and (3) Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. The last directive was adopted after the Court, in Case C-295/90 *European Parliament vs. Council of the European Communities* (1992) had annulled Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students.

385 Countil Directive 90/364/EEC of 28 June 1990 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

insurance and having sufficient resources, so that no recourse to the host state's social assistance system takes place – as per Article 1 of Directive 90/364/EEC. Moreover, the subsequent signing of the Treaty on European Union meant that EU citizenship was established (via then article 8 EC, now article 20 TFEU), and the right of EU nationals to move and reside within the Member States (via then article 8a EC, now article 21 TFEU) was formally inserted in the Treaty text. Member States subjected this latter freedom to 'limitations and conditions laid down in the Treaty and by the measures adopted to give it effect'[386], thus meaning that this right was not unconditional.

In ***Martínez Sala***, a Spanish national, had lived and worked in Germany for more than ten years at various intervals.[387] Ms Martínez Sala had applied for a child-raising allowance but her request was rejected because she did not have German nationality, a residence entitlement or a residence permit.[388] She had been authorised and was lawfully residing in Germany but she did not possess a specific type of residence permit which would allow her to receive the benefit.[389] The CJEU[390] held that once an EU non-national lawfully resides within another Member State, the provisions on European citizenship, including the principle of non-discrimination on grounds of nationality (then article 6 TEC, now article 18 TFEU), are triggered. This would therefore mean that the host state is not allowed to deprive the Union citizen, in this case Ms Martínez Sala, of benefits on the ground that she does not possess a specific document which nationals of the host state are not required to have.[391]

This approach was then confirmed in ***Grzelczyk***.[392] Mr Grzelczyk was a French national studying and residing in Belgium. He successfully maintained himself for the first three years of studies, but during the last year he was no longer able to do so and therefore applied for the Belgian minimum subsistence benefit called the 'minimex.'[393] Though initially granted, the benefit was later withdrawn on the basis that Mr Grzelczyk was a student and not a worker.[394] Belgian law had extended entitlement to the minimex only to persons to whom Regulation No. 1612/68 applied, that is to workers.[395] In this judgment the Court held that, the abovementioned articles 6 and 8 TEC (articles 18 and 20 TFEU respectively)

386 Article 8c of the then Treaty on European Union.
387 Case C-85/96 *María Martínez Sala vs. Freistaat Bayern* (1998) para 14.
388 ibid paras 15-16.
389 ibid paras 49-50.
390 ibid paras 61-62.
391 ibid para 63.
392 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 32.
393 ibid paras 10-11.
394 ibid paras 11-12.
395 ibid para13.

did not allow the discriminatory practice whereby the non-national, lawfully residing in the host state, upon a request for a social assistance benefit, would be subjected to conditions (that is requiring him to be a worker) which nationals in the same position would not be subjected to.[396]

The ***Trojani*** judgment further developed this case law and can be said to be the most controversial of the three judgments. Mr Trojani, a French national living in Belgium, resided in a Salvation Army hostel whilst undertaking a personal socio-occupational reintegration programme. Since he lacked resources, Mr Trojani applied for the minimex. The Court in this case held that economically inactive citizens like Mr Trojani, because of their Union citizenship, can directly rely on article 18 TEC[397] (now article 21 TFEU), so as to enjoy a right of residence in the host state.[398] It did acknowledge that such a right was subjected to the requirement that the Union citizen has sufficient resources to avoid becoming a burden on the social assistance system of the host state, as per article 1 of Directive 90/364/EEC. Yet, it went on to hold that though it was clear that Mr Trojani failed to satisfy this condition (as he was in fact requesting a social assistance benefit), it did not mean that he could not invoke the principle of non-discrimination (now article 18 TFEU) once he lawfully resided within the host state.[399] Therefore, as per this case law, an economically inactive non-national lawfully residing in the host state (even if such residence is not based on Union law), gains access to the latter's social assistance system, as otherwise, discrimination on the grounds of nationality would result.[400]

Much criticism has been directed towards this case law. In all the three judgments, the Court held that for the articles in question (that is now articles 18, 20 and 21 TFEU) to be applied, the circumstances at stake need to be within the scope of application *ratione materiae* of Community law. However, the Court has not explained in a clear manner how this was so in the three cases. In ***Martínez Sala*** in order to explain how the child-raising allowance in that case fell within the scope *ratione materiae* of Community law, the Court in the fourth question which dealt with the issue of non-worker and social assistance, made reference to the answers given to the first, second and third questions, which tackled the issue of workers and concerned Regulation No. 1612/68. The first three questions were referred to and considered as providing the needed answers when these did not concern economically inactive individuals as question four

396 ibid para 46.
397 This article laid out the EU citizen's right to move and reside freely within the territory of Member States.
398 Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 30-31.
399 ibid para 40.
400 ibid para 44.

did.[401] In ***Grzelczyk*** the Court considered the exercise of the fundamental freedoms guaranteed by the Treaty and the right to move and reside freely in another Member State to be one of those situations which fall within the scope *ratione materiae* of Community law. In essence, this reasoning is sound. However, one is reminded that the aforementioned 1990s directives made it explicitly clear that the right to residence was subjected to the 'sufficient resources' requirement. In this regard, it is argued that the Court deliberately skipped this requirement (which clearly limited the fundamental freedom and the right relied on as above mentioned) in order for it to come to the conclusion that the circumstances at stake where within the scope *ratione materiae* of Community law.[402] The most perplexing conclusion is however found in ***Trojani***. It remains unclear[403] how lawful residence based on national law (as in that case the Court made it clear that Mr Trojani did not fulfil the requirements laid out in Directive 90/364/EEC[404]) was found to be within the Treaty's scope.

It has been argued that the Court made use of the Union citizenship concept and the principle of equal treatment in order to develop this case law in a manner which clearly disregards the financial requirements, as laid out in the 1990s directives, which the Union citizen should satisfy. This was so despite the fact that then article 12 TEC[405] (now article 18 TFEU) clearly recognised the possibility of having special provisions (such as the 1990s directives) which would constitute an exception to this general principle of non-discrimination[406]. As for the Union citizenship concept, the Court seems to have grasped this concept and developed it upon the assumption that its introduction rendered the conditions laid out in Directive 90/364/EEC inapplicable[407]. Why the Court felt

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401 Case C-85/96 *María Martínez Sala vs. Freistaat Bayern* (1998) para 57. See also Gareth Davies, 'The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 Journal of Social Welfare and Family Law 211, 217. Davies calls the Court's attempt in *Martínez Sala* as sophistry, that is an illogical method of reasoning. Reference is here also made to Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1254-1255.

402 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1250.

403 ibid 1251.

404 Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 33, 36 and 40.

405 The text of article 12 of the Treaty Establishing the European Community can be found on the following link <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT> accessed 15 January 2016.

406 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1247-1249, 1251-1252. See also Anne Pieter van der Mei, 'Union citizenship and the 'De-Nationalisation' of the Territorial Welfare State' (2005) 7 European Journal of Migration and Law 203, 209, wherein van der Mei has rightly held that the Court seems to consider such conditions as alternative rather than absolute conditions.

407 Refer to: Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review, 1250 and Gareth Davies, 'The High Water Point of Free

that the introduction of this concept[408] brought about such a far-reaching change[409] remains unclear.

In ***Grzelczyk*** and ***Trojani***, the Court heavily restricted the Member States' power to withdraw or renew the residence permit conferred on the economically inactive individual by stating that 'in no case may such measures [that is the withdrawal or non-renewal of the residence permit] become the automatic consequence'[410] of resort to social assistance. Furthermore, the Court held that, all the three 1990s directives require Member States to act with a certain degree of financial solidarity in such situations, especially if the beneficiary's difficulties are temporary.[411] Hailbronner[412] insists that this clearly goes against the spirit of the three 1990s directives, as the requirement of having sufficient resources is clear. Verschueren[413] holds that the Court was merely adopting its usual functional approach, in order to give substance to the right to reside and move freely within the Union territory. Van der Mei[414] argues that in view of the need to act with a 'certain degree of financial solidarity'[415] it is probable that, had Mr Grzelczyk made a request for social assistance prior to his final year, rather than during his final year (which is what he did), the Court would not have come to the same conclusion. The author rightly holds that ***Trojani*** does not change the outcome of ***Grzelczyk***. However, it is argued that in ***Trojani***, the Court directed the Member State to act with more than just a limited degree of financial solidarity. This is because Mr Trojani wished to benefit from the host state's social assistance system, possibly for an unlimited period of time.

Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 Journal of Social Welfare and Family Law 219.

408 O'Leary (n 28) 16, in fact argues that it this concept has only 'been used to broaden the scope of the non-discrimination principle'.

409 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0184&qid=1456659831648&from=EN> accessed 15 January 2016, para 43 and Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* (2004) para 35.

410 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 43 and Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* (2004) para 45.

411 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 44.

412 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review.

413 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 430.

414 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 209-210.

415 As opposed to an unlimited one.

The Court's '*effet utile*'[416] approach would generally be encouraged. However, seen within the context of the then three 1990s directives, it is argued that the Court may have been too over-enthusiastic in its development of the free movement of economically inactive Union citizens, thereby leading to a neglect of the legislator's intention.[417] In this regard, the Court has been criticised for using vague and wide concepts, such as Union citizenship and the principle of equal treatment, in order to open up the host state's social assistance system to economically inactive Union citizens.[418]

3. New Case Law

3.1 *Workers*

The worker's right to reside in the host state still conceptually arises from article 45(3)(c) TFEU. However, it nowadays also features in Directive 2004/38. As mentioned in the introduction, the latter directive presents three temporal stages of the right to reside, which consequently determine the right to social assistance. However, such temporal divisions do not affect the worker's right to social assistance. As per the old case law, once it has been established that the non-national is carrying out 'effective and genuine'[419] activities, he attains the worker status and is entitled to social assistance, just like any other national worker, and this as per article 7(2) of Regulation 492/2011[420]. Therefore, the non-national who has attained the worker status is allowed access to social assistance benefits even during the first three months of residence.[421] When given the chance a Union citizen will strive to hold on to such a status, as the latter, once attained, automatically provides the individual with the 'right to residence [and consequently the right to social assistance] *without having to fulfil any other condition*.'[422]

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[416] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1258.

[417] Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 142.

[418] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1266.

[419] For one of the most recent judgments which upholds such a requirement, see for instance Case C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* (2013) para 42.

[420] Council Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[421] Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 12 <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI(2014)140808_REV1_EN.pdf> accessed 10 January 2016.

[422] Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 927. Italics as per original text. See also

When compared to the other categories of individuals outlined in article 7(1)(b) to (d) of Directive 2004/38, the worker status (article 7(1)(a)) is certainly a 'privileged' one. This becomes even more evident when one considers the ***Alimanovic*** judgment. Ms Alimanovic and her children, all Swedish nationals, had moved to Germany.[423] Mother Alimanovic and her eldest daughter had worked in temporary jobs in Germany lasting less than a year.[424] For the period of six months from the time when they became unemployed, the two were provided with subsistence allowances for the long-term unemployed.[425] Once those six months elapsed, the two were no longer considered to be workers as per the German law and article 7(3)(c) of Directive 2004/38. The relevant German law held that they could no longer claim such subsistence allowances.[426] The loss of the worker status was confirmed by the Court,[427] which directly applied article 7(3)(c); once six months had passed from when their last employment had ended, the Alimanovics no longer benefitted from the worker status and thus were no longer entitled to the social assistance benefit in question.

It might have been expected of the Court in ***Alimanovic*** to carry out an assessment in order to determine whether article 7(3)(c) constitutes a rightful exception to the primary law concerned (that is article 45 TFEU), and more broadly, whether it is in line with the general principles of Union law. Article 7(3)(c) is a clear instance of Member States displaying the limits of their willingness to act with solidarity towards another Member State's national, and thereby setting conditions to the right to free movement and residence, as per article 1(a) of Directive 2004/38. Therefore, it is argued that had not the Court arrived to the conclusion it did in ***Alimanovic***, it would have been heavily criticised on the basis that it had ignored the legislator's will. Furthermore, though the approach as laid out by the legislation in question hinders a citizen's access to social assistance benefits, it is clearly in line with the need to ensure that individuals exercising their right to reside do not become an unreasonable burden on the social assistance system of the host state during their initial period of residence.[428]

in this regard Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 75.

423 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 25.

424 ibid para 27.

425 ibid para 28.

426 ibid paras 34-35.

427 ibid para 55. The Court then moves on to assess whether the Alimanovics could acquire a right to reside on the basis of another article of Directive 2004/38. That part of the judgment will be discussed in section 2.3 below.

428 This is as per recital 10 of Directive 2004/38's preamble. As per the same recital, this 'initial period of residence' entails periods in excess of three months.

3.2 *Economically inactive*

Despite the criticism[429] directed at the Court as explained in section 1.2, the Member States[430] refrained from outrightly barring economically inactive Union citizens from gaining access to the host state's social assistance benefits prior to the attainment of the right to permanent residence (that is for the period between 3 months and 5 years.)[431]) Meduna notes that, as opposed to current times, when Directive 2004/38 was being drafted, there was barely any mention of the fear of social tourism.[432] Yet, the text of the Directive itself evidences that, despite the lack of actual mention during the discussions, the Member States were well aware of such a possibility.

This Directive is torn between, on the one hand, wanting to safeguard the interests of Member States and, on the other hand, granting the Union citizens the right to move and reside freely within the Union's territory. Article 7(1)(b) requires the economically inactive Union citizen to have sufficient resources in order for him not to become a burden on the social assistance system of the host state and to have comprehensive sickness insurance cover in the host state. Article 14(2) then holds that Union citizens shall only have the right of residence as per article 7, if they comply with the conditions set out therein. These two articles therefore aim to safeguard the Member States' concern. On the other hand, article 14(3) holds that an expulsion measure shall not be the automatic

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429 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review.

430 The Commission originally barred such access (unless the host Member State was nevertheless willing to provide such benefits) until the attainment of the right to permanent residence, as evidenced in article 21(2) of *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001PC0257&from=EN> accessed 31 January 2016. The Commission then subsequently removed such restriction mainly so that it would be in line with the Court's case law, as evidenced in page 7 and 8 of *Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003PC0199&from=EN≥ accessed 31 January 2016. As a response, the Council had only specifically requested that economically inactive Union citizens are not allowed access to social assistance benefits for the first three months of residence. This is reflected in the final version of article 24(2) of Directive 2004/38 (n 8). See in this regard Michal Meduna, 'Institutional Report' in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing 2014) 263.

431 This will be the period towards which we direct our focus as the Directive, unlike with regards to the other two temporal stages, fails to make it clear whether the Union citizen is entitled to such benefits.

432 Michal Meduna, 'Institutional Report' in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing 2014) 264.

consequence of a Union citizen's recourse to the host state's social assistance system. Moreover, article 8(4) holds 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. In addition to this, the just mentioned article 14(2) ends with the caveat that the verification as to whether the Union citizen complies with the requirement laid out in article 7 is not to be carried out systematically. Article 14(3) and 8(4), together with part of article 14(2)[433] are clearly trying to ensure that the Union citizen's right to move and reside freely within the Union's territory is not heavily restricted. Apart from this clear 'conflict' between the two opposing interests, after the enactment of the directive, it was still not clear what, for instance, constituted an 'unreasonable burden'.[434] All this lack of clarity signified that it was now up to the Court to give substance to the Directive.[435]

In ***Brey,*** Mr Brey and his wife were two German nationals who moved to Austria.[436] Mr Brey received an invalidity pension and a care allowance from the German state. His wife used to receive a basic benefit in Germany, but upon moving to Austria, she was no longer entitled to it and thus no longer received it.[437] Mr. Brey applied for a compensatory supplement but the relevant Austrian authority refused such an application on the basis that, due to his low retirement pension, Mr Brey did not have the sufficient resources in order to lawfully reside in Austria.[438] The Court held that articles 7(1)(b), 8(4), and article 24 (dealing with the right to equal treatment) of Directive 2004/38 preclude national legislation (such as the Austrian legislation in this case) which ties the attainment of a special non-contributory benefit (to be referred to as SNCB)[439] to

[433] The tension between the two concerns within article 14(2) itself has also been noted by Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 904.

[434] Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 432.

[435] Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 23. See also Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 20.

[436] Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 16.

[437] ibid.

[438] ibid para 17.

[439] For the purposes of clarity, it is important to point out that SNCB have concurrent attributes of social security benefits and social assistance benefits, as per article 70 of Regulation 883/2004. Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (now replaced by Regulation 883/2004 which, unlike Regulation 1408/71, is not restricted to employed persons and their families) was enacted so as to be able to coordinate the social security systems of the Member States. Most importantly it was enacted so as to allow for the exportability of benefits (as per article 10 of Regulation 1408/71), as otherwise Union citizens would be discouraged in their pursuit of employment in other Member States if, upon doing so, they

the fulfillment of a condition attached to the right to reside,[440] that is, the need to ensure that the individual has enough resources so as not to apply for the said benefit. This was so, in as much as, the national legislation automatically barred the economically inactive individual from gaining access to such benefits once he did not have the sufficient resources. The Court acknowledged the tension between the Member State's concern and the individual's needs[441] (that is, the two opposing interests which have been just explained). It therefore presented a two-tiered test. The CJEU[442] argued that in line with articles 7(1)(b) and 8(4) of the directive, and the principle of proportionality, the personal circumstances characterising the individual situation of the person concerned need to be examined (test 1). The examination carried out in this first test was consequently to be taken into consideration when carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole (test 2). The Court shed light as to what factors Member States need to take into consideration when assessing the personal situation of the individual.[443] With regards to whether the specific request for a benefit constituted an unreasonable burden, the Court put forward one criterion which may be taken into consideration, that is, 'the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.'[444] Yet it then pointed out that it was up to the national court to decide whether this specific request for the benefit constituted an unreasonable burden.[445]

It is observed that the Court in this judgment, by means of the two-tiered test, tried to give due regard to the opposing interests.[446] These two interests are the

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would thereby forfeit any benefits accrued in the home state. Despite the fact that social assistance benefits were not covered by this regulation, the CJEU, in the 1970s and 1980s developed a wide definition of social security benefits and SNCB which effectively encompassed also social assistance benefits, thereby making the latter exportable. This led to the legislature's intervention in 1992. From then onwards SNCB were no longer exportable as they were only to be distributed in the place of residence. As such benefits were not usually based on payment of contributions and were targeted at providing a means of subsistence, it therefore made sense to tie the provision of such benefits to the place of residence. See in this regard Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 147, 159-161.

440 Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* (2013) paras 29 and 80.

441 Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* (2013) paras 53, 57 and 63.

442 ibid para 76.

443 ibid para 78.

444 ibid.

445 ibid para 79.

446 See for instance Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) paras 53 and 55. See in this regard also Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 259, and Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 28.

host state's concern of the burden imposed on its social assistance system once granting the benefit to the Union citizen, as opposed to the citizen's need for benefits. Such an approach meant that when viewing the judgment as a whole, the Court considered the two opposing interests of being more or less of equal importance. Moreover, in listing the multitude of factors (above referred to) to be taken into account whilst carrying out the two tests, the ultimate result was that the Court did not provide clarity[447] as to when there is actually an unreasonable burden. All the factors to be taken into consideration brought about more confusion rather than clarity.

In ***Brey*** the Court affirmed that though being designated as SNCB under Regulation 883/2004 such benefits constituted social assistance benefits within the context of article 7(1)(b) of Directive 2004/38. The definition of 'social assistance' under the two legal instruments was not necessarily the same as the two pursued different objectives.[448] For the purposes of Directive 2004/38, any benefit which provided the individual with resources sufficient to meet his own basic needs, and which, because of that fact, may render that person a burden on the host state's public finance (thus impacting on the overall level of assistance provided by the host state)[449] constituted a social assistance benefit. This was so regardless of the formal structure of the benefit in question.

This was then confirmed in ***Dano***.[450] The benefit in this case was an SNCB as per Regulation 883/2004[451] which was also to be considered as a social assistance benefit as per Directive 2004/38.[452] Elisabeta Dano and her young son were Romanian nationals residing in Germany.[453] Ms Dano obtained child benefits.[454] Additionally, she applied for a grant of benefits by way of basic provision for jobseekers under the specific German law, and this despite the fact that though her ability to work was not questioned, there was nothing to indicate that she

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447 In this regard see Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 147, 159.

448 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) paras 58, 50, 57.

449 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 61. An interesting point of discussion is whether, by adopting such a definition for certain SNCB, the CJEU was thereby adding a further condition (that is requiring the residence not only to be factual but also in line with the requirements laid out in article 7(1)(b) of Directive 2004/38) which needed to be considered prior to the conferment of such SNCB – see in this regard Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 162, 165-166, 169, 179. See also Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, Case C-333/13, Elisabeta and Florin Dano v Jobcenter Leipzig' (2015)11 European Constitutional Law Review 121, 132-134.

450 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) paras 63 and 83.

451 ibid para 47.

452 ibid para 63.

453 ibid paras 35, 37.

454 ibid para 38.

was looking for a job or that she entered Germany in order to do so.[455] Such an application was rejected on the basis of the German law, which held that foreign nationals who had entered the German territory in order to obtain social assistance or whose right of residence arose solely out of the search for employment did not have a right to social assistance.[456] The referring court confirmed that on the basis of this German law, it was clear that Ms Dano and her son were not entitled to the benefits in question. It however doubted whether the German law was to be considered invalid when taking into consideration article 4 of Regulation 883/2004 (which encompassed the right to equal treatment), article 18 TFEU (that is the principle of non-discrimination) and article 20 TFEU (that is the general right to reside).[457]

In ***Dano***, the Court does acknowledge the importance of articles 18 to 21 TFEU[458] and the rights laid out therein. Yet it focuses on the fact that such articles allow for the establishment of conditions and limitations to these same rights.[459] It holds that the principle of non-discrimination as per article 18 TFEU 'is given more specific expression in Article 24'[460] of Directive 2004/38 and proceeds to resolve the issue entirely on the basis of that Directive. The CJEU in ***Dano*** therefore makes a clear distinction between Treaty rights and the rights laid out in the Directive, but basis its reasoning on the latter. Though not explicitly excluding it,[461] the possibility of relying on the principle of non-discrimination as per article 18 TFEU despite the fact that the right to reside emanates from national law (as per the old case law discussed in section 1.2 above), seems no longer to be possible.[462] This is because as per ***Dano***, it seems that article 18 TFEU no longer provides complete safeguard from unequal treatment within the context of the right to move and reside freely, as the Court[463] appears to have narrowed down article 18's application only to those instances where article 24

455 ibid paras 39, 42,66.
456 ibid para 43,26.
457 ibid para 43.
458 ibid paras 57-59.
459 ibid para 60.
460 ibid para 61.
461 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 258. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 915, 931-932.
462 mr. dr. Sjoerd Claessens, 'Dano, or how the CJEU limits rights granted to EU citizens' (*Maastricht Law News & Views*, 13 November 2014) <http://law.maastrichtuniversity.nl/newsandviews/dano-or-how-the-cjeu-limits-rights-granted-to-eu-citizens/> accessed 5 February 2016. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 932.
463 Case C-333/13 *Elisabeta Dano and Florin Dano v s.Jobcenter Leipzig* (2014) para 61.

of Directive 2004/38 is applicable.[464] The Court in ***Dano*** held that a Union citizen can rely on the principle of equal treatment as per article 24 only if his residence in the host state complies with the conditions of Directive 2004/38.[465]

In the case of Ms Dano, who had been residing in the host state for more than three months but less than five years,[466] the sufficient resources requirement as per article 7(1)(b) had to be complied with. The Court held that if Union citizens who do not have a right of residence under Directive 2004/38 were allowed to claim benefits just like any other host state national, an objective of the Directive would have been disregarded. The objective in question is that of preventing Union citizens from becoming an unreasonable burden on the social assistance system of the host state.[467] The Court held that it was clear that article 7(1)(b) seeks to prevent economically inactive Union citizens from using the host state's welfare system to fund their means of subsistence.[468] The CJEU agreed with the Advocate General's statement that any emerging unequal treatment between the Union citizens and the host state nationals with regards to the conferment of the SNCB in question, was an inevitable consequence of Directive 2004/38. More specifically, a consequence of article 7(1)(b) of this directive which establishes that the Union citizen is to have sufficient resources in order not to become a burden on the social assistance system of the host state.[469] The Court held that on the basis of this article, the Member States must have the possibility of refusing to confer benefits upon economically inactive Union citizens who exercise their right to freedom of movement (even if they do not have sufficient resources to claim a right of residence) only in order to obtain access to another Member State's social assistance system.[470] If the Member States did not have such a possibility, the conferred SNCB would allow the individuals to be able to comply with the sufficient resources requirement.[471] When taking into consideration all of the above it is agreed with Düsterhaus when he holds that 'the Court's interpretation finds a sufficiently solid basis in the provisions and objectives of the Citizenship directive.[472]

The CJEU came to the conclusion that the equal treatment articles in Regulation 883/2004 (article 4 thereof) and Directive 2004/38 (article 24(1) thereof),

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464 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 909.

465 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 69.

466 ibid para 73.

467 ibid para 74.

468 ibid para 76.

469 ibid para 77.

470 ibid para 78.

471 ibid para 79.

472 Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, 132.

together with article 7(1)(b) of the latter directive (that is the sufficient resources requirement) do not preclude national legislation which, like the German law in question, excludes the conferment of SNCB to economically inactive citizens who do not have a right to reside as per Directive 2004/38, despite the fact that host state nationals are entitled to such SNCB. This interpretation emanates from the fact that article 24(1) of Directive 2004/38 grants the entitlement to equal treatment to all Union citizen **as long as they reside on the basis of the Directive.**[473]

This judgment has been referred to as the 'common sense'[474] judgment by UK Prime Minister David Cameron, whilst being heavily criticised by those who had welcomed the Court's progressive attitude in the older case law. There is no denying that when compared to the older case law, the Court in ***Dano*** focuses more on the Member State's concern of the possible burden on its social assistance system rather than the individual's need to obtain the benefits in question. Yet, one cannot criticise the Court for arriving to the conclusion that Member States can deny benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain access to another Member State's social assistance system.[475] Setting aside any nationalists' rhetoric of 'we[476] do not want to pay for them',[477] had the court come to a different conclusion, the sustainability of the host state's social assistance system would be in peril – if not in the short term, in the longer term.[478] This would be an inevitable consequence if many Union citizens rely on the host state's social assistance system without being willing or able to contribute.

4. Further Comments

4.1 *The Individual Assessment Test*

Considering the emphasis put on the individual assessment test in *Brey* wherein the Court provided concrete examples of which criteria should be considered in

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473 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) paras 67-69.

474 Bbc News, 'Eu 'Benefit Tourism' Court Ruling Is Common Sense, Says Cameron' (11 November 2014) <http://www.bbc.com/news/uk-politics-30002138> accessed 5 february 2016.

475 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 78.

476 Nationals of the host state.

477 Union citizens claiming benefits in the host state.

478 dr. Anne Pieter van der Mei, 'Alimanovic: social tourism and jobseekers' (*Maastricht Law News & Views*, 27 March 2015) <http://law.maastrichtuniversity.nl/newsandviews/alimanovic-social-tourism-and-jobseekers/> accessed 5 February 2016.

this regard,[479] it was felt necessary to consider whether this test still remains important when taking into consideration ***Dano*** and ***Alimanovic***. The individual assessment test is carried out in order to determine whether the claimant should be entitled to social assistance benefits. However, in two specific instances it remains clear that such a test need not be carried out, as the legislator has made a choice thereby ruling out such a need. This is the case of situations covered by article 24(2) or article 7(3) of Directive 2004/38. With regards to article 24(2) the legislator has made it clear that the host state shall not be obliged to confer entitlement to social assistance during the first three months of residence (except for in the case of workers, as explained in section 2.1) or, the longer period provided for in article 14(4)(b). When the situation is covered by article 7(3) it means that the directive has already taken into consideration the individual circumstances of the case and so such an assessment is not needed, and this as per ***Alimanovic***.[480]

Shuibhne[481] explains that the relevance of the individual assessment test lies in the fact that without such test, the implementation of the rights to residence (which consequently impacts on the implementation of the right to social assistance) becomes more akin to the 'standard immigration rules', thus moving away from the '*rights*-based singularity of a transnational order rooted in citizenship'. Some have held that this individualised approach ensures proper protection of this right to reside and entitlement to social assistance[482]. Others like Verschueren[483] point to the administrative costs involved, and go so far as to argue that the costs emanating from the carrying out of such a test could themselves be considered an unreasonable burden. More significantly, this multitude of considerations and others which may be added to those mentioned in *Brey*,[484] gives rise to further confusion rather than the desired legal certainty. How do we distinguish between, ties between the host state and the non-national which matter, and those which do not? Where do we draw the line?

The Court in ***Dano*** neither denounced nor upheld the individual assessment test laid out in ***Brey***. It merely points to the 'findings of the referring court'[485] thus presumably meaning that an individual assessment had been carried out by he

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479 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 78.

480 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015), para 60.

481 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 913.

482 Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 20.

483 Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 174.

484 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 78.

485 Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (2014) para 81.

national court. Yet the emphasis put on the 'financial situation'[486] and the lack of sufficient resources may be interpreted as though this was the only criteria which had been taken into consideration. In ***Dano*** the Court does not seem determined to establish whether, despite not having sufficient resources, Ms Dano's reliance on the host state's social assistance system will constitute a burden. If the financial situation is the only criterion taken into consideration, it would then mean that article 7(1)(b) is to be interpreted as it is; if the individual does not have sufficient resources, then he does not attain the right to reside and thus is not entitled to equal treatment and social assistance benefits. In such a case, this 'mechanical' approach would lead one to argue that the ***Dano*** judgment has 'effectively turned Union citizens who are economically inactive and are living abroad without sufficient resources into illegal migrants.'[487] Moreover, such an approach would lead to a situation wherein only those who have sufficient resources are allowed to reside. In that case, if such individuals have sufficient resources, then they should not need social assistance.

Perhaps in a bid to dispel any doubts emanating from ***Dano***, the Court[488] in ***Alimanovic*** made it clear that the individual assessment test as per ***Brey*** was still applicable. However, such proclamation is unconvincing when considering the tenuous[489] reasoning put forward by the Court in that case in order to justify itself for not carrying out the individual assessment test. Moreover, the fact that the Court has already conceded to two generally framed exceptions as emanating from ***Dano***[490] and ***Alimanovic***[491] can be perceived as an indication that, despite not being 'dead', the individual assessment test no longer holds center stage as initially hinted at in ***Brey***.[492] This will in turn effect the citizenship status which the Court explicitly upheld up until ***Dano***.[493] In indirectly doing away with the individual assessment test, the Court is also disregarding the citizenship status,

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486 ibid para 80.

487 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 260.

488 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015), para 59.

489 Though the Court rightly respected the legislator's choice by following article 7(3), the argument that the carrying out of this test is not necessary since the Directive 2004/38 (n 8) takes into consideration various factors characterizing the individual situation of each applicant for social assistance is, as already discussed in section 2.3, tenuous.

490 That is that Member States may, via their national legislation, exclude Union citizens from entitlement to SNCB which nationals of that host state are entitled to, if the Union citizens do not have a right of residence in the host state since they do not fulfill the requirements of Directive 2004/38 (n 8). See in this regard *Dano* (n 102) para 84.

491 That is that Member States may, via their national legislation, exclude Union citizens who are job-seekers as explained in more detail in article 14(4)(b) of Directive 2004/38 (n 8), from entitlement to SNCB which also constitute social assistance, even if nationals of the host state in the same situation are entitled to them. See in this regard Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 63.

492 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 913.

493 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 58.

as such a test is 'a consequence of having deployed the status of citizenship in the first place'.[494]

Admittedly the Court in ***Alimanovic*** may have strived to uphold the individual assessment test[495] in order to provide a connection between ***Brey*** and the more recent case law, whilst at the same time not undermining the legislator's will as clearly laid out in article 7(3)(c). Perhaps it decided not to outrightly strike down or ignore this test, in its last attempt to push it (and the citizenship status) forward, despite the current political climate (referred to in the Introduction). In this manner, it has for the time being partially withheld 'the desired *carte blanche* for national authorities to refuse any claim to social assistance by indigent EU citizens'.[496]

4.2 *Backtracking on Union Citizenship?*

In ***Dano***, though still remarking that Union citizenship is to constitute the fundamental status of nationals of the Member States, the Court effectively removes the 'fundamental' nature of such a status for some individuals, by, for the first time, allowing host Member States to treat a whole category of individuals[497] differently from the rest of the Union citizens and host state nationals, and this despite the fact that such individuals are still effectively Union citizens.[498] In ***Alimanovic*** the Court does not even mention such a concept, and though upholding the individual assessment test which is in line with the rights-based approach of the citizenship concept, it validates the legislator's move of singling out a category of individuals (that is, job-seekers as per article 14(4)(b)), which again will not be treated as being equal to other Union citizens and host state nationals. Thym and Shuibhne[499] both ultimately question whether, post-***Dano***, Union citizenship can be considered to be 'as fundamental as it had often appeared to be previously'.[500] Several authors[501] have in fact come to the

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494 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 910.

495 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 59.

496 Dion Kramer, 'Had they only worked one month longer!' (*European Law Blog*, 29 September 2015) <http://europeanlawblog.eu/?p=2913> accessed 3 December 2016.

497 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para78.

498 Since, as stated in article 20(1) TFEU, Union citizenship emanates from the holding of the nationality of a Member State.

499 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 926.

500 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253.

501 See for instance Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 926 and Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, 138.

conclusion that rather than a fundamental status, Union citizenship is gradually establishing itself as a privileged status, available only for those who can afford it, and for workers.[502]

Although the Court has repeatedly held that Union citizenship is to be the fundamental status of nationals of the Member States, it has never explained what this actually means.[503] It has tied citizenship to equality, which is coherent when considering that '[e]qual treatment before the law is a basic principle of formal justice'.[504] The focus in both the old and new case law is still equal treatment but a difference in approach is observed. In the older case law, the Court acknowledges the conditions and limitations imposed on the right to move and reside (as per the three 1990s directives),[505] and also the host state's right to act upon its concerns (that is the right to withdraw the individual's residence permit or not to renew it).[506] This acknowledgment is in line with now article 21 TFEU which makes it clear that free movement rights are not unlimited. However, these conditions and Member State's concern are later on considered to be subordinate to the rights laid out in the relevant Treaty articles (that is today's articles 18 to 21 TFEU) and the general principles of Union law. The limitations were given too much importance and were not considered *only* as limitations. In this manner the individual's right to move and reside ultimately gets the upper hand. On the other hand in ***Dano***, as already noticed, though the Court clearly distinguishes between the rights emanating from the Treaty as per articles 18 to 21 TFEU and those emanating from the directive, it downsizes article 18 TFEU's potential. This is because upon holding that article 18 TFEU is given more specific expression in article 24 of Directive 2004/38[507] the Court proceeds to resolve the issues at stake entirely upon the basis of Directive 2004/38. This consequently means that since article 24(1) requires that any Union citizen who wants to benefit from it (that is article 24, meaning the principle of equal treatment) has to first be residing on the basis of the Directive,

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502 It is to be noted that the situation for workers may also (to a certain degree) change if the alert and safeguard mechanism established in page 23 of the Council Decision mentioned in footnote 2 is put into effect. Such a mechanism can only be implemented if the Council authorises the Member State concerned to do so. This mechanism allows for the restriction of access to non-contributory in-work benefits. It is reminded that the Decision will only come into effect if the UK decides to remain within the Union.

503 JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* 249.

504 Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 217.

505 See for instance Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 32-33.

506 See in this regard Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* para42.

507 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 61.

then it is only such complying individuals which will benefit from the principle of equal treatment. The wider covering of article 18 TFEU is in this manner denied since the protection derived from the principle of non-discrimination is limited to the instances were the individual has a right of residence on the basis of Directive 2004/38. Therefore though the mentioned Treaty articles are acknowledged, by nevertheless proceeding to consider the case only on the basis of the directive's articles, in ***Dano***, Shuibhne argues, the Court 'declines to review the legitimacy of legislative limits vis-à-vis the Treaty and wider principles'.[508] In ***Alimanovic***, the Court does not consider the Treaty articles but merely applies the directive's text, that is articles 7(3)(c), 14(4)(b) and 24(2). In this manner the Court 'makes it easier for Member States to justify refusal of benefits than might otherwise have been the case under prior case law'[509] and therefore, this time, the Member State gets the upper hand.

The older case law can therefore be interpreted as either having the 'tendency to interpret secondary Community law against its wording and purpose',[510] or having duly reviewed the validity of secondary legislation against primary law. In the same manner, ***Dano*** and ***Alimanovic*** can be viewed as being faithful to the wording of secondary law to the citizen's detriment,[511] or the Court having failed to undertake a proper review, as though the superior Treaty articles were still being adhered to, since these expressly cater for conditions and limitations, such conditions were given a too broad interpretation and were too emphasised upon. The liberal view that in the older judgments the Court was merely using a functional and teleological approach in order to further the people's rights and that thus such case law is 'politically empowering',[512] will be countered by the republican view that the Court's task is not to 'protect and empower individuals, but rather to express and carry forward the views of a political community'.[513]

Why did the Court change its approach? Clearly it was not the introduction of

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508 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 910.

509 Steve Peers, 'EU citizens' access to benefits: the CJEU clarifies the position of former workers' (*EU Law Analysis*, 15 September 2015) <http://eulawanalysis.blogspot.com.mt/2015/09/eu-citizens-access-to-benefits-cjeu.html> accessed 3 December 2016.

510 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1251.

511 It is considered to be to the citizen's detriment because, via the method of reasoning adopted by the Court in those two cases, Ms Dano and Ms Alimanovic did not obtain entitlement to social assistance benefits. See in this regard Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 935-936.

512 Mark Dawson, 'The political face of judicial activism: Europe's law-politics imbalance' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing Limited 2013) 11.

513 ibid 11-12.

Directive 2004/38 which changed the situation.[514] The sufficient resources requirement, which played a central role in ***Dano*** existed also when the three 1990s directives were in force.[515] Moreover, in ***Brey*** the Court also focuses on Directive 2004/38 but does not come to the same conclusion as ***Dano***.[516] Mr Brey, just like Ms Dano, clearly did not have sufficient resources as otherwise he would not have applied for such a benefit, but the Court in that case still urged the national court to consider the specific circumstances[517] of the individual, thereby being in line with the 'certain degree of financial solidarity'[518] requirement as first established in ***Grzelczyk***. From ***Brey*** to ***Dano*** and ***Alimanovic***, we see a shift: from a willingness to protect the two main concerns as transpiring from Directive 2004/38 (in ***Brey***), to a willingness to prioritise the Member State's concern (in ***Dano*** and ***Alimanovic***). Moreover, it is argued that in ***Dano*** and ***Alimanovic*** the Court may have intentionally omitted its previously uttered statement that Directive 2004/38 'recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.[519] The Court might have become aware that though this interpretation of Directive 2004/38 is sound when taken into consideration within the general framework of the directive, it did not adequately take into account the present political debate, whether the latter is based on statistical evidence or mere populist rhetoric. It thus opted, as already pointed out, for another statement which carries a more negative connotation.[520]

Thym has argued that the focus on the Member State's concern[521] cannot be disassociated from the present political context.[522] He[523] holds that though this does not mean that the judges will automatically concede to the political climate's expectations, the Court may make use of tools available to it in order to come to an outcome which would garner less criticism than prior case law did.

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514 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 903.

515 ibid.

516 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) is not being referred to here as the situation of Mother Alimanovic and her daughter was different from that of Mr Brey and Ms Dano. The former were considered to be job-seekers, whereas the latter were considered to be economically inactive individuals.

517 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para78.

518 ibid para 72.

519 ibid.

520 That is, as per Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 62, that 'the accumulation of all the individual claims which would be submitted to it would be bound' to impose an unreasonable burden on the host Member State.

521 Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 25.

522 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 902.

523 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253.

This is arguably what the Court has done via ***Dano*** and ***Alimanovic***. In the latter judgments the Court chose to abandon its aspirational approach vis-à-vis the citizenship concept (as it had done in the older case law) and opted for a doctrinal conservative approach, wherein it focused more on the legislation's actual wording.[524] However, one could also hold that in coming to the conclusion which it did come to in *Dano* and *Alimanovic*, the Court was merely following the Directive's text, and that therefore the current political context had nothing to do with the outcome of such case law.

Whether or not the current political context did bring about the change in the Court's approach, it remains clear that backtracking on the interpretation of Union citizenship has taken place. However, the Court cannot be blamed for adopting this less progressive approach vis-à-vis Union citizenship and the right to move and reside freely within the Union. There is *so much* the Court can do. When taking into consideration *Dano*, the CJEU could not have kept pushing forward this requirement of transnational solidarity (as it did in the older case law), thereby ignoring the Directive's requirement of sufficient resources and the need to prevent an unreasonable burden on the social assistance system of the host state. With regards to *Alimanovic* the Court could not have ignored the clear political will of the legislator vis-à-vis the retention of the worker status as laid out in article 7(3), and the possibility for the Member States not to provide social assistance benefits to job-seekers as laid out in article 24(2). For the Court to adopt a progressive approach (something which it rightly did not do in the more recent case law) a clear political will in favour of an 'equitable redistribution of welfare in the EU[525]' has to be present. Once this is not present, it is argued that in *Dano* and *Alimanovic* the Court was merely carrying out its duty of complying with the legislator's will.

5. Conclusion

The reviewed case law signifies not only that we are presumably[526] approaching a state of play wherein free movement is restricted to those who can afford it, but the end result that EU law will not provide assistance to those who end up destitute is also not consistent with the Union's policy objectives[527] of providing

[524] ibid.

[525] Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 4.

[526] Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) page 413 writes 'the right to free movement could very well become impossible for indigent people'.

[527] See in this regard Treaty on European Union art 3(3), Treaty on the Functioning of the European Union arts 9 and 151(1) and Charter of Fundamental Rights of the European Union art 34(3). See also Herwig Verschueren, 'EU migrants and destitution: The ambiguous

social protection and the combating of social exclusion and poverty. Indeed, in a perfect world wherein Union citizenship is in fact a fundamental status, no categorical exclusions *a la* ***Dano*** or ***Alimanovic*** would be permitted. The poor would be allowed to move freely without being perceived as parasites of the host state's social assistance system.[528]

Nevertheless, despite the earlier progressive case law, we see that there are signs which hint at the fact that Member States are not willing to establish a redistributive justice system. De Witte[529] rightly points to, for instance, the Member States' unwillingness to confer competence upon the Union for the latter to be able to define the fundamental principles of the Member States' social security systems.[530] This reluctance emanates from fear that in doing so a constitutive element of the national political system will be given up. If this argument is turned on its head it becomes clear that until the 'central role in the generation and distribution of policies related to citizen well-being'[531] is religiously held on to by the Member States, the EU cannot be perceived to have the 'capacity to generate and sustain interpersonal solidarities and communal redistributive arrangements[532]'. The Member States are still not yet willing to consider non-nationals as 'one of their own', as this 'civic glue' at the European level is still largely absent.[533] It seems that the time is not yet ripe to 'liberate' the Community[534] from its economic preoccupation and to prepare the way for a [true] community[535] of citizens'.[536]

EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 413, 416-418.

528 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 220.

529 Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 53-54.

530 Treaty on the Functioning of the European Union art 153(4).

531 Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 54.

532 ibid.

533 Meghan Benton, 'Reaping the benefits? Social security coordination for mobile EU citizens' (2013) Migration Policy Institute Europe, <http://www.migrationpolicy.org/sites/default/files/publications/Benton-ReapingBenefits-FINAL.pdf> accessed 8 February 2016> 6.

534 Read as 'Union'.

535 ibid.

536 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245.