THE ELUSIVE LIMITS OF SOLIDARITY: RESIDENCE RIGHTS OF AND SOCIAL BENEFITS FOR ECONOMICALLY INACTIVE UNION CITIZENS

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Abstract

The free movement of persons is central to the legal and political identity of the European project; it is the most important right attached to Union citizenship and defines the self-perception of those holding the status. Nevertheless, the precise legal standards for the delimitation of residence and equal treatment rights often remained elusive, in particular with regard to citizens with scarce resources. It will be demonstrated that Union law and corresponding Court judgments (most recently Brey and Dano) fluctuate between two visions of how to perceive EU citizenship and the limits of transnational solidarity: one conception based on territorial presence and another promoting social cohesion.

1. Introduction

For more than a decade, the Court of Justice has famously maintained that citizens from other Member States may expect "a *certain* degree of financial solidarity".[1] Corresponding judgments guarantee equal access to social benefits whenever there exists "a *certain* degree of integration"[2] into the host society. Along similar lines, the EU legislature confirmed a generic right of residence as long as citizens do "not become a *burden* on the social assistance system".[3] The abstract principles underlying these rules have received much attention over the past years, but the criteria that guide the resolution of individual cases remained surprisingly obscure. This contribution examines the legal standards governing residence rights and equal treatment, with a focus on Union citizens who are not active economically.

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1. Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 44 (emphasis added).
2. Case C-209/03, *Bidar*, EU:C:2005:169, para 57 (emphasis added); a different formula applies for jobseekers.
3. Art. 7(1)(b) Directive 2004/38/EC (O.J. 2004, L 158/77).

As a starting point, it is worth remembering that free movement is no uniform category but consists of historic layers, which the unitary concept of Union citizenship now binds together without reversing distinctive rules and rationales, which characterize different circumstances (below, 2.) and which took centre stage in the *Brey* and *Dano* rulings (3.). These developments highlight an ambivalence that has characterized case law on access to social benefits from the beginning: how to quantify public interests that may justify restrictions to free movement (4.). It will be demonstrated that alternative solutions to this question reflect conceptual cleavages about how to conceive of the foundations of transnational mobility (5.). On this basis, this contribution will conclude with an assessment of implications for the loss of residence status (6.) and for equal treatment (7.).

2. Towards status convergence?

Free movement is the most important right attached to Union citizenship. It dominates most academic writing on the issue, inspires important segments of the case law, and defines the self-perception of those holding the status.[4] Against this background, the Court's famous stipulation that Union citizenship "is destined to be the fundamental status … enabling those who find themselves in the same situation to enjoy the same treatment in law"[5] can be understood as an overarching idea supporting status convergence by way of interpretative or legislative approximation of the diverse legal rules for the different categories of Union citizens. From this angle, citizenship would be the fixed star guiding our approach to particular legal questions.[6] Indeed, the Directive 2004/38/EC is based upon the explicit desire to remedy the "sector-by-sector, piecemeal approach to the right of free movement"[7] and the Commission staff with a responsibility for Union citizenship deplore the absence of a unifying narrative.[8]

Even if status convergence is an option, change cannot be expected to be linear. Rather, it will often present a process of stratification, in which different layers supplement and influence each other. Such evolution may result in gradual approximation, but it can also cause frictions or

4. See the Flash Eurobarometer No 365: European Union Citizenship (summary), Nov. 2012/Feb. 2013, p. 11.

5. Case C-184/99, *Grzelczyk*, para 31.

6. For a pronounced statement see Kochenov, "The citizenship paradigm", 15 CYELS (2012–13), 197–226.

7. Recital 4 of Directive 2004/38/EC.

8. See Meduna et al., "Institutional report", in Neergaard et al. (Ed.), *Union Citizenship. The XXVI FIDE Congress in Copenhagen* (DJØF, 2014), p. 228.

contradictions, when later events have a transformative impact upon earlier developments – and *vice versa*.[9] Arguably, the interaction of the diverse categories of free movement exemplify such stratification. Many of the interpretative and legislative cleavages discussed in this paper can be explained as a result of status conflation, which simultaneously brings about interpretative alignment, continued disparities and conceptual tensions. This is particularly true for the generic right to free movement of the economically inactive (below 2.1) and the intense political debates about it (2.2).

2.1. *Different categories of free movement*

To this date, free movement is not a uniform legal category. It is well known that the free movement of workers and self-employed persons constitutes a central element of the single market and that both the EU legislature and the ECJ had long maintained a generous reading of these guarantees, embracing part-time employment, family reunion as well as equal access to social and tax advantages.[10] Notwithstanding the economic underpinning of the single market, economic self-sufficiency is not always a precondition for the free movement of workers or self-employed,[11] since recourse to social assistance does not pre-empt the application of the economic freedoms.[12] Unconditional mobility is also available for service recipients who move to another Member State temporarily.[13] Finally, single market rules allow jobseekers to reside in other Member States to look for work,[14] although the precise conditions for access to jobseekers' allowances remain contested following a series of controversial ECJ judgments.[15]

For our purposes, it should be highlighted that the generous reading of the free movement rights for workers, self-employed and service recipients has always transcended purely economic rationales.[16] Against this background,

9. Cf. Weiler, "The geology of international law", 64 *Heidelberg Journal of International Law* (2004), 549.

10. For debates surrounding early legislation, see Goedings, *Labour Migration in an Integrating Europe* (SDU Uitgevers, 2005), chs. 3–5.

11. See Art. 7(1)(a), (d) Directive 2004/38/EC.

12. Cf. Case 139/85*, Kempf*, EU:C:1986:223, para 14.

13. Case C-200/02, *Zhu & Chen*, EU:C:2004:639, paras. 22–23 recognizes that citizens may not "bypass" the requirements for the economically inactive, discussed below, by claiming *permanent* residence as service recipients under Art. 56 TFEU.

14. Cf. Art. 45(3) TFEU and Arts. 1–6 Regulation (EU) 492/2011, O.J. 2011, L 141/1.

15. Case C-67/14, *Alimanovic* (pending) seeks clarification.

16. See Spaventa, "From *Gebhard* to *Carpenter*", 41 CML Rev. (2004), 743–773; Nic Shuibhne, "The resilience of EU market citizenship", 47 CML Rev. (2010), 1605–1609; and Kadelbach, "Union citizenship", in von Bogdandy and Bast (Ed.), *Principles of European Constitutional Law*, 2nd Ed. (Hart, 2009), pp. 445–448.

the introduction of a generic right to free movement for all citizens could be perceived to continue a long-established trend towards the free movement for all persons.[17] In 1990, three Directives laid down distinct rules for students, pensioners and all other citizens, which have in the meantime been replaced by Directive 2004/38/EC specifying the Treaty right to free movement in today's Article 21 TFEU, which had been introduced by the Maastricht Treaty.[18] Yet, the generic right to free movement comes with strings attached and requires citizens, in particular, to have comprehensive sickness insurance cover and "sufficient resources … not to become a burden on the social assistance system of the host Member State".[19] In short, free movement is conditional upon a certain degree of financial self-sufficiency for those who do not qualify as workers, self-employed, jobseekers, temporary service recipients or family members.[20]

2.2. *Political significance of free movement*

Political debates about EU migration are not a novel phenomenon. The original Treaty design, implementing legislation, successive enlargements, the status of posted workers and access to welfare benefits were discussed controversially in the past.[21] At this moment, free movement is a dominant political issue once again, not least because of political tensions in the United Kingdom and the rise of Eurosceptic parties across the continent. It is in the nature of political debates that certain symbolic issues develop a life of their own, which can outgrow the empirical relevance of the matter.[22] Arguably, free movement has acquired such a symbolic function at this juncture; it serves as a projection sphere for economic, social and political unease about wider globalization processes. If that is correct, the resulting political terrain is difficult to master. Actors involved need to respond to the concerns of the population, while also evading the pitfalls of scapegoating inherent in many policy responses to migratory phenomena.[23]

17. For debates since the 1970s, see Wiener, *Building Institutions* (Westview, 1998).

18. For developments since the 1990s, see Wollenschläger, *Grundfreiheit ohne Markt* (Mohr Siebeck, 2007), pp. 106–121.

19. Art. 7(1)(b) Directive 2004/38/EC in line with the previous Art.1(1) Directive 90/364/EEC, O.J. 1990, L 180/26.

20. There are other peripheral statuses, which are not considered further for sake of clarity, such as family members after separation from or death of their partner/parent, or pensioners who remain in the country of employment.

21. See the Editorial comments, "The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare", 51 CML Rev. (2014), 729–740.

22. See Parsons, "The theory of symbolism in relation to action", in Parsons et al. (Eds.), *Working Papers in the Theory of Action* (The Free Press, 1953).

23. See, generally, Girard, *La Violence et le sacré* (Grasset, 1972).

Indeed, the political visibility of free movement contrasts with limited statistical prominence, in particular when it comes to "incentives for migration into the social protection systems".[24] Most citizens living abroad are economically active as workers or self-employed persons or enjoy free movement rights as students or family members. Among those of working age, the employment rate stands at 67.7 %, while 12.5 % of the same group are unemployed.[25] These employment figures are comparable for different countries of origin, although there is more unemployment among citizens from Romania and Bulgaria living abroad.[26] Nonetheless the overwhelming majority of citizens from these countries are in employment, including many who are highly skilled with university degrees.[27]

Within this overall context, this contribution scrutinizes the *legal* situation with an emphasis on economically inactive migrant EU citizens. This category is only a minority and, yet, their status requires our attention. Doing so is justified by both legal uncertainties and political tensions regarding a group of citizens, whose overall numbers may be small, but which are, nonetheless, the centre of legal and political debates.

3. *Setting the scene: The* Brey *and* Dano *judgments*

Unfortunately, the rules on the free movement of citizens who are not economically active are not crystal clear. The Treaty stipulates in general terms that the economically inactive shall have a right to move and reside freely "subject to the limitations and conditions"[28] and, moreover, the legislature adopted some ambiguously phrased and potentially contradictory provisos in the Free Movement Directive 2004/38 and the Social Security Coordination Regulation 883/2004. This underlying ambivalence had to be confronted by the ECJ in the *Brey* and *Dano* cases, which both concerned the residence and equal treatments rights of EU citizens who do not work. Core findings of both judgments with a direct bearing on our topic will be discussed below. They concern the interaction of legislative instruments (3.1.), the scope of equal treatment (3.2.) and free movement rights (3.3.).

24. This expression is used in the German "coalition agreement", cf. CDU/CSU/SPD, Deutschlands Zukunft gestalten, Koalitionsvertrag, Dec. 2013, p. 108.

25. See Commission, Social Europe quarterly review, June 2013, p. 42 (the remaining proportion includes students and family members; working age is 15–64).

26. The unemployment figure stands at 21.7 %; see Commission, ibid.

27. For statistics from Germany, see Brücker et al., IAB-Kurzbericht 16/2013, <doku.iab.de/kurzber/2013/kb1613.pdf>, p. 3.

28. Art. 21(1) TFEU.

3.1. *Deciphering the legal regime*

In *Brey*, a German couple with a combined pension of roughly 860 EUR, who had relocated to Austria in 2011, applied for a pension supplement, which the Austrian legislature had restricted to those with legal residence status.[29] This meant that the German couple had to demonstrate a right to free movement under Article 7(1)(b) of Directive 2004/38, which, in turn, required them "not to become a burden on the social assistance system". In order to evaluate whether the conditions set out in the Directive were met, the Court was required to clarify the meaning of the term "social assistance" in the Free Movement Directive by juxtaposing it with the language and contents of the Social Security Coordination Regulation. From the perspective of the latter, the pension surplus constituted a special non-contributory benefit and cannot be designated as "social assistance".[30]

In the eyes of the ECJ, this narrow definition is specific to Regulation 883/2004 and cannot be extended to Directive 2004/38. This conclusion was derived from the distinctive rationales and objectives underlying both legal instruments: the Social Security Coordination Regulation should be construed, first and foremost, as a coordination instrument that identifies the legal order applicable and does not harmonize national rules governing the access to specific social benefits.[31] Against this background, the Court embarked on an autonomous definition of the term "social assistance" within the specific context of the Free Movement Directive, which it considered the prime instrument regulating the conditions for and the scope of free movement rights.[32] This laid the basis for a broad definition of "social assistance" for free movement purposes,[33] which has been reaffirmed by the Grand Chamber in *Dano*.[34] Insofar as residence rights are concerned "all assistance introduced

29. See Case C-140/12, *Brey*, EU:C:2013:565, paras. 14–15, 29–30.

30. Cf. Case C-160/02, *Skalka*, EU:C:2004:269; and Verschueren, "EU free movement of persons and Member States' solidarity systems", in Guild and Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff, 2012), pp. 58–59.

31. See Case C-140/12, *Brey*, paras. 39–43; and the critique by Verschueren, "Free movement or benefit tourism", 16 *European Journal of Migration and Law* (2014), 159–164; for underlying ideas see Rennuy, "The emergence of a parallel system of social security coordination", 50 CML Rev. (2013), 1222–1227.

32. See Case C-140/12, *Brey*, paras. 50–58; other directives also employ the term, again with autonomous connotations; cf. A.G. Wahl in Case C-140/12, *Brey*, paras. 58–67.

33. See Case C-140/12, *Brey*, para 61; this does not conflict with the narrow reading of the same term in Joined Cases C-22 & 23/08*, Vatsouras & Koupatantze*, EU:C:2009:344, which resulted from an interpretation of the Directive in conformity with primary law with regard to jobseekers (paras. 33–44).

34. Cf. Case C-333/13, *Dano*, EU:C:2014:2358, para 63.

by the public authorities" counts towards the assessment of economic self-sufficiency.[35]

To sum up, the Court limited the legal relevance of Regulation 883/2004 for the free movement and equal treatment rights of the economically inactive. Their status is to be determined on the basis of the Free Movement Directive and the EU Treaty instead.

3.2. *No equal treatment without residence rights*

Initially, the Commission had proposed to lay down unequivocally in Article 24 of Directive 2004/38 that Member States "shall not be obliged to confer entitlement to social assistance on persons other than those engaged in gainful activity".[36] It later abandoned this project after the Court had decided in *Grzelczyk* that a similar provision on students does not hinder recourse to the Treaty guarantee of equal treatment in today's Article 18 TFEU,[37] thereby effectively shifting the responsibility to resolve potential disputes upon the ECJ.[38] The ECJ confronted this challenge in the *Dano* judgment, which concerned an application for subsistence benefits by a Romanian national in Germany. Ms Dano had been living with her sister in Leipzig for about four years, has a child of Romanian nationality[39] and possessed a German free movement certificate; however, she did not seek employment, had not been trained in any profession and spoke little German. On this basis, the Court concluded that she enjoyed no residence right under EU law and could not invoke equal treatment as a result. This outcome is essentially based upon three inter-related reasons.

Firstly, the ECJ found that legislative non-discrimination guarantees should be interpreted in the light of primary law, since both Article 24 of Directive 2004/38 and Article 4 of Regulation 883/2004 are to be considered a "more specific expression" of Article 18 TFEU.[40] Although the Court did not

35. Case C-140/12, *Brey*, para 62; this broad definition embraces benefits, such as child allowances, which are financed through taxation and are available to everyone, including (but not being limited to) those with sufficient resources; similarly, it covers local services, such as shelter to the homeless – not only financial income support.

36. See Art. 21(2) of the original proposal, COM(2001)257 of 23 May 2001.

37. Cf. the explanatory memorandum for the revised proposal, COM(2003)199 of 15 Apr. 2003.

38. See Sweet, "The European Court of Justice", in Craig and de Búrca (Ed.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 126–128.

39. Note that the widely discussed "substance of rights test" on the basis of the *Ruiz Zambrano* and *Dereci* rulings concerns residence in the country of nationality only, i.e. not free movement to other EU Member States; this was confirmed by Case C-86/12, *Alokpa & Moudoulou*, EU:C:2013:645, paras. 34–35.

40. See Case C-333/13, *Dano*, para 61.

mention earlier case law to justify this assumption, it had followed this line of argument before with regard to both free movement[41] and social security coordination.[42] Even the classic backbone of transnational equality, Article 7(2) of Regulation 492/2011, must nowadays be considered, in the eyes of the Court, as "the particular expression … of the principle of equal treatment … and must be accorded the same interpretation".[43] This synchronization of primary and secondary law is not unproblematic from a constitutional perspective, since it leaves the legislature little leeway for diverging positions,[44] but it has the advantage of supporting the search for coherent solutions across legislative acts.[45]

Secondly, the ECJ reiterated earlier findings that, without a residence right, Union citizens cannot rely upon the equal treatment provisions, since the latter only extend to situations "falling within the scope *ratione materiae* of EU law", such as Article 21 TFEU.[46] This emphasized unmistakably that the "fundamental status", which Union citizenship is destined to be, does not bring the right-holder within the scope EU law by itself; it is legally relevant only in conjunction with other, more specific rules.[47] Without a residence right Article 18 TFEU does not apply. To be sure, the Court had insisted ever since *Martínez Sala* that equal treatment should be limited to those who are "lawfully resident in the territory of the host Member State",[48] but closer inspection below will demonstrate the practical and doctrinal ambiguities underlying earlier rulings.[49] Indeed, the Court scarcely invoked its classic citizenship judgments in the official reasoning on the *Dano* case, thereby concealing the doctrinal imponderabilities.

41. See Case C-75/11, *Commission* v. *Austria*, EU:C:2012:3048, para 54, incl. the "genuine link" argument in paras. 59–64 (although the ECJ usually employs the "integration" criterion for students); and Guild, Peers and Tomkins, *The EU Citizenship Directive. A Commentary* (OUP, 2014), pp. 235–237.

42. See Case C-346/05, *Chateignier*, EU:C:2006:711, para 32 referring to Case C-138/02, *Collins,* EU:C:2004:172; and Van Overmeiren et al., *Social Security Coverage of Non-Active Persons moving to another Member State, trESS network: Analytical study 2011*, p. 47.

43. Case C-20/12, *Giersch et al.*, EU:C:2013:411, para 35, incl. discussion of the "link of integration" (para 63), which may justify unequal treatment.

44. See Thym, "Towards 'real' citizenship?", in Adams et al. (Ed.), *Judging Europe's Judges* (Hart, 2013), pp. 157–159.

45. The *Brey* judgment relies on various judgments on primary law in order to interpret Directive 2004/38/EC; see Case C-140/12, *Brey*, paras. 44, 63, 72.

46. See Case C-333/13, *Dano*, paras. 59, 69.

47. For a different view, see O'Keeffe, "Reflections on European citizenship", 49 *Current Legal Problems* (1996), 366–372; and Kochenov and Plender, "EU citizenship", 37 EL Rev. (2012), 376–377.

48. Case C-85/96, *Martínez Sala*, EU:C:1998:217, para 63.

49. See *infra* section 6.

Thirdly, the outcome is founded upon an argumentative U-turn, which is best illustrated with the teleological twist underlying the *Dano* judgment, in which the Grand Chamber effectively reversed the objective of Directive 2004/38, which the Court had earlier identified as being "to facilitate the exercise of the primary and individual right to move and reside freely",[50] whereas Article 7(1)(b) is now construed as "seek[ing] to prevent economically inactive Union citizens from using the host Member State's welfare system".[51] Insofar as the classic "fundamental status" formula is concerned, the judgment reactivated the final subordinate clause of the full citation that had always designated "exceptions" to equal treatment, but which various earlier rulings had omitted in the reproduction of the formula.[52] Along similar lines, the Grand Chamber did not mention that it had assumed on an earlier occasion that today's Article 7(1)(b) "must be interpreted broadly"[53] and that the supremacy of primary law may require a restrictive interpretation of the conditions and limitations in that provision.[54]

In sum, the *Dano* judgment presents us with a noteworthy shift of emphasis, which accentuates Member State interests, while side-lining countervailing constitutional arguments that could have justified a different outcome. In line with Kay Hailbronner's outspoken critique of earlier judgments,[55] the "conditions and limits" in Article 20(2)(a) and Article 21(1) TFEU took centre stage in the Grand Chamber's reasoning.

3.3. *Residence rights under Article 21 TFEU*

The clarity of the *Dano* judgment rests, in part at least, on a self-limitation on the side of the ECJ, which built its argument on the assumption of the domestic

50. Case C-127/08, *Metock*, EU:C:2008:449, para 82.

51. Case C-333/13, *Dano*, para 69; earlier judgments reiterated the original "aim" (French: *but*) to facilitate free movement, while recognizing that the Directive is "also intended" to set out conditions (French: *vise également à préciser*) or "concerns" public policy (French: *objet*); cf. Case C-434/09, *McCarthy*, EU:C:2011:277, para 33; Case C-456/12, *O & B*, EU:C:2014:135, para 41; and Case C-140/12, *Brey*, para 53.

52. Cf. Case C-333/13, *Dano*, para 58 to Case C-413/99, *Baumbast & R*, EU:C:2002:493, para 82 and Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, para 41; for further comments see Šadl, "*Ruiz Zambrano* as an illustration of how the Court of Justice of the European Union constructs its legal arguments", 9 EuConst (2013), 221–224; and Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP, 2013), pp. 74–81.

53. Case C-200/02, *Zhu & Chen*, para 31 with regard to Directive 90/364/EEC.

54. Cf. Case C-413/99, *Baumbast & R*, para 92; Dougan, "The constitutional dimension to the case law on Union citizenship", 31 EL Rev. (2006), 622–626; and Iliopoulou, *Libre circulation et non-discrimination, éléments du statut de citoyen de l'U.E.* (Bruylant, 2008), pp. 441–458.

55. See Hailbronner, "Union citizenship and access to social benefits", 42 CML Rev. (2005), 1247–1258.

court that Ms Dano could not claim free movement rights in the first place.[56] In other situations, the picture will be less clear-cut and national authorities will have to assess whether individuals meet the requirements of Article 7(1)(b) of Directive 2004/38/EC, since they "have sufficient resources … not to become a burden on the social assistance system". That threshold can be difficult to apply and the Grand Chamber evaded principled pronunciations on the issue in *Dano*. It seems, therefore, that the position put forward by a Chamber of five judges in *Brey* will guide the assessment of individual cases by national authorities.[57]

Generally speaking, the interpretation of Article 7(1)(b) is no easy task, since the EU legislature had opted for deliberate ambiguity when drafting the free movement rules. Not only is the term "burden" inherently vague and confused by a "surprising"[58] discrepancy of the German language version.[59] Several provisions in the Directive obscure the precise demarcation: the Directive does not specify the meaning of "sufficient resources" and rather prescribes a case-by-case analysis by national authorities (Art. 8(4)); expulsion shall not be the automatic consequence of recourse, by migrants, to the social assistance system (Art. 14(3)); instead, free movement rights depend upon the person not becoming "an unreasonable burden" (recitals 10 and 16). In short, the EU legislature had failed to establish clear standards, which may be explained by the diplomatic tradition of open compromise formulae in politically sensitive terrain.[60]

In *Brey*, the judges recognized the discrepancies within the Directive[61] and stressed, in striking contrast to the later *Dano* ruling, that conditions for free movement should be narrowly construed in the light of Article 21 TFEU and the *effet utile* of the aim to facilitate mobility.[62] On this basis, the Court concluded that recourse to social assistance does not hinder free movement as

56. Cf. Case C-333/13, *Dano*, para 81.

57. Initially, Case C-140/12, *Brey* appeared to be a technical matter; the Chamber should arguably have referred the case to a Grand Chamber under Art. 60(3) Rules of Procedure (O.J. 2012, L 265/1), when it broadened its analysis in paras. 26–32.

58. A.G. Wahl, Opinion in Case C-140/12, *Brey,* para 77.

59. The German version, which guided domestic proceedings in the Austrian *Brey* and the German *Dano* cases, does not to take up the word "burden" (French: *charge*; Italian: *onere*; Spanish: *carga*; Dutch: *laste*) and could be read that any recourse to social assistance (also short of the burden-threshold) hinders free movement; this divergent terminology can be traced back to Art. 1(1) Directive 90/364/EEC.

60. Cf. Sharpston, "Transparency and clear legal language in the European Union", 12 CYELS (2009/10), 411–412.

61. See Case C-140/12, *Brey*, paras. 64–69.

62. Ibid., paras. 70–71; it is established case law that the purpose and the general scheme take centre stage when language versions diverge.

such, since national authorities have to assess whether it amounts to an "unreasonable burden". Doing so ensues a proportionality test,[63] which ought to relate the individual circumstances to the impact upon the social assistance system "as a whole".[64] Judges also established that this reading of the Directive complied with primary law.[65] It will be discussed below how the proportionality test put forward in *Brey* can be accommodated with the more restrictive reasoning of the Grand Chamber in *Dano*.[66] It will be demonstrated, moreover, that the abstract "unreasonable burden" formula leaves much uncertainty about the relative weight of countervailing arguments guiding the determination of free movement rights.

4. How to measure the impact on social assistance systems?

The fundamental line of compromise, which the ECJ followed in *Brey*, reiterated the famous dictum in *Grzelczyk* that EU law "accepts a certain degree of financial solidarity"[67] between host States and mobile citizens. For our purposes, this implied that economically inactive persons can invoke a right to free movement as long as they do not become an "unreasonable burden" on social assistance systems. This leaves us with the question how to assess whether the threshold of "unreasonable burden" has been passed. On closer inspection, there are two alternative standards how to measure the impact. This recognition is of great relevance, since the two standards can lead to divergent conclusions in concrete scenarios (below, 4.1.). On this basis, this article continues with a proposal, founded on case law, of how to accommodate countervailing claims (4.2.).

4.1. *Two alternative standards*

Both the *Brey* judgment and earlier case law exhibit two alternative standards for the proportionality test. This is better understood when we remember that the general notion that a balance has to be struck between, on the one hand, the exigencies of transnational mobility and, on the other hand, the effectiveness of national social assistance systems was originally developed for access to healthcare services in order to pre-empt "the risk of seriously undermining the

63. As predicted by Dougan, op. cit. *supra* note 54, 627–628.
64. Case C-140/12, *Brey*, para 72.
65. Ibid., para 70 notes the "limits imposed by EU law" and refers to *Baumbast & R*, which had interpreted the predecessor Directive in the light of Art. 21 TFEU.
66. *Infra* section 6.2.
67. Case C-184/99, *Grzelczyk*, para 44; reaffirmed by Case C-140/12, *Brey*, para 72.

financial balance of the social security system".[68] This solution was taken up later by the Court in *Bidar* where, within the context of today's Article 18 TFEU, it first employed the formula that the provision of social benefits is not meant to "become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State".[69] The same standard was applied, rather strictly, to transnational university access,[70] and has now been reaffirmed for residence rights of economically inactive Union citizens in *Brey*. Throughout these diverse cases, the ECJ fluctuated between a primary focus on the individual and systemic implications[71] – with both standards pushing the debate in opposite directions.

Firstly, the Court often tends towards a *systemic evaluation*, which focuses on the implications for the quality and sustainability of public services. This solution builds upon the classic hypothesis "that economic grounds can never serve as justification for barriers"[72] to the fundamental freedoms and it assumes that it is no legitimate end in itself to save taxpayers' money. Instead, financial implications of free movement can be considered indirectly with regard to the "consequences for the overall level of assistance which may be granted by that State".[73] In other words, judges in Luxembourg recognize that financial sustainability is a precondition for high quality public services, which – as a non-economic objective – may justify national restrictions.[74] If you follow this argument in a strict manner, it would require Member States, like in the case of transnational university access, to demonstrate in "an objective, detailed analysis…, with solid and consistent data, that there are genuine risks to public [services]".[75] This objective approach was taken up in some judgments on access to health care,[76] which sometimes recognized that

68. Case C-158/96, *Kohll*, EU:C:1998:171, para 41; and Case C-120/95, *Decker*, EU:C:1998:167, para 39.

69. Case C-209/03, *Bidar*, para 56.

70. Cf. Case C-73/08, *Bressol & Chaverot*, EU:C:2010:181, paras. 62–82.

71. For a similar presentation see Rebhahn, "Zugang zu Sozialleistungen", (2015) EuR, section IV.2.a.ab therein (forthcoming); Dougan and Spaventa, "'Wish you weren't here …'", in Dougan and Spaventa (Eds.), *Social Welfare and EU Law* (Hart, 2005), pp. 201–205; and Verschueren, op. cit. *supra* note 31, 167–169.

72. Case C-265/95, *Commission* v. *France*, EU:C:1997:595 for goods, building upon Case 7/61, *Commission* v. *Italy*, EU:C:1961:31, 329.

73. Case C-140/12, *Brey*, para 61; among the judgments to which the ECJ refers, only *Bidar* and *Förster* took up this formula (not: *Eind*, *Kamberaj* or *Chakroun*).

74. For a thorough analysis, see Nic Shuibhne and Maci, "Proving public interest", 50 CML Rev. (2013), 997–1003.

75. Case C-73/08, *Bressol*, para 71.

76. See Newdick, "Citizenship, free movement and health care", 42 CML Rev. (2006), 1658–1662.

limited numbers of people were involved and that, therefore, the impact upon public services was negligible.[77]

In *Brey*, judges hinted at such a systemic understanding, when they urged national authorities to assess the impact of free movement "on that Member State's social assistance system *as a whole*".[78] The individual right to free movement would prevail regularly, if that meant – as stipulated by Advocate General Sharpston in a different case[79] – that Member States had to demonstrate, with solid and consistent data, a threat to the stability of social assistance systems. In financial terms, the German welfare State would not collapse, even if it had to finance roughly 20 bn. EUR per year for the – purely hypothetical – arrival of 2 million EU citizens without any income, which would create an additional cost of roughly 0.75 % of GDP.[80] Along similar lines, the Commission countered criticism of alleged "benefit tourism" by pointing out that receiving countries gained from free movement financially.[81] It funded a study, which found that migrant EU citizens are no more likely to have recourse to non-contributory social benefits than nationals of the host State.[82] For our purposes, all these arguments point towards a systemic assessment of the impact on social assistance.

Secondly, one can alternatively employ an *individual standard*, which focuses on the situation of each citizen. Indeed, there are plenty of ECJ judgments obliging both the Member States and the EU legislature not to disregard the specific circumstances of individual cases.[83] This approach also surfaced throughout the *Brey* judgment, where the ECJ considered how to decide whether free movement resulted in an "unreasonable burden" for the purposes of free movement. When applying this standard, national authorities should "tak[e] into account a range of factors in the light of the principle of proportionality",[84] such as the amount of

77. Cf. Case C-385/99, *Müller-Fauré & van Riet*, EU:C:2003:270, para 95.

78. Case C-140/12, *Brey*, para 64 (emphasis added); similarly, paras. 61, 72 and 76–78.

79. A.G. Sharpston, Joined Cases C-523 & 585/11, *Prinz & Seeberger*, EU:C:2013:90, paras. 58–63 with regard to study grants for outgoing nationals.

80. General estimation by the author to cover monthly costs of approx. 833 EUR per capita for income support, health insurance, child allowances, housing benefits, etc.

81. Commission Communication, COM(2013)837 of 25 Nov. 2013, p. 5; for similar findings, see OECD, *International Migration Outlook*, 2013, ch. 3; both calculations concern overall assessments, including workers, family members and the economically inactive.

82. See ICF GHK/Milieu Ltd, "A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants" (2013); the study is limited to certain benefits and does not cover all social assistance.

83. For a rich analysis see Dougan, op. cit. *supra* note 54, 615–626.

84. Case C-140/12, *Brey*, paras. 70 and 72; and A.G. Wahl's Opinion in *Brey*, para 88; note that Recital 16 and Art. 8.4 Directive 2004/38/EC explicitly call for an individual assessment.

aid involved,[85] the sustainability of financial difficulties,[86] and the personal circumstances of the applicant, including the duration of residence and other factors with no immediate financial implication.[87] It should be noted that this individual standard does not operate, like in other instances where the Court focused on individual circumstances, to the benefit of the citizen in the context of Article 7(1)(b) of Directive 2004/38.[88] When Member States do not face the risk of systemic breakdown of social services as a result of free movement, the individual assessment may nonetheless support the conclusion that free movement can be denied in individual cases.

4.2. *Towards interpretative coherence*

Recent debates about the limits of free movement compel EU institutions to confront the underlying tension between the systemic evaluation and the individual assessment. In doing so, the provisions of Directive 2004/38 should, of course, be taken seriously,[89] whilst acknowledging that the outcome has broader ramifications for free movement and equal treatment more generally. Indeed, the *Brey* judgment contained various cross-references to cases which had not concerned Directive 2004/38, thereby indicating that the Court strives for a generic model of how to assess the impact on public services.[90] Such a generic approach could still be flexible enough to take into account the specificities of different subject areas. It could, for instance, argue for a strict assessment in the field of student mobility, thereby supporting encounters among young people,[91] and leave Member States more leeway for transnational healthcare services.[92]

85. Including future payments; see Case C-140/12, *Brey*, paras. 63, 69 and 78; A.G. Wahl's Opinion in *Brey*, para 84; and Commission Communication, COM(2009)313 of 2 Jul 2009, p. 9.

86. See Case C-140/12, *Brey*, para 72 and the case law to which the Court refered.

87. See A.G. Wahl's Opinion in *Brey*, paras. 86–87; and Commission Communication, *supra* note 85, pp. 9–10.

88. By contrast, the focus on the individual regularly supports mobile EU citizens in the context of equal treatment, if Member States are prevented from applying blanket rules, cf. Spaventa, "The constitutional impact of EU citizenship", in Neergaard et al. (Ed.), *European Legal Method* (DJØF, 2011), pp. 151–154.

89. As the Court did in Case C-140/12, *Brey*, paras. 66, 67, 69, 72 and 77.

90. Ibid., paras. 63, 65, 68, 70, 72.

91. Cf. Case C-147/03*, Commission* v. *Austria*, EU:C:2005:427, para 44; and Joined Cases C-523 & 585/11, *Prinz & Seeberger*, para 29; in contrast to Case C-20/12, *Giersch et al.*; cf. O'Leary, "The curious case of frontier workers and study finance: *Giersch*", 51 CML Rev. (2014), 611–612.

92. As it did in Case C-157/99, *Smits & Peerbooms,* EU:C:2001:404, para 79; cf. Lenaerts and Heremans, "Contours of a European Social Union", 2 EuConst (2011), 101, 112–114; and Nic Shuibhne and Maci, op. cit. *supra* note 74, 997–998.

Within this overall context, the various prescriptions in the Free Movement Directive to consider each case separately render a purely systemic standard difficult to defend with regard to the economically inactive. Recital 16, Article 8(4) and Article 14(3) of Directive 2004/38 explicitly call for an individual assessment. To set aside these rules in favour of a purely systemic approach would, arguably, have required the Court to mandate a different outcome in the light of primary law.[93] There are no indications that the ECJ is moving in this direction. On the contrary, the Grand Chamber explicitly supported the individual approach in *Dano*, when it emphasized the objective generally to prevent recourse to national welfare systems[94] and continued in line with the Opinion of Advocate General Wathelet and without any hint at the need for systemic implications that the "the financial situation of each person concerned should be examined specifically".[95]

Moreover, broader constitutional considerations argue against a strict systemic evaluation. Social policy is no quasi-scientific undertaking that allows judges to measure the impact on the welfare State numerically; the design of social policies requires – and allows – societies to make policy choices and to prioritize the allocation of scarce resources.[96] It reflects a basic compromise among members of a society based upon a diffuse sense of joint identity, which may sustain solidarity with those in need.[97] To expect judges in Luxembourg or domestic courts to embark upon the extensive adjudication of underlying societal choices runs the risk of judicial overreach.[98] In the eyes of the German Constitutional Court, fundamental social policy choices constitute a core ingredient of democracy and belong, therefore, to the national constitutional identity[99] (the current German constitutional *juge rapporteur* on EU matters warns that extensive equal treatment of migrant citizens could fall foul of this standard[100]).

93. As it did in Case C-413/99, *Baumbast & R*, and Case C-22 & 23/08*, Vatsouras & Koupatantze*.

94. Cf. Case C-333/13, *Dano*, para 76 without any indication that the overall functioning would have to be compromised.

95. Case C-333/13, *Dano*, para 80; as well as A.G. Wathelet in *Dano*, paras. 110–117.

96. For a convincing argument, see Newdick, op. cit. *supra* note 76, 1650–1652.

97. See Dougan, op. cit. *supra* note 54, 623; and Golynker, "Jobseekers' rights in the European Union", 30 EL Rev. (2005), 121.

98. Cf. Croon, "Comparative institutional analysis, the ECJ and the general principle of non-discrimination", 19 ELJ (2013), 163–172.

99. See Federal Constitutional Court (*BVerfG*), judgment of 30 Jun. 2009, 2 BvE 2/08 et al., *Treaty of Lisbon*, BVerfGE 123, 267, paras. 252, 257–260; and Thym, "In the name of sovereign statehood", 46 CML Rev. (2009), 1800–1802.

100. See Huber, "Unionsbürgerschaft", (2013) EuR, 650–654; the article is based upon a presentation during a visit from an ECJ delegation in July 2013.

None of the above suggests that the ECJ should refrain from judicial oversight. Both the EU Treaty and Directive 2004/38 make it clear that they want judges in Luxembourg to define the limits of free movement. It implies, however, that the ECJ should also be careful not to ignore implications for social cohesion. A purely systemic approach, in particular, runs the risk of downplaying the constitutional and sociological foundations of social policy – in contrast to the conciliatory approach to the interplay of domestic social policies and transnational free movement supported by the Court in *Viking*.[101] Together with the textual and systemic arguments discussed above, these constitutional concerns support a flexible or mixed approach on the side of the Court, combining the individual situation with the consequences for national social assistance systems at large.

How could such a conciliatory approach be construed doctrinally? It seems that a series of chamber judgments and the *Dano* ruling indicate the way forward. Advocate General Sharpston had twice invited judges to clarify the legal criteria in cases concerning the export of study grants and had proposed to present the individual standard as a proxy for the systemic argument,[102] and a Chamber judgment finally concurred.[103] In another case, the same chamber explicitly stated, in line with the *Dano* ruling discussed above, that the focus on the individual situation and the systemic argument are two sides of the same coin. The assessment of individual cases serves the wider objective "to ensure that the grant of assistance … does not become an unreasonable burden which could have consequences for the overall level of assistance".[104] This reaffirmed that the situation of individual citizens, who exercise their right to free movement, is the central yardstick.

This position resolves the underlying tension between the systemic approach and the individual standard on how to measure the impact on social assistance systems: the former is a proxy for the latter. Still, these abstract principles do not translate into precise criteria for the assessment of specific scenarios. It will be argued later that the ECJ bears the responsibility to clarify

101. See Azoulai, "The Court of Justice and the social market economy", 45 CML Rev. (2008), 1346–1355.

102. See A.G. Sharpston, op. cit. *supra* note 79, paras. 66–72; and, some months before, ibid., Case C-542/09, *Commission* v. *the Netherlands*, EU:C:2012:79, paras. 81–85 (the ECJ did not address the question in its judgment).

103. Joined Cases C-523 & 585/11, *Prinz & Seeberger*, paras. 34–39 focused on the situation of the individual, although Germany had relied explicitly on the systemic argument (to justify non-exportability); see Acosta Arcarazo and Iglesias Sánchez, "Social justification", in Koutrakos, Nic Shuibhne and Syrpis (Eds.), *Exceptions from EU Free Movement Law* (Hart, 2015 (forthcoming)).

104. Case C-220/12, *Thiele Meneses*, EU:C:2013:683, para 35 under references to *Bidar*, which had first introduced the "unreasonable burden" formula.

the criteria guiding the resolution of individual cases. At this point in time, these benchmarks often remain elusive.

5. Conceptual implications

The American migration scholar Hiroshi Motomura has demonstrated that the U.S. perspective on immigration evolved over time. He distinguishes between three alternative ways to comprehend the relationship between incoming migrants and U.S. society with regard to residence, equal treatment and citizenship: legal rules on these matters may be perceived, alternatively, as a quasi-automatic "transition", as a "contract" compelling newcomers to comply with certain conditions, or as an "affiliation" when immigrants gradually get involved with the nation's life.[105] In a similar way, EU citizenship and corresponding free movement rules are the outcome of divergent visions of transnational mobility, which influence the institutional practice as a theoretical anchor.[106] Such a constructivist account recognizes that different ideals of EU citizenship co-exist and change over time.[107] It is particularly useful with regard to economically inactive citizens, whose status transcends the established rationales of the single market.

To identify different conceptual visions of transnational mobility is not to say that the ECJ or other EU institutions hold a uniform concept of citizenship, which the collective of judges and advocates general reflect consciously or discuss openly.[108] Nor do I claim that individual ECJ judgments realize one of the models unequivocally. This does not prevent academic commentators, however, from reconstructing the theoretical infrastructure. Such academic reconstructions are ideal types, which are modelled upon judgments as legal phenomena and which accentuate theoretical features for analytical purposes. They are not mutually exclusive and the positions of policy actors will most likely reflect a blend, combining

105. See Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (OUP, 2006).

106. These conclusions about EU citizenship cannot be extended to EU immigration law concerning third-country nationals without modification, since both sets of rules pursue different objectives in an EU context; see Thym, "EU migration policy and its constitutional rationale", 50 CML Rev. (2013), 718–725.

107. For a similar approach, see Kostakopoulou, "Co-creating European Union citizenship", 15 CYELS (2012/13), 256–259; and Shaw, "Citizenship of the Union" in *Collected Courses of the Academy of European Law*, Vol. VI-1 (1998), pp. 287–296.

108. This extends to the Commission, which famously promoted a coherent vision for the single market, but hesitates to present a distinct rationale for the free movement of the economically inactive; cf. e.g. the Commission Communication cited *supra* note 81, which concentrates on empirical data and a summary of case law.

elements of different ideal types. Arguably, the discrepancies underlying many free movement rulings can be explained by this mixture; judges drift along. In this section, I will present two visions of transnational social solidarity, which I shall call the "residence model" and the "integration model". I do not consider further a hypothetical "federal solution" with uniform social standards and a single social assistance system,[109] since this is unrealistic at this juncture.[110]

5.1. *"Residence model"*

Equal treatment constitutes the backbone of the economic freedoms and citizenship case law. It enables those who move across borders to enjoy the same treatment as nationals of the receiving State as a matter of principle. Access to social benefits is among the most recent (and controversial) areas, in which EU law mandates Member States to treat incoming citizens on an equal footing. On this basis, various authors propagate the emergence of some sort of stakeholder citizenship, where the formal link of nationality is replaced by residence-based locality as the demarcation line between outsiders and insiders participating in the formation and evolution of communities characterized by solidarity.[111] Access to social benefits is a perfect prism to elucidate the significance of the "residence model", since welfare provision represents a core ingredient of modern statehood and corresponding citizens' rights.[112] If it was extended to Union citizens who are economically inactive, the "residence model" would become reality to a large extent.

The classic foundation of the residence model may be found in the recitals of Regulation (EEC) 1612/68: equal treatment is perceived as a means to facilitate social integration, thus allowing migrant workers to enjoy the same rights from day one as a matter of principle.[113] This prescription coincided with the reorientation of national social security systems, which embraced territoriality instead of nationality as the door opener for social security after

109. Cf. Schönberger, *Unionsbürger* (Mohr Siebeck, 2005), pp. 353–365; and Van der Mei, *Free Movement of Persons within the European Community* (Hart, 2003), pp. 208–213.

110. Of course, elements of this model may be applied at present, such as support for local integration by the European Social Fund.

111. See Bauböck, "Global justice, freedom of movement and democratic citizenship", 50 Eur. J. Sociol. (2009), 1–31; Kostakopoulou, *The Future Governance of Citizenship* (CUP, 2008), ch. 4; and Davies, "Any place I hang my hat", 11 ELJ (2005), 47–49.

112. See Marshall, *Class, Citizenship and Social Development* (Doubleday, 1964).

113. Cf. Recital 5 Regulation (EEC) 1612/68, which has been replaced by Recital 6 Regulation 492/2011; see also Case 186/87, *Cowan*, EU:C:1989:47, paras. 16–17; and A.G. Jacobs, Case C-148/02*, Garcia Avello*, EU:C:2003:311, para 72.

World War II.[114] This trend was reaffirmed by the EU's social security coordination regime, which linked special non-contributory cash benefits (at the centre of recent disputes) to the place of residence.[115] The ECJ endorsed this approach in the light of primary law, since non-contributory benefits are "closely linked with the social environment".[116] This has important ramifications for our topic: mobility entails a changing of the guard in the realm of welfare benefits, since the State of residence is expected to take over whenever someone moves across borders.

A strict version of the residence model would focus, in line with social security coordination, on the place of "habitual residence" to determine the State bearing responsibility for social assistance; the crucial question would be "where the habitual centre of their interests is to be found".[117] We would have to distinguish, for that matter, between "temporary" visitors, who are physically present but retain habitual residence elsewhere, and "residents", who relocate their centre of interests enduringly.[118] Social security experts had argued that the ECJ should have moved down this road in *Brey* and *Dano*,[119] which it decided not to do by side-lining the relevance of the Social Security Coordination Regulation.[120] Yet, it is not only social security coordination that tilts towards the "residence model". In a similar vein, the doctrinal foundations of free movement in the EU Treaties and Directive 2004/38 can be applied in a manner which effectively extends the domestic welfare system to all who are physically present as residents.[121] However, this is not the only possible outcome; the same rules can be interpreted in a way that directs the case law in a different direction.

114. See Ferrera, *The Boundaries of Welfare* (OUP, 2005); and Kingreen, *Soziale Rechte und Migration* (Nomos, 2010).

115. See Art. 70 of Regulation (EC) 883/2004.

116. Case C-537/09, *Bartlett et al.*, EU:C:2011:278, para 38; for further reading see Dougan, "Expanding the frontiers of European Union citizenship", in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart, 2009), pp. 144–150.

117. Definition of the term "habitual residence" in Case C-90/97, *Swaddling*, EU:C:1999:96, para 29; for details see Van der Mei, op. cit. *supra* note 109, 161–164.

118. For practical examples, see Commission, Practical guide: The legislation that applies to workers, Dec. 2013, sect. 3; for a normative account see Carens, "Live-in domestics, seasonal workers, foreign students, and other hard to locate on the map of democracy", 16 *Journal of Political Philosophy* (2008), 419–445.

119. See Verschueren, "European (internal) migration law as an instrument for defining the boundaries of national solidarity systems", 9 *European Journal of Migration and Law* (2007), 324–328; and Farahat, "Kollisionsrechtliche und aufenthaltsrechtliche Perspektiven", (2014) *Neue Zeitschrift für Sozialrecht*, 490–495.

120. See *supra* section 3.1.

121. In cases such as Case C-138/02, *Collins*, Case C-209/03, *Bidar*, or Case C-20/12, *Giersch*, the Court had recourse to the "certain degree of integration/real link" standard but applied it in a manner, which focused on territorial presence – not qualitative factors of social integration.

5.2. *"Integration model"*

The "integration model" considers social integration as an objective to be achieved and expects the individual to actively pursue incorporation into societal structures. Success or failure of this venture may regulate the degree of residence security and equal treatment under EU law.[122] From this perspective, the Union is more than an emancipatory "playground of opportunities"[123] enhancing individual well-being; not anyone residing abroad is automatically considered to be an insider like under the "residence model" discussed above. Rather, the integration model respects the value of social cohesion as a precondition for democratic allegiance and social solidarity in the same way as it recognizes transnational freedom. It makes access to social benefits conditional upon the fulfilment of certain prerequisites without which equal treatment will be denied.

It is important to note that there are a broad variety of theoretical explanations for the significance of social cohesion,[124] which can result in different replies to specific questions. In particular, social cohesion does not imply ethno-cultural closure and may support, on the contrary, changing self-perceptions of European societies in response to transnational mobility and cultural diversity.[125] The argument for social cohesion is not about classic nationalism; it recognizes, rather, that associations of people require a sense of shared identity if our societies are to be more than the sum of its parts.[126] Despite the inherent emphasis on individual liberty, EU free movement law embraces important expressions of such an "integration model", which the Court has strengthened over past years.

It is well known that the *Förster* ruling is the most prominent expression of this concept, when the ECJ made equal access to study grants conditional upon "a certain degree of integration".[127] Along similar lines, Directive 2004/38 promotes a "gradual system"[128] for equal treatment and protection against expulsion, including through permanent residence status with

122. See Azoulai, "Transfiguring European citizenship", in Kochenov (Ed.), *EU Citizenship and Federalism* (CUP, 2015 (forthcoming)).

123. Kochenov, "The essence of EU citizenship emerging from the last ten years of academic debate", 62 ICLQ (2013), 130.

124. For an overview see Moore, "Cosmopolitanism and political communities", 32 *Social Theory and Practice* (2006), 627–658; or Song, "Three models of civic solidarity", in Smith (Ed.), *Citizenship, Borders, and Human Needs* (Penn Press, 2011), pp. 192–207.

125. See Thym, op. cit. *supra* note 106, 732–734.

126. See Joppke, *Citizenship and Immigration* (Polity Press, 2010), ch. 4.

127. Case C-158/07, *Förster*, EU:C:2008:630, para 49; in *Bidar* and *Collins* it used the same standard, but applied it in a way, which focused on territorial presence, thereby demonstrating that individual rulings can combine elements of both models.

128. Joint Cases C-424 & C-425/10, *Ziolkowski & Szeja*, EU:C:2011:866, para 38.

widespread guarantees after five years of lawful residence.[129] From this perspective, equal treatment no longer appears as a means to promote integration, as under the "residence model". EU law rather employs the integration yardstick to determine the legal position of mobile citizens in host societies; if they disappoint the integration objective, they obtain fewer rights. In a series of creative decisions, the ECJ has recently emphasized the pertinence of this approach. In doing so, it effectively turned the integration standard, which had originally been developed for students and jobseekers, into an overarching guideline for free movement.

Following a proposal by Advocate General Trstenjak, judges interpreted the right of permanent residence in the light of the "integration-based reasoning behind Article 16 [of Directive 2004/38]".[130] In *Dias*, this implied that formal factors (presence of national residence certificates) are outweighed by qualitative considerations (absence of sufficient resources) in deciding whether the requirements of Article 16 were met, because "the integration objective … is based not only on territorial and time factors but also on *qualitative elements*, relating to the level of integration in the host Member State".[131] This approach has been reaffirmed in other (not: all) judgments on permanent residence.[132] Along similar lines, the ECJ used the integration criterion to buttress its novel approach to the public security justification. This was manifest in the generous definition of public security put forward in both *Tsakouridis* and *P.I.,*[133] as well as in the conclusion in *G* that the seemingly precise ten-year rule for enhanced protection against expulsion should be understood as a proxy for temporal, territorial and qualitative integration criteria and that, therefore, periods of imprisonment are not to be taken into account.[134]

The doctrinal impact of these judgments should not be overestimated, since they primarily concerned access to permanent residence status and enhanced protection against expulsion. By contrast, they have no immediate bearing on the ECJ's well-established and generous case law on entry, residence and

129. See Barnard, "EU citizenship and the principle of solidarity", in Dougan and Spaventa, op. cit. *supra* note 71, 165–167.

130. Case C-162/09, *Lassal*, EU:C:2010:592, para 37 following A.G. Trstenjak, para 80.

131. Case C-325/09, *Dias*, EU:C:2011:498, para 64 (emphasis added) taking up a formulation by A.G. Trstenjak, Opinion in *Dias,* para 106.

132. See Case C-378/12, *Onuekwere*, EU:C:2014:13, paras. 34–36 and Case C-469/13, *Tahir*, EU:C:2014:2094, paras. 33–34 in contrast to the interpretation of Art. 16(2) in Case C-244/13, *Ogieriakhi*, EU:C:2014:2068.

133. Case C-145/09, *Tsakouridis*, EU:C:2010:708 and Case C-348/09, *P.I.* v. *Oberbürgermeisterin der Stadt Remscheid,* EU:C:2012:300. See Azoulai and Coutts, "Restricting Union citizens' residence rights on grounds of public security", 50 CML Rev. (2013), 558–570.

134. Cf. Case C-400/12, *G*, EU:C:2014:9, paras. 29–36.

public policy justifications.[135] Yet, they signal a conceptual shift away from equal rights as a means for integration, towards an output-oriented assessment that links citizens' rights to the degree of integration.[136] Integration is not perceived to be within the sole responsibility of the individual, but remains subject to State oversight. Public authorities have to assess whether EU citizens "have become *genuinely* integrated into the host society".[137] In doing so, EU institutions – controversially[138] – develop their understanding of "good" and "bad" citizens and extend less rights to the latter.[139] To be sure, the conditions are much less onerous than immigration law towards third-country nationals, but from a conceptual perspective, it is a clear move towards the "integration model".

When it comes to social benefits, the integration model has implications for both incoming and outgoing citizens. While the former may be excluded from welfare provision (as in *Förster*), the latter can rely on the integration argument to "export" benefits when moving abroad. Conceptually, limitations on incoming citizens and generosity for outgoing nationals are two sides of the same coin, if social affiliation – not territorial presence – guides the scope of transnational rights.[140] Against this background, it is conceptually coherent that the ECJ allows students to export study grants, which host societies can withhold from incoming foreigners; it has delivered a remarkable line of rulings emphasizing the responsibility of the home State through benefits' exportation in various domains.[141] *Dano* is the most radical expression of this approach, since the Court flatly denied any claim to equal treatment by the economically inactive without sufficient resources.[142] Territorial presence is

135. Doctrinally, the new approach remains limited – so far, at least – to Arts. 16 and 28, not to Arts. 7 and 27 of Directive 2004/38/EC.

136. For a similar argument, see Robin-Olivier, "Libre circulation des travailleurs", (2011) RTDE, 604–607; and Acosta Arcarazo and Iglesias Sánchez, op. cit. *supra* note 103.

137. Case C-145/09, *Tsakouridis*, para 24 (emphasis added).

138. For a critique see O'Brien, "I trade, therefore I am", 50 CML Rev. (2013), 1672–1681; and Somek, "Solidarity decomposed", 32 EL Rev. (2007), 806–818; for a more positive outlook see F de Witte, "Transnational solidarity and the mediation of conflicts of justice in Europe", 18 ELJ (2012), 706–707.

139. Cf. Azoulai, op. cit. *supra* note 122; and Barbou des Places, "Integration", Paper presented at the conference "The category of the person in EU law" at the EUI, Florence, on 10/11 Nov. 2014.

140. See Bauböck, op. cit. *supra* note 111, 19–22; and Davies, op. cit. *supra* note 111, 49–54.

141. See Rennuy, op. cit. *supra* note 31, 1232–1250; and Dougan, op. cit. *supra* note 116, 136–162.

142. It does not employ the integration argument, but the judgment can be read as assuming that Art. 7(1)(b) Directive 2004/38/EC lays down in *abstract* that those without sufficient resources are not integrated (instead of the *individual* assessment of the degree of integration, which it usually requires); cf. A.G. Wathelet in Case C-333/13, *Dano*, para 135.

irrelevant; unlawful presence brings about no legally significant quality of social integration under EU law.

Along similar lines, the Commission recently adopted a formal recommendation requesting Member States to retain the right to vote for nationals living abroad[143] – instead of taking up the (ultimately unsuccessful) citizens' initiative to extend the right to vote in the country of residence.[144] This episode may not be of crucial doctrinal relevance, but it nonetheless constitutes anecdotal evidence for the spread of the "integration model" in EU law, which accentuates social affiliation instead of territorial presence as the decisive factor for the allocation of citizens' rights. As mentioned at the outset, it is not to be expected that the EU institutions will embrace either concept in pure form. Our models are conceptual abstractions that expose theoretical alternatives for analytical purposes, while individual judgments will often combine elements of both patterns.

6. Union citizens without residence rights

In *Dano*, the Grand Chamber maintained in line with earlier judgments that non-discrimination guarantees embrace only those who are lawfully resident.[145] What appears to be a precise statement at first sight, in fact, leaves room for refinement at closer inspection. Although it is well established that residence rights are being acquired and lost automatically (6.1.), it is not immediately clear which legal standards define the alternative category of "unlawful" presence and how the latter should be determined by national authorities in practice (6.2.). It will be demonstrated that, notwithstanding the clear-cut outcome of the *Dano* case, the legal position of Union citizens with uncertain residence status remains ambiguous. In practice, the outer limits of EU free movement law are inherently fragile.

6.1. *Autonomy of EU residence status*

It is a classic position of EU law that individual rights of workers and other citizens are directly applicable; national residence permits serve a declaratory function.[146] Conversely, the loss of the worker status also occurs automatically, whenever someone no longer meets the requirements of Article

143. See Commission recommendation, 2014/53/EU (O.J. 2014, L 32/34).
144. Cf. the Citizens' initiative "Let me vote" (No. ECI(2013)000003), which failed to gather enough signatures in 2013/14.
145. Case C-333/13, *Dano*, para 69; and the cases cited in Case C-140/12, *Brey*, para 44.
146. See Case 48/75, *Royer,* EU:C:1976:57, paras. 32–33.

45 TFEU.[147] Against this background, it did not come as a surprise that the ECJ decided in *Dias* that the residence status of citizens, who are economically inactive, must be decided autonomously and that corresponding free movement rights depend upon the continuous fulfilment of the conditions under EU law.[148] This implies, for our purposes, that those who do not work lose their free movement right under Directive 2004/38 for a stay of more than three months, once they become an "unreasonable burden" on the social assistance system of the host State.[149] Only expulsion on grounds of public policy, security or health requires Member States to make a formal decision terminating an existing residence right – in the case of workers not differently than for the economically inactive.[150]

By emphasizing the automatic acquisition and loss of free movement rights, the Court opted against those who had argued that the lack of sufficient resources did not affect legal residence status, but rather constituted a justification for State measures terminating that right.[151] The ECJ did not follow this argument and chose to synchronize the criteria for the acquisition and loss of residence status instead.[152] That conclusion does not necessarily contradict earlier findings in *Martínez Sala*, *Grzelczyk* and *Trojani* that Article 18 TFEU applied in situations where no free movement right existed or where national authorities could proceed with deportation.[153] Ms Martínez Sala and Mr Trojani were in possession of a national residence permit for other purposes than free movement[154] and the situation of students may be different from other economically inactive citizens due to statutory disparities.[155] The

147. Cf. Case 39/86, *Lair*, EU:C:1988:322, paras. 31–36.

148. See Case C-325/09, *Dias*, paras. 48, 54; and Pataut, "Citoyenneté de l'Union européenne", (2012) RTDE, 626–628.

149. This had been stipulated already by Case C-456/02, *Trojani*, EU:C:2004:488, para 36; Art. 14(2) of Directive 2004/38/EC allows (and limits) Member States to monitor the factual situation as a procedural rule and does not deny automatic loss.

150. See Arts. 27–31 Directive 2004/38/EC; for the procedural guarantees of those without residence status, see Thym, "When Union citizens turn into illegal migrants", 40 EL Rev. (2015 (forthcoming)).

151. As the Commission and A.G. La Pergola had argued in Case C-85/96, *Martínez Sala*; see also Wollenschläger, op. cit. *supra* note 18, 180–188; Van der Mei, op. cit. *supra* note 109, 148–149; and Shaw and Fries, "European citizenship", 35 EPL (1998), 546–547.

152. The prohibition of "automatic" expulsion in Art. 14(3) Directive 2004/38/EC requires a proportionality assessment, which mirrors the ECJ's reading of the residence conditions in *Brey*; see also Calliess, "The dynamics of European Citizenship", in ECJ (Ed.), *The Court of Justice and the Construction of Europe* (Springer, 2013), p. 437.

153. Cf. Case C-184/99, *Grzelczyk*, para 42; and Hailbronner, op. cit. *supra* note 55, 1251.

154. See Case C-85/96, *Martínez Sala*, paras. 60, 61; Case C-456/02, *Trojani*, paras. 37, 43; and Nic Shuibhne, "Derogating from the free movement of persons", 8 CYELS (2005/06), 215–223.

155. Art. 7(1)(c) Directive 2004/38/EC requires students to make just a declaration (instead of a confirmation) about their resources, i.e. the loss may – unlike in *Dano* – not be automatic,

Dano judgment can be read not to exclude these instances from the scope *ratione materiae* of Article 18 TFEU.[156] Nevertheless, these situations will be rare in practice. For economically inactive Union citizens without sufficient resources, the Grand Chamber stated unambiguously in *Dano* that they cannot claim equal treatment.

6.2. *Ambivalence of "unlawful" presence*

It should be noted that the position of the Court may leave economically inactive citizens with scarce resources in a situation of legal uncertainty about the (un-)lawfulness of their stay abroad. The automatic acquisition and loss of free movement rights implies that it can be difficult to determine whether someone resides (il-)legally under EU law. The *Dano* judgment is a case in point, since Ms Dano was in possession of a German "free movement certificate", which seemed to confirm her entitlement to free movement.[157] Yet, such a certificate performed just a declaratory function and did not change her status under EU law in the light of the ECJ case law discussed above.[158] That demonstrates that citizens (and public authorities) can never be sure, in borderline cases at least, whether they reside legally. Thus, it will not change much that the German legislature has abolished the registration scheme in the meantime.[159] Union citizens with scarce resources or with an instable employment position live in a grey zone with a precarious residence status and without much legal certainty.

This ambiguity is more than a practical matter; it extends to the legal standards applicable. It has been mentioned already that the "unreasonable burden" formula is notoriously open-ended and that it remains uncertain, moreover, how the strict reasoning in *Dano* relates to the earlier findings in

at least for students like Mr Grzelczyk, who had sufficient resources initially and obtained a residence right on the basis of a declaration.

156. Case C-333/13, *Dano*, para 59 seems to have been carefully drafted by stating that the scope "include[s]" (not: is limited to) free movement rights under EU law; moreover, Case C-46/12, *N.*, EU:C:2013:9725, para 28, to which the Court referred, invoked the classic judgments on equal treatment, such as *Martínez Sala*.

157. Cf. Case C-333/13, *Dano*, para 36.

158. See *supra* section 6.1; the *Dano* judgment did not elaborate on the issue, although allegedly it had been discussed during the oral hearing; the Austrian court reacted to *Brey* with a proportionality assessment, in which the Austrian certificate played a crucial role in the final conclusion that the couple was no "burden" and resided legally as a result; cf. Verschueren, op. cit. *supra* note 31, 174–176.

159. Registration is not mandatory under Art. 8 Directive 2004/38/EC, although allegedly the Commission report, COM(2008)840 of 10 Dec. 2008, p. 6 reported that most Member States had introduced at least an optional scheme originally; in Germany, the certificate was regularly handed out without any substantive assessment of the individual situation.

Brey.[160] Whereas *Brey* seemed to require national authorities to embark upon a proportionality assessment in each case,[161] the Grand Chamber's reasoning in *Dano* can be understood that any recourse to social assistance pre-empts legal residence status.[162] The two positions could be realigned by insisting upon a particularly strict proportionality test that allowed for lawful residence despite recourse to social benefits in exceptional circumstances,[163] or by necessitating an individual appraisal only, if citizens – unlike Ms Dano[164] – are in possession of some resources of her own.[165] Irrespective of how precisely we construe the requirements for the evaluation of individual situations, the underlying legal uncertainty is palpable.

In practical terms, the delineation of (un-)lawful residence of the economically inactive is not the only challenge. Firstly, national authorities may struggle to distinguish between jobseekers and the economically inactive when unemployed Union citizens are looking for work.[166] Indeed, not just anyone looking for work will qualify as a jobseeker, since this status requires him to "provide evidence that he is continuing to seek employment and that he has genuine chances of being engaged".[167] The residual category of the economically inactive will apply whenever a citizen fails this test, but it will rarely be crystal clear whether there are "genuine chances of being engaged" in practice; national rules limiting the right to reside of jobseekers to a strict six-month period were vetoed in Luxembourg.[168] This has important implications for any attempt to regulate the free movement of those who do

160. See *supra* section 3.3.

161. See *supra* section 4, which also explained why such proportionality test should be oriented at the individual situation in the light of, among others, the *Dano* ruling.

162. Cf. Case C-333/13, *Dano*, paras. 74, 76 and A.G. Wathelet, paras. 110–117.

163. It could be argued, for instance, that temporary recourse to benefits (like in *Grzelczyk*) or minor supplementary assistance do not hinder free movement, if the other factors, which have to be taken into account in line with the arguments *supra* notes 83–87, support this outcome; in other scenarios, the proportionality test would fail regularly.

164. Case C-333/13, *Dano*, para 81 indicates that she lacked resources in the first place, although the support from her sister (ibid., para 37) cannot be ignored in line with Case C-408/03, *Commission* v. *Belgium*, EU:C:2006:192.

165. Note that Art. 7(1)(b) Directive 2004/38/EC *positively* requires "sufficient resources", whose absence might pre-empt legal residence irrespective of whether and to what extent citizens have recourse to social assistance systems; also, the original Commission proposal that only active recourse to social benefits could justify the termination of residence status was dismissed by the Member States (see Meduna et al., op. cit. *supra* note 8, 257–260); since Member States cannot prescribe static limits in the light of Art. 8.4 Directive 2004/38/EC, the "positive" sufficient resources test would fail in obvious situations only, while all other scenarios would require a proportionality test.

166. For general comments, see *supra* section 2.1.

167. Case C-292/89, *Antonissen*, EU:C:1991:80, para 22.

168. Ibid.

not contribute actively to the labour market.[169] In future, the Court may want not to pursue a strict line towards the extension of national six-months periods for jobseekers in order to prevent its recent *Dano* judgment being practically irrelevant, if many persons without sufficient resources can claim prolonged transnational residence rights as jobseekers.[170]

Secondly, it is well known that the Court has long defended a low threshold for worker status; regular employment for 6 hours per week with a monthly salary of below 200 EUR may suffice,[171] irrespective of whether the persons concerned receive social benefits.[172] This can result in outcomes that are conceptually difficult to defend: let's assume that Ms Dano was married and that her husband pursued a low intensity employment along the parameters mentioned above; the family would qualify for at least 1000 EUR of various kinds of supplementary social benefits in Germany, if we maintain, in line with earlier case law, that workers and their families cannot usually be denied equal treatment.[173] Of course, these discrepancies are not the Court's liability; they underlie the principled distinction between economic actors and those without sufficient resources, which may lead to seemingly arbitrary outcomes.[174] The introduction of Union citizenship may have created an overarching status, but it did not reverse the idiosyncrasies of the different layers of free movement law, which have been historically accumulated in a process of stratification discussed at the outset.

Finally, both the automatic acquisition and loss of free movement rights as well as the inherent ambiguity of legal and practical criteria for the determination of (un-)lawful residence supported an indirect approach of the Member States towards the identification of (il-)legal presence. More specifically, the example of both Germany and the United Kingdom shows the spread of so-called "right-to-reside" tests that make access to certain social benefits conditional upon the prior acquisition of free movement rights.[175] In

169. Remember that the residence of jobseekers does not depend upon sufficient resources, while it is contested whether they can claim benefits; cf. *supra* note 15.

170. At the time of writing, the first chamber of the German parliament had voted for a rebuttable presumption that the jobseeker status is lost after six months; moreover, David Cameron proposed a similar approach in a policy speech on immigration on 28 Nov. 2014 (without any indication that the presumption would be rebuttable).

171. See Case C-14/09, *Genc*, EU:C:2010:57, paras. 19–32.

172. See Case 139/85*, Kempf*, para 14.

173. See *infra* section 7.2.

174. Similarly, the distinction between cross-border situations and purely domestic scenarios remains imprecise and can result in an impression of arbitrariness; see Tryfonidou, *Reverse discrimination in EC law* (Kluwer, 2009), Ch. 5.

175. See the infringement proceedings *Commission* v. *the United Kingdom* (Case C-308/14, pending); and, for Germany, Thym, "Unionsbürgerfreiheit und Aufenthaltsrecht", (2014) *Zeitschrift für Ausländerrecht*, 224–226.

the light of *Dano*, it will be difficult to argue that this approach violates EU law.[176] That is the effect of a judgment that effectively turned Union citizens without sufficient resources into illegal migrants.

7. Equal treatment

The evolution of the case law on Union citizenship sometimes left the impression of an irresistible drive towards full equality. While this was correct for certain aspects, distinctions have always persisted in other areas – as the *Dano* judgment emphasized. Yet, the denial of equal treatment to Union citizens without sufficient resources is not the only discrepancy. It is well known that the ECJ recognized abstract limits to equal treatment and that, as a result, lawful residence does not necessarily coincide with unconditional access to social benefits (7.1). Unfortunately, it remains difficult to discern any clear pattern from the case law on how to decide individual cases (7.2). In future, we may have to distinguish more clearly between different kinds of benefits (7.3). Adjudicating these scenarios, the Court will develop, step by step, its position on the limits of transnational solidarity. In doing so, judges in Luxembourg will define the relative weight of the two ideal types of pan-European solidarity discussed earlier.

7.1. *Justifications for unequal treatment*

Access to social benefits for jobseekers and economically inactive citizens has been controversial for more than a decade. Judges developed a compromise formula, which employed the "real/genuine link"[177] or "certain degree of integration"[178] standard as an objective consideration for the justification of unequal treatment. Member States are only obliged to provide equal access to social benefits when this hurdle is crossed[179] (a position, which even the ECtHR has taken up when considering discriminatory access to social

176. If Art. 18 TFEU and other non-discrimination guarantees are not applicable without a right to reside, it is unnecessary for Member States to rely on the "abuse" criterion in Art. 35 Directive 2004/38/EC and Case C-456/12, *O & B*, para 58.

177. Case C-224/9, *D'Hoop*, EU:C:2002:432, para 38; and Case C-138/02, *Collins*, para 67 for jobseekers.

178. Case C-209/03, *Bidar*, para 57 for other Union citizens.

179. The diverse terminology stems from the succession of judgments, which were integrated only gradually into a coherent concept; cf. Jesse, "The value of 'integration' in European law", 27 ELJ (2011), 174–182.

benefits[180]). It should be noted that the "integration/real link" benchmark is not limited to the economically inactive and jobseekers, for which it was originally developed. In recent years, the Court turned it into a generic formula guiding the interpretation of the non-discrimination principle in varied legal settings. In *Dano*, the ECJ reaffirmed this parallel interpretation of the non-discrimination guarantees in Article 18 TFEU, Article 24 of Directive 2004/38, Article 4 of Regulation 883/2004 and Article 7 of Regulation 492/2011.[181]

Thus, the "integration/real link" standard can be applied in a synchronized way in the context of Article 45 TFEU (workers and jobseekers), Article 18 TFEU (economically inactive) and Article 21 TFEU (outgoing nationals). This may have important repercussions for the status of workers whose equal treatment had often been regarded as being unconditional. Applying the "integration/real link" benchmark to workers presents us with a noteworthy feedback loop between the "old" rules of the single market and the "new" provisions for the economically inactive.[182] Up to now, this has not affected the equal treatment of workers in practical terms,[183] but this outcome cannot be guaranteed in the medium run. From a doctrinal perspective, the mechanism is in place to defend potential future distinctions in the treatment of workers, especially with regard to those working limited hours on the minimum wage. That sounds abstract, but might soon gain practical relevance, if the British government moves ahead with plans to limit the equal access of workers to social assistance and to housing benefits.[184]

7.2. *Uncertain directions of the case law*

In constitutional adjudication, vagueness can be a virtue and it was wise of the Court not to have presented a precise definition of the "real link/integration" criterion from the beginning, thereby leaving room for refinement and modification. Nevertheless, the ECJ should provide clear guidance on the meaning of EU law.[185] That is not to say, crucially, that it should engage in micro-management and leave no breathing space for national authorities,

180. See de Vries, "Towards integration and equality for third-country nationals?", 38 EL Rev. (2013), 256–257.

181. See *supra* section 3.2.

182. See O'Leary, "Developing an ever closer Union between the peoples of Europe", 27 YEL (2009), 182–191.

183. See *infra* notes 188, 189; and Robin-Olivier, "Libre circulation des travailleurs", (2013) RTDE, 857–858.

184. See the proposal by David Cameron, cited *supra* note 170.

185. See Sarmiento, "Half a case at a time", in Van de Heyning and De Visser (Eds.), *Constitutional Conversations in Europe* (Intersentia, 2012), pp. 14–19.

courts and legislatures. It certainly should, but only after having told them which standards under Union law guide and limit their discretion, thus combining discretion with transparent parameters for national decision-making. This is not always the case, and there remains room for improvement with regard to the operation of the "real link/integration" standard. To be sure, the ECJ instructed Member States that it "must rest on clear criteria known in advance",[186] but the Court failed, in the eyes also of prominent observers,[187] to establish well-defined principles for the interpretation and application of the "real link/integration" formula. This is illustrated by disparate case law on different status groups:

Workers and their family members are normally considered to be fully integrated from day one of their stay, as a matter of principle.[188] This does not mean, however, that family members remain fully integrated after the death of the worker, because the Court has judged a two-year waiting period to be a proxy for a sufficient connection.[189] Along similar lines, frontier workers must be treated like nationals in most circumstances, despite the fact that they can occasionally be excluded from equal treatment due to limited integration.[190] For jobseekers, the Court asked Member States to consider a range of factors, including the length of stay, family ties and search intensity (after it had originally focused primarily on territorial presence).[191] In a similar vein, the "unreasonable burden" formula requires consideration of various factors in determining the residence rights of the economically inactive.[192] By contrast, incoming students may be excluded from study grants for a five-year period,[193] while outgoing nationals may not be subject to strict time limits.[194] Those residing unlawfully (under EU law) can, like Ms Dano, even be excluded from equal treatment altogether.

186. Case C-138/02, *Collins*, para 72.

187. See O'Leary, "Solidarity and citizenship rights in the Charter of Fundamental Rights", in De Búrca (Ed.), *EU Law and the Welfare State* (OUP, 2005), pp. 73–74; and Dougan, "The bubble that burst", in Adams et al., op. cit. *supra* note 44, 140–145.

188. See Case C-542/09, *Commission* v. *the Netherlands*, paras. 64–66; and for a normative account F de Witte, "Who funds the mobile student?", 50 CML Rev. (2013), 208–209.

189. See Case C-257/00, *Nani Givane*, EU:C:2003:8, paras. 46–47 without direct recourse to other "real link/integration" judgments.

190. See Case C-287/05, *Hendrix*, EU:C:2007:494, para 55; Case C-20/12, *Giersch*, para 64; for comments see Van der Mei, op. cit. *supra* note 109, 165–167; and O'Leary, op. cit. *supra* note 91, 608–610.

191. Contrast Case C-367/11, *Prete*, EU:C:2012:3121, paras. 45–50 to the earlier position in Case C-138/02, *Collins*, para 72.

192. See *supra* section 4.

193. See Case C-158/07, *Förster*, paras. 51–54.

194. See Joined Cases C-523 & 585/11, *Prinz & Seeberger*, paras. 37–38; and Case C-542/09, *Commission* v. *the Netherlands*, para 86.

Arguably, the uncertainty over the direction of the case law stems partly from the specifications of the preliminary reference procedure.[195] There have been many instances in which the Court declared one-sided national rules, which applied exclusive residence criteria, to fall foul of European standards.[196] If the Court wants to increase predictability, it should move away from such a "negative" assessment, towards a "positive" definition of the criteria that ought to determine the access to social benefits.[197] Telling Member States that they should use a set of standards is a move in the right direction,[198] although the criteria could be spelt out more clearly. In doing so, there are good reasons to emphasize that "Member States enjoy a broad discretion in deciding which criteria are to be used",[199] since judges ought not to be the sole gatekeepers of national solidarity systems.[200] At present, uncertainty about the judicial standard often has a chilling effect, when national authorities shy away from taking decisions in practice.[201] Requiring national law to lay down a range of factors on access to social benefits should not prevent it from establishing a domestic regime, which is both predictable and manageable at the same time.[202]

7.3. *Distinguishing different social benefits*

From a normative perspective, there is nothing new in a gradual inclusion of transnational migrants into national solidarity systems.[203] It presents a formidable challenge, nonetheless, to translate this hypothesis into concrete answers about who should have access to which benefits under what circumstances. A practicable way forward could be to separate different categories "according to the constitutive elements of the benefit in question,

195. Cf. Sarmiento, op. cit. *supra* note 185, 35–40; and O'Leary, op. cit. *supra* note 187, 66.

196. See Acosta Arcarazo and Iglesias Sánchez, op. cit. *supra* note 103; and Neuvonen, "In search of (even) more substance for the 'real link' test", 39 EL Rev. (2014), 132–133.

197. As argued by Rebhahn, op. cit. *supra* note 71, sec. IV.2.a.ab.

198. Cf. Case C-503/09, *Stewart*, EU:C:2011:500, para 95; Case C-75/11, *Commission* v. *Austria*, para 62; and Joined Cases C-523 & 585/11, *Prinz & Seeberger*, para 37; as well as Neuvonen, op. cit. *supra* note 196, 133–135; and Pataut, op. cit. *supra* note 148, 625–629.

199. See Case C-220/12, *Thiele Meneses*, paras. 37 and 41; Case C-192/05, *Tas Hagen & Tas*, EU:C:2006:676, para 36; Case C-499/06, *Nerkowska,* EU:C:2008:300, para 38; and O'Brien, "Real links, abstract rights and false alarms", 33 EL Rev. (2008), 650–656.

200. See *supra* section 4.2; Somek, op. cit. *supra* note 138, 806–818; and A.G. Kokott, op. cit. *supra* note 190, paras. 71–73.

201. Cf. Spaventa, "Seeing the wood despite the trees?", 45 CML Rev. (2008), 39–43.

202. As recognized in principle by Case C-546/11, *Dansk Jurist- og Økonomforbund*, EU:C:2013:603, para 70; and A.G. Wathelet in Case C-333/13, *Dano*, para 132.

203. See Becker, "Migration und soziale Sicherheit – Die Unionsbürgerschaft im Kontext", (2007) *Europarecht* special issue 99–103; F. de Witte, op. cit. *supra* note 138, 706–707; Schönberger, op. cit. *supra* note 109, 407–432; and O'Brien, op. cit. *supra* note 199, 646–650.

including its nature and purpose".[204] In the application of the "real link/integration" formula, Member States may, for instance, establish a distinct (and stricter) set of criteria for supplementary pension schemes, which newcomers could claim in exceptional circumstances only.[205] In contrast, child benefits may have to be granted more easily, considering that children – unlike pensioners – cannot typically be expected to have contributed much to society.[206] The "integration/real link" formula does not stand in the way of such differentiation. To say that anyone should be viewed as fully integrated after three months of residence is too simple.[207]

On this basis, it would be up to the Court to specify the precise conditions for inclusion, consequently fine-tuning the relative weight of the "residence model" and the "integration model" discussed earlier.[208] For this purpose, access to outright financial subsistence support (social assistance *sensu stricto*) will be of crucial political and conceptual importance, since it touches the heart of the welfare State. In this respect, *Dano* is a powerful reminder that those without a right to reside under EU law cannot claim transnational solidarity in the State of residence in the first place. While this outcome can be defended from the perspective of Article 21 TFEU, which never promised unconditional mobility, the Court should have explained it better, arguably, from the perspective of both Union citizenship and the Charter of Fundamental Rights.[209] It did not elaborate, in particular, why Article 34(2) of the Charter did not influence the interpretation of Article 21 TFEU and Directive 2004/38.[210] If it had done so, this would have allowed it to explain the vision of social justice underlying the *Dano* ruling.

This brings us back to the theoretical distinction between the "residence model" and the "integration model" discussed above, which showed that the interpretation of free movement rules has wider repercussions for European integration. It is about more than the technical finesse of doctrinal

204. Case C-75/11, *Commission* v. *Austria*, para 33; see also Dougan, op. cit. *supra* note 116, 152–157; and Dougan and Spaventa, op. cit. *supra* note 71, 208–210.

205. It could embrace a range of factors, such as education or work, prior periods of residence, contributions to the mandatory pension system, family links, language skills, etc.

206. See Art. 24 Charter of Fundamental Rights; and F. de Witte, op. cit. *supra* note 188, 210–212.

207. *Contra* Van Overmeiren et al., op. cit. *supra* note 42, 15 and 49; and Husmann, "Reaktionen in der Freizügigkeits-RL 2004/38", (2009) *Neue Zeitschrift für Sozialrecht*, 656; recall also that the Case C-400/12, *G*, considers strict time-limits in Directive 2004/38/EC to be a proxy for abstract integration criteria, incl. qualitative factors.

208. On the incremental approach in developing coherent judicial positions, see Kostakopoulou, op. cit. *supra* note 107, 262–281.

209. See Thym, op. cit. *supra* note 175; and Nic Shuibhne, op. cit. *supra* note 52, 75–76.

210. Instead, it interpreted these provisions autonomously and considered the Charter only in the – convincing – response to the fourth question, that without free movement the Charter does not apply; see Case C-333/13, *Dano*, paras. 85–92.

interpretation; it reflects and expresses the Court's vision of the values underlying the integration process and its effects upon our societies – and the "integration/real link" formula serves as a projection sphere of the corresponding vision of social justice.[211] Against this background, the uncertainty underlying the Court's case law can also presented as a conceptual hesitation how to accommodate transnational mobility and the welfare State, reflecting a general difficulty of the supranational institutions to develop a coherent approach towards value judgments.[212] In *Dano*, the Court opted for a clear-cut answer but it will soon face similar choices in other scenarios, in which its approach towards the evolution of the "integration/real link" formula will define the values underlying free movement.

8. Conclusion

Free movement has become a disputed issue, and the status of citizens who are not economically active is at the heart of legal, political and conceptual debates. This article set out to highlight underlying tensions and to show possible ways forward. Persisting uncertainties can be traced back to the indecisiveness of the legislature, which failed to establish clear standards for the free movement of the economically inactive. Directive 2004/38 contains internal discrepancies, which shifted the responsibility to distil a coherent concept onto the Court. Judges confronted the challenge in the *Brey* and *Dano* judgments, which distinguished the free movement regime from social security coordination and asserted that those without a residence right cannot claim equal treatment under EU law. In cases of doubt, the "unreasonable burden" formula determines whether citizens with scarce resources have a right to free movement. This solution provides us with clear guidance at an abstract level, although the definition of (un-)lawful presence and the application of non-discrimination rules remain ambiguous for three reasons.

Firstly, recent and earlier case law exhibits two alternative ways how to assess whether citizens present an "unreasonable burden" on host societies, which would entail the loss of free movement rights under Article 7(1)(b) of Directive 2004/38. We have to distinguish between a systemic approach and an individual assessment, which often leads to different conclusions; this contribution maintained, on the basis of case law, that the focus on the

211. See F. de Witte, op. cit. *supra* note 138; Barbou des Places, op. cit. *supra* note 139; and Azoulai, "L'autonomie de l'individu européen et la question du statut", in Kessedjian (Ed.), *Autonomie en droit européen* (Editions Panthéon-Assas, 2013), pp. 187–205.

212. Cf. Williams, *The Ethos of Europe* (CUP, 2011).

individual circumstances of citizens prevails as the demarcation line between lawful and unlawful residence.

Secondly, access to social benefits will ultimately depend on the handling of the "real link/integration" formula in the application of non-discrimination rules. It remains the responsibility of the Court to develop clear patterns guiding the domestic resolution of specific cases. By doing this, judges will decide about the limits of social solidarity towards transnational migrants, which have often in the past remained elusive.

Thirdly, it is a classic position of EU law that free movement rights are acquired and lost automatically and the economically inactive are no exception. The right to reside is lost whenever someone fails the "unreasonable burden" test, does not qualify as jobseeker any longer, or stops working. Against this background, the inherent flexibility of the legal thresholds results in legal uncertainty in borderline cases, if citizens cannot be sure whether the requirements are met.

In assessing different legal questions and the future evolution of free movement law, it is important to understand that legal rules, institutional practice and academic accounts reflect divergent theoretical visions on how to perceive EU citizenship and the limits of solidarity. While some rules, actors and commentators propagate a "residence model" that construes residence-based locality as the boundary between outsiders and insiders, others move towards an "integration model" that accentuates the value of social cohesion and requires newcomers to develop a certain degree of societal bonds before they can claim equal access to all social benefits. In *Brey* and *Dano*, the Court made a decisive step towards the second model by emphasizing the limits and conditions, upon which the not quite so "fundamental" status of Union citizenship continues to be built.