Articles

The Social Dimension of EU Citizenship – A Castle in the Air or Construction Gone Wrong?

By Tina Oršolić Dalessio [*]

A. Introduction

This year is designated the "European Year of Citizens".[1] It marks the 20th anniversary of the establishment of the European Union citizenship under the Treaty of Maastricht.[2] It is important to ask what exactly will be celebrated on this occasion. Specifically, which rights did the European peoples gain by virtue of their so-called *fundamental status* of EU citizenship,[3] and were the guarantees embedded in those rights satisfactory? This article will address these questions by focusing on the social rights[4] field, a field which has been dramatically affected by the development of the European Union citizenship concept.[5]

In order to determine the extent to which EU citizenship played a role in the expansion of citizens' social rights, the analysis will focus on the rights of non-economic EU migrants.[6]

[*] Doctoral researcher in European law at Maastricht University; teaching assistant at the University of Zagreb, Faculty of Law. I would like to thank Monica Claes and Miguel Poiares Maduro for their valuable comments on earlier drafts of this paper. All errors and opinions remain my own. Email: tinaorsolic@gmail.com.

[1] *See* European Parliament, European Year of Citizens: raising awareness of EU citizens' rights**,** EUROPEAN PARLIAMENT NEWS (3 September 2012), available at: http://www.europarl.europa.eu/news/en/pressroom/content/20120903IPR50346/html/European-Year-of-Citizens-raising-awareness-of-EU-citizens%27-rights (last accessed: 27 June 2013).

[2] *See* Viviane Reding, *Proposing 2013 as the "Year of European Citizens"*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/commission_2010-2014/reding/multimedia/news/2011/08/20110811_en.htm (last accessed: 27 June 2013).

[3] As proclaimed by the Court of Justice of the European Union ("CJEU"), "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for"; Case C-184/99, Grzelczyk, 2001 E.C.R. I-6193, at para. 31.

[4] The reference to "social rights'" used in this paper primarily concerns the rights of Union citizens to access social benefits (mainly non-contributory ones) in other Member States. Since this paper analyzes precisely the expansion of those kinds of social rights of Union citizens, my subsequent uses of terms such as "the field of social rights", "the area of social policy", "the social/welfare field" etc., will also refer to this limited notion of social rights and, more generally, social policy.

[5] DAMIAN CHALMERS *ET AL.,* EUROPEAN UNION LAW: TEXT AND MATERIALS 597 (2006).

[6] Since economic EU migrants were assimilated into the welfare society of their host Member States even prior to the introduction of Union citizenship, this concept seems to have added little to their rights; Michael Dougan &

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This article will thus revisit and examine the limitations of the relevant case law and legislation elaborating on the *Martínez Sala* rule,[7] whereby EU citizens lawfully resident in host Member States have been granted the right to equal treatment in accessing social benefits. Ultimately, the goal of the analysis will be to evaluate legal developments in the social rights field, and to evaluate their implications for the overall construction of the social dimension of EU citizenship.

The analysis will show that the legal contours of this aspect of European integration have been thus far defined rather arbitrarily. The social rights of EU citizens have come about mainly as a consequence of a continuing balancing exercise between the goal of promoting the freedom of movement and solidarity at the EU level, and the goal of preserving the financial interests of Member States and their social security systems. Over the course of time, this approach has generated no clear "winners" or "losers", making it impossible to predict future trends or dynamics in the development of the social dimension of EU citizenship. At best, one can conclude that the evolution of the concept of Union citizenship in this field has so far been a product of random political bargaining[8] and a case-by-case approach driven by balancing, rather than a comprehensive strategy for defining social rights of EU citizens.

It will be argued that this way of approaching legal developments in the social rights field is less then satisfactory. It shows a clear reluctance, by both the Union legislator and the Court of Justice of the European Union ("the CJEU"), to comprehensively address the evolvement of social rights of EU citizens. As a consequence of this approach, the social dimension of EU citizenship is today marked by a lack of coherency, legal certainty and legitimacy. This, in turn, makes it difficult for the Union citizenship to live up to its assigned role of the *fundamental status* of the Member States' nationals.

Eleanor Spaventa, *Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC*, 28(5), EUR. L. REV. 699, 700 (2003). This paper will thus focus on the right of access to benefits of economically inactive migrant Union citizens. This category of persons includes pensioners and self-sufficient persons, previously covered by Directives 90/364/EEC and 90/365/EEC, and students, previously covered by Directive 93/96/EEC.

[7] Case C-85/96, Martínez Sala, 1998 E.C.R. I-2691.

[8] *See further* MIGUEL POIARES MADURO, *Europe's Social Self: The Sickness Unto Death*, *in* SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION 337, 340, 342 (Jo Shaw ed., 2000).

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B. Two Steps Forward - Establishing the Rule on Equal Treatment of EU Citizens

At the time the concept was first introduced in EU law, it was clear that the right to free movement was at the nucleus of EU citizenship[9] and that citizenship rights became relevant mainly when EU citizens travelled abroad[10]. What was not clear, however, was the precise content and meaning of citizenship rights. While some of the works published in this period expressed skepticism about the prospect of expanding citizenship rights beyond those explicitly conferred by the Treaty[11], others quite convincingly predicted the expansion of citizenship rights, especially the role that the right to non-discrimination on grounds of nationality would play. Today, this right is provided by Article 18 of the Treaty of the Functioning of the European Union (TFEU).[12]

Shortly after these predictions were made, the CJEU confirmed that they were correct. It was in *Martínez Sala*[13], one of the Court's groundbreaking decisions, that the CJEU clarified the role of the right to non-discrimination in relation to citizenship rights. By interpreting the right to reside and move freely, now provided by Article 21 of the TFEU, in conjunction with the right not to be discriminated against on grounds of nationality, which is now provided by Article 18 of the TFEU, the Court established a new rule. This rule provided that EU citizens lawfully resident in a Member State other than that of their origin, have the right not to be discriminated on grounds of nationality, in all situations falling within the scope of EU law.[14]

Not only was this the first time that the CJEU relied directly on the provisions concerning EU citizenship, but it was also the first instance in which it revealed the potential of this

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[9] *See id*. at 332; Michelle Everson*, The Legacy of the Market Citizen*, *in* NEW LEGAL DYNAMICS OF THE EUROPEAN UNION 73 (Jo Shaw & Gillian More eds., 1995); Jo Shaw, *Citizenship of the Union: Towards Post-National Membership?*, *in* COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 1995, VOL. VI, BOOK 1 246 (The European University Institute ed., 1998); David O'Keeffe, *Union Citizenship*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 93 (David O'Keeffe & Patrick Twomey eds., 1994); MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION 18 (2002).

[10] *See* Jo Shaw, *The Interpretation of European Union Citizenship* 61(3) M.L.R. 293, 298 (1998); *see also* Catherine Jacqueson, *Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship*, 27 EUR. L. REV. 260, 279-281 (2002).

[11] *See for example*, Hans Ulrich Jessurun d'Oliveira, *European Citizenship: Its Meaning, Its Potential*, *in* EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION? 141 (Renaud Dehousse ed., 1994). Reich observed that Union citizenship has remained a metaphor and that it is yet to be seen whether it can become a genuine source of rights; Norbert Reich*,* UNION CITIZENSHIP: METAPHOR OR SOURCE OF RIGHTS? 7(1) EUR. L. J. 4*,* 23 (2001).

[12] *See* Shaw, *supra* note 10, at 298 and Shaw, *supra* note 9 at 247-8; *see also* SÍOFRA O'LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP 16, 104-105, 118, 134 (1996).

[13] Martínez, *supra* note 7.

[14] *Id*. at para 63.

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legal concept.[15] Some even claimed that, by this revolutionary decision, the Court finally put an end to the unequal treatment of Union citizens based on their economic status.[16]

Looking to the facts of the case, *Martínez Sala* concerned Mrs. Martínez Sala, a Spanish national, who sought access to a child-raising allowance in Germany, her host Member State. The question at issue was whether she could rely on Article 18 of the TFEU to claim equal treatment with the host Member State's nationals in access to this non-contributory social benefit.

In order for Mrs. Martínez Sala to be able to rely on the principle of equal treatment provided by Article 18, her situation had to fall within the material and personal scope of EU law. Since the benefit in question constituted both a social advantage within the meaning of Article 7(2) of Regulation 1612/68, and a family benefit within the meaning of Article 4(1)(h) of Regulation 1408/71, the CJEU found that Mrs. Martínez Sala's situation indeed fell within the material scope of EU law.[17] Somewhat curiously, this conclusion was reached even though it was not certain whether the conditions for the application of these Regulations were fulfilled - that is, whether Mrs. Martínez Sala could be regarded as a worker or an employee.[18] Regarding the personal scope of EU law, the Court found that as a national of a Member State lawfully residing in the territory of another Member State, Mrs. Martínez Sala fell within the scope *ratione personae* of the Treaty provisions on EU citizenship.[19]

The Court proceeded to conclude that, since Article 20 of the TFEU attaches to the status of the EU citizen rights and duties laid down by the Treaty, including the right not to be discriminated on grounds of nationality provided by Article 18 TFEU, any EU citizen lawfully resident in the host Member State can rely on Article 18 to claim equal treatment in situations falling within the scope of application *ratione materiae* of the Treaty.[20] This reading of Articles 18 and 21 of the TFEU, which significantly expanded the scope of EU law, was not only seen as a broad and generous interpretation, but also as a major novelty in the CJEU's approach, which is difficult to square with some of the earlier case law.[21]

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[15] Jacqueson, *supra* note 10, at 264.

[16] *Id*.

[17] Martínez, *supra* note 7, at paras 26-7.

[18] Jacqueson, *supra* note 10, at 265; *see further*, Sybilla Fries & Jo Shaw, *Citizenship of the Union: First Steps in the European Court of Justice*, 4(4) EUR. PUB. L. 544*,* 543 (1998).

[19] *Id*. at para 61.

[20] Martínez, *supra* note 7, at paras 62-3.

[21] Namely, with its judgment in: Case 316/85, Lebon, 1987 E.C.R. 2811, in which the Court "appeared to set strict limits upon the scope of equal treatment principle for those without independent means unless they were the

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Still, at the time, doubts were expressed as to whether this rule would stick or whether the *Martínez Sala* judgment was, in fact, closely tied to the circumstances of this case, and thus not enunciating a lasting legal principle.[22] Shortly after, these doubts were cast away by the Court's ruling in the *Grzelczyk* case[23], where the *Martínez Sala* rule was confirmed and further clarified.

In *Grzelczyk*, the Court analyzed whether Articles 20 and 18 of the TFEU precluded national legislation which made the entitlement to a minimum subsistence allowance (a non-contributory benefit referred to as "*minimex*"), in the case of nationals of Member States other than the host state, conditional on their falling within the scope of Regulation 1612/68, when no such condition applied to nationals of the host Member State.[24] Concretely, it was analyzed whether and on which basis Mr. Grzelczyk, a French student studying and lawfully residing in Belgium, could successfully challenge the decision of the Belgian authorities withdrawing the payment of *minimex*, because he did not meet the required condition of being a worker within the meaning of Regulation 1612/68.

Since the requirement imposed by the Belgian legislation clearly constituted discrimination on the ground of nationality[25], the Court considered whether a person such as Mr. Grzelczyk could rely on Article 18 to claim equal treatment with Belgian nationals in accessing the benefit in question. It was in relation to this question that the CJEU reaffirmed its *Martínez Sala* ruling.

In particular, the Court stated once more that an EU citizen, lawfully resident in a host Member State, can rely on what is now Article 18 of the TFEU, in all situations which fall within the scope *ratione materiae* of EU law.[26] Yet, unlike in *Martínez Sala*, the Court developed a more comprehensive line of reasoning and clarified that situations which fall within the material scope of EU law "include those involving the exercise of fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State"[27].

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dependants of migrant workers themselves"; Fries & Shaw, *supra* note 18, at 550; *see further*, Jacqueson, *supra* note 10, at 265-6.

[22] *See* Fries & Shaw, *supra* note 18, at 558-9; *see further,* Jacqueson, *supra* note 10, at 269.

[23] Grzelczyk, *supra* note 3.

[24] *Id*. at para 19.

[25] *Id*. at para 29.

[26] *Id*. at para 32.

[27] *Id*. at para 33.

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This line of reasoning was used by the Court in a number of cases, including *Grzelczyk*, to depart from its settled case law and to bring within the material Treaty's scope certain benefits previously excluded. In *Grzelczyk*, the Court found that assistance given to a student for maintenance and studies in the form of a non-contributory social benefit *minimex* fell within the substantive Treaty scope.[28] This finding was subsequently confirmed in the *Trojani* case.[29] In the cases *Bidar* and *Förster*, analyzed below, the Court found that *maintenance student assistance* constituted a benefit covered by the scope *ratione materiae* of EU law.[30] Finally, in its recent decision *Commission v Austria*, the Court found that *reduced transport fares* for students come within the scope of the Treaty insofar as they enable students, directly or indirectly, to cover their maintenance costs.[31]

In all these instances, the Court departed from its earlier case law where it had held that assistance given to students for maintenance and training falls, in principle, outside the scope of the Treaty for the purposes of Article 18.[32] This kind of interpretation of Treaty provisions has, in turn, played in favor of expanding non-economic migrant EU citizens' social rights, as it allowed these citizens to claim equal treatment in accessing benefits previously excluded from the material Treaty scope. Some accordingly referred to it as the Court's "pro-integrative approach".[33]

All in all, the reaffirmation and application of the *Martínez Sala* reasoning in *Grzelczyk* suggested that the established rule on equal treatment covered not only non-workers, but also students who study in a Member State other than that of their origin. In fact, it was emphasized by the Court that the fact that a Union citizen pursues university studies in a Member State other than that of his origin cannot, in and of itself, deprive him of the

[28] *Id*. at paras 33-35.

[29] Case C-456/02, Trojani, 2004 E.C.R. I-7573, at para 42.

[30] Case C-209/03, Bidar, 2005 E.C.R. I-2119, at paras 37-48; Case C-158/07, Förster, 2008 E.C.R. 00000.

[31] Case C-75/11, Commission v Austria, 2012 E.C.R. 00000, at para 43. However, the Court also clarified that such transport costs for students do not come within the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38. According to the Court, this derogation from the principle of equal treatment provided for in Article 18 TFEU requires a narrow interpretation, which, more concretely, means that only maintenance aid for studies 'consisting in student grants or student loans' come within its scope: *Id.* at paras 54, 55.

[32] *See* Case 197/86, Brown, 1988 E.C.R. 03205, at para 18; *see also,* Case 39/86, Lair, 1988, E.C.R. 03161, at para 15. In these cases, the Court has pointed out that student assistance falls within the scope of EU law only in so far as it is intended to cover registration and other fees, in particular tuition fees, charged for access to education. *See,* Lair*, supra* note 32, at para 16; *see,* Brown, *supra* note 32, at para 17.

[33] *See* Jacqueson, *supra* note 10.

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possibility of relying on the prohibition of discrimination on grounds of nationality laid down in Article 18 of the TFEU[34].

Apart from restating the reasoning laid out *Martínez Sala* based on the reading of Articles 18 and 21 in conjunction,[35] the Court also proclaimed one of its famous phrases, later repeated as a mantra in the subsequent cases concerning citizenship rights.[36] It stated: "Union citizenship is destined to be *the fundamental status* of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for"[37].

At that point, a general rule seemed to have been established. This rule, later relied on by the CJEU in a number of cases[38], can be summarized in terms of a simple formula:
EU citizenship plus lawful residence in a host Member State plus a situation within the scope *ratione materiae* of EU law equals access to Article 18 equal treatment guarantee. According to some, this rule established "something close to a universal non-discrimination right including access to all welfare benefits", by which the Court removed an important barrier to "welfare tourism".[39]

Admittedly, the application of this rule *did* limit the Member States' regulatory power in the area of social policy. By extending access to certain social rights to Union citizens in their host Member States, EU law placed upon the Member States a requirement to ensure an effective exercise of those rights in their territory. This implied not only the need to adjust existing national legal practices and norms so as to ensure the full effectiveness of the EU social guarantees, but also the related requirement not to enact any new laws that could jeopardize or obstruct the future exercise of EU citizens' social rights. Both of these requirements seemed to diminish the operative capacity of national authorities in the social policy field. The existence of this rule in EU law, thus, suggested that national institutions were no longer free to do as they pleased when it came to regulating access to

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[34] Grzelczyk, *supra* note 3, at para 36.

[35] *Id*. at paras 30, 32, 37.

[36] Robin White, *Free Movement, Equal Treatment, and Citizenship of the Union*, 54 INT'L & COMP. L. Q. 885, 887 (2005). *See also* GRÁINNE DE BÚRCA & PAUL CRAIG*,* EU LAW: TEXT, CASES AND MATERIALS 848 (4th ed. 2008).

[37] Grzelczyk, *supra* note 3, at para 31. Emphasis added.

[38] *See for example*, Trojani, *supra* note 29, Bidar, *supra* note 30, and Förster, *supra* note 30.

[39] Jacqueson, *supra* note 10, at 267. Welfare tourism is understood here as "movement undertaken for the sole purpose of exploiting a more generous welfare system of another Member State". DERRICK WYATT *ET AL.*, WYATT AND DASHWOOD'S EUROPEAN UNION LAW 666 (5th ed. 2006).

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social benefits of non-economic migrants from other Member States in their state territory.

Yet, the Member States were not left entirely powerless in restricting the access of Union migrants to their welfare systems and, consequently, in protecting their financial systems. On the contrary, over the course of time, they were provided with several defense mechanisms, defined in EU legislation and the CJEU's subsequent case law. These defense mechanisms enabled the Member States to "escape", to a certain extent, the consequences of the newly established rule, thereby limiting access of non-economic migrant EU citizens to social benefits.

In order to come to a better understanding of these derogations to the established equal treatment guarantee, the following section will analyze the relevant case law and legislation. This will be done in order to assess the true extent of the expansion of citizens' social rights and the limitations imposed on the freedom of the Member States to regulate access to their welfare systems. Such an analysis will provide valuable insights into the ways in which the Union legislator and the CJEU have thus far defined the scope and the content of the social dimension of EU citizenship. It will show that this aspect of European integration was defined primarily on the basis of random political bargains and on a case-by-case approach driven by balancing, rather than a comprehensive strategy for addressing developments in the social policy field. This has, in turn, lead to a lack of coherency, legal certainty and legitimacy in the development of social rights for EU citizens.

C. One Step Back - Defining the Limitations of the Equal Treatment Guarantee

The "general rule" of equal treatment of EU citizens lawfully residing in a Member State, other than the one they originated from, provides that these citizens will be afforded the same rights on the same terms as host Member State nationals in accessing social and other benefits, so long as their situation falls within the material Treaty scope. This rule, established and repeatedly relied upon in the CJEU's case law, was also inserted in Article 24 of Directive 2004/38. Accordingly, Article 24(1) of the Citizens' Rights Directive now provides that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty".

An important question to ask is what limits exist regarding this equal treatment guarantee for non-economic migrants in the current context of European integration. Are there any situations in which the Member States can lawfully deny non-economic migrants equal treatment, even if all of the preceding elements of the equation summarizing the "general rule" have been satisfied? If so, what exactly do derogations to equal treatment consist of, and what are the limitations in their application?

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First, regarding the precise meaning of the equal treatment principle, it should be noted that along with the so-called direct or overt discrimination grounds of nationality, EU law also prohibits all forms of indirect or covert discrimination which, by applying other distinguishing criteria, lead in fact to the same result.[40] However, this right is not guaranteed in absolute terms. It can be subject to certain exceptions, which are recognized in Article 24 of Directive 2004/38.

Two exceptions to the equal treatment guarantee are immediately apparent from Article 24(2) of Directive 2004/38. First, this provision provides that host Member States are not obliged to confer entitlement to social assistance during the first three months of residence. Second, Article 24(2) provides that host Member States are not obliged, "prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families". This later derogation of the right to equal treatment, in turn, seems to represent an equivalent of the *genuine link* requirement, a defense mechanism established by the CJEU in cases concerning jobseekers,[41] and later replicated in cases concerning non-economic migrant Union citizens.

The *genuine link* requirement essentially represents a permissible justification of what would otherwise be direct or indirect discriminatory behavior. In justifying such discrimination prohibited by EU law, the Member States are free to invoke this requirement, which aims at ensuring a sufficient degree of connectedness between the host state and the applicant seeking the benefit. Therefore, the *genuine link* requirement is suitable for protecting the Member State's public finances from unreasonable intrusions from abroad.

[40] *See for example*, Bidar*, supra* note 30, at para 51, citing Case 152/73, Sotgiu, 1974 E.C.R. 153, at para 11, Case 57/96, Meints, 1997 E.C.R. I-6689, at para 44, and Case 212/99, Commission v Italy, 2001 E.C.R. I-4923, at para 24. *See further*, ANNE PIETER VAN DER MEI, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY: CROSS-BORDER ACCESS TO PUBLIC BENEFITS 74-77 (2003).

[41] *See* Case C-224/98, D'Hoop, 2002, E.C.R. I-6191, Case C-138/02, Collins, 2003, E.C.R. I-2703, and Case C-258/04, Ioannidis, 2005 E.C.R. I-08275. Jobseekers enjoy a special status under EU, which in fact places them in the category of economic migrants within the meaning of Article 45 of the TFEU: *see* Collins, *supra* note 41, Ioannidis*, supra* note 41, and joined Cases C-22/08 & C-23/08, Vatsouras and Koupatantze, 2009 E.C.R. 00000. However, even though they can rely on this Article to claim equal treatment in access to benefits intended to facilitate access to employment, their right to equal treatment is subject to certain limitations and they are not considered as workers within the meaning of Regulation 1612/68 when they move to a host Member State in search for work: *see* case C-138/02 Collins, at paras 26-33. In that respect, it can be claimed that, even though they do constitute economic migrants, they resemble to a certain extent to non-economic migrant EU citizens, as they share certain important limitations in access to social benefits.

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Yet, according to the CJEU, national measures applying the *genuine link* requirement must be appropriate and proportionate.[42] National measures must not go beyond what is necessary for national authorities to satisfy themselves that the applicant in question is in fact "genuinely linked" to a host state.[43] The application of such a requirement by the national authorities also must rest on clear criteria known in advance, and judicial means of redress must be made available.[44]

What this means concretely, in cases concerning non-economic EU migrants, was for the first time analyzed by the Court in *Bidar*[45]. In this case, the CJEU dealt with the question of whether EU law, particularly the principle of equal treatment enshrined in Article 18, precluded UK legislation from making entitlement to student maintenance assistance conditional on a three year prior residency requirement in the UK, as well as a requirement of being "settled" in the UK[46].

In answering this question, the Court started with the observation that the requirements in question risk placing nationals of other Member States at a disadvantage, as both of these requirements are likely to be more easily satisfied by UK nationals.[47] Such differences in treatment can be justified only if they are based on objective considerations which are independent of the nationality of the persons concerned, and are proportionate to the legitimate aim pursued by the national provisions.[48]

Regarding a possible justification of the unequal treatment in question, the Court observed that although Member States must, in the organization and application of their social assistance systems, show "a certain degree of financial solidarity" with nationals of other Member States, it is permissible for a host Member State to ensure that the grant of assistance to cover the maintenance costs of foreign students does not become *an unreasonable burden*, which could have consequences for the overall level of assistance granted by that State.[49] It is thus legitimate for a Member State to only grant the assistance

[42] *See* Förster, *supra* note 30, at paras 52, 53.

[43] *Id*. at para 53.

[44] *Id.* at para 56.

[45] Bidar, *supra* note 30.

[46] Under the UK legislation, the person is settled in the UK if he/she is ordinarily resident there without being subject to any restriction on the period for which he may remain in the territory. As became clear from the national case law submitted to the Court, this requirement is impossible of being satisfied by nationals of other Member States in their capacity as students: *Id.* at paras 17-18.

[47] *Id.* at para 53.

[48] *Id.* at para 54.

[49] *Id.* at para 56.

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covering maintenance costs to students who have demonstrated *a certain degree of integration* into the society of the host Member State.[50] Such *a genuine link* with the host Member State's society can, in the Court's opinion, be established by finding that the student in question has resided in the host state for a certain length of time.[51]

As for the concrete requirements imposed by the UK legislation, the Court found that both the "three years of previous residence" requirement and the requirement of being settled in the UK corresponded to the legitimate aim in question. Yet, while the requirement of prior residence was considered to be justified, this was not the case when it came to the requirement of being settled in the territory of the UK. The fact that the criterion of being "settled" in the UK can never be satisfied by nationals of other Member States in their capacity as students was the basis for the Court's conclusion.[52] Thus, by imposing such a requirement, the national legislation prevented all students from other Member States, including those who have already established a genuine link with the host Member State society, from enjoying the right to student maintenance assistance.[53] For that reason, the Court concluded that such treatment could not be justified by the legitimate aim pursued by the national rules, and was thus contrary to the Article 18 equal treatment guarantee.[54]

What follows is that the *genuine link* requirement can provide a basis for the justification of unequal treatment that would otherwise amount to *indirect* discrimination. Soon after *Bidar*, the Court confirmed that this requirement could also be used as a justifiable criterion in cases concerning unequal treatment that would otherwise amount to *direct* discrimination.

The first, and so far the only example of this interpretation can be found in the case *Förster*[55], which like *Bidar*, concerned the rights of students in accessing educational

[50] *Id.* at para 57. This implies that the legitimate aim justifying the unequal treatment in question is that of protecting the Member State's public finance from unreasonable burdens from abroad. See the Opinion of AG Sharpston in Case C-542/09, Commission v Netherlands, at para 84.

[51] Bidar*, supra* note 30, at para 59.

[52] *Id.* at paras 18, 61.

[53] *Id.* at paras 61, 62.

[54] *Id.* at para 63. Unfortunately, it does not seem entirely clear on which step of the proportionality test did this requirement fall. What seems to emerge from the Court's reasoning is that the measure has fallen because it is too narrowly tailored (since it excluded from access to the benefit already integrated foreign students) and is, thus, incapable of achieving the legitimate aim in question.

[55] Förster, *supra* note 30; *see also* Anne Pieter Van der Mei, *Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid,* 16 MAASTRICHT J. OF EUR. & COMP. L. 494 (2009); and Síofra O'Leary, *Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance*, 34(4) E.L. REV. 612, 621-622 (2009). However, AG Sharpston does not seem to share that opinion. *See* Case C-73/08, Bressol, 2010 E.C.R. 00000, at paras 128- 129; *see also* Case C-542/09,

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benefits. In *Förster*, the question raised was whether the principle of equal treatment enshrined in Article 18 precluded the Dutch national legislation which made entitlement to student maintenance grants for non-economic Union citizens who were nationals of other Member States conditional on a five year continuous residency requirement in the host state territory.

In assessing whether such a direct discriminatory requirement complied with EU law, the Court reasserted that it is legitimate for the Member State to ensure that the grant of student assistance *does not become an unreasonable burden* for the host state's public finances and to grant such benefits only to those students who have established *a certain degree of integration* with the host Member State's society.[56] Furthermore, the Court reiterated that the existence of the required degree of integration may be established by finding that a student seeking the benefit has resided in the host Member State for a certain length of time.[57]

The Court then proceeded to analyze whether the five year residency requirement could justify the objective of ensuring that students who are nationals of other Member States have a sufficient degree of integration with the host Member State's society. In other words, the analysis confirmed that a case of direct discrimination on grounds of nationality could be justified by the same *genuine link* requirement previously employed in cases concerning indirect discrimination. In order to be justified, however, the condition in question was required to be appropriate and proportionate to the legitimate objective pursued by the national provisions.[58] It must not go beyond what was necessary to attain the objective pursued and it must be applied by the national authorities on the basis of clear criteria known in advance.[59]

Commission v Netherlands*,* 2012 E.C.R. 00000*,* at para 83. Neither the Court's judgment in the case *Bressol,* nor the one in *Commission v Netherlands* seem to provide any clarification in that respect.

[56] *Id.* at paras 48, 49. Contrary to the Court's reasoning in *Bidar* and Cases C-11 and 12/06 *Morgan and Bucher* [2007] E.C.R. I-8507 (para 43), these paragraphs in *Förster* seem to suggest that ensuring integration of the student is not merely a *means* of avoiding the collapse of the social scheme due to its financial cost, but *a legitimate objective of its own*. They thus raise some doubt as to what are the means and what are the ends. *See* Van der Mei, *supra* note 53, and the Opinion of AG Sharpston in Case C-542/09 *Commission v Netherlands*, para 85. The Court's subsequent *Stewart* judgment is also somewhat ambiguous it this regard, though it eventually seems to confirm that establishing a degree of connection with the host Member State society should be treated as a *means* to pursue the legitimate objective of averting an unreasonable financial burden. *See* Case C-503/09, Stewart, 2011 E.C.R. I-0000, at paras 89, 90, 103, 108. The same conclusion seems to derive from the judgment in Case C-542/09, Commission v Netherlands, 2012 E.C.R. 00000, at paras 59, 60 and Case C-75/11, Commission v Austria, 2012 E.C.R. 00000, at paras 60, 61.

[57] Förster, *supra* note 30, at para 50.

[58] *Id.* at paras 52-53.

[59] *Id.* at paras 53, 56.

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In assessing whether the case at hand complied with these EU legal requirements, the Court found that the condition limiting assistance to students with five years of prior residence in the host Member State's territory constituted an appropriate measure for establishing a genuine link with the host state's society.[60] As far as the proportionality requirement was concerned, the Court concluded that the condition in question complied with the requirements of legal certainty and transparency, since it was clearly laid down in advance in the national legislation.[61]

Additionally, without seriously scrutinizing the condition in question, the Court was quick to conclude that a five year residency requirement was not excessive since it did not go beyond what was necessary to attain the objective pursued.[62] Moreover, to support its conclusion, the Court invoked Article 24(2) of Directive 2004/38. Although not applicable to the facts of this case, this provision also made the grant of student maintenance assistance conditional upon a five year lawful residence requirement for non-economic Union citizen students residing in the territory of a host Member State. The five year requirement, perhaps not coincidentally, exactly matched up with the time period required for acquiring the status of permanent resident in a host Member State.[63] Thus, the Court relied on the explicit derogation to equal treatment prescribed in the Citizens' Rights Directive to justify the case of direct discrimination before it.

This reasoning is quite indicative. It shows us that Article 24(2) derogation to equal treatment, which at first sight appears to be a separate defense mechanism, is in fact a mere reflection of the *genuine link* requirement.[64] This would suggest that both the *genuine link* requirement and the derogation to the principle of equal treatment on grounds of nationality prescribed in Article 24(2) of Directive 2004/38, for students who claim access to maintenance aid for studies, essentially represent the same defense mechanism.[65]

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[60] *Id.* at para 52.

[61] *Id.*, at para 56.

[62] *Id.* at para 54.

[63] *Id.* at para 55.

[64] This conclusion also seems to be deriven from the Court's reasoning in: Case C-542/09, Commission v Netherlands, 2012 E.C.R. 00000*,* at paras 63, 64. *See also Koen* Lenaerts, *European Union Citizenship, National Welfare Systems and Social Solidarity,* 18(2) JURISPRUDENCE 397, 401 (2011).

[65] Given the fact that the Court has drawn inspiration from the cases concerning jobseekers to introduce the *genuine link* requirement as a permissible justification of unequal treatment in the cases concerning students' access to maintenance assistance, it appeared that the same conclusion can be reached in relation to the *genuine link* requirement applicable to jobseekers and the derogation to equal treatment of jobseekers prescribed in Article 24(2). However, the joined Cases C-22/08 & C-23/08, Vatsouras and Koupatantze, 2009 E.C.R. 00000 seem to suggest that the *genuine link* requirement applied in the cases concerning the jobseekers' right to access social

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More importantly, the Court's lenient approach and the low level of scrutiny applied when assessing the proportionality of the national measure in question seem to indicate that, by upholding the five year residency requirement, the Court has shown a clear reluctance to second-guess the political process that had taken place at the Union level when the Citizens' Rights Directive was adopted. [66] Furthermore, such a refusal to subject the national measure in question to a more serious level of scrutiny seems to demonstrate that the Court has decided to backtrack its progressive interpretation of the concept of Union citizenship.[67]

What is left of Union citizens' social rights after the Court has assumed such a regressive approach? Can we truly speak of the "new models of social solidarity"[68] being generated at the Union level via the medium of EU citizenship, or would that seem greatly exaggerated and distant from reality after the *Förster* ruling?

To a certain extent, it seems that, by adopting such a reasoning, the Court has not only made a significant step back in developing the social rights of non-economically active Union citizens, but it has virtually stripped them of all the positive effects arising from the so-called *fundamental status* of Union citizenship. Yet, in order to answer these questions and to best depict the current *status quo* of EU citizens' social rights, one should also bear in mind that the *genuine link* requirement has so far been applied only to one category of non-economic Union migrants, namely students. Also, before drawing any overly pessimistic conclusions from the Court's case law, one should bear in mind the fact that the *genuine link* requirement remains surrounded with much ambiguity, which will hopefully be clarified by the Court in the near future.

In that regard, it remains to be seen whether national measures relying on Article 24(2) will be subject to the proportionality assessment or not. As discussed above, Article 24(2)

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benefits intended to facilitate employment and the Article 24(2) derogation to equal treatment of jobseekers covered by Article 14(4)(b) of Directive 2004/38 are not a reflection of one another. This follows from the Court's interpretation of Article 24(2), whereby it concluded that "benefits of a financial nature which […] are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38" (*see* Vatsouras and Koupatantze, *supra* note 65, at para 39). While it is yet to be seen exactly what kinds of benefits are covered by this Article, it seems quite clear that after this case we cannot refer to the part of Article 24(2) concerning jobseekers as a codification of the *genuine link* requirement developed by the Court in *D'Hoop*, *Collins* and *Ioannidis* in relation to access to jobseekers' allowances. *Also see* Lenaerts, *supra* note 64, at 404.

[66] *See* Van der Mei, *supra* note 55, at 489- 490; O'Leary, *supra* note 55, at 622-623; and Lenaerts, *supra* note 64, at 407.

[67] *See also* Van der Mei, *supra* note 55.

[68] This terminology is borrowed from Dougan & Spaventa, *supra* note 6, at 699, 704.

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seems to represent an equivalent of the *genuine link* requirement.[69] Accordingly, one might presume that the Court will continue to apply the same limitations to the Member States' action when they rely on the explicit derogation prescribed in this Article, as it did in the cases where the Member States have resorted to the *genuine link* requirement in order to justify discriminatory behavior. In other words, one might expect that in future cases where the Member States apply Article 24(2) derogation to equal treatment, their discretion will be limited by the application of the principle of proportionality, in the same way as it was in the cases described above.[70] However, the explicit reference to Article 24(2) made within the proportionality assessment in *Förster*, might suggest the opposite. It might indicate that, having upheld the five year residency requirement as proportionate, in particular given the existence of the equivalent requirement in EU law, the Court might regard any future national measures relying on Article 24(2) as automatically complying with the principle of proportionality, thereby making any further assessments of the validity of such measures superfluous.

Yet another open question is whether the CJEU's interpretation of the *genuine link* requirement as a justifiable criterion for unequal treatment, that would otherwise amount to direct discrimination, should be seen as an isolated case, or whether this sort of justification could be applied beyond cases covered by Article 24(2) of the Citizens' Rights Directive. In addition, it needs to be clarified what the exact meaning of the *genuine link* is, and which methods can be used to determine it. While the *genuine link* requirement has often materialized as the *length of residence* requirement, the Court made it clear that it may be interpreted more broadly, so as to encompass other representative elements of a genuine link between a claimant and the host Member State in question.[71] This is evident from the Court's reasoning in *Collins*, where it stated that the genuine link may be determined by establishing that a person concerned has, for a reasonable period, genuinely sought work in a host Member State.[72] This is also evident from the cases *Stewart*[73] and *Prete*[74], where the Court held that matters which can be inferred from the

[69] At least when it comes to students' rights. *See*, *supra*, note 65.

[70] For an additional argument regarding the application of the principle of proportionality to the Member State's action when relying on the explicit derogations in Article 24(2) of Directive 2004/38, *see* Michael Dougan, *The constitutional dimension to the case law on Union citizenship* 31(5) EUR. L. REV. 613 (2006).

[71] *See* Koen Lenaerts & Tinne Heremans*, Contours of a European Social Union in the Case-Law of the European Court of Justice,* 2 EU CONST 101*,* 107 (2006); and Lenaerts, *supra* note 64, at 418.

[72] Case C-138/02, Collins, 2003 E.C.R. I-2703, at para 70. *Also see* joined cases C-22/08 & C-23/08, Vatsouras and Koupatantze, 2009 E.C.R. 00000, at para 39.

[73] Case C-503/09, Stewart, 2011 E.C.R. I-0000.

[74] Case C-367/11, Prete, 2012 E.C.R. 00000. More specifically, the Court declared that "the existence of close ties, in particular of a personal nature, with the host Member State where the claimant has, following her marriage with a national of that Member state, settled and now habitually resides are such as to contribute to the

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family circumstances of a claimant of a benefit are capable of demonstrating the existence of a genuine link between the applicant and the host Member State.[75] Finally, this is evident from the recent case *Commission v Austria*, in which the Court clarified that the genuine link required between a student claiming a benefit and a host Member State need not be fixed in a uniform manner for all benefits, but should be established "according to the constitutive elements of the benefit in question, including its nature and purpose or purposes".[76]

In the specific case of *Commission v Austria*, this has led the Court to conclude that the existence of a genuine link for the purpose of the reduced transport fares for students could be ascertained, *inter alia*, by checking whether the person is enrolled at a private or public establishment, accredited or financed by the host Member State, for the principal purpose of following a course of study, including vocational training.[77] Conversely, granting reduced fares on public transport in principle only to students whose parents are in receipt of the host Member States' family allowances, was not considered by the Court as justified.[78]

It should be noted, however, that this part of the Court's judgment declaring the national measure in question incompatible with the Treaty provisions is not free from ambiguity. It is not clear whether the Austrian scheme was deemed unjustifiable because it was "too exclusive in nature";[79] because it "unduly favour[s] an element which is not necessarily representative of the real and effective degree of connection";[80] or because it was "set in a uniform manner" rather then "established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes".[81] Even though not entirely clear in itself, the Advocate General's Opinion in this case, on which the Court has heavily relied, seems to indicate that the measure in question has "fallen" because it is too excessive given the nature of the benefit, thus going beyond what it necessary to attain the

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appearance of a lasting connection between the claimant and the Member State in which she has newly established herself, including with the labor market of the latter". See para 50.

[75] *See id*.

[76] Case C-75/11, Commission v Austria*,* 2012, E.C.R. 00000*,* at para 63.

[77] Id. at para 64.

[78] Id. at paras 65, 66.

[79] *Id.* at para 62.

[80] *Id.*

[81] *Id.* at para 63.

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objective pursued.[82]

All in all, it remains to be seen what precisely will become of the *genuine link* requirement as an important defense mechanism left at the Member States' disposal. For now, one can conclude that even in situations where seemingly all conditions for access to equal treatment of non-economic EU migrants are fulfilled, ways still exist that allow the Member States to protect their welfare systems and, more generally, public purses.

D. Conclusion

In the past two decades, the evolvement of citizens' social rights has taken a direction neither intended by the Member States nor foreseen by those who participated in discussions about the meaning and the potential of the concept of EU citizenship. By interpreting the Treaty provisions on EU citizenship in conjunction with the freedom from discrimination on grounds of nationality to expand citizens' social rights, the CJEU has played an important role in defining the contours of what may be termed as "social citizenship"[83].

More generally speaking, via the medium of Union citizenship, European integration has been taken to a new level, comprising not only markedly economic features, but also social ones. This is yet another proof of the fact that the model of European integration is no longer restricted to purely economic integration. Rather, it increasingly shows signs of reorientation towards "political integration", in which a degree of social solidarity and a certain level of social rights protection are required as the consequence of membership in such a community, and not only as a means of securing a level playing field and fair competition.[84] This tendency "to rebalance the weight of market and non-market values" has been also confirmed in Articles 2 and 3 of the TEU, which make strong reference to values such as solidarity, social justice and protection, social cohesion and the well-being of the peoples of the Union.[85]

Yet, despite this more extended formulation of the basic values and goals of European integration and despite the initial expansive interpretation of the citizenship provisions, the above-described developments in this field seem to confirm that social rights of EU

[82] *See* Opinion of Advocate General Kokott in the Case C-75/11, Commission v Austria*,* 2012 E.C.R. 00000, at paras 75-77.

[83] The term is borrowed from Shaw, *supra* note 9.

[84] *See* Miguel POIARES MADURO, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, *in* THE EU AND HUMAN RIGHTS 466 (Philip Alston ed., 2000).

[85] Dragana Damjanovic & Bruno de Witte, *Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty* (EUI Working Paper LAW No. 2008/34, 25).

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citizens remain rather limited in scope and character. This is exemplified by the analysis of the defense mechanisms left at the disposal of the Member States, whereby the right to equal treatment in access to social and other benefits has been significantly circumscribed. Regardless the obligation of the Member States to comply with the principle of proportionality in the application of these defense mechanisms, the overall impression is that social rights and solidarity were not significantly expanded at the EU level. The main reason for such a reluctant approach in defining citizens' social rights seems to be the concern that the social assistance systems and public finances of Member States should not be unreasonably burdened .

By and large, this finding demonstrates that what was given to EU citizens by one hand, through the establishment of the general rule on equal treatment and the expansive interpretation of the material Treaty scope, seems to have been taken by the other, through derogations to the equal treatment guarantee. From the point of view of EU citizens, those whose rights are at stake, this development of the concept of EU citizenship seems rather unsatisfactory. Indeed, according to a number of recent surveys, Union citizens have expressed their strong desire to witness the provision of more meaningful social guarantees and more solidarity at the EU level.[86]

In addition, the identified *give and take* approach, whereby the Union legislator and the CJEU have defined the scope and content of social rights of EU citizens, is unsatisfactory for another reason. It shows that the social dimension of Union citizenship has been developed as a consequence of recurrent attempts to balance the goal of promoting free movement and solidarity across the Union, and the goal of safeguarding the Member States' welfare systems and public finances, without ever giving clear priority to either of

[86] In particular, this is reflected in the results of one of the recent surveys showing that the idea of solidarity, according to EU citizens, takes precedence over all other values and that "a unified social protection system between Member States would be the main factor in reinforcing the sense of being a European citizen". See the European Parliament Eurobarometer (EB Standard 70) - Autumn 2008 analysis, European Elections 2009, available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_303_synt_en.pdf (last accessed: 27 June 2013). Also *see* the European Parliament Eurobarometer (EB/EP 77.4) from 20 August 2012, titled 'Two years to go to the 2014 European elections', available at: http://www.europarl.europa.eu/aboutparliament/en/00191b53ff/Eurobarometer.html?tab=2012_4 (last accessed: 27 June 2013). The later survey also confirms that that tackling poverty and social exclusion is considered to be the first among the priority policies that Europeans want to see promoted by the European Parliament. Also see European Parliament Eurobarometer (EB/PE 76.3), Parlemeter - November 2011, available at: http://www.europarl.europa.eu/pdf/eurobarometre/2012/76_3/eb76_3_synthese_analytique_en.pdf (last accessed: 27 June 2013). Other indicative surveys, in this regard, are those on EU citizens' perception of the Europe 2020 strategy, which show that social measures continue to lead the ranking of initiatives, which are perceived as the most important. See the Standard Eurobarometer 75 - Spring 2011 analysis, Europe 2020 Report, available at: http://ec.europa.eu/public_opinion/archives/eb/eb75/eb75_eu20_en.pdf (last accessed: 27 June 2013) and the Standard Eurobarometer 76 - Autumn 2011 analysis, Europe 2020 Report, available at: http://ec.europa.eu/public_opinion/archives/eb/eb76/eb76_en.htm (last accessed: 27 June 2013). All of this seems to affirm the continuing desire of EU citizens to witness the expansion of solidarity and social rights at the EU level.

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them. Rather then being a product of a clear conception of social protection deserved by any European citizen,[87] social rights of Union citizens have thus far come about mainly as a consequence of a case-by-case approach driven by balancing and "*ad hoc* political bargains"[88].

This kind of approach in developing the social dimension of EU citizenship points to a more general conclusion. It shows that, at the EU level, there is a lack of perspective and plan for defining social rights attached to the so-called *fundamental status* of Union citizenship. Specifically, it confirms that there exists no agreement on the core set of European social values, no clear underlying rationale commanding social developments of the concept of EU citizenship, no criteria of distributive justice at the EU level and, in general, no idea of what the European social identity should consist of.[89] As a result, the precise path to be taken in relation to development of Union citizens' social rights is far from being determinate.

Some might argue that, given the nature of the social policy field, the perpetual and intrinsic conflict of goals needs no final resolution. Accordingly, engaging in the eternal process of balancing and striking random bargains represents exactly the kind of approach that is suitable in this area. From that perspective, the reluctance of both the CJEU and the Union legislator to ever give a clear priority to either of the opposing interests and aims is not only expected, but also a desirable way of addressing developments in the field of social rights.

It is true that the mentioned goals conflict is inherently tied to the social policy field, at least at the present stage of development of European integration where the Member States still constitute primary providers of welfare benefits. It does not automatically follow, however, that the assumed approach at the EU level should be regarded as suitable for defining the social dimension of the concept of European citizenship. Addressing this conflict of interests and goals on a case-by-case, *ad hoc* basis, with no clear idea as to desired or expected implications of this approach, has lead to several serious problems in the development of social rights of EU citizens.

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[87] *See* Maduro, *supra* note 8, at 337, 340, 342.

[88] This term is borrowed from Maduro (*Id*.) Emphasis added.

[89] Maduro has in that regard rightly argued that the European Union should no longer avoid dealing with this issue in a coherent manner and, in that sense, defining its "social self". See Id. For a similar argument, *see* Kay Hailbronner, *Union Citizenship and Access to Social Benefits,* 42 COMMON MARKET L. REV. 1245, 1267 (2005). Besides the fact that this is needed in order to complete the construction of the concept of Union citizenship, this requirement is also justified by the concern that the expansion of social rights "without an appropriate framework of legitimacy identifying their status and overall placing in the European political project will raise potential conflicts of rights without appropriate criteria to regulate them". Maduro, *supra* note 8, at 339.

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In particular, approaching this aspect of European integration in the described ways has shown not only a lack of vision and initiative, but also a clear reluctance to assume any responsibility in development of the social dimension of Union citizenship. The identified *give and take* approach, whereby the CJEU and the Union legislator have tried to ease the tension between the opposing interests and goals, hardly qualifies as an attempt to strike a compromise. Rather, it seems representative of a disguised refusal to face and comprehensively tackle the question of the future of social rights of EU citizens.

Given the fact that the currently assumed approach at the Union level essentially constitutes an attempt to avoid any substantial engagement in this area, it can hardly provide a framework of legitimacy needed to responsibly and coherently address the development of the European social dimension. In fact, it can only serve the opposite purpose for which it seems to be designed: to maintain the indeterminacy in the area and perpetuate vagueness as to exact rights of Union citizens.

Though the continued application of this approach may come as no surprise, it is damaging for all parties involved. The inconsistency and randomness in decision-making leaves both the Member States, as primary providers of welfare benefits, and EU citizens, as primary beneficiaries of social rights, in doubt as to what rights and obligations under EU law are, and how they will be interpreted in the future. This indeterminacy is exemplified not only by a general lack of agenda for developing the social aspect of EU citizenship, but also a number of unresolved issues existing in relation to the already established rule on accessing social benefits for EU citizens.

Thus, while the trend of resorting to *ad hoc* and case-by-case solutions driven by balancing may be predictable, it is undesirable in the context of the development of the EU citizenship concept and its social dimension. The unwillingness to put in place a comprehensive agenda for the development of "social citizenship" by the EU legislative and judicial actors have not only generated confusion, incoherency and uncertainty in the field of social rights of EU citizens, but also failed to provide this important aspect of European integration with the needed legitimacy. To a large extent, this is the reason why the citizenship of the Union still has a hard time living up to its designated role of the *fundamental status* of the Member States' nationals.

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