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Sandra Mantu & Paul Minderhoud

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Centre for Migration Law
Faculty of Law
Radboud University Nijmegen
P.O. Box 9049
6500 KK Nijmegen
The Netherlands

Editors Carolus Grütters
Ashley Terlouw

Lay-out Kim Geilman

Cover photo Erik van 't Hullenaar

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SOLIDARITY (STILL) IN THE MAKING OR A BRIDGE TOO FAR?

Sandra Mantu & Paul Minderhoud[1]

Abstract

Political debates concerning the free movement of (poor) EU citizens (mainly from the newer EU Member States) have focused upon the issues of abuse of free movement rights and welfare tourism, despite the lack of meaningful evidence that the two are actually taking place on a wide scale in the EU. This paper seeks to look beyond the politicized discussion on who should be allowed to move by asking whether the jurisprudence of the Court of Justice on issues of free movement, EU citizenship and social solidarity reflects these political debates. The paper seeks to understand the relationship between law and politics in this field of EU law and, to what extent the case law on social rights reflects the politics of the past years. We conclude that despite the lack of clear evidence that politics influences CJEU case law, a shift is noticeable in the Court's jurisprudence on issues of EU citizenship and social rights that raises questions about the scope of EU citizenship.

Keywords

EU citizenship, social rights, benefit tourism, poverty migration, CJEU

[1] Both at the Centre for Migration Law, Radboud University, Nijmegen, the Netherlands (http://www.ru.nl/rechten/cmr/) .

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1. Introduction

Social rights are an important benchmark for understanding whether a person is seen by the host state as 'one of us' and therefore entitled to the same social rights as own nationals. EU citizenship and the rules adopted to give it effect have an impact upon how EU Member States deliver welfare benefits since they impose obligations upon them to treat EU citizens as own nationals, although conditions have to be met by EU citizens before equal access is granted. The exact geometry of how mobile EU citizens are incorporated into the social security and welfare systems of host states is prescribed by rules of secondary legislation implementing the Treaty rights on citizenship, workers, self-employment and equality and by the interpretation of these rules by the Court of Justice.

In this contribution, we take 2004 as the starting point of our analysis of EU social rights jurisprudence. 2004 is an important year which marked three developments in the field of free movement of persons: a) enlargement and extension of EU citizenship status to nationals of the EU8 countries, the largest enlargement in the history of the EU, followed by the 2007 enlargement (EU2 countries); b) adoption of Directive 2004/38, the Citizens' Directive which was meant to bring clarity to the right of EU citizens to move and reside freely in another Member State and c) recast of Regulation 883/2004, the social security coordination regulation which was meant to extend, clarify and simplify the already existent system of coordination of social security systems in the EU. Thus, the extension of the right of free movement to millions of persons was doubled by a process of legislative consolidation and expansion of the rules on free movement and social security coordination. By the same token, the rules on social security were consolidated in order to give access to special non-contributory benefits to EU citizens who were not economically active in their host Member States, provided that they were habitually resident there. The political message from the EU institutions, including the representatives of the EU Member States acting in the Council and Parliament, could be interpreted as positive and focused on making the right to free movement a reality for all EU citizens. According to Guild, the enlargement process went hand in hand with a process of strengthening social solidarity by the adoption of the Citizens Directive and of Regulation 883/2004, despite the fact that most of the countries that joined in 2004 (and 2007) had lower GDPs than the 'older' Member States.[2] Her conclusion is that EU's experience with the last two enlargements

[2] E. Guild (2014) Does European Citizenship Blur the Borders of Solidarity?, in Guild, Gortazar Rotaeche &Kostakopoulou (eds) *The Reconceptualization of European Union Citizenship*, p. 205

shows that enlarging the pool of people who are entitled to social rights does not necessarily imply a lowering of standards or acts as inhibiting factor for social protection.

However, 10 years after the 2004 enlargement, the EU institutions are increasingly called to defend the fundamental character of the rules on free movement of EU citizens and show that welfare tourism is not a reality, but an exception. The contestation of mobility is very much linked to cries of welfare tourism and the portrayal of mobile citizens as 'abusers' who move in order to benefit from the better welfare provisions of their host states.[3] This debate is not new; it is ongoing since the introduction of EU citizenship and its expansive interpretation by the Court in relation to the principle of equality.[4] However, at present it has taken on new dimensions as politicians call into question the fundamental character of free movement of persons.[5] Legally, the main issue seems to be whether economically inactive persons should be entitled to access social assistance and special non-contributory benefits (which sit at the intersection of social assistance and social security) in their host states. What has happened in the space of ten years to account for this change of landscape? Although the economic crisis that took hold since 2008 is one of the important elements of any answer given to this question, in this paper we look at what has happened in law, and more specifically, in the case law of the European Court of Justice in relation to the social rights of mobile EU citizens within the last ten years.

The paper is divided as follows: Section 2 starts with general considerations about free movement in the EU, taking a closer look at discrepancies between who can move, who actually moves and (from the perspective of some EU gov-

[3] For an overview see, H. Verschueren (2014) Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*, in *European Journal of Migration and Law* 16, pp. 147-179

[4] C. Barnard (2005) EU citizenship and the principle of solidarity, in M. Dougan and E. Spaventa (eds) *Social welfare and EU law*, Oxford: Hart Publishing, pp 157-180; M. Dougan and E. Spaventa (2005) "Wish you weren't here...' : new models of social solidarity in the European Union.', in M. Dougan and E. Spaventa (eds) *Social welfare and EU law*, Oxford: Hart Publishing, pp. 181-218; S. Giubonni (2007) Free movement of Persons and European solidarity, in *European Law Journal* 13:3, pp 360-379; C. O'Brien (2008) Real links, abstract rights and false alarms: the relationship between ECJ's 'real link' case law and national solidarity, in *European Law Review* 33:5, pp 643-665; G. Davies (2010) The humiliation of the state as a constitutional tactic, in F. Amtenbrink and P.A.J. van den Berg (eds) *The Constitutional Integrity of the European Union*, Asser Press, pp 147.

[5] D. Cameron (2013) Free movement in Europe needs to be less free, in *Financial Times*, 26 November 2013; E. Guild (2013) Cameron's proposals to limit EU citizens' access to the UK: lawful or not, under EU rules?, CEPS Commentary, http://www.ceps.eu/system/files/EG%20Commentary%20Cameron%27s%20Proposals.pdf

ernments) who should ideally move. Section 3 tries to identify whether the political jargon used to contest free movement rules has penetrated CJEU jurisprudence. Section 4 presents the general rules on free movement as contained by Directive 2004/38, whereas Section 5 discusses how CJEU jurisprudence dealing with social rights and social solidarity is changing. The final section reflects on how the political debates and changes identified in case law affect the scope of EU citizenship and asks whether we are witnessing its transformation into an elite status.

2. Who can move? Who actually moves? Who should move?

These questions capture in a nutshell the current contestation of EU mobility, which is increasingly presented as an abuse of EU rights or as 'poverty migration'. The last term is a new trope in debates about EU citizenship signalling the increasingly difficult political climate in which intra-EU migration takes place.

Who can move? The right to free movement of persons is one of the original four fundamental freedoms making up the basis of what is now the European Union. Although initially limited to workers and self-employed persons, the right to move was extended to various categories of economically inactive persons in the 1990s. This process was cemented with the introduction of the legal status of European Union citizenship by the Maastricht Treaty (1992). Thus, legally the answer to the question who can move can be found in Article 21 TFEU: '*every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*' Articles 45 and 49 TFEU are seen as special legal provisions dealing with workers and respectively, self-employed persons. The text of the Treaty clearly suggests that although in theory any EU citizen can move, s/he will nevertheless need to fulfil certain conditions when doing so and that the right is also subject to limitations. These limitations and conditions are further spelled out in Directive 2004/38, which is the main piece of secondary legislation that details the rules applicable to the exercise of the right to move and reside freely in another Member State.[6] It applies to EU citizens irrespective of their economic participation and to their family members irrespective of nationality.

In the ten years since the adoption of the Citizens' Directive as the overarching piece of legislation applicable to EU citizens who move to another Member State, the position of economically inactive citizens and their claims to equal

[6] Directive 2004/38/EC (OJ 2004, L 158/77)

treatment in the host state have led to a series of cases before the CJEU that have received a lot of attention from politicians and media. Usually, the discussion is posed in terms of 'benefit tourism' and presented as a phenomenon linked to east-west migration within the EU, which is also read as movement of poor EU citizens to richer Member States. So popular is the term, it has its own Wikipedia entry, which defines it as '*a political term coined in the 1990s and later used for the perceived threat that a huge number of citizens from eight of the ten new nations given membership in the European Union in the 2004 enlargement of the European Union would move to the existing member states to benefit from their social welfare systems rather than to work. This threat was in several countries used as a reason for creating temporary work or benefit restrictions for citizens from the eight new member states.*' In some Member States, notably Germany, the discussion has entered a new plane where fears of benefit tourism are doubled by discussions on 'poverty migration', a term that describes the movement of poor EU citizens mainly from the Eastern Member States, some of whom are Roma EU citizens.[7] Similar debates are present in the UK too and in both cases they are partly fuelled by concentration of EU citizens in certain geographic areas that already contain migrant populations, where they are seen as putting pressure on local infrastructure.[8] However, some German reports[9] suggest that under this new term one can also address the movement of EU citizens who work for a limited number of hours and who rely on social benefits and social assistance to supplement their income. It is unclear how such debates relate to the reality of the labour market in specific member states where part-time jobs and zero-hours contracts are the norm, nor to the definition of the concept of EU worker, which is seen as an autonomous concept of EU law.[10]

Who actually moves? The number of EU citizens who move has increased considerably after the 2004 enlargements and it is estimated that in 2013 there

[7] Deutscher Stätetag (2013) Position Paper by the German Association of Cities on questions concerning immigration from Romania and Bulgaria, 22 January 2013, http://www.staedtetag.de/imperia/md/content/dst/internet/fachinformationen/2013/positionspapier_dst_zuwanderung_2013-e.pdf

[8] C. Bruzelius, E. Chase & M. Seeleib-Kaiser (2014) *Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need for Strong State Capabilities*, Oxford Institute of Social Policy 2014/3, www.social-europe.eu; D. Bräuninger (2015) *Debate on free movement – Does the EU need new rules on social security coordination?*, Deutsche Bank Research Briefing, 20 March 2015.

[9] Bräuninger, p. 10

[10] Mark Freedland, The Regulation of Casual Work and the Problematical Idea of the 'Zero Hours Contract' (OxHRH Blog, 25 March 2014) <http://ohrh.law.ox.ac.uk/?p=5026> [30-6-2015]; T. Tse & M. Esposito, Germany, the giant with the feet of clay (blog Euro crisis in the press, 12 March 2015) http://blogs.lse.ac.uk/eurocrisispress/2015/03/12/germany-the-giant-with-the-feet-of-clay/

were 13,7 million citizens living in another EU state (2,7% of the entire EU population). Coupled with the fact that most migration takes place towards EU15 states, this increase has led to discussions about how migrants impact their host states. The fact that the last three enlargements took place more or less at the same time as the global economic crisis and recession in Europe is seen as having an impact on how migration is perceived by destination countries. Over the same period of time most EU countries experienced a worsening of their fiscal balances, whereas taxes levied on labour were insufficient to cover increasing social expenditure, leading to the conclusion that '*the typical employee is a net beneficiary of the social security system if taxes on labour alone are taken into account.*'[11] This points towards changing economic conditions that affect workers irrespective of their nationality or migration status, although national governments seem less inclined to portray national workers as (net) users of welfare rather than producers thereof.

According to Giulietti two main questions are asked in relation to immigrants: whether they deliberately move to countries with more generous welfare systems and whether migrants take up excessively or abuse social benefits.[12] Giulietti's empirical research showed that there is no strong support for the welfare magnet hypothesis, nor for arguments that immigrants are more likely to use and abuse social programs. He argues that '*immigration is primarily driven by differentials in unemployment and wages between sending and destination countries, by the presence of social networks and by geographical proximity.*'[13] Moreover, limiting restricting immigrants' access to welfare benefits is likely to worsen their socio-economic integration and in the long run may increase welfare claims. Most research into the characteristics of intra-EU movers shows that indeed they are young, mainly move for work and contribute to the social system of their host state. A 2014 study into the fiscal impact of EU migrants in Austria, Germany, the Netherlands and the UK confirmed that most EU migrants fall into the 20-44 age group, they are generally younger, with fewer children and their main objective in moving to one of the 4 states investigated was to find work.[14] The study found that they have both higher employment and un-

[11] ECAS (2014) *Fiscal Impact of EU migrants in Austria, Germany, the Netherlands and UK*, Brussels, p. 10

[12] C. Giulietti (2014) *The welfare magnet hypothesis and the welfare take-up of migrants*, IZA World of Labour 2014:37, doi: 10.15185/izawol.37; See also his study with Kahanec that reached similar conclusions: C. Giuletti and M. Kahanec (2013) Does generous welfare attract immigrants? Towards evidence-based Policy-Making, in E. Guild and S. Carrera (eds) *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, CEPS: Brussels

[13] Ibidem

[14] ECAS (2014) p. 13

employment rates, a fact attributed to their higher participation in the labour market.[15]

The ECAS study is important because it looked at the fiscal impact of EU migration in these states as opposed to impact in relation to the host state's labour market and macroeconomic impact of migration. The study found that 'the fiscal contribution of EU foreigners increased substantially in the past several years' and that migrants made a positive contribution to government budget in all 4 states 'as the total taxes paid exceeded the total benefits they received'.[16] The result remained positive in all states except for the Netherlands when pensions were taken out of the calculation. For 2013, the net fiscal impact calculated without pensions was EUR 627 million in Austria, EUR 11 billion in Germany, close to EUR 600 million in the UK and a negative impact of 350 million in the Netherlands.[17] It is important to mention that the ECAS study tried to collect information based on nationality in relation to both income taxes and social contributions revenues and expenditures, including benefit fraud. However, when the national authorities were asked to provide such data, it became clear that '*none of the official government institutions collects data on the citizenship of taxpayers or benefit recipients through a process that would allow for the statistical use of such information.*'[18] This suggests that the public calls for curbing free movement on grounds that EU citizens are abusing the welfare systems of their host states are not based on data but rather the result of a politicization of EU mobility that is divorced from the reality of intra-EU movement.

Who should move? In 2013, the interior ministers of 4 EU Member States wrote a letter to the EU Commission asking for restrictive measures that would curb the abuse of the right to free movement and protect the national welfare systems that were being 'abused' by EU citizens. The letter also suggested that the only EU citizens whose mobility should be encouraged are workers, students and those wishing to set up a business in another Member State.[19] The lack of reliable data showing that benefit tourism is actually taking place on a large scale in the EU was quoted by the European Commission and the Visegrad

[15] Ibid

[16] ECAS (2014) p 79

[17] Ibid

[18] ECAS (2014) p 19

[19] Y. Pascouau (2013) *Strong attack against freedom of movement of EU citizens: turning back the clock*, European Policy Centre

countries (Czech Republic, Hungary, Poland and Slovakia)[20] in their reactions to this 2013 letter of the Austrian, German, Dutch and UK ministers calling for a reform of the free movement rules. Since 2013, a host of studies were published that tried to bring data to understand the impact of intra-EU mobility, most of which suggests that benefit tourism is not taking place on a large scale and that generally EU migrants have positive effects upon the economies of their host states.[21] A comprehensive study was commissioned by the European Commission which concluded that the share of non-active intra-EU migrants is small, that such migrants account for a very small share of special non-contributory benefits (SNCB) recipients, that the budgetary impact of SNCB claims made by non-active EU citizens is low and that costs associated with the take-up of healthcare by non-active intra-EU migrants is very small. The study highlighted that the main driver of intra-EU migration is employment.[22]

In spite of now existing data, the political debate concerning free movement continues to be fuelled by a series of political parties from a select group of Member States. In this context and precisely because data and the reality of migration seems to play no role in the debate, alternative explanations may be relevant. Bruzelius et alii have looked at different social constructions of EU citizenship and social rights as reflected by analysis of print media in 3 EU Member States: UK, Germany and Sweden.[23] Their analysis suggests different national approaches and attitudes towards EU citizenship, EU migrants and their entitlements to social rights. 2004 and secondly 2007 are seen as important dates in framing the discourse on EU citizenship resulting in an increase in media attention concerning topics such as intra-EU migration and the impact of EU citizens/migrants on the national welfare state. The trajectory of the UK distinguishes itself from the other two states since it has an increasingly predominant negative reporting culture that challenges the concept of freedom of movement and the entitlement of EU citizens to social rights, more generally. Germany and Sweden have a more balanced and neutral approach that focuses more on economically inactive EU citizens and their entitlement to social

[20] Joint statement from the Foreign Ministers of the Visegrad countries of 04.12.2013 (JAI 1115 FREMP 205 MI 1129 POLGEN 255 SOC 1019)

[21] E. Guild, S. Carrera & K. Eisele (2013) *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, CEPS:Brussels and ECAS (2014) for a review of several studies

[22] ICF/GHK (2013) *A fact finding analysis on the impact on the member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, Final report submitted by ICF GHK in association with Milieu Ltd., DG Employment, Social Affairs and Inclusion via DG Justice Framework contract

[23] C. Bruzelius, E. Chase, C. Hueser & M. Seeleib-Kaiser (2014) *The Social Construction of European Citizenship and Associated Social Rights*, Barnett Working Paper 14/01, Oxford.

benefits in the absence of having first contributed to the welfare system. [24] Moreover, issues of abuse of social rights are not presented as a generalized phenomenon, whereas in the UK media portrays groups of Eastern Europeans supposedly moving to claim benefits in the UK and abuse the system. The study suggest that domestic politics play an important role in the contestation of mobility and that domestic specificities inform the process of presenting EU migration as problematic. However, what needs further research are the mechanisms through which such concerns are pushed onto the EU level and translated into concerns that demand EU legal actions (eg, Treaty amendments to free movement rules) as opposed to social or political responses.

According to European Parliament Research Service research conducted on the topic of social benefits and EU citizenship '*the discussion ... has long gone beyond proof by numbers, and some member states feel they have lost control over one of the core competences of a sovereign state, namely, their welfare system, not by agreeing to such a shift of competences, but through the back door of EU citizenship.*' [25] The European Court of Justice has played an important role in this process of enlarging the pool of EU citizens who can move and enjoy social benefits in their host state and its role is criticised by some authors who view this process as undermining the solutions negotiated by the Member States with the occasion of the adoption of secondary legislation in the field of free movement.[26] In the following sections we focus on the legal limits of social solidarity as they appear in EU law and in the Court's case law in order to understand the links between law, its interpretation by the Court and the increasing politicisation of mobility of certain EU citizens.

3. General overview of case-law and responses from the Member States

Before starting with the analysis of the legal rules on EU citizenship, free movement and social rights, it is useful to have a general view of the Court's case law since 2004 in order to check whether one can find traces of discussions concerning 'benefit tourism'. We made several searches on the 'curia' portal using its search engine taking 01/01/2004 and 30/05/2015 as our time frame of reference and 'citizenship of the Union' as the field of search. During

[24] Bruzelius et alii, p 21

[25] E-M Poptcheva (2014) *Freedom of movement and residence of EU citizens – Access to social benefits*, European Parliamentary Research Service, p. 4

[26] S. Giubonni (2007) Free movement of persons and European solidarity, *European Law Journal* 13:3, pp 360-379; G. Davies (2010) The humiliation of the state as a constitutional tactic, in F. Amtenbrink & P.A.J. van den Berg (eds) *The Constitutional Integrity of the European Union*, Asser Press, pp 147-174

this time frame, there were 116 cases dealing with 'citizenship of the Union'. We searched in both judgments and opinions of AGs and included the grounds, operative part of the decisions and the opinions in our searches. We used different search terms: 'abuse social benefits, 'abuse welfare system', 'benefit fraud', 'benefit tourism', 'poverty migration', 'social tourism' and 'welfare tourism'. The table below summarizes our findings, although we are not entirely convinced about the reliability of 'curia' a search engine for reasons we discuss further:

Abuse social benefits	**Abuse welfare system**	**Benefit fraud**	**Benefit tourism**	**Social tourism**	**Welfare tourism**	**Poverty migration**
~~C-202/13 *McCarthy* Opinion~~	C-457/12 *S. and G.* Opinion	C-244/13 *Ogieriakhi* Opinion	C-507/12 *Saint Prix* Opinion	C-507/12 *Saint Prix* Opinion	C-507/12 *Saint Prix* Opinion	NO Results
C-457/12 *S. and G.* Opinion	C-456/12 *O.* Opinion	~~C-202/13 *McCarthy* Opinion~~	C-457/12 *S. and G.* Opinion	C-457/12 *S. and G.* Opinion	C-457/12 *S. and G.* Opinion	
C-456/12 *O.* Opinion	C-73/08 *Bressol and Others* Opinion	C-457/12 *S. and G.* Opinion	C-456/12 *O.* Opinion	C-456/12 *O.* Opinion	C-456/12 *O.* Opinion	
C-348/09 *I* Opinion	C-200/02 *Zhu and Chen* Opinion	C-456/12 *O.* Opinion	C-22/08 *Vatsouras* Opinion	C-22/08 *Vatsouras* Opinion		
C-345/09 *van Delft* Opinion		C-423/12 *Reyes* Opinion	C-258/04 *Ioannidis* Opinion	C-258/04 *Ioannidis* Opinion		
C-34/09 *Ruiz Zambrano* Opinion		C-394/11 *Belov* Opinion	C-209/03 *Bidar* Opinion	C-209/03 *Bidar* Opinion		
~~C-127/08 *Metock* Judgment~~		C-137/11 *Partena* Opinion+ Judgment	C-456/02 *Trojani* Opinion	C-456/02 *Trojani* Opinion		
C-73/08 *Bressol* Opinion		C-348/09 *I* Opinion				
C-22/08 *Vatsouras* Opinion		~~C-135/08 *Rottmann* Judgment~~				
C-551/07 *Sahin* Order		~~C-127/08 *Metock* View + Judgment~~				
C-522/04 *Com v. Belgium* Judgment		C-123/08 *Wolzenburg* Opinion				
C-406/04 *De Cuyper* Opinion		C-551/07 *Sahin* Order				
C-185/04 Öberg Judgment						
C-209/03 *Bidar* Opinion						

A couple of issues are worth mentioning: poverty migration has not yet entered in the vocabulary of the AGs or of the Court which can be explained by its novelty. Secondly, compared with 116 hits we received when selecting 'citizenship of the Union' in this time frame, the specific searches we made for terms associated with benefit tourism have delivered few hits; the highest number we got was 14 hits for an individual search; we had a total of 49 hits for 7 separate searches. However, because several cases appeared in all searches, in reality we have a total of 24 single cases that seem to fit our search criteria. However, we need to discount the *Rottmann* and *Metock* cases as they deal with questions relating to fraud in the acquisition of nationality and family reunification. *McCarthy* can also be discounted as issues of abuse were discussed in relation to the right to entry and not to social rights under Directive 2004/38. To our surprise, several cases in which questions about benefit tourism and abuse of social benefits were very much part of the background discussion (at least in the media and academic literature) and intuitively one would expect to find them in the lists with results, did not appear in our 'curia' searches. These cases include *Brey*, *Dano*, *Alimanovic* and *Garcia Nieto;* the last two cases are pending but all cases deal with questions about the extent to which economically inactive EU citizens can enjoy social assistance benefits or SNCBs in their host states.

It is interesting to note that it is mainly AGs that discuss, mention or refer to issues relating to benefit tourism and not the Court as such, which may be explained by the Court being more cautious about engaging with/in political debates. AG Wathelet in his opinion in the *Alimanovic* case made a reference to the *Dano* decision which focuses on inactive EU citizens claiming social assistance and its impact by stating '*The unusual stir that that Court judgment has caused in the European media and all the political interpretations that have accompanied it confirm the importance and sensitivity of the subject.*'[27] Although we can value the AG's awareness of the social and political implications of the Court's case law (after all, decisions taken by courts do affect the lives of the applicants in question) we find it worrisome that the AG emphasises the reverberations of the *Dano* decision without even mentioning the fact that based on existing data about intra-EU migration, some of which is produced by the EU institutions, it is clear that the *Dano* case is not emblematic of intra-EU migration. It also raises further questions about the role of political debates in legal processes, since in theory they should not be relevant for how courts interpret the law.

[27] Opinion AG Wathelet in Case C-67/14 *Alimanovic*, delivered 26 March 2015, para 4

Equally interesting is that most cases originate from Member States that are also vocal in the political discussion on social rights and benefits for migrant EU citizens. In the case of Germany, the same benefit is the cause of 4 references (*Vatsouras*, *Dano*, *Alimanovic* and *Garcia-Nieto*) which may suggest that the EU route is used by national courts to settle national disputes concerning this one benefit.[28] From previous research performed at the national level in the context of the Network on the Free Movement of EU Workers, we know that the German benefit that led to ECJ litigation divided the German courts and was responsible for divergent jurisprudence at the national level (Reports of 2012 and 2013).[29] Likewise, British attempts to limit access to social benefits for EU migrants by introducing a right to reside test (which is addressed in the *Saint Prix* case) have led to action by the European Commission that started infringement procedures against the UK that resulted in the UK being taken to court by the Commission.[30] Another observation concerning the list of results generated by 'curia' is that some of the cases mentioned deal with residence rights and only indirectly with social rights, an issue that is increasingly clear when looking into the Court's jurisprudence that links entitlement to social rights to legal residence in the host state. This may explain why some cases relevant for our topic are not listed under results, since they may be classified under different categories (although this hypothesis requires more in depth research than this paper allows).

4. Free movement and social rights under Directive 2004/38

Directive 2004/38/EC makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different preconditions for residence apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. The directive gives in Article 6 all EU citizens a right to entry to any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months.

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[28] On judicialization see, A. Stone Sweet (2010) The European Court of Justice and the judicialization of EU governance, in *Living Reviews in European Governance* 5:2, p. 24

[29] Reports are available at http://www.ru.nl/law/cmr/projects/fmow-1/

[30] C-308/14 Commission v. UK, action brought on 27 June 2014. The Commission claims that requiring a claimant of Child Benefit and Child Tax Credit to have a right to reside in the United Kingdom as a condition of being treated as resident there violates Regulation 883/2004. Alternatively, the Commission submits that by imposing a condition of entitlement to social security benefits that is automatically met by its own nationals the United Kingdom has created a situation of direct discrimination against nationals of other Member States which breaches the same Regulation.

According to Article 7(1) of Directive 2004/38/EC Union citizens only have the right of residence on the territory of another Member State for a period of longer than 3 months if they
(a) are workers or self-employed persons in the host Member State;
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
(c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
When Union citizens have resided legally for a continuous period of 5 years in the host Member State they shall have the right of permanent residence there. This right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover any more after these five years.
The conditions regarding sufficient resources and comprehensive sickness insurance neither apply to workers and self-employed persons, nor to persons who stopped being economically active but who retain this status pursuant to Article 7(3) Directive 2004/38. Nor do they apply to jobseekers who entered the territory of the host Member State in order to seek employment. Such persons may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.
The question when an inactive citizen has sufficient resources is not an easy one to answer, as shown by the history of the negotiations regarding the concept of 'sufficient resources' in the Directive.[31] The main points of dispute included the prohibition of using a fixed amount of money on one hand, and the indication

31 P. Minderhoud, Sufficient resources and residence rights under Directive 2004/38, in H. Verschueren (ed) *Where do I belong? EU law and adjudication on the link between individuals and Member States*, Intersentia: Antwerp, forthcoming

of a threshold at social assistance benefit level on the other hand. This ambivalence is reflected in the practice of various Member States as well. CJEU jurisprudence regarding the notion of sufficient resources highlights two important issues: the level of resources and the origin of the resources. Underpinning these issues is the relation between sufficient resources and reliance on the host state's social assistance. The Court's biggest challenge at the moment is finding a balance between the requirement to fulfil the condition of sufficient resources and the possibility to apply for social assistance as shown by the *Brey* and *Dano* cases.[32] Regarding the origin of the resources, it is clear from the case law of the CJEU that to 'have' sufficient resources means that these resources are available to the Union citizen, regardless of their origin. They can be derived from another person, including a third national family member (*Zhu* and *Chen*). But it is still disputed whether the prospect of future earnings can mean that the condition of sufficient resources is fulfilled as well (opinion of AG Mengozzi in *Alopka*). Another question to be solved concerns the interpretation of the concept of sufficient resources in situations in which Union citizens start working only for a short period of time to create a right to reside and work for their third country national spouse and stop working themselves immediately afterwards (*Singh*).[33]

The requirement to have comprehensive sickness insurance has not received a lot of attention in EU scholarship or case law, and overall there is little information concerning the situation in the Member States.[34] Issues are known to exist in the UK[35,] where economically inactive EU citizens are required to have private health insurance since UK authorities do not consider NHS entitlement as comprehensive sickness insurance under Directive 2004/38 (NHS entitlement is dependent on legal residence in the UK, whereas the UK authorities do not consider habitual residence in the UK sufficient and instead apply the right to reside test). This situation has led to the Commission opening infringement procedure against the UK in 2012 but there is no decision on whether to proceed further with litigation before the Court of Justice.[36]

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[32] Case C-140/12, *Brey*, EU:C:2013:565; Case C-333/13, *Dano*, EU:C:2014:2358

[33] Case C-218/14, *Singh and Others*, (Reference for a preliminary ruling from High Court of Ireland (Ireland) made on 5 May 2014; Guild, Peers & Tomkin (2014) *The EU Citizenship Directive. A Commentary*, Oxford:OUP p. 129

[34] P. Minderhoud (forthcoming). Concerning case law, the *Baumbast* case is relevant for interpreting the requirements of comprehensive sickness insurance, Case C-413/99, *Baumbast*, EU:C:2002:493.

[35] S. de Mars (2014) Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links, in *European Law Review* 6, pp 770-789

[36] Similar to the benefit tourism discussion, UK media also reports on 'health tourism' and the alleged burden placed by EU migrants on the NHS. For a counter view, the Guardian published data →

According to Article 24 of the Directive, Union citizens who reside on the basis of the Directive (that is, they fulfil the conditions attached to the type of residence rights as discussed above) enjoy equal treatment with nationals of the host state within the scope of the Treaty. However, Article 24(2) stipulates that

> *"by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be 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."*

The wording of the Directive in relation to the social rights of economically inactive mobile citizens or jobseekers has been criticised for lacking clarity.[37] On the one hand, the Directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand it includes all kinds of signals that when these inactive persons apply for a social assistance benefit, this should be granted and this would not mean automatic expulsion. It is not clearly defined when an EU citizen becomes an 'unreasonable burden' to the social assistance system. Leeway is given to Member States to examine whether financial difficulties may be temporary, which some duly used by developing own definitions.[38] Some legal experts hold the opinion that even before EU citizens have received a permanent residence right it will not be possible to deny them access to social assistance benefits.[39]

Moreover, it is not entirely clear when a benefit can be categorized as a social assistance benefit. According to the CJEU in *Vatsouras* a benefit of a financial nature intended to facilitate access to the labour market is not a social assis-

showing that in actual fact UK citizens treated in Europe cost 5 times more than EU migrants treated by the NHS in the UK http://www.theguardian.com/society/2015/apr/07/treating-uk-tourists-in-europe-costs-five-times-more-than-equivalent-cost-to-nhs

[37] P. Minderhoud (2014) Directive 2004/38 and Access to social Assistance, in Guild, Gortazar Rotaeche and Kostakopoulou (eds) *The Reconceptualization of European Union Citizenship*, Leiden Boston: Nijhoff, pp 209-225; D. Thym (2015) The elusive limits of solidarity: residence rights of social benefits for economically inactive Union citizens, in *Common Market Law Review* 52, pp 17-50

[38] P. Minderhoud (2014)

[39] D. Sindbjerg Martinsen (2007) *The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses,* Paper prepared for the EUSA tenth biennial International conference, Montreal, May 17-19, 2007

tance benefit in the sense of Directive 2004/38.[40] This raises questions on the character of social assistance benefits in several countries (France, Germany, UK and the Netherlands) which all have the intention of facilitating labour market access.[41] It was precisely some of these Member States that complained to the Commission about abuse of their welfare systems although it is not clear whether the free movement rules encourage abuse or the nature of the benefits makes it easier for economically inactive citizens to claim those benefits.
In July 2009 the Commission published a Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[42] It repeated that in assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become an unreasonable burden, the authorities of the Member States must carry out a proportionality test. To this end, Member States may develop for example a points-based scheme as an indicator. Recital 16 of Directive 2004/38 provides three sets of criteria for this purpose:

1. Duration: For how long is the benefit being granted? Is it likely that the EU citizen will get out of the safety net soon? How long has the residence lasted in the host Member State?
2. Personal situation: What is the level of connection of the EU citizen and his/her family members with the society of the host Member State? Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?
3. Amount: Total amount of aid granted? Does the EU citizen have a history of relying heavily on social assistance? Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

The Communication emphasizes that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member States, they cannot be expelled for this reason, which is in line with Article 14(3) of the Directive. Concerning job-seekers, Article 14(4) states that they "*may not be expelled for as long as the Union citizens can*

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[40] C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344

[41] H. Verschueren (2010) Do national activation measures stand the test of European law on the free movement of workers and jobseekers, in *European Journal of Migration and Law*12:1, pp 81-103

[42] COM(2009)313/4 on guidance for better transposition and application of Directive 2004/38/EC on the
right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels.

provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" by way of exception from the general rule that EU citizens retain their right to reside for longer than 3 months if they meet the conditions of Article 7. Although this Guide and Communication were meant for clarification, Member States are left leeway to define the concept of unreasonable burden. Unsolved questions seem to be: when is it a case of temporary difficulties, how long should the duration of residence have been, which personal circumstances should be relevant and how much aid granted is too much?

5. The limits of solidarity for EU citizens

Due to the introduction of Directive 2004/38 one can argue that inactive EU citizens applying for a social assistance benefit because they lacked sufficient resources, kept a right of residence under Directive 2004/38 until the moment this right was withdrawn, on the ground that they were supposed to have become an unreasonable burden to the social assistance system. On the basis of Articles 14 and 24 and paragraph 16 of the preamble of Directive 2004/38 access to social assistance is not out of the question as long as it does not become an unreasonable burden on the social assistance system of the host Member State.

So far the Court of Justice of the EU has not allowed an unconditional access to social assistance benefits in the host State. A first condition is always that the applicant has to have legal residence in the host State. In several cases the CJEU has formulated additional conditions to the extent that the applicant should 'have a genuine link with the employment marker of the State concerned' (Collins, para 67-69), or 'need to demonstrate a certain degree of integration into the society of the host State' (Bidar, para 57). Equally, CJEU recognises the right of the host Member State to stop the right of residence of the person concerned, but this should not be/become 'the automatic consequence of relying on the social assistance system' (Grzelczyk, para 43 and Trojani, para 36).

The *Brey* case of 19 September 2013 gives the first signals of an altering position of the CJEU regarding the tension between the condition of sufficient resources and applying for a social assistance benefit. This case concerned a German national, who was in receipt of a German invalidity pension of EUR 1.087,74 and who had transferred together with his wife his residence to Austria where he applied for an Austrian compensatory supplement which aimed at guaranteeing the person concerned a minimum subsistence income in Austria.

The Austrian authorities refused to grant this benefit because Mr Brey did not meet the conditions required to obtain the right to reside, due to a lack of sufficient resources. The Court held the view that the fact that an economically inactive national from another Member State may be eligible, in the light of a low pension, to receive that compensatory supplement benefit, could be an indication that the national in question does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State, for the purposes of obtaining or retaining the right to reside under Article 7(1)(b) of Directive 2004/38. However, this is just 'an indication'. The Court recalls that it should be noted that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Therefore, it follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned. National authorities first have to carry out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterizing the individual situation of the person concerned. The CJEU stressed that any limitation upon the freedom of movement as a fundamental principle of EU law, must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality. The Member States' room for manoeuvre may not be used in such a manner as to compromise attainment of the objective of Directive 2004/38, more specifically its objective to facilitate and strengthen the primary right to free movement. On the basis of these elements the Court confirms that EU law recognizes a certain degree of solidarity between nationals of a host Member State and nationals of other Member States. The mere fact that a national of a Member State receives social assistance is not sufficient to demonstrate that he constitutes an unreasonable burden on the social assistance system of the host Member State. For that reason the Austrian legislation, by virtue of which the mere fact that an economically inactive migrant EU citizen has applied for the 'compensatory supplement' is sufficient to preclude that citizen from receiving it, is not compatible with EU law. This automatic refusal keeps the national authorities from carrying out an overall assessment of the specific burden.

A year later, however, the CJEU delivered its judgment in the *Dano* case and here the approach is totally different from that in *Brey*. In this case two Romanian nationals, mother and son who lived in Germany were refused access to

benefits under the German basic provision. Ms Dano had not entered Germany to seek employment and although she applied for benefits reserved to job-seekers the case file showed that she had not been looking for a job. She had no professional qualifications and had not exercised any profession in Germany nor Romania. The Court held that nationals of other Member States as regards their access to social benefits are only entitled to be treated equally with a national of the host Member State if their residence in the territory of the host Member State meets the requirements of Directive 2004/38. According to the Court, the Directive thus seeks to prevent Union citizens from using the host Member State's social assistance system to fund their means of subsistence. The Court consequently considers in paragraphs 77 and 78 that the possibility that Union citizens who have used their freedom of movement and of residence are being treated differently from the host Member State's own nationals with regard to social benefits is an inevitable consequence of Directive 2004/38. This potentially unequal treatment is in fact based on the link between sufficient resources being a residence requirement on the one hand and, on the other, the desire to prevent the burden on the social assistance system of the Member States, established by the Union legislator in Article 7 of that Directive. A Member State must therefore, in accordance with Article 7 have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to free movement for the sole purpose of obtaining another Member State's social assistance, although they do not have sufficient resources in order to qualify for a right of residence. According to the Court, Ms Dano and her son lack sufficient resources and, pursuant to Directive 2004/38, are therefore not entitled to a right of residence in Germany, nor are they entitled to benefits under the German basic provision.

The judgment in the *Dano* case seems to imply that the fact that economically inactive EU citizens (residing for less than five years in another Member State) apply for a social assistance benefit would mean automatically that they have no sufficient resources (and no residence right under Directive 2004/38) anymore. Thus, if in *Brey* applying for the benefit was an 'indication' of lack of sufficient resources, in *Dano* this has become 'certainty'. The reasoning in *Dano* leads to the paradoxical situation where a Union citizen would only be entitled to any social assistance if he has sufficient resources and therefore is not in need of any social assistance.[43] This seems to be a real Catch-22 situation.
The latest development in seeking a balance between the requirement of fulfilling the condition of sufficient resources and the possibility to apply for social

[43] H. Verschueren (2015) Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*? in *Common Market Law Review* 52, p 381

assistance is given in the opinion of Advocate General Wathelet, delivered in the *Alimanovic* case on 26 March 2015.[44] Ms Alimanovic and her three children, are all Swedish nationals. The three children were born in Germany. After living abroad for ten years, the family re-entered Germany in June 2010. Between then and May 2011, Ms Alimanovic and her eldest daughter worked for less than a year in short-term jobs or under employment-promotion measures in Germany. The two women have not worked since. From 1 December 2011 to 31 May 2012, they received subsistence allowances for beneficiaries fit for work ('SGB II benefit'), while the other children received social allowances for beneficiaries unfit for work. Subsequently, the competent German authority stopped paying those allowances, because according to the German legislation, non-nationals (and members of their family), whose right of residence arises solely out of the search for employment, may not claim such benefits. The conclusion of the AG takes as a starting point that following the *Dano* judgment, it is established that the Member States may — but are not obliged to — refuse to grant social assistance to Union citizens who enter their territory without intending to find a job and without being able to support themselves by their own means. The AG notes that the unusual stir that that Court judgment has caused in the European media and all the political interpretations that have accompanied it confirm the importance and sensitivity of the subject. This case however is concerned with the situation in which a Union citizen, after working for less than a year in the territory of a Member State of which he is not a national, applies for subsistence benefits in the host State.

According to the AG restrictions of the grant of social assistance to Union citizens who have not, or no longer, a worker status, that are established on the basis of Article 24(2) of Directive 2004/38, must be legitimate.[45] The AG therefore proposes that three situations should be distinguished. Firstly, a national of one Member State who enters the territory of another Member State and stays there (for less than three months or for more than three months) without the aim of seeking employment there, may, as the Court held in the judgment in *Dano*, legitimately be excluded from social assistance benefits, in order to maintain the financial equilibrium of the national social security system. Secondly, such exclusion is also legitimate, for the same reasons, in respect of a national of one Member State who moves to the territory of another Member State in order to seek employment there. On the other hand, as regards, thirdly, a national of one Member State who stays for more than three months in the

[44] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, EU:C:2015:210

[45] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 86

territory of another Member State and has worked there, the Advocate General considers that such a person (like Ms Alimanovic) may not automatically be refused the benefits in question.

The AG confirms that it is true that an EU citizen having worked in national territory for less than one year may, in accordance with EU law, lose the status of worker after six months of unemployment.[46] Nevertheless, he considers that it runs counter to the principle of equal treatment to exclude automatically an EU citizen from entitlement to social assistance benefits beyond a period of involuntary unemployment of six months after working for less than one year without allowing that citizen to demonstrate the existence of a genuine link with the host Member State.[47] In that regard, in addition to matters evident from the family circumstances (such as the children's education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of such a link with the host Member State.[48]

6. Conclusions (Is free movement an elite status?)

In this paper we have looked at the interaction between political debates about free movement which are increasingly focusing on the mobility of poor or economically inactive EU citizens. Although no study seems to find any evidence that social tourism, benefit fraud or abuse are happening on a large scale, the debate is going strong. While we failed to find conclusive evidence that the political debate and accompanying discourses are infiltrating the Court's jurisprudence, it is equally clear that the case law concerned with the entitlement of economically inactive EU citizens to social rights in their hosts' states is undergoing some profound changes. The shift we noted in the case law – from asking for social assistance being an indication of lack of resources to becoming a certainty that no longer requires an individualized examination of the case and decision – raises some fundamental questions about the scope of EU citizenship and seems to go against the Court's well established way of interpreting EU citizenship rights with its emphasis on proportionality and the need for individual assessment.

It remains to be seen if the Court will agree with such a vision of EU citizenship where the links established by the migrant citizen with the host state will count

[46] Based on Article 7(3)(c) Directive 2004/38. This happened in the case of Ms Alimanovic and her daughter in December 2011

[47] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 110

[48] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 111

as evidence of her/his belonging to and entitlement to the social solidarity system provided by the host state (*Alimanovic*). The Court's answer will have an impact upon how fundamental EU citizenship is as a status and whom it actually captures. An interpretation where economically non-active EU citizens must have resources sufficient not to qualify for any social assistance benefit may lead to an effective exclusion of most economically non-active EU citizens by providing for a social benefit with very high resource threshold in national laws. Take for instance as example the Romanian pensioners who have an average old-age pension of around € 175. Such pensioners would meet the requirement of sufficient resources only in 8 of the 27 Member States (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia). The area of free movement, in which such Romanian pensioners may exercise their fundamental right to move and reside freely would shrink to less than 1/3 of the EU.49

According to Spaventa we are witnessing a reactionary phase in the Court's interpretation of citizenship.50 She describes this phase as characterized by '*an apparent retreat from the Court's original vision of citizenship in favor of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin.'51* In this way, the promise of Union citizenship – as a status which 'exploded' the traditional links of belonging, pre-assigned rather than chosen, in favor of a more fluid concept where belonging is determined also having regard to the actual links established by the (individual) citizen with the polity of reference – is much reduced if not altogether nullified. We share her concerns that the current jurisprudence points towards a very limited vision of social solidarity that benefits workers and economically active citizens with the implication that the 'fundamental status' of EU citizenship is to be enjoyed only by mobile, healthy and wealthy migrants. What type of solidarity is being promoted in the EU, if it is available only for those who do not need it and only when they do not need it? Moreover, if the political discussion is to continue along the line of problematizing the working poor, while also bearing in mind the structural changes underwent by national labour markets that increasingly rely on part-time, poorly paid jobs to generate growth, who will still be able to move freely in the EU?

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49 M. Meduna et al (2014) 'Institutional report', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE* Congress in Copenhagen, (Copenhagen: DJØF Publishing), p 236

50 E. Spaventa, Earned citizenship – understanding Union citizenship through its scope, in D. Kochenov (ed) EU *Citizenship and Federalism: the Role of Rights*, Cambridge: CUP (forthcoming)

51 Idem