Linking EU citizenship and social rights: ‘real link’ or illusion?

A research of the case law of the European Court of Justice on EU citizens’ access to social rights

Gwenn (G.C.) Korteweg
3547647

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Supervisor
Prof. mr. F.J.L. Pennings

Second Supervisor
Prof. mr. S.A. de Vries
Abstract

This thesis analyses the contribution of the Court’s case law on EU citizens claiming social rights to the development of the concept of EU citizenship. The concept of EU citizenship laid down in Articles 20 and 21 TFEU is interpreted in conjunction with the equal treatment principle laid down in Article 18 TFEU. The case law of the Court contributed significantly to EU solidarity and assures a degree of social protection for all EU citizens. Within its case law, the Court established the ‘real link’ approach to determine whether a EU citizen should have access to social rights in a host or home Member State. The ‘real link’ has been developed on a case-by-case basis. This thesis argues that EU citizens cannot on the basis of being a EU citizen alone claim social rights within another Member State. In many recent cases, such as Brey and Dano, which are defining the boundaries of EU citizenship, it has become clear that EU citizens are still subject to certain limitations and conditions. The Court’s ‘real link’ approach is a compromise, as it balances the interests of the EU Member States to protect their social systems and the rights of free movement and equal treatment of EU citizens. EU citizenship in combination with a ‘real link’ with society, based on a number of factors, could ensure access for EU citizens to claim social rights in a host or home Member State. The link between EU citizenship and social rights is certainly not an illusion. However, social EU citizenship is not a stand-alone concept; it has to be read in conjunction with the ‘real link’.
Acknowledgements

Writing this thesis was like travelling through European Union law. This thesis travels from Rome to Lisbon, and probably other destinations lie ahead. My journey had to take into account what happens in Brussels and Luxembourg. My journey at Utrecht University has come to an end after concluding two Masters, so has writing my European Law Master thesis. It was a very interesting and challenging journey, on which I will look back with much joy.

This thesis researches the case law of the Court on EU citizens claiming social rights; this is currently a ‘hot topic’ within the EU. As a Dutch national, this topic also concerns me, as I also am a EU citizen wanting to move and reside freely. At this very moment there are many debates going on about ‘social tourism’ and possibilities of a Grexit or a UK exit. It was very interesting to research the boundaries of EU law, the interests of the Member States, the EU and especially the boundaries of being a EU citizen.

There are many people without whom I could not have written this thesis. I especially would like to thank Professor Frans Pennings, for providing me with this very interesting and politically difficult topic, his assistance, comments and feedback. I would also like to thank my family and friends, specifically Joan Winkelhof, Rob Burgers and Alexander Laheij, for supporting me during my journey at Utrecht University.

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1 Introduction

1.1 Context of the research

European migration is a hot topic in many political debates, not least because of the discussions and Eurosceptic voices in (especially) the United Kingdom (UK). In the last couple of years, among others due to the economic crisis and several European Union (EU) enlargements, opposition towards free movement of persons within the EU has grown. Traditionally, Member States have the power to decide upon whom to include in their social systems, but the interference of the EU and the case law of the Court of Justice of the European Union have increased over time. In light of the economic crisis in Europe, solidarity between Member States has, next to the sovereignty issue, also become a challenging issue financially. Member States often claim that migrating EU citizens are posing high financial burdens to their national social systems.

Access to social benefits for EU migrants has become a crucial topic in the debate on the essence of freedom of movement and residence within the EU. Free movement of workers and self-employed constitutes a central element of the EU’s internal market. The status of being a worker is no longer the only way to get access to social benefits in a host Member State. Since its introduction by the Maastricht Treaty, EU citizenship and the rights accompanying this status have been heavily debated. Criticism concerning low-income workers, jobseekers and persons that are economically inactive is increasingly voiced. Several Member States argue that some EU citizens only move to another Member State to avail themselves of social benefits and by doing so they misuse free movement rights. These EU citizens are often referred to as ‘social’ or ‘benefit’ tourists. ‘Social tourism’ or ‘benefit tourism’ means that EU citizens migrate to a specific Member State with the sole purpose of obtaining access to social benefits and the high level of social protection in that Member State. However, social tourism is also often used to refer to economically inactive EU citizens who lawfully make use of their free movement rights. With the accession of Romania and Bulgaria, fear of social tourism has grown. Especially in the UK, critics and politicians propose to limit free movement and to introduce restrictions on migrant EU citizens’ access to social benefits. Prime Minister Cameron openly proposed to amend the free movement rules, not only for economically inactive EU citizens, but also for EU workers. Also, in Germany and the Netherlands EU citizens’ access to social benefits is heavily debated. Cases of jobseekers and economically inactive EU citizens that want to access social benefits have given rise to several questions surrounding the concept of EU citizenship and EU citizens’ rights to access social benefits. Whilst the European Commission and many experts argue that current free movement and social coordination rules are effective instruments to combat social tourism and that there is in fact little statistic evidence of social tourism, several Member States have called for a change in and a strengthening of EU legislation. The recent Dano judgement answered to some of the concerns of the Member States.

The rights attached to EU citizenship are connected to the full participation within the community of a Member State. According to Article 20 and 21 of the Treaty on the Functioning of the European Union (TFEU), EU citizens have the right ‘to move and reside freely’, but this right is subject to ‘limitations and conditions’. The rights of EU citizens to be treated equally and the interests of the Member States must be balanced. When EU citizens become an unreasonable burden for the social system of a Member State EU law provides this Member State with certain instruments. However, the instruments a Member State could use are not always crystal clear. The case law of the Court on EU

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1 Hereafter: ECJ or the Court.
3 Hereafter: EU citizenship.
4 David Cameron, ‘Free movement within Europe needs to be less free’, Financial Times, 27 November 2013. See also the proposals formulated on 26 November 2014 by UK Prime Minister Cameron, available on www.bbc.com/news/uk-politics-30224493 (last visited 21 April 2015). See also the letter sent in April 2013 by the UK Home Secretary and her Austrian, German and Dutch counterparts to the President of the Justice and Home Affairs Council regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the response of Czech, Hungarian, Polish and Slovak Ministers, in December 2013; highlighting the beneficial nature of such movement for host Member State economies.
citizenship recognizes that even EU citizens who are economically inactive have access to social benefits in other EU Member States. Member States may limit access to their social systems when they can justify this limitation by requiring a ‘real link’ with their society as a justification ground. This ‘real link’ with the society of a Member State is no longer solitary based on nationality or residence conditions.

1.2 Problem statement

The main contours of the concept of EU citizenship were defined in the context of social rights. The most important right attached to EU citizenship is the right to move and reside freely. The Court has stated that EU citizens ‘may expect a certain degree of financial solidarity’ from the Member States. However, the Court did not grant economically inactive EU citizens unconditional access to social benefits within the EU. Those who do not qualify as workers, self-employed, jobseekers with a genuine chance of finding a job, temporary service recipients or as family members, only have a right to free movement and equal access when they have sufficient resources and do not place an unreasonable burden on the social system of the Member State where the benefit is claimed. Requiring a ‘real link’ represents a legitimate objective and could justify restrictions on the free movement rights of EU citizens. Access to social benefits for those EU citizens that seek work, those that have a very low income and those that are economically inactive is at the center of the EU debate. The rules on free movement are not entirely clear for these categories of EU citizens. It seems that the ‘real link’ is an attempt of the Court to balance the interests of the Member State to protect their social systems and the rights to free movement and equal treatment of EU citizens.

The ‘real link’ is the means the Court uses to impose duties on the Member States when dealing with both migrant EU citizens within their territories and their own nationals residing somewhere else. However, the criteria of the ‘real link’ remain unclear. With fears of social tourism in mind, Member States do not desire that EU citizenship becomes a status on the basis of which EU citizens can claim social benefits in every EU Member State just because of their status of being a EU citizen. However, it is important to examine the boundaries of EU citizenship and whether such an identity can and/or will be created in the future.

1.3 Research question

The main research question of this thesis, deducted from the aforementioned, is:

*How does the case law on EU citizens claiming social rights contribute to the development of the concept of EU citizenship?*

The research question is relevant to research, because the concept of EU citizenship and its true meaning in the context of social rights remains unclear. Particularly the principles underlying free movement of persons, including the prohibition of discrimination on grounds of nationality will be assessed. Important sub questions are for example: How was the concept of EU citizenship developed? What are important cases on EU citizens claiming social rights? What are the boundaries of the national social systems on granting social benefits? Furthermore, to what extent does the EU interfere in defining the boundaries of the national social systems? How should one combine the EU free movement objectives and the countering of social tourism? Can recommendations be construed on how the concept of EU citizenship should be understood? This research will ultimately try to answer whether the ‘real link’ approach of the Court fills in the concept of EU citizenship in the context of social rights and to answer the question whether the ‘real link’ is the path to be followed in the context of social rights and EU citizenship in the future.

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7 See also Pennings 2012, p. 308.
1.4 Methodology and limits of the research

The main research question will be answered by using different legal sources. First of all, some key provisions of the Treaty on the European Union (TEU) and TFEU will be analysed. Furthermore, secondary legislation, such as the Social Security Coordination Regulation 883/2004, Regulation 492/2011 and the Citizens’ Rights Directive 2004/38/EC are key legal instruments touched upon in this research. Most importantly, the case law of the Court of Justice of the European Union will be analysed. Moreover, policy documents of the European Commission and national governments will be reviewed. Literature on legal doctrine and legal theory will be used to provide different views on the several topics, to analyse criticism and to search for constructive arguments and ideas on the topic.

Within the overall context, this thesis scrutinizes the legal situation of EU citizens within the context of social rights. With the purpose of determining the extent to which EU citizenship played a role in the development of EU citizens’ social rights, the focus of this analysis will be on economically inactive migrant EU citizens. Economically inactive migrant EU citizens are, for the purpose of this thesis, those EU citizens that migrate to another Member State without working or even seeking a job in that State. In this thesis, economically inactive EU citizens will include students, pensioners and unemployed persons who are not jobseekers. Jobseekers that have no genuine chance of finding a job in a host Member State will most of the time be treated equally with economically inactive EU citizens. Jobseekers and economically inactive EU citizens have, in contrast to workers and other economically active EU citizens, limited access to social benefits. This is based on their social integration rather than economic integration within the host Member State society. Furthermore, the impact of the Court’s case law on the Member States social systems will be touched upon.

1.5 Aim and significance of the research

The aim of this analysis is to evaluate the developments within the area of social rights and their implications for the concept of EU citizenship. First, this thesis will show that the Court regards free movement of EU citizens and equal treatment of these EU citizens as an important aspect of EU integration. This analysis will be conducted in order to examine the extent to which EU citizens gained access to social rights in host Member States, as well as claiming social rights in the Member State they left. Second, this thesis aims to evaluate the developments in the case law of the ECJ in the context of social rights and EU citizenship. The limitations of the relevant case law and legislation on EU citizens claiming social rights will be considered. Ultimately, the aim of this analysis will be to identify the manner in which – in the context of social rights – the concept of EU citizenship can be covered or linked with social rights by the ‘real link’ approach of the Court.

1.6 Roadmap

This research consists of six chapters. These six chapters provide an in-depth analysis of EU citizenship and the ‘real link’ case law of the Court. Chapter two analyses the emergence of the concept EU citizenship, with emphasis on EU citizenship in the context of social rights. Chapter three assesses the conditions for EU citizens, whether economically active or inactive, to claim social rights. Subsequently, chapter four describes the case law of the Court after the very important Förster case. In chapter five, an analysis on the Court’s case law and literature on the issue will be made. Furthermore, challenges will be brought to light. Ultimately, the last chapter will offer recommendations and conclusions based on the findings of this research, and conctures an answer on the main research question.
2 Emergence of EU citizenship within the context of social rights

2.1 Citizenship of a welfare system

When examining the development of EU citizenship, the meaning of this concept and the contribution of the case law of the Court to this concept, one must first assess the concept of citizenship itself. The concept of citizenship cannot be captured in a single, comprehensive definition. Traditionally, there is a close link between citizenship and a state. Citizenship is in this context the realization of the relationship (or link) between the individual and the state. The understandings of Held and Marshall on the concept of citizenship will be kept in mind when examining the concept of EU citizenship and the filling in of this concept within the context of social rights.

Held’s definition of citizenship is that ‘citizenship has meant reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one’s life. And membership has invariably involved degrees of participation in the community.’ This definition suggests that there are three interconnected elements of citizenship, namely rights and duties, membership and participation.\(^8\)

Marshall\(^9\) argues that ‘citizenship involves full membership of a community, which has gradually been achieved through historical development of individual rights, starting with civil rights, followed by political rights and last social rights’. The question that can be posed in this regard is where the concept of EU citizenship stands in this framework.

The core of citizenship can be described as participation in, and equal membership of, a particular community. Equality between citizens is a cornerstone of the notion of citizenship, as it indicates a relationship between individuals within a community and their relationship with the community itself. Generally, in addition to this predominant right to equal treatment, citizenship rights contain civil, social and political rights. It is debatable whether the concept of EU citizenship embraces all of these notions. The EU seems to be a citizenship-capable polity, however, the EU Member States use differing solidarity models; there is no social harmonization within the EU. There are still many challenges for the idea of the EU undertaking citizen-type tasks and activities. All these considerations contribute to the complexity of this area.\(^10\)

As part of a community a citizen has, in addition to duties he or she has, above all the right to be (socially) protected by the State. The right to equal treatment is intertwined with the social rights of citizens.\(^11\) Social rights are connected to the participation of citizens in a community and will be granted to citizens based on a certain link between the members of that community. Nationality and residence conditions are commonly used to determine the link with or the ‘degree of integration’ within a community.

In the context of this thesis it is important to investigate the meaning of citizenship in a EU perspective. Furthermore, it is important to research if being a EU citizen could be a basis on its own to claim social rights or whether access to a social system is based upon other grounds. To examine the contribution of the case law on EU citizens claiming social rights to the concept of EU citizenship and to see whether the concept of EU citizenship embraces social rights, it is important to first demarcate the concept of EU citizenship itself.

2.2 The market childhood of EU citizenship

Before Maastricht, Amsterdam, Nice, the unfortunate European Constitution\(^12\) and Lisbon, membership of a community as a condition to claim social rights was defined in terms of nationality, employment status and residency. These elements constituted in principle the link between citizens and the state where these citizens claimed social rights. The justification for this link was that


\(^10\) Van Eijken 2014, p. 129.

\(^11\) Van Eijken 2014, p. 89.

\(^12\) Treaty establishing a Constitution for Europe, 17 June 2004. France and the Netherlands rejected this Treaty.
nationality shows a shared identity and could be a moral basis for claiming social rights. Residence or employment in a specific Member State could similarly constitute such a justification, as it shows a link with the society of the Member State concerned.

Free movement of citizens of the Member States within Europe was one of the founding principles set out in the 1957 Treaty of Rome\(^\text{13}\) and has remained a very important pillar within the EU. The social dimension of the EU was already included in the objective of that Treaty, as the preamble stipulated the determination to lay the foundations of ‘an ever closer union among the peoples of Europe’. Furthermore, the principles of equal pay for equal work, improvement of work conditions and non-discrimination lay at the heart of the early judgements of the Court in the area of social rights.\(^\text{14}\) Prior to the introduction of EU citizenship by the Maastricht Treaty, the enjoyment of rights of free movement and residence was limited to those who performed, or were to some extent involved in the performance of, an economic activity. The right to free movement for workers and the self-employed has been accompanied by secondary Union legislation\(^\text{15}\), which ensures that these persons have access to social benefits in a host Member State. To ensure free movement of workers, it was important that nationality and residence conditions would be abolished.

The right to freedom movement for workers was established as a core principle of the EU internal market. Besides the economic aspect of the freedom of movement for workers, it also has a social aspect, which is reflected in the principle of equal treatment of EU workers. Economically active EU citizens, also known as market citizens, are those nationals who have exercised their rights of free movement as workers, self-employed or who are providers and recipients of services. Market citizens benefit from, and participate in, the internal market as economic actors. In the specific context of Article 45 TFEU, the Court stated that the concepts of worker and employed person, which define the field of application of this freedom, must receive a broad autonomous Community definition.\(^\text{16}\) The rules on the free movement of workers cover the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. As long as work is genuine and effective, the persons performing this work cannot be excluded from the personal scope of the EU free movement of workers provisions. Neither should these persons be denied the social rights to which they are entitled under these provisions. Considering the free movement of workers and self-employed, the residence and nationality conditions to claim social rights were replaced by the requirement that these citizens made an economic contribution to the host Member State. It is important to mention that EU law only coordinates national social security systems and does not harmonize them. The Court hardly ever mentioned the condition of making an economic contribution in its cases on the Coordination Regulation and Regulation 492/2011. Mentioning this condition would contradict with the free movement objectives of the Treaties as it provides for an obstacle to free movement.\(^\text{17}\) Abolition of residence and nationality conditions under these coordination rules is not based on solidarity arguments, but on ensuring the free movement of workers. The goal of the EU coordination rules on social security is to prevent that citizens suffer disadvantages in protection of social security when exercising their free movement rights. The requirement of making an economic contribution made it possible to access social rights in a host Member State.\(^\text{18}\) When making an economic contribution to a Member State, it is assumed there is a link with the society of that Member State. However, as will be shown by several cases, this link is still not always crystal clear.

In the last decades, the concept of EU citizenship went beyond its internal market context; also economically inactive EU citizens can access social rights under certain conditions that are not based on an economic contribution. Access to social rights is normally preserved for those who are nationals of or those who contributed to the society. This does not mean the contribution has to be

\(^{13}\) Treaty establishing the European Economic Community (TEEC).

\(^{14}\) The Court played an important role in reaching social objectives within Europe, which became apparent in the Defrenne II case; Case C-43/75 Defrenne v Sabena [1976] ECR 455.

\(^{15}\) That is, in the Coordination Regulation (Regulation 883/2004 of the European Parliament and of the Council on the coordination of social security systems, OJ 2004 L166) and Regulation 492/2011 (Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (Text with EEA relevance)). These Regulations will be discussed in the following chapter.

\(^{16}\) Barnard 2013, p. 479.

\(^{17}\) Pennings 2012, p. 327.

\(^{18}\) Pennings 2012, p. 327.
economic. In this area, the Court significantly contributed to the filling in of the concept of EU citizenship by its case law on the free movement of persons. Through the case law of the Court, the concept of EU citizenship has been gradually expanded so as to guarantee protection of certain social rights to all, including economically inactive, EU citizens.

2.3 EU citizenship: not merely a symbolic polish for classic internal market rights

2.3.1 A journey from Rome to Lisbon

Long before the Maastricht Treaty of 1992, there was a desire within Europe to create a ‘Europe for Citizens’. Although the concept of EU citizenship was established long after the establishment of the internal market, the idea of a EU citizenship was already detectable in the landmark cases of Van Gend en Loos\(^{20}\) and Costa/ENEL.\(^{21}\) In these cases, the ECJ already referred to the citizens of the Member States as subjects of Union law.

In 1990, the Spanish delegation published the memorandum ‘Towards European Citizenship’. This memorandum defined EU citizenship as ‘a personal and inalienable status of citizens of Member States, which by virtue of their membership of the Union have special rights and tasks, inherent in the framework of the Union, which are exercised and protected specifically within the borders of the Community, without this prejudicing the possibility of taking advantage of this same quality of European citizens also outside the said borders.’\(^{22}\)

With the Maastricht Treaty the concept of EU citizenship became more concrete. The concept was introduced as part of the move from the European Economic Community towards a more political European Union.\(^{23}\) Already at the time of the introduction of EU citizenship, a lot of discussion was going on about the content, nature and potential of the concept. Various authors\(^{24}\) provided their views on what is or should be the content, the role and the purpose of EU citizenship. In the lengthy debate on the model of EU citizenship several suggestions were made on the possible nature of the concept. One of these suggestions was a market citizenship focusing on the rights of economic actors. Another suggestion was one of social citizenship, which emphasized the social-welfare rights of EU citizens. The broader goals of European integration were also mentioned within these views. According to some authors the creation of EU citizenship could contribute to resolving the problem of the lack of democratic legitimacy of the Union as well as to strengthen the sense of belonging to the European Union.\(^{25}\)

The entry into force of the Lisbon Treaty\(^{26}\) on the 1\(^{st}\) of December 2009 constituted a major reform of the European Treaties. The Lisbon Treaty did not have a major impact on the provisions on EU citizenship. Nonetheless, it linked EU citizenship rights more closely to the prohibition of discrimination on grounds of nationality. The TFEU now provides in Article 20 that ‘every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to, and not replace, national citizenship’. This is an important limitation, as the condition for inclusion within the EU citizenship provisions is the possession of the nationality of a EU Member State. The Member States still hold the exclusive competence in conferring their nationality on their citizens; for this reason they have final say on the acquisition of EU citizenship.\(^{27}\) The TFEU does not try to create ‘a European nationality’. Rather, EU citizenship is an additional status for all those persons who already are and will continue to remain the nationals of one or more Member States.\(^{28}\) Still, Article 20 TFEU has significantly broadened the personal scope of the EU

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22 Towards a European Citizenship (Europe documents, nr. 1653), 2 October 1990.
23 Craig De Burca 2012, p. 819-820.
25 Barber 2002, p. 246. See also O’Leary 1996. In fact, the very aim behind the establishment of European citizenship was to ‘strengthen and consolidate European identity by greater involvement of the citizens in the Community integration process’.
26 The Treaty of Lisbon amends the European Unions two core treaties, the Treaty on European Union (TEU) and the Treaty establishing the European Community. The latter is renamed the Treaty on the Functioning of the European Union (TFEU).
27 Craig and De Burca 2013, p. 819-821.
28 Article 20 (1) TFEU states that Citizenship of the Union shall be additional to and not replace national citizenship.
citizenship provisions; it requires only the nationality of a Member State to have access to EU citizenship rights.

As far as the substantive content of the concept of EU citizenship is concerned, Article 20(2) TFEU declares that citizens of the Union ‘shall enjoy the rights and be subject to the duties imposed by the Treaties’. EU citizens shall have the right to move and reside freely within the territory of the Member States. In addition to Article 20 TFEU, Article 18 TFEU provides that ‘within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’.

According to Article 21 TFEU every citizen shall have the right to move and reside freely. An important Directive in this context is Directive 2004/38/EC on the rights of EU citizens and their families to move and reside in the European Member States, which replaced the old Residence Directives. Directive 2004/38/EC codified the key features of the Court’s case law on free movement. It differentiates between situations of residence of up to three months, three months to five years, and over five years.29 This Directive will be assessed in detail in the next chapter.

To provide for a complete overview, it is important to mention that EU citizenship also grants political rights. A EU citizen has the right to vote and stand as a candidate as laid down in Article 22 TFEU and the right to protection by diplomatic or consular authorities of any European Member State according to Article 23 TFEU. Finally, according to Article 24 TFEU EU citizens have the right to petition the European Parliament, apply to the Ombudsman and address the institutions and advisory bodies of the Union.

It is interesting to see that the EU citizenship provisions do not refer to social rights, while the provisions on the free movement of workers do refer to social rights. The starting point for the examination of the meaning of the concept of EU citizenship within the context of social rights is that EU citizenship is additional to national citizenship. EU citizenship is of a composite nature. It will be argued that the composition of EU citizenship in the context of social rights ultimately will depend on the link with the Member State where social rights are claimed. The construction of this link will be examined hereafter.

2.3.2 Early case law on EU citizenship

Evidently, as discussed in the above, the concept of EU citizenship was born out of free movement rights. Central to the Court's development of the concept of EU citizenship are the rights of economically inactive EU citizens to move and reside freely and the right to equal treatment. For these economically inactive migrant EU citizens the right to reside freely was never free from restrictions. In the judgement in Cowan30 it became apparent that the Court was widening both the personal and material scope of the Treaty provisions on free movement, residence and non-discrimination rights of EU citizens. The Court used the economic free movement provisions togrant social rights to particular individuals who were merely visiting and were (potential) recipients of services. According to the Court, these tourists were governed by Union law and should be treated equally to Member States nationals.31

The Court’s case law in the area of social rights and EU citizenship can be considered as the first cornerstone for a social European Union. From the key EU citizenship judgements of the Court, such as Martinez Sala, Grzelczyk, Baumbast, Bidar and Förster, a number of fundamental developments can be deducted.

First of all, in its ground breaking case Martinez Sala32 the ECJ clarified the relation between the right of non-discrimination on the grounds of nationality and the concept of EU citizenship. Mrs Martinez Sala was a Spanish national who had been a resident in Germany since her childhood. She

29 Directive 2004/38/EC has been integrated into the EEA Agreement, and also applies to Iceland and Norway. The Directive does not apply to Liechtenstein. See Decision of the EEA Joint Committee No. 191/1999. The Directive does not apply to Switzerland. The 1999 Free Movement Agreement and successive changes to it regulate free movement between the EU and Switzerland.
30 Case C-186/87 Cowan [1989] ECR 00195. The Court stated that ‘tourists as recipients of services should be treated equally to a Member State’s own nationals with regard to compensation following an assault’. The Court made use of internal market arguments and the contribution of the individual, in this case a tourist, to the host Member State.
31 Van Eijken 2014, p. 126.
had various jobs in Germany, but was unemployed as of October 1989. Since then she had received social assistance under German Federal Social Welfare Law. In the period leading up to 1984 Mrs Martínez Sala obtained various residence permits. As of 1984, she has only been in possession of documents certifying she applied for extension of her residence permit. The applicable law did not allow that she would be deported. She had been unemployed for four years at the time of claiming child-raising allowance. In principle she was eligible for the payment of the child-raising allowance, given the fact that she did not have any full-time employment, or any employment for that purpose. The German authorities refused her claim. Although she was lawfully residing in Germany, she was not a German national, was not in the possession of a residence entitlement and also did not have a permanent residence permit. From a German law perspective, this decision was well grounded. However, from a law perspective, the outcome could be different. Mrs Martínez Sala was not considered to be a worker or an economically active person. Therefore, the question was whether a EU citizen lawfully residing in a Member State, could invoke Community law rights against the host Member State.

The Court interpreted the right to move and reside freely – now laid down by Article 20 and 21 TFEU – in conjunction with the right of non-discrimination as enshrined in the current Article 18 TFEU. Consequently, citizens lawfully residing in a Member State other than the home State, including those who are not economically active, have the right not to be discriminated against on grounds of nationality in all situations falling within the scope of EU law. The child-raising allowance fell within the scope ratione materiae of Union Law. As a national of a Member State lawfully residing in the territory of another Member State, Mrs Martínez Sala also came within the personal scope of the EU citizenship provisions.

In order to be able to rely on the Article 18 TFEU equal treatment guarantee, economically inactive migrant EU citizens need to acquire the status of lawful resident in the host Member State. Because of Martínez Sala the freedom for the Member States to regulate access to their social systems was reduced. Still, Martínez Sala left unanswered several key legal questions, as the facts of this case were very unusual and case specific.

Not long after Martínez Sala the ECJ’s ruling in Grzelczyk confirmed and further clarified Martínez Sala. Mr Grzelczyk was a French student who invoked (now) Article 18 TFEU in conjunction with (now) Article 21 TFEU and the old Residence Directive to claim public assistance in Belgium. This public assistance was a minimum income guarantee and did not count as study finance, but as a social advantage. Mr Grzelczyk had been working until the fourth year of his studies to support himself financially. The fact that Mr Grzelczyk was not of Belgian nationality was the only condition on the basis of which he could not receive public assistance. According to the Court, such discrimination was in principle prohibited by Article 18 TFEU. This discrimination could however be justified. Article 21(1) TFEU is subject to express derogations. Students can be a too heavy burden on the social system of the Member State. According to the Belgian government, Mr Grzelczyk asked for financial support and did thus by definition not have sufficient resources. The Belgian government was therefore of the opinion that he could be denied equal treatment and be evicted. The Court argued that automatic withdrawal of a residence permit could not be justified by the argument of not having sufficient resources. Students only need to declare they have sufficient resources at the beginning of their studies, Mr Grzelczyk should be entitled to some State support as long as he was not an ‘unreasonable burden’. According to the Court the free movement of citizens was based on ‘a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties that a beneficiary of the right of residence encounters are temporary’. The outcome in the Grzelczyk case was just as in Martínez Sala very dependent on the facts. The Court did not want to exclude the group of migrant students to claim social rights in the European Union too easily. According to the Court, recourse to a Member State social system may

32 In the material scope of the Coordination Regulation.
33 Case C-65/96 Martínez Sala, par. 61.
35 Pennings 2012, p. 318; Case C-184/99 Grzelczyk, par. 37.
36 Case C-184/99 Grzelczyk, par. 41, 42 and 45.
37 Case C-184/99 Grzelczyk, par. 44.
not automatically lead to expulsion. A Member State should take the principle of proportionality into account. Proportionality can be assessed by age, health and the links someone has with the home Member State, and by assessing the degree of integration, for example the period of residence in a host Member State, family and the economic situation.

In Baumst the ECJ ruled that (now) Article 20 TFEU was directly effective. The case addressed the question whether a EU citizen who no longer enjoyed a right of residence in the host Member State from his or her status as a migrant worker ‘can, as a citizen of the Union, enjoy a right of residence by direct application of Article 18(1) EC’. The Court argued that Mr Baumst enjoyed a free standing right to reside in the UK under what is now article 21(1) TFEU, although subject to the limitations and conditions laid down by Union law and the measures adopted to give effect to Union law, which at that time were the Residence directives. The Court argued that those limitations and conditions had to be in compliance with the principle of proportionality.

Also the case of Trojani was about access to social benefits provided to those who reside in a host Member State and backed the Martinez Sala case. In Trojani a French national who had a temporary residence right in Belgium claimed a ‘minimex payment’, which was the same social advantage Grzelczyk claimed earlier. Due to the residence permit Mr Trojani possessed, he could rely on (now) Article 18 TFEU. Mr Trojani suffered from direct discrimination on grounds of nationality, which was not allowed.

It is important to mention another very much debated aspect of the Grzelczyk case. In Grzelczyk the Court proclaimed for the first time it’s since then oft-repeated words ‘Union Citizenship is destined to become the fundamental status of nationals of the Member States’. When this status will exactly be achieved is still unclear. As a status, EU citizenship is dependent on the different approaches to citizenship within the Member States, as only nationals of the Member States are citizens of the European Union. A possible interpretation is that EU citizenship is not purely a means of economic integration and implies a basic level of rights.

The aforementioned case law and the introduction of EU citizenship show a development in EU law that does not only take economic perspectives into account. Still, the facts of these cases were crucial for the outcomes in these cases. It can be concluded that in these cases there has been a disconnection with the economic link. Even when a EU citizen is not economically active, this citizen can under certain circumstances be allowed to access social benefits in a EU Member State. The development did not end with these cases. For this reason, in the following chapters the later case law of the Court will be assessed.

2.4 The journey continues

The accomplishments of the EU in the area of social policy, although individually very important, resemble more to an early framework of a social Europe, as the adopted social measures do not establish a coherent social protection system. As has been shown, market or economically active EU citizens have access to social benefits in the EU Member States. For these market citizens the rules of Article 45 TFEU, the coordination rules and case law of the Court apply. There has been a development to also increasingly grant ‘social’ EU citizens access to these social benefits. This seems to be in line with Article 3(3) TEU, which mentions that the EU shall establish ‘a highly competitive social market economy aiming at full employment and social progress’. This article also states that the Union shall combat social exclusion and discrimination. However, there are inherent limits to the Lisbon Treaty and the competences of the EU. In the Lisbon Treaty, social policy is mentioned both in Article 4(2) TFEU on ‘shared competence’ and Article 5(3) TFEU on ‘complementary

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40 Case C-184/99 Grzelczyk, par. 38-43.
41 Pennings 2012, p. 323; this is now laid down in Article 14(3) of Directive 2004/38/EC.
42 Case C-413/99 Baumst and R v Secretary of State for the Home Department [2002] ECR I-7091, par. 76.
43 Case C-413/99 Baumst, par 81.
44 Case C-413/99 Baumst, par. 86 and 91.
45 Case C-656/02 Trojani [2004] ECR I-7573.
46 Case C-184/99 Grzelczyk, par. 31.
47 Article 20(1) TFEU.
48 Article 4(2)(b) TFEU stipulates that social policy, ‘for the aspects defined in the TFEU’ falls under a shared competence between the European Union and the Member States. ‘Shared competence’ means that in certain social policy areas, both the European Union and the
citizens, and, particularly, migrant EU citizens who are not economically active. See Lenaerts and Heremans 2006, p. 103. Als social rights, since the citizen
which systems, par.
Member States are competent to exercise their regulatory powers. The Member States shall exercise their competence to the ext
Martínez Sala 51 stated that the introduction of the concept of EU citizenship has evolved since the introduction of this concept in the Maastricht Treaty. 52 The effects of the case law on the concept of EU citizenship are mostly visible in the context of social rights. Most notable is the use of the Court of the Treaty. 53 The principles of free movement and equal treatment play an important role in this regard. The provisions on EU citizenship expand the opportunity to claim social benefits in another Member State significantly and affect the Member States’ sovereignty in regulating their social systems. Still, the EU does not directly interfere with the substantial social choices of the Member States. 54

The development of the concept of EU citizenship within the context of social rights continued in cases such as D’Hoop 55, where the Court has allowed access to social benefits by a former student in the home Member State, and Bidar 56, involving a migrant student who applied for a student loan in a host Member State. When a link between the EU citizen and the Member State society is established, this EU citizen should have access to social benefits in that Member State. This also has impact on non-migrating EU citizens. With a ‘real link’, the degree of integration within a society can be measured. Also, in the case of Morgan and Bucher 57 the Court applied this link approach to EU citizens who were treated unequally with those who stayed in the home Member State. In order to assess the degree of integration or the ‘real link’ the Court uses a proportionality test. 58 These cases and the ‘real link’ approach will be assessed in the following chapters.

2.5 Conclusion

The concept of EU citizenship has evolved since the introduction of this concept in the Maastricht Treaty. 59 The effects of the case law on the concept of EU citizenship are mostly visible in the context of social rights. Most notable is the use of the Court of the EU citizenship concept to extend the application of the principle of non-discrimination on grounds of nationality to all, even economically inactive, EU citizens. The right to free movement changed from ensuring economic integration to help ensure the broader goal of (social) EU integration. The establishment of the concept of EU citizenship placed EU citizens at the heart of EU integration. 60 The Court in Grzeleczky stated that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’ and started in Martínez Sala to base the equal treatment guarantee on the status of EU citizenship. Worker status was

Member States are competent to exercise their regulatory powers. The Member States shall exercise their competence to the extent that the Union has not or has ceased to exercise its competence (Article 2(2) TFEU).

50 Article 5 (3) TFEU empowers the EU to ‘take initiatives to ensure coordination of Member States’ social policies’.

51 Shaw 2011, p. 12.

52 Case C-85/96 Martínez Sala v Freistaat Bayern.

53 Dougan and Spaventa 2005, p. 189.


55 Case C-209/03 Bidar [2005] ECR I-2119.

56 Case C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-09161.


58 That is to say, the effects of developments concerning the concept of Union citizenship have been most dramatically felt in the field of social rights, since the citizenship provisions of the Treaty revealed themselves as ‘notorious catalysts’ in expanding social rights of Union citizens, and, particularly, migrant EU citizens who are not economically active. See Lenaerts and Heremans 2006, p. 103. Also, see Chalmers 2006, p. 597.

no longer the sole criterion for EU citizens’ access to social benefits in a host Member State. As described above, by its broad interpretation the Court expanded the concept of EU citizenship to guarantee certain social rights to EU citizens in Member States of which they are not nationals. The rule developed in *Martinez Sala* enabled EU citizens to access social benefits, provided that they lawfully reside in their host Member State and their situation falls within the scope *ratio materiae* of EU law.\(^{60}\) However, Member States can justify restricting access to their social system.

The case law on EU citizenship granting access to foreign social systems is much debated. It seems to be accepted that when EU citizens are a ‘reasonable’ burden on the social system of a Member State they should be able to benefit from the social rights that Member State provides. However, when these citizens constitute an ‘unreasonable’ burden, Member States do not have to accept their claims. The introduction of EU citizenship entails important consequences for the Member States and their social systems. The Court, in trying to answer to both the concept of EU citizenship and the exclusiveness of national social systems, introduced the ‘real link’ approach in the case law on EU citizens claiming social rights, to answer to the different interests in this context.\(^{61}\) This ‘real link’ approach will be assessed in detail in the following chapters. Furthermore, the differences in conditions for access to social rights by economically active and inactive EU citizens will be discussed in detail.

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\(^{60}\) Case C-85/96 *Martinez Sala*.

3 Conditions for EU citizens’ access to social rights

3.1 Accessing social rights within the EU

3.1.1 Introduction

After having discussed the emergence of EU citizenship, the early case law of the Court on EU citizenship and EU citizens claiming social rights, it is crucial to provide an outline of the conditions for economically active as well as economically inactive EU citizens to fulfil to secure access to social rights.

An issue on which much is written, especially after the establishment of EU citizenship, is to what extent a EU citizen who exercised the right to free movement can establish a link with the society of a host Member State. In 1957, it was deemed essential for achieving the free movement of workers to adopt rules that override nationality and residence conditions.62 There is a difference between economically active and inactive EU citizens; distinctions are made between migrant workers, former workers, jobseekers, frontier workers and non-workers. Correspondingly, different standards apply with regard to legal status and duration of residence. Furthermore, distinctions can be made between family members of workers and family members of EU citizens. Third country nationals fall in a separate category. In Antonissen63 the Court already held that when the right to work in a Member State other than that of origin would be preserved for persons that found a job in this Member State before residing there, this right would become illusory.64 In this case the Court made it possible for jobseekers to access certain social rights that allow them access to the employment market of that Member State, ‘as long as they have a genuine chance of finding work there’.

Different conditions for access to social rights apply to these different categories of EU citizens. The right of economically inactive migrant EU citizens to reside freely was never entirely free from restrictions. Even now, EU law subjects their residence right to certain limitations and conditions expressly provided for in Directive 2004/38/EC in accordance with Article 21(1) TFEU. Unless the host Member State decides to adopt and apply provisions for lawful residence that are more favourable for these EU citizens, the limitations and conditions provided for by secondary EU legislation will apply.

In claiming social rights, workers and economically active EU citizens receive the best protection and have the easiest access to social rights within the EU. For this reason, one always has to assess whether Article 45 TFEU is applicable, before assessing the EU citizenship provisions and Article 18 TFEU. Article 21 TFEU generally sets out the right to free movement of EU citizens, which also finds specific expression in Article 45 TFEU. As discussed, the Court has a broad interpretation of those that are to be considered workers.65 Economically inactive EU citizens can, subject to certain conditions and limitations, access social rights when their situation falls within the scope of EU law. This equals access to the aforementioned Article 18 TFEU equal treatment guarantee.

Even though the focus of this thesis is on economically inactive EU citizens’ eligibility to social benefits, it is still vital to illustrate EU legal provisions on social rights for the economically active. This is particularly crucial as some categories of economically inactive EU citizens, for instance family members or those that are or have been economically active in the host Member State before, may access social rights on the basis of legislation on free movement of workers.

First, it is also important to notice that there is a difference between social security and social assistance, but the boundaries between what is deemed social security and what is meant with social assistance are often vague. Generally, social assistance benefits especially depend on the actual needs of the person who claims the benefit and not on previous (economic) contributions to the social system. Social security is intended to cover certain risks with a social character, such as risks of

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64Van Eijken 2014, p. 125.
65Case 53/81 Levin [1982] ECR 1035. A worker is a person who is performing work for a certain period of time for remuneration and under the supervision of another person, which is an economic activity.
invalidity, sickness, unemployment, maternity and old age. In this thesis, also special non-contributory benefits will be mentioned, these benefits are a mix of social assistance and social security.66

In the following, the legislation that applies to economically active and inactive EU citizens when accessing social rights within the EU and the case law of the Court on the access of EU citizens to these social rights will be assessed.

3.1.2 The Coordination Regulation: a limited list of social benefits

The Coordination Regulation67 is based on Article 48 TFEU and contains rules for the purpose of determining which (home or host) Member State is responsible for providing social benefits.68 The objective of this Regulation on the coordination of social security systems was adopted in the area of the social protection of migrant workers. This Regulation does not create a EU wide social security system; the Regulation only coordinates the 28 social security systems of the Member States. The aim of the Regulation is to promote the free movement of persons and to determine the applicable legislation. This Regulation protects migrant workers from any losses in their social protection when they make use of their free movement rights by taking up work in another, or more than one, Member State, and thereby being subject to different social security systems. The Regulation is especially important for migrant persons who want to export social benefits or might have to pay contributions in more than one Member State. Article 4 of the Coordination Regulation contains a prohibition of direct and indirect discrimination. This Regulation has priority over Regulation 492/201169 and Article 18 TFEU in combination with Article 21 TFEU. Therefore, this Regulation will be assessed shortly.

The personal scope of the Coordination Regulation is determined in Article 2 of the Regulation; the Regulation applies to all nationals of the Member States and is not limited to the employed or self-employed.70 Persons with the nationality of the Member States, whether economically active or not, can rely on the Coordination Regulation, which has horizontal direct effect. Refugees and persons that are stateless can also rely on the Regulation when they reside in a EU Member State.71 Nationals of one of the European Economic Area (EEA) countries and Switzerland are assimilated with the nationals of the EU Member States in this context. These persons are not regarded as third country nationals in the context of the Regulation. Third country nationals did not fall under the scope of Article 48 TFEU and therefore not under the scope of the Regulation, since they do not enjoy the free movement rights of the EU Treaty.72 For this reason Regulation 1231/201073 based on Article 79 TFEU was adopted. Third country nationals now can rely on the Coordination Regulation when they are legally resident in a Member State and the facts concern at least two Member States.

Article 3 of the Regulation provides the material scope, which is a limited list of statutory (social) benefits.74 The list does not mention study grants or social assistance; therefore, these social benefits fall outside the material scope of the Coordination Regulation.75 Residence conditions are in principle removed when it considers contributory benefits. In Hendrix76 the Court ruled in the case of a migrant worker that residence conditions could only be maintained when objectively justified and proportionate to the objective pursued. Mr Hendrix had exercised his right of free movement as a

66 According to Regulation 883/2004, special non-contributory benefits are granted in the Member State of residence. Each Member State's special non-contributory benefits are listed in Annex X to that Regulation.
68 See the Preamble of Regulation 883/2004.
69 The difference between Article 45 and 48 TFEU is that Article 45 TFEU prohibits any discrimination on grounds of nationality. Article 48 TFEU is on the promotion of free movement.
71 Penning 2012, p. 310.
72 Recital 7 and Article 2 of the Coordination Regulation.
74 This replaced Regulation 859/2003. The United Kingdom, Ireland and Denmark reserved an opt-out.
75 This Regulation shall apply to all legislation concerning the following branches of social security: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits. Social security coordination does not extend to social and medical assistance.
76 Penning. 2012, p. 310.
77 Case C-287/05 Hendrix [2007] ECR I-6909.
worker and maintained a link to the home Member State. For the purpose of this thesis it is important to note that additional criteria were added to establish a link instead of relying on a residence condition. However, this case concerned a worker, which is an economically active EU citizen.

In this context it is also important to notice that jobseekers have the possibility to claim jobseekers’ allowance in Member States that do not qualify these benefits as social security benefits, but as special non-contributory benefits as laid down in Annex X of the Coordination Regulation. The Coordination Regulation lays down a residence based approach for these special non-contributory benefits.

When a person does not fall within the personal scope, the benefit does not fall within the material scope or the issue does not fall within the territorial scope of the Coordination Regulation, one has to assess whether Regulation 492/2011 or Article 18 TFEU in combination with Article 21 TFEU is applicable.

3.1.3 Regulation 492/2011: only workers

Regulation 492/2011 is an elaboration of Article 45 TFEU on the free movement of workers. The personal scope of this Regulation includes only workers and establishes the equal treatment of EU workers with the host Member State nationals with regard to social- and tax advantages. Under the Regulation the concept of worker is, just as under Article 45 TFEU, broadly interpreted. The Court often leaves it to the national court to decide whether someone is to be regarded a worker. Jobseekers, frontier and seasonal workers are included in the scope of the Regulation. Furthermore, former workers can be included when a relationship between their quality as a worker and the rights in question exists, for instance with unemployment benefits, as former workers do have an economic link with the Member State society. Finally, members of the family can be included. However, a Member State is only obliged to grant a social benefit to family members when these family members are economically dependent of the worker in question and when this benefit is regarded a social benefit ‘pertaining to the employed person’. The self-employed and economically inactive (non-family members) are excluded from the personal scope of this Regulation.

The material scope of Regulation 492/2011 comprises all advantages that are paid in a particular Member State to workers or residents. This means that when a person is a worker, or someone falling within the personal scope of the Regulation, this person can also receive study grants; study grants are social benefits within the meaning of this Regulation. The Regulation provides for an exception to war compensation benefits, as these benefits are linked to national gratitude.

Article 7 of the Regulation contains a non-discrimination rule and removes nationality conditions. The Court broadly interprets this non-discrimination rule, but a study grant for the child of a former worker is excluded; this social benefit is not related to the former employment relationship. Residence conditions are not completely removed by Article 7. For some types of benefits residence conditions can be allowed, if it can be preserved that for these benefits a ‘real link’ with the society is an acceptable requirement, and, in case of indirect discrimination, there is a legitimate justification.

The Coordination Regulation has a rather limited material scope. Regulation 492/2011 has a much broader material scope, yet its personal scope is limited to workers, former workers and family members. Therefore, when the Court in Martinez Sala linked Article 20 to the non-discrimination rule

77 Pennings 2012, p. 311. Inter alia by the rules determining the applicable legislation, by provisions prohibiting indirect discrimination, by provisions requiring assimilation of periods and facts and by transfer provisions.
79 As in the Case C-656/02 Trojanj.
82 Case 248/83 Hoeckx [1985] ECR 982: Social benefits are all those which, ‘whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community’.
85 Pennings 2012, p. 315.
86 Pennings 2012, p. 316.
of Article 18 TFEU, this meant an enormous extension of the applicability of the equal treatment guarantee.\(^{87}\)

### 3.2 Access to social rights by economically inactive EU citizens

#### 3.2.1 Famous and infamous: EU citizens claiming social rights

As has been mentioned, in the EU also non-workers can be allowed to access social rights. Article 21 TFEU ensures free movement of EU citizens.\(^{88}\) For a EU citizen to fall within the scope of EU law there has to be some cross-border aspect.\(^{89}\) The applicability of Article 18 TFEU to social assistance and study grants removed nationality conditions. Articles 18, 20 and 21 TFEU not only prohibit direct and indirectly discriminatory national rules, also legislation that disadvantages EU citizens when they exercise their right to move and reside freely is prohibited. Unequal treatment can be justified by objective considerations that are proportionate, and that are not based on nationality.

The specifics concerning the exact meaning of the lawful residence requirement have been elaborated in the ECJ's case law on EU citizens claiming social rights. In *Martinez Sala* the Court clarified that lawful residence could not only be derived from Article 21 TFEU or secondary EU legislation;\(^{90}\) it could also be derived from national legislation of a host Member State.\(^{91}\) When a person is considered to fall within the personal scope of EU law, he or she will be able to rely on Article 18 TFEU.\(^{92}\) According to *Baumbast*\(^{93}\) the existence of limitations and conditions does not prevent Article 21 TFEU from conferring on EU citizens a directly effective right of residence, which can be enforced by these individuals and must be protected by the national courts.\(^{94}\) However, EU law does not completely reduce the Member States power in limiting the number of EU citizens coming to their territory to reside there and provides several defence mechanisms to avoid social tourism.

In *Collins* the Court overruled the *Lebon*\(^{95}\) case on jobseekers. This ruling was already implicitly called into question by the aforementioned *Martinez Sala* case. In *Lebon* the Court had distinguished between those migrant workers that became unemployed, and therefore became jobseekers, and those who are first-time jobseekers. The latter do not have a right to equal treatment with regard to unemployment benefits. The *Collins*\(^{96}\) case serves as an example of a case that broadened the material scope of EU law. Collins was a jobseeker who claimed equal treatment as regards the entitlement of jobseeker allowance. The Court stated that ‘in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 45 TFEU a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’.\(^{97}\) For this reason, economically inactive jobseekers can access certain social benefits when they facilitate access to the labour market.

\(^{87}\) Pennings 2012, p. 317 and 327.

\(^{88}\) Case C-413/99 *Baumbast*, par. 84. In *Baumbast* the Court recognized that the right to reside as enshrined in Article 21 TFEU is conferred directly on every European citizen.

\(^{89}\) Still, Union law does not cover purely internal situations. These purely internal situations will not be further discussed in this thesis.


\(^{92}\) Case C-656/02 *Trojani*, par. 37-40.

\(^{93}\) Case C-413/99 *Baumbast*, par. 85-86.

\(^{94}\) According to settled case law, the existence of limitations and conditions to a certain right cannot automatically deprive this right of its direct effect, since the application of limitations and conditions is subject to a judicial control. See Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337, par. 7. See further Jacquesson 2002, p. 274.

\(^{95}\) Case 316/85 *Lebon* [1987] I-02811. In 1987, the ECJ held in *Lebon* that ‘those who move in search of employment qualify for equal treatment only as regards access to employment’. Consequently, jobseekers could move to another Member State in order search for work, yet they would not enjoy all the social advantages attached to the status of worker until they actually found work.

\(^{96}\) Case C-138/04 *Collins* [2004] I-2703, par. 61.

\(^{97}\) Case C-138/02 *Collins*, par. 63.
With regard to social assistance benefits, the Court held in Trojani\textsuperscript{98} that a EU citizen that is not economically active might rely on Article 18 TFEU when he or she has been lawfully resident in the host Member State for a certain time or possesses a residence permit.

In \textit{D’Hoop}\textsuperscript{99} Belgium had to grant a tide-over allowance to a Belgian national, Nathalie D’Hoop, who had studied in France, but returned after obtaining her diploma to live and seek work in Belgium. The Belgian authorities rejected her application. The Court stated that the national legislation at hand placed a disadvantage on certain Belgian nationals, simply because they exercised their right to free movement. Mrs D’Hoop pursued education in another Member State and was treated less favourable because of this movement. Linking the advantage concerned to acquiring a diploma in Belgium was not allowed. The justification the Belgian government used was too general and too exclusive, a ‘real link’ was not considered in the overall assessment.\textsuperscript{100} ‘A difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions’.\textsuperscript{101} A link to the geographical labour market could have sufficed as an argument for Belgium.

The \textit{Morgan and Bucher}\textsuperscript{102} case concerned export of student grants. \textit{Morgan and Bucher} was about German nationals who wanted to study in another Member State. Compared to other German nationals who stayed in Germany, they were negatively affected by using their freedom of movement. Morgan and Bucher wanted to go abroad and study in the Netherlands. The study programme they wanted to pursue was not available in Germany. For that reason they could not fulfil the German requirement for study allowance, which was the attending of German education for at least one year and having permanent residence in Germany. The Court found that this requirement was a restriction of free movement.\textsuperscript{103} According to the Court, the aim of the restriction was legitimate, but not proportionate. Social benefits should not be precluded in a general way; however, the justification ground did not take into account the degree of integration of Morgan and Bucher in Germany. A ‘real link’ between the citizen and the Member State has to be taken into account.\textsuperscript{104} In \textit{Morgan and Bucher} the Court explicitly referred to the \textit{Bidar}\textsuperscript{105} case, \textit{Bidar} will be assessed in the following.

A residence condition for frontier workers, which are economically active EU citizens, was upheld in the case of Geven.\textsuperscript{106} This case concerned a Dutch national that was a part-time frontier worker in Germany. Mrs Geven wanted to claim a child-raising allowance, however, the applicable German law required a minimum of fifteen hours work a week before a person could claim this benefit. The child-raising allowance was granted to persons who had a ‘real’ or ‘genuine link’ with the society of Germany. Lawful residence in Germany was not the only factor to establish such a link, the requirement was making a substantial economic contribution. The refusal of the child-raising allowance was considered justified by the Court. According to Geven, Article 7 of Regulation 492/2011 can allow a residence condition when the specific type of benefit asks for it.

\textit{Gravier}\textsuperscript{107} already assured that access to education in a host Member State, and thereby access to grants and loans for tuition costs, must be based on the principle of equal treatment. Foreign students only had access to host Member State grants and loans for tuition costs. However, the introduction of EU citizenship also gave students access to a host Member State maintenance grants. This became clear in the \textit{Bidar} case. Mr Bidar was a French national who claimed a study grant for maintenance costs in the United Kingdom. He already had completed his secondary education in the UK without recourse to social assistance. Mr Bidar received tuition costs for his education at University College London. The application for maintenance costs was refused, as the UK government did not consider Mr Bidar to be ‘settled’ within the UK.

\begin{footnotesize}
\begin{enumerate}
\item Case C-456/02 Trojani, par. 43.
\item Case C-224/98 D’Hoop [2002] ECR I-06191.
\item Case C-224/98 D’Hoop, par. 30.
\item Case C-224/98 D’Hoop, par. 36.
\item Joined Cases C-11/06 and C-12/06, Morgan and Bucher [2007] ECR I-09161.
\item Joined Cases C-11/06 and C-12/06, Morgan and Bucher, par. 25 and 28-31.
\item Joined Cases C-11/06 and C-12/06, Morgan and Bucher, par. 35-50.
\item Schrauwen 2011, p. 12.
\item Case C-213/05 Geven [2007] ECR I-6347.
\item Case 293/85 Gravier [1985] ECR 593.
\end{enumerate}
\end{footnotesize}
The Court in *Bidar* held that student maintenance constituted a benefit covered by the scope *ratione materiae* of Union law.\(^{108}\) Considering the introduction of EU citizenship the Court held that the situation of a EU citizen that is lawfully residing in another Member State falls within the scope of application of Article 18 TFEU. The Court accepted that ‘in the case of assistance covering the maintenance costs of students, it is legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State’.\(^{109}\) According to the Court a ‘Member State cannot require the students concerned to establish a link with its employment market’.\(^{110}\) The Court did mention that a certain degree of integration may be established when someone has lived in the host Member State for a certain period.\(^{111}\) The ECJ ruled that Dany Bidar was to be considered ‘settled’ as he did have a ‘genuine link’ with the UK, but that ‘English legislation precludes any possibility of a national of another Member State obtaining settled status as a student\(^{112}\), which made him unable to ‘pursue his studies under the same conditions as a national of that Member State. It is therefore incompatible with Community law’.\(^{113}\) The UK requirement was not proportionate and appropriate. The Court did not apply the old Residence Directive, which excluded maintenance grants or loans for students. Again, the facts of this case might have influenced the Court, as Mr Bidar already had a general right of residence in the UK, not based on him wanting to pursue a study programme. In both *D’Hoop* and *Bidar* the Court argued that the Member States have the possibility to justify the restrictions for access to social rights by economically inactive EU citizens. The Member States at issue used the wrong arguments to justify the restrictions they imposed. After the ruling in *Bidar*, the new Citizens’ Rights Directive 2004/38/EC entered into force.

### 3.2.2 Restrictions from Directive 2004/38/EC on EU citizens’ access to social benefits

Directive 2004/38/EC,\(^{114}\) the so-called Citizens’ Rights Directive, provides for the right to move and reside freely for EU citizens. The aforementioned case law was consolidated in this Directive. The Directive applies to EU citizens, as defined in Article 20(1) TFEU and Article 2(1) of the Directive. Any person having the nationality of a Member State is a EU citizen that falls within the personal scope of the Directive. Also family members\(^{115}\) fall within the personal scope of the Directive.

Article 6 of the Directive contains the right to stay in a Member State for the maximum of 3 months without any conditions. Article 7 states that in the case a person stays for more than 3 months and less than 5 years this person should not become an unreasonable burden to the host Member State. According to Article 7(3) of the Directive a person can retain his or her status as worker or self-employed.\(^{116}\) After five years of residence, a EU citizen and his or her family members gain a permanent right of residence within the EU Member State concerned.

According to Article 24 of the Directive, all EU citizens residing in the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of EU law. The benefit of this right shall be extended to family members. Still, Article 24 draws a distinction between the economically active and the inactive. Article 24(2) provides that a Member State is not obliged to

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\(^{108}\) Case C-209/03 *Bidar* [2005] ECR I-2119, par. 44 and 48.

\(^{109}\) Case C-209/03 *Bidar*, par. 57.

\(^{110}\) Case C-209/03 *Bidar*, par. 58.

\(^{111}\) Case C-209/03 *Bidar*, par. 59.

\(^{112}\) Case C-209/03 *Bidar*, par. 61.

\(^{113}\) Case C-209/03 *Bidar*, par. 61-63.

\(^{114}\) Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. These Directives already made the enjoyment of such rights subject to fulfilment of two important conditions, namely the possession by the applicants for residence of medical coverage in respect of all risks in the host Member State and having sufficient resources so that these persons could not become a burden on the host Member States. These Directives were repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68. In 2004, the Student Mobility Directive along with two other directives on welfare and residence rights for non-economically active mobile persons in the European Community (Directive 90/364/EEC ‘on the right of residence’ and Directive 90/365/EEC ‘on the right of residence for employees and self-employed persons who have ceased their occupational activity’) was repealed by the Citizenship Directive 2004/38/EC, which combined the different bases for welfare claims of these three directives.

\(^{115}\) Article 2(2) of the Directive gives the definition of family members.

\(^{116}\) When this person is temporary incapable to work, this person is unemployed after having worked for more than 1 year, after a fixed term it is no less than 6 months retained or when it concerns a person in vocational training.
confer social assistance during the first 3 months of residence or, where appropriate, a longer period provided for in Article 14(4)(b). Nor shall the host Member State ‘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’. Thus, exceptions to equal treatment apply to study grants and public assistance.117

3.2.3 Three lawful residence types under Directive 2004/38/EC

As mentioned, the Citizens’ Rights Directive distinguishes between three types of lawful residence. The first type is the ‘right of residence for up to three months’, provided by Article 6 of the Directive. According to this article, ‘Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport’. The right of temporary residence enshrined in Article 6 is not free from restrictions. Article 14 (1) states that ‘Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State’. Accordingly, when a host Member State decides to give its temporary residents access to social assistance, it is open to this Member State to terminate such residence when the EU citizen concerned relies too excessive on its social system. This provision evidently aims to protect the Member State social systems.

The second lawful residence type is the ‘right of residence for more than three months’118 In Article 7(1) the limitations to and conditions that need to be satisfied by economically inactive migrant EU citizens who wish to reside for a period longer than three months in the host Member State are prescribed.119 The residence right is made conditional upon the requirement of having comprehensive medical insurance and sufficient resources not to become a burden on the social system of a host Member State. Those EU citizens do not pose a threat to the host Member State social system and will be admitted to its territory. The Directive provision makes a distinction between economically independent and dependent economically inactive EU citizens; the provision prescribes different conditions for the residence right for these different categories of citizens. Economically independent are those who are self-sufficient or for example pensioners.120 Students are an example of economically dependent EU citizens.121 It is rather peculiar that economically independent citizens have to provide evidence of their financial situation, while students only need to assure the host Member State authorities they have sufficient resources not to become a burden on the social system.

The ‘right of permanent residence’ covered by Article 16 of the Directive is the final lawful residence type. The main requirement is five years of continuous lawful residence in the territory of a host Member State.122 The ECJ found the requirement of legal residence in Article 16(1) to be a period of residence that complies with the conditions laid down in this Directive, in particular those set out in Article 7(1).123 A EU citizen that has been resident for more than five years in a host Member State on

119 According to Article 7(1) (b) and (c) of Directive 2004/38 migrant European citizens who do not constitute workers or self-employed persons are allowed to reside on the territory of another Member State fu more three months only if 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 and have comprehensive sickness insurance cover in the host Member State’, or ‘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’. 120 Previously covered by Directives 90/364/EEC and 90/365/EEC. This category is now covered by Article 7(1)(b) of Directive 2004/38.
121 Previously covered by Directives 93/96/EEC. Article 7(1) (c) of Directive 2004/38 now covers this category.
122 In relation to the 5 years of continuous lawful residence requirement, Directive 2004/38 further clarifies that temporary absences not exceeding a total of six months a year, or longer absences in relation to compulsory military service, will not affect the required continuity of residence. It also provides that the continuity of residence will not be affected by an absence of a maximum of twelve consecutive months if this absence is caused by important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. However, the right of permanent residence will end in the case of an absence from a host Member State for a period exceeding two consecutive years.
123 Joined Cases C-424/10 and C-425/10 Ziółkowski and Szeka [2011] ECR 1-14035, par. 46.
the sole basis of the national law of that Member State, cannot be regarded as having acquired the right of permanent residence under Article 16(1) of the Directive if this EU citizen did not satisfy the conditions laid down in Article 7(1) of the Directive during that period of residence.\textsuperscript{124}

Once someone acquires a permanent residence right, this is not conditioned upon any (economic) requirements aiming to protect the Member State social system from potential financial burdens. On the contrary, after five years of continuous lawful residency, a migrant EU citizen is deemed to have established a link with the society and has a full right to equal treatment in access to social benefits. On the other hand, someone should have been eligible for residence in that Member State in the foregoing five years.\textsuperscript{125}

The Citizens’ Rights Directive is, unlike the model of making an economic contribution to a society as before Maastricht, based on a broader understanding of links between a migrant EU citizen and the host Member State. Not only making an economic contribution is taken into account. It can be concluded that the number of justifications Member States have, decrease as the degree of integration of economically inactive migrant EU citizens into a host Member State society grows. Nonetheless, the Directive still provides for a residence condition of five years before a EU citizen is considered integrated within the Member State society. The question to be answered in the following chapters is how the degree of integration has to be assessed in individual cases and if other criteria can be taken into account than years of residence for establishing a link with a Member State society.\textsuperscript{126}

\subsection*{3.2.4 A special regime for jobseekers under Directive 2004/38/EC}

According to the Citizens’ Rights Directive jobseekers have a mixed status: on the one hand, they are not contributing to the host Member State’s economy, on the other they hold the potential to do so. In the Directive, a difference is made on first-time jobseekers that come to a Member State to seek work and those jobseekers that have already been employed in the host Member State. Under Article 7(3) of the Directive, EU citizens will retain their worker or self-employed status if they ‘are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as a jobseeker with the employment office’. When a EU citizen has been employed for less than one year and becomes involuntarily unemployed, according to Article 7(3)(c) this EU citizen will retain the worker status for 6 months. The first-time jobseekers have no worker status they can retain. Given the mentioned concerns on social tourism, the EU legislator and the Court have been reluctant to grant equal treatment to these jobseekers, as their economic activity is merely potential.\textsuperscript{127} Article 24(2) of the Directive also applies to jobseekers, which means Member States are not obliged to grant them social assistance benefits ‘during the first three months of residence, or, where appropriate, the longer period provided for in Article 14(4)(b)’. Article 14(4)(b) provides that EU citizens who ‘entered the territory of the host Member State in order to seek employment and their family members may not be expelled for as long as the United citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’.

\subsection*{3.2.5 The Förster case}

Nationality suggests a common identity of those persons with that particular nationality. Making an economic contribution is not likely to create such identity. Especially economically inactive EU citizens have to face a lot of obstacles before belonging to the community of a host Member State. Particularly interesting in this regard is the ‘real link’ approach of the Court. As aforementioned, the Court introduced this approach in cases where EU citizens were seeking access to social benefits based on a combination of Articles 18, 20 and 21 TFEU. Requiring such a link is seen as a legitimate means for Member States to justify unequal treatment of, or restrictions on, EU citizens claiming social rights, its purpose being essentially to counteract social tourism.

\footnotesize
\begin{itemize}
\item[\textsuperscript{124}] Joined Cases C-424/10 and C-425/10 Ziołkowski and Sceja, par. 51 and 63.
\item[\textsuperscript{125}] Joined Cases C-424/10 and C-425/10 Ziołkowski and Sceja.
\item[\textsuperscript{126}] Barnard 2013, p. 449-455.
\item[\textsuperscript{127}] O’Brien 2008, p. 652-653.
\end{itemize}
In the Förster\textsuperscript{128} case, the Court set out conditions on the award of maintenance grants to students who are nationals of another Member State and were directly discriminated against. In Förster a German student challenged the Dutch five-year residence requirement, which was a precondition for access to student loans and grants. Jaqueline Förster considered herself to be integrated into the society of the Netherlands, the host Member State in this case. When she came to the Netherlands Mrs Förster was considered a worker, which entitled her to obtain a maintenance grant from the Informatie Beheer Groep\textsuperscript{129} to finance her studies. She had access to study grants pursuant to Article 45 TFEU. Yet, in the period between July and December 2003 she was unemployed, for this reason the IB-Groep requested repayment of the grants. She was no longer a worker, as she did not pursue any real and genuine employment in the period in question, and could no longer rely on Article 45 TFEU. Also, she was not regarded sufficiently integrated in the Netherlands; the IB-Groep policy required a lawful residence of at least five years.

Together with Advocate General Mazák\textsuperscript{130} and the European Commission, Mrs Förster took the view that the concept of integration could not be equated with a certain period of lawful residence. They argued that the concept of integration should be assessed based on other relevant criteria. The Court did not share this view. The Court stated that Articles 18 and 21 TFEU cover those Member State nationals that go to study abroad. In principle, the host Member State is required to treat these students equally with their own nationals. The ECJ ruled that the five-year residence requirement was a discriminating requirement, however, there was an objective justification for the residence condition.\textsuperscript{131} As the Court had already recognised in Bidar, a host Member State is entitled to require a certain degree of integration into its society. It is permissible for a Member State to ensure that foreign students do not become an unreasonable burden to that Member State’s social system, which could have consequences for the overall level of protection granted by that State.\textsuperscript{132} Directive 2004/38 was not applicable to the facts in Förster; nonetheless, the Court used it as a means of examination. Article 24(2) of Directive 2004/38 requires the Member States to comply only with the outer limit of five years of residence in order to ensure the existence of a sufficient connection between a student from another Member State and the host Member State society. If they wish to do so, Member States are free to lay down conditions that are more favourable or take into account alternative factors indicative of the degree of integration.\textsuperscript{133} The Court therefore found the condition of five years residence an appropriate measure for establishing a 'genuine' link with the host Member State society.\textsuperscript{134} The ECJ furthermore ruled that the proportionality test was satisfied; in this case, a five-year residence requirement was considered adequate and proportionate. The condition complied with requirements of legal certainty and transparency and does not go beyond what is necessary.\textsuperscript{135} The reasoning of the Court was that the same condition was enshrined in Directive 2004/38.\textsuperscript{136}

Thus, the Court applied a marginal test; the ‘real link’ was established by five years of residence, based on the Citizens’ Rights Directive and the proportionality test. This approach will be assessed in the following chapters.

3.3 Conclusion

EU citizenship has extensive effects; it has been used to broaden the scope of the equal treatment principle and could be relied on as evidence of the Court's continuing broad interpretation of the Treaties free movement provisions. It is also further proof of the Court’s contribution to ‘an ever closer European Union’.

Social rights are granted by using the provisions on free movement and equal treatment in two ways. These two ways have been of essential importance for the creation of a meaningful concept of

\textsuperscript{128} Case C-158/07 Förster [2008] ECR 1-8597.
\textsuperscript{129} The administrative body charged with the enforcement of Netherlands legislation relating to the financing of studies (the IB-Groep).
\textsuperscript{130} Opinion of Advocate General Mazák in Case C-158/07 Förster, par. 97 and 130.
\textsuperscript{131} Case C-158/07 Förster, par. 48-50.
\textsuperscript{132} Case C-158/07 Förster, par. 52 and 53.
\textsuperscript{133} Case C-158/07 Förster, par. 59.
\textsuperscript{134} Case C-158/07 Förster, par. 52.
\textsuperscript{135} Case C-158/07 Förster, par. 54 and 56.
\textsuperscript{136} Although not applicable to the facts of the case. See Case C-158/07 Förster, par. 55.
EU citizenship. The first way is the equal treatment on grounds of nationality of EU citizens residing in a host Member State, as was the case in Bidar and Förster. The second way is the export of social benefits based on a continued solidarity from the home Member State, like in D’Hoop and Morgan and Bucher. These cases all have in common that the outcomes are specific to the facts of these cases.

In the Court’s case law a development can be detected towards applying a ‘real link’ test that requires a link between the EU citizen and the Member State society before the EU citizen has the possibility to claim social rights. A EU citizen must not become an unreasonable burden to the social system of the host Member State, certainly not before this EU citizen is integrated.

In the case law before the entry into force of Directive 2004/38, the Court usually considered the right to equal treatment in the host Member State as the consequence of EU citizenship. As equal treatment was regarded a very important aspect of EU citizenship, only restrictive and proportionate unequal treatment is considered acceptable. After the entry into force of the Directive, Member States were allowed more flexibility by the Court. While the facts of the case are very important, Member States could require from economically inactive EU citizens a certain degree of integration into the society, or, as in Grzelczyk, it could be that the EU citizen concerned is unlikely to place an unreasonable burden on the social system of the Member State concerned.

In cases on study grants, the Court based its decisions on the idea that EU citizens should not become an unreasonable burden to the social system of the Member State concerned; therefore, before being eligible for study grants, a EU citizen should have a ‘real link’ with society. When analysing the case law of the Court on EU citizens’ access to social benefits, a categorisation can be made. The question for the next chapter is therefore if the case law of the Court after Förster contributes to the development of the concept of EU citizenship in the field of social rights. The ‘real link’ test of the Court will be assessed in detail in this respect.

137 See also Case C-224/02 Pusa [2004] ECR I-05763, par. 20.
4 EU citizens claiming social rights: developments after Förster

4.1 The ‘real link’ approach

4.1.1 A ‘real link’

In the previous sections, the following has been discussed. Historically, nationality was the single most important condition for assuming there is a link with the society of a State. Later on, making an economic contribution to the society of a Member State became an additional condition for EU citizens to access social benefits in a host or home Member State. The latter is commonly referred to as an ‘economic link’ with society. Another link could be construed by a lawful residence requirement that is frequently imposed on EU citizens claiming social rights. When a EU citizen had been lawfully residing in a host Member State for a certain period of time, it can be assumed that this EU citizen has established some link with that society. The longer someone resides in a Member State, the stronger the link with society is assumed to be. If a EU citizen has a ‘real link’ with the society of either a home or host Member State, he or she can claim social rights in that Member State. To identify the presence of sufficient integration within the society of a host or home Member State, the ‘real link’ approach can be applied. The next step of this research is to define the ‘real link’ with society and which conditions have to be met. It seems unlikely that a EU citizen would be able to claim social rights based on the concept of EU citizenship itself, as Member States should be able to defend themselves against social tourism to a certain extent.

A flexible approach to the concept of membership of a community is based on the assessment of integration of an individual within the society of a Member State on a case-by-case basis. When a ‘real link’ is established, non-national EU citizens will be able to access social rights in the host Member State. Furthermore, the ‘real link’ approach can be used to identify whether there still exists a sufficient connection with the social community of the home Member State when a national has left that Member State. As is shown by the case law mentioned in this chapter, on the basis of the ‘real link’ host as well as home Member States may have to grant equal access to certain social rights even to (non-)nationals residing in another Member State. The ‘real link’ with the host or home Member State society asks to analyse the link that justifies the extending of social rights to non-national EU citizens and the ways in which the required link has to be construed.

From a theoretical perspective, a flexible link approach has an advantage over a static approach of assessing integration within a society based only on nationality, economic contributions or residence periods. On the one hand, the ‘real link’ approach could provide a more nuanced approach to justify the claims of economically inactive EU citizens to equal treatment. On the other, this approach could serve as a guarantee to counter social tourism. The flexible ‘real link’ also has a downside; it is rather unpredictable, uncertain and dependant on the facts of each specific case. It remains uncertain which other requirements, besides the usual requirement of a residence period, should be regarded as suitable for establishing a ‘real link’. In order to gain a deeper understanding of which link approach should be used, static or flexible, the case law of the Court on EU citizens claiming social rights after Förster will be assessed in the following.

4.1.2 Recap: Förster

In the previous chapters it has been discussed that Member States may be entitled to restrict access to social benefits to those EU citizens without a ‘real link’ with or an effective degree of integration within their society. Because of their status as EU citizens, Member State nationals are in principle entitled to residence and/or equal treatment with respect to a whole range of social benefits in a Member State. However, Member States can still legitimately request proof of a ‘real link’ with the society in which the social benefit in question is claimed. The objective behind the requirement of a

138 Case C-209/03 Bidar.
139 Case C-224/98 D’Hoop; Case C-192/05 Tax Hagen [2006] ECR I-10451; Case C-499/06 Nerkowska [2008] ECR I-3993; Cases C-11 and C-12/06 Morgan and Bucher.
‘real link’ is to ensure that the obligation of solidarity towards EU citizens is not stretched beyond acceptable limits for the Member States.

In Förster, the Court accepted a five-year residence condition as proof of existence of a ‘real link’ with the society of a host Member State. In the case of students, this five-year condition seems legitimate, as students are a special kind of economically inactive EU citizens. Even though it has been argued that five years is a long time to establish a link, as a normal education programme does not take five years, the five-year requirement seems proportional to the Court. Students are pre-eminently mobile, it could be questioned what other requirement than a five-year residence requirement could suffice for access to student support in host Member States. When a Member State opens up its social system, foreign students could become a too heavy financial burden on the their social systems. This also touches upon the problem of social tourism: easy access to study grants may be an incentive to move to a particular Member State.

After the Förster case, the ECJ ruled in a number of cases on this topic. The proportionality test has proven a very important tool of the Court. The case law of the Court after Förster shows that the Court is willing to use other criteria than only a residence requirement when assessing EU citizens claims on social rights. As a whole, the recent case law of the Court has clarified the criteria for the eligibility to claim social benefits, which are financed by either the host or home Member State. It is important to mention that the distinction between economically active and inactive EU citizens is not always clear in these cases. The most influential cases on both economically active and inactive EU citizens will be discussed in the following.

4.2 The case law after Förster

4.2.1 Jobseekers

In the Vatsouras and Koupatantze judgment the Court confirmed the applicability of the ‘real link’ approach to cases of jobseekers, as was already asserted in Collins. According Collins ‘a jobseeker who has established a genuine link with the labour market of a Member State can receive a financial benefit intended to facilitate access to employment’. In the case at hand the Court interpreted Directive 2004/38 by stating that jobseekers are subject to a special regime. Vatsouras and Koupatantze could rely on Article 45 TFEU. The Court distinguished between the benefits of financial nature intended to facilitate access to employment in the labour market of a Member State and social assistance within the meaning of Article 24(2) of Directive 2004/38. Independently of its status under national law, financial benefits intended to facilitate access to employment in the labour market of another Member State ‘is not ‘social assistance’ that Member States may refuse to jobseekers’. The Collins approach continued to be applicable. In Vatsouras and Koupatantze, the requirement of a ‘real link’ between the Member State and the jobseeker could not be equated to a certain period of lawful residence of these EU citizens. However, it is connected with the economic contribution both Vatsouras and Koupatantze would make to the labour market of the Member State concerned. So, unlike students, jobseekers’ access to social benefits is not conditional upon the completion of a five-year residence period.

The case of Prete also concerned a jobseeker. Mrs Prete was a French national who completed her education in France, where she obtained a diploma as a secretary. Her husband was a Belgian national, for that reason they settled in Belgium. She registered as a jobseeker for the tide-over allowance which Belgian legislation provides to young people who have completed their studies and are looking for their first job, just like Mrs D’Hoop did a couple of years earlier. The tide-over allowance was rejected to Mrs Prete. Mrs Prete was of the opinion that the rejection infringed both ‘her right to family life and the principle of Community law requiring each Member State to ensure optimal conditions for the integration of a Community worker’s family’. The Court stated that the

141 Joined Cases C-22/08 and C-23/08 Vatsouras and Koupatantze, par. 37.
142 Joined Cases C-22/08 and C-23/08 Vatsouras and Koupatantze, par. 40 and 44.
143 Joined Cases C-22/08 and C-23/08 Vatsouras and Koupatantze, par. 45.
144 Case C-367/11 Prete [2012], ECR 00000.
145 Case C-367/11 Prete, par. 12.
fact that Mrs Prete made use of the freedom of movement guaranteed to EU citizens by Article 20 and 21 TFEU and moved to a host Member State following her marriage, cannot be disregarded when assessing whether Mrs Prete has a ‘real link’ with the labour market of the host Member State. The Court, as it had done in its earlier case law, argued that Article 45 TFEU precludes national provisions such as the provision at hand. The Court scrutinized the Belgian legislation making the right to a tide-over allowance subject to the condition that ‘the person concerned has completed at least six years of studies in an educational establishment of the host Member State’. The Court concluded that this requirement, as long as it prevents taking ‘other representative factors’ into account that can demonstrate a ‘real link’, and ‘accordingly goes beyond what is necessary to attain the aim pursued by that provision which is to ensure that such a link exists’, fails to comply with the principle of proportionality. The family circumstances of Mrs Prete contributed to demonstrating the existence of a ‘real link’ with Belgium, as her husband was a Belgian national. The Prete case confirms the importance of the Court’s test on the legitimate aim of the conditions imposed, the appropriateness of the measure and the proportionality principle. Recognizing the potential contribution of the jobseeker to the labour market, the Court made it clear that the jobseeker has to have the possibility to access these benefits.

4.2.2 Family members and care takers of EU citizens

In its decisions in Ibrahim and Teixeira, the Court argued that the applicants acquired a derivative lawful residence right in the UK, as they were the primary care takers of the children being educated there. In the case of Ibrahim the facts were as follows. Mrs Ibrahim was a Somali national first married with and then divorced from a Danish national who had worked in the UK. The Teixeira case concerned Mrs Teixeira, a Portuguese national who worked in the UK for a certain period. The UK authorities questioned in both of these cases whether these women were lawfully residing in the UK. They both applied for housing benefits and for this reason, the UK considered them to become a financial burden on its social system. The Court stated that the old Regulation 1612/68 (which is now Regulation 492/2011) did not pose prior requirements of self-sufficiency. The rights conferred by the Regulation on the children of migrant workers, to complete their education in the host Member State were predominant. Furthermore, the right to respect family life ensured in these cases that the primary caretakers of these children could reside in the UK.

Both Ibrahim and Teixeira were assessed in the framework of the free movement of workers. However, the actual work that was undertaken was in fact marginal. The Court in these cases lowered the threshold. It seems that in these cases the actual goal was to allow the two families who were outside the scope of Directive 2004/38 to continue to live in the UK, the Member State where these families settled.

In the case of Alarape and Tijana, the Court also set some boundaries to the access to social rights of primary caretakers in the context of the free movement of workers, outside the scope of Directive 2004/38. To obtain permanent residence within the meaning of the Directive only periods of residence under the Directive are taken into account. According to Alarape and Tijana, third country nationals cannot obtain permanent residence on the basis of a previous stay as a family member of a EU citizen. Mrs Alarape and her son Tijana, both Nigerian nationals, applied for permanent residence in the UK, this application was rejected. Mrs Alarape was previously married to EU citizen. Tijana was following an education in the UK; he had a right of residence under Regulation 1612/68 as long as he pursued studies in the UK. Mrs Alarape, in spite of her divorce, had a derivative residence right as a primary caretaker of her studying child. The Court held that periods of stay in the UK, which were

146 Case C-367/11 Prete, par. 48.
147 Case C-367/11 Prete, par. 51 and 53. See also Case C-258/04 Ioannidis [2005] ECR I-08275.
148 Case C-367/11 Prete, par. 50.
149 Case C-310/08 Ibrahim and Secretary of State for the Home Department [2010] ECR I-1065.
151 Nic Shuibhne 2013, p. 74-78.
152 Nic Shuibhne 2013, p. 77.
153 Case C-529/11 Alarape and Tijani v Secretary of State for Home department [2013], judgment of 8 May 2013, not yet reported.
in this case based only on the Regulation – as they were family members – would not count for acquiring a permanent residence right under Article 16(2) of Directive 2004/38.

4.2.3 Requiring a link from economically active EU citizens

4.2.3.1 Commission v the Netherlands

As previously discussed, in order to remove a nationality or residence condition it can be required by a Member State that EU citizens have a link with the society of that Member State. An important question in the Commission v the Netherlands154 case was whether this link also affects economically active EU citizens. In this case, a complaint was made to the European Commission concerning a residence requirement laid down in Dutch law. In order to be eligible for exporting his or her study grant, one of the conditions was that a student must have lawfully resided in the Netherlands for at least three out of the six years preceding the enrolment for higher education outside the Netherlands. Thus, access to the study grant itself in the Netherlands was not at stake. This requirement applied to all persons, irrespective of the nationality of the student concerned. However, the European Commission held the opinion that this rule negatively affected the children of frontier workers. According to the Commission, the requirement was a form of indirect discrimination.

The Court ruled that the requirement of three out of six years was inconsistent with Article 45 TFEU and Article 7(2) of Regulation 492/2011. The Court stated that study grants for children of workers of a Member State constituted a benefit migrant workers could also access for the purposes of Article 7(2) of the Regulation. In this context a residence requirement affected migrant and frontier workers negatively and was considered as indirectly discriminatory by the Court. Unless objectively justified, such a condition is prohibited.155

In Commission v the Netherlands, the Netherlands invoked two reasons to justify the contested residence requirement. First, the Netherlands claimed that the three out of six requirement was necessary in order to avoid unreasonable financial burdens to its social system. Second, the national legislation at issue was intended to promote higher education outside the Netherlands; therefore, the requirement ensured that exporting of study grants is available solely to those students who, without the grants, would pursue their education in the Netherlands.156 The Court mentioned that ‘it should be borne in mind that, although budgetary considerations may underlie a Member State’s choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers’.157

The Netherlands argued on the basis of the Bidar case that the Court ‘accepted the legitimacy of the objective of limiting, by means of a residence requirement, the recipients of assistance intended to cover the maintenance costs of students from other Member States in order to ensure that the grant of that assistance did not become an unreasonable burden for the host Member State. This was confirmed in Förster’.158 The Court stated that Bidar and Förster concerned resident requirements for economically inactive EU citizens that were no workers or family members in the Member State concerned. The Court ruled after finding that the students concerned did not ‘come within the scope of the provisions of EU law relating to freedom of movement for workers’ that these students could be required ‘to demonstrate a certain degree of integration into society’ in order to receive a maintenance grant.159 The Court considered that ‘the existence of a distinction between migrant workers and the members of their families, on the one hand, and EU citizens that apply for assistance without being economically active, on the other hand, arises from Article 24 of Directive 2004/38/EC’. A Member State may limit the granting of maintenance aid in case of students that have not acquired a right of

155 Case C-542/09 Commission v the Netherlands, par. 54-55.
156 Case C-542/09 Commission v the Netherlands, par. 56.
157 Case C-542/09 Commission v the Netherlands, par. 57; in this context the Court refers to Case C-187/00 Kutz-Bauer [2003] ECR I-2741, par. 59, and Case C-96/02 Nikoloudi [2005] ECR I-1789, par. 53.
158 Case C-542/09 Commission v the Netherlands, par. 59.
159 Case C-542/09 Commission v the Netherlands, par. 61. The Court refers to Bidar, par. 29, and Förster, par. 32 and 33.
permanent residence.160 However, according to the Court the existence of a residence requirement is inappropriate when the case concerns frontier workers or migrant workers. They participated in the labour market of the Member State where the benefit is claimed and for that reason have established a sufficient link with that Member State’s society.161

According to the Court the ‘real link’ arises from a number of factors, for instance by paying taxes in the host Member State and by contributing to the financing of social policies in that State. For that reason a frontier or migrant worker should be able to equally profit from social benefits as national workers.162 The objective of the Netherlands – imposing a residence requirement to avoid unreasonable financial burdens – ‘cannot be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as compared with Netherlands workers’.163

Additionally, the Court stated that the purpose of increasing student mobility was in itself legitimate. The Court considered the measure appropriate for securing the attainment of the objective relied upon.164 According to the Court it was up to the Netherlands to show whether the measure was necessary to attain the objective.165 By requiring specific periods of residence in a Member State, ‘the ‘three out of six years’ rule prioritizes an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State’.166 The Netherlands did not establish that the residence requirement did not go beyond what was necessary and failed to fulfill its obligations under Article 45 TFEU and Regulation 492/2011.

4.2.3.2 Giersch

The Giersch167 case concerned Elodie Giersch, a Belgian national living in Belgium. Mrs Giersch was the child of a frontier worker who was working in Luxembourg. Consequently, she applied to the competent Luxembourg Ministry for financial aid for her studies at a university in Belgium. The applications of Giersch and other children of frontier workers were rejected on the basis of Article 2 of the financial aid law of Luxembourg168, which laid down a residence condition. The applicants were children of frontier workers and argued that the aid constitutes a social advantage within the meaning of Article 7(2) of the old Regulation 1612/68, to which their parents and, consequently the applicants, were entitled based on the principle of equal treatment.

Due to the number of existing case law on this topic, it was not very difficult for the Court to argue that assistance for maintenance and education for these children in order to pursue their studies constituted a social advantage within the meaning of the Regulation. According to the Court distinguishing on the basis of residence conditions, such as in the Luxembourg Financial Aid Law, which mainly disadvantage non-nationals of Luxembourg, constituted indirect discrimination. Luxembourg argued that the social objective justified the residence condition, as according Luxembourg ‘only residents have an attachment with Luxembourg society of such a kind as to justify the assumption that they will return to Luxembourg in order to apply their knowledge for the benefit of that country’s economic development’.169 The Court accepted this and stated that the promotion of higher education can be regarded as an objective of public interest.170 The Court also considered that the aim of the residence condition was to avoid that these non-resident students would become an unreasonable burden on the State finances; this does not constitute a social policy aim.171

160 Case C-542/09 Commission v the Netherlands, par. 64.
161 Case C-542/09 Commission v the Netherlands, par. 65. That principle is applicable not only to all employment and working conditions, but also to all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. See Case C-85/96 Martínez Sala, par. 25.
162 Case C-542/09 Commission v the Netherlands, par. 66.
163 Case C-542/09 Commission v the Netherlands, par. 69.
164 Case C-542/09 Commission v the Netherlands, par. 73 and 79.
165 Case C-542/09 Commission v the Netherlands, par. 80-86.
166 Case C-542/09 Commission v the Netherlands, par. 86.
167 Case C-20/12, Elodie Giersch v État du Grand-Duché de Luxembourg [2013], June 20, 2013 (ECJ), not yet reported.
169 Case C-20/12 Giersch, par. 48 and 58.
170 Case C-20/12 Giersch, par. 53 and 56.
171 Case C-20/12 Giersch, par. 51-52.
The appropriateness of the residence condition was the most important aspect of the Giersch case. The Court concluded that both migrant and frontier workers participate in the labour market of a Member State. Therefore, in principle, a sufficient link with the society of the Member State concerned is created. This implies that migrant and frontier workers should benefit from the equal treatment principle. The Court held that the ‘link of integration arises through the payment of taxes in the host Member State by virtue of their employment there, taxes which in turn finance that Member State’s social policies’. The Court also stated that a distinction between residents and frontier workers could be permissible, but depends on the extent of integration in the society of the Member State where the frontier workers are employed. According to the Court ‘a frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State’. Students that are residing in Luxembourg when they are about to embark on their higher education studies may be more likely than non-resident students to settle in Luxembourg and become integrated in the Luxembourg labour market after completing their studies, even if those studies were undertaken abroad. Thus, the Court found the residence condition appropriate.

The next step is to ensure whether the residence condition in question was necessary. According to the Court a residence condition can be ‘disproportionate if it is too exclusive’ when it favors an element which is not necessarily representative of the ‘real link’ and excludes all other representative elements. The Luxembourg rule excluded all non-residents. According to the Court ‘the existence of a reasonable probability that the recipients of that aid will return to settle in Luxembourg and make themselves available to the labour market of that Member State, in order to contribute to its economic development, may be established on the basis of elements other than a prior residence requirement in relation to the student concerned’. The Court held that a sufficient attachment of a student could also be derived from the fact that the students’ parent is a frontier worker who lives near the border of Luxembourg.

The last paragraphs of the Giersch case are very interesting, as the Court mentioned possibilities for the Luxembourg legislature to avoid ‘study grant forum shopping’. The Court held that Luxembourg could make granting study grants conditional on the return to Luxembourg after the students studies, taking into account the risk of duplication or making the granting of student finance conditional on a certain minimum period the parent of the student has worked in that Member State. In this regard the Court mentioned that, in another context, Article 16(1) and 24(2) of the Citizens’ Rights Directive requires a five-year residence period. The Court did not make an explicit connection between an employment period of a frontier worker that could be required before entitlement to social benefits, such as study grants, and the residence period of the Citizens’ Rights Directive.

An aspect worthy of mentioning is that the Court makes a number of statements on objective justifications and proportionality which seem to be in contradiction with the very rationale behind the free movement of workers and, by extension, the free movement of students, as Member States can require a degree of integration from frontier workers. This could be important when filling in the criteria for the ‘real link’ requirement.

4.2.3.3 Saint-Prix

The Court also ruled on EU citizens retaining the status of worker. For instance in the Saint-Prix case, the Court extended the concept of ‘former worker’ of Article 7(3) of the Citizens’ Rights Directive. This article states that a person retains the status of worker if ‘temporarily unable to work as a result of an illness or accident’, in ‘involuntary unemployment’ or ‘undertaking vocational training,

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172 Case C-20/12 Giersch, par. 63.
173 Case C-20/12 Giersch, par. 64.
174 Case C-20/12 Giersch, par. 65.
175 Case C-20/12 Giersch, par. 67.
176 Case C-20/12 Giersch, par. 71.
177 Case C-20/12 Giersch, par. 77.
178 Case C-20/12 Giersch, par. 78.
179 Case C-20/12 Giersch, par. 79-82.
which must be linked to their prior employment unless they are unemployed involuntarily’. According to the Court, this article does not state that the list is exhaustive. Pregnant women who stopped working or seeking work can, because of ‘the physical constraints of the late stages of pregnancy and the aftermath of childbirth’, under certain conditions retain the status of worker within the meaning of Article 45 TFEU, provided that ‘she returns to work or finds a job within a reasonable period after the birth of the child’.181

4.3 Case law of the Court: more substance for the ‘real link’ approach

4.3.1 Commission v Austria: a fact and benefit specific test

A rather interesting case is that of the Commission v Austria182, where the European Commission was informed that in certain Austrian ‘Länder’ (states), solely students from families who received Austrian family allowances could get a reduced transport fare. The Court established that reduced transport fares for students come within the scope of the Treaty when they enable them (in)directly to cover their maintenance costs.183 The Austrian provision gave rise to unequal treatment between Austrian nationals and nationals of other Member States.184 First, the Court 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 2004/38.185 According to the Court, this derogation from the principle of equal treatment provided for in Article 18 TFEU requires a narrow interpretation, which means that only maintenance aid for studies consisting of student grants or loans come within the derogation.186

Secondly, according to the Court ‘a national scheme requiring a student to provide proof of a genuine link with the host Member State could, in principle, reflect a legitimate objective capable of justifying restrictions on the right to move and reside freely in the territory of the Member States provided for in Article 21 TFEU’.187 The proof required to demonstrate the ‘real link’ must not be too exclusive or unduly favour an element that is not necessarily representative of the ‘real link’. 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’.188 This means that a very fact specific test has to be applied.189 In the specific case of Commission v Austria the facts led the Court to conclude that the existence of a ‘real link’ could be ascertained by checking whether the student concerned is enrolled at a private or public establishment, accredited or financed by the Austrian Authorities for the sole purpose of following a course of study including vocational training.190 The Court found that, by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, was not objectively justified.

It seems that even in situations where apparently all conditions for access to equal treatment of economically inactive migrant EU citizens are fulfilled, there are still ways provided for the Member States to protect their social systems with the fact and benefit specific test.191

4.3.2 Other factors to prove a ‘real link’: Prinz and Seeberger

The judgment in Prinz and Seeberger192 also needs to be read in the context of the so-called ‘real link’ case law. One of the joined cases was the case of Mrs Prinz. Mrs Prinz was a German national

181 Verschuuren 2015, p. 376.
182 Case C-75/11 Commission v Austria [2012] ECR 00000.
183 Case C-75/11 Commission v Austria, par. 43.
184 Case C-75/11 Commission v Austria, par. 50.
185 Case C-75/11 Commission v Austria, par. 53-56.
186 Case C-75/11 Commission v Austria, par. 54-55.
187 Case C-75/11 Commission v Austria, par. 61.
188 Case C-75/11 Commission v Austria, par. 63.
189 Case C-75/11 Commission v Austria, par. 62-63.
190 Case C-75/11 Commission v Austria, par. 64.
191 Orsič Dalessio 2013, p. 74-76.
192 Joined Cases C-523/11 and C-585/11 Prinz and Seeberger [2013] judgment of 18 July 2013 (ECJ), not yet reported.
who had lived in Tunisia with her family for 10 years. She returned to Germany, where she completed her secondary education. Mrs Prinz had lawfully resided in Germany for a period of two years and eight months. After that period she moved to the Netherlands for a higher education at a Dutch University. The first year of her studies in the Netherlands, Mrs Prinz got a study grant from Germany. A grant for the second year was refused, as she did not fulfill the residence requirement required under the applicable German Law. According to this law, study grants were only awarded for more than one year if the student had been a resident in Germany for a minimum of three consecutive years prior to the stay abroad. Mrs Prinz argued that the imposed residence condition infringed her right to move and reside freely of Article 21 TFEU. When she would have stayed four months longer in Germany, the connection would have been assumed.

Mr Seeberger was another German national, who lived in Spain with his family for several years before returning to Germany in 2006. In 2009 he went to the University in Mallorca. Mr Seeberger was also refused a study grant, as he could not demonstrate he fulfilled the German residence requirement. The German court wanted to know whether a sufficient degree of integration could be based on grounds other than a three-year uninterrupted residence requirement.

The Court rephrased the questions before it and noted that it would need to assess whether Article 20 and 21 TFEU preclude national legislation that makes the award of a study grant in another Member State subject to ‘a sole condition, such as that laid down in Paragraph 16(3) of the BAföG’.

The Court confirmed that both Prinz and Seeberger could, as EU citizens, rely on the rights conferred on them by that status against their home Member State.

The Court followed the opinion of AG Sharpston and stated that national legislation which ‘places at a disadvantage its own nationals’ who have exercised their freedom of movement right, constitutes a restriction under Article 21 TFEU. This could only be justified when this is based on ‘objective considerations of public interest and proportionate to the legitimate objective’.

The Court argued that this was especially important in the field of education. Member States must ensure that the national legislation on awarding study grants does not constitute an unjustified restriction on the rights to free movement of EU citizens. The Court noted that the condition of three uninterrupted years of residence constituted a restriction on the right to move and reside freely under Article 21 TFEU, even though it applied to both German nationals and non-nationals. The Court underlined in its assessment of whether the restriction could be justified in the cases of Mrs Prinz and Mr Seeberger, that the requirement of a ‘genuine link’ must not be ‘too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective connection between the claimant and this Member State, to the exclusion of all other representative elements’.

The Court found that ‘although the existence of a certain level of integration may be regarded as established by the finding that a student has resided in the Member State where he may apply for an education or training grant for a certain period’, in this case ‘a sole condition of residence’, risks the exclusion from funding of ‘students who, despite not having resided for an uninterrupted period of three years in Germany immediately prior to studying abroad, are nevertheless sufficiently connected to German society’. The Court named several factors based upon which a student can have a ‘real link’ with society, such as nationality, prior education, employment, language skills, family or other social and economic factors. Some of the provisions of the applicable German legislation already regarded some of these other factors relevant. Thus, the Court concluded that a ‘sole condition of uninterrupted residence could not be regarded as proportionate, and goes beyond what is necessary to achieve the objectives pursued and cannot, therefore, be regarded as proportionate’.

In *Prinz and Seeberger* the Court developed a more substantive approach to what constitutes a ‘real link’ between a EU citizen and a Member State. In the context of this thesis this approach is more
interesting than the final conclusion of this case, as the case also was about German nationals claiming German social benefits. According to Neuvonen the reasoning of the Court ‘could have far-reaching implications for the comparability between EU citizens if its findings on the content of a ‘real link’ can be extrapolated to the interpretation of integration requirements under Article 18 TFEU and not just under Article 21 TFEU’. Neuvonen thinks that the examination of the ‘real link’ in light of the equal treatment requirement supports an ‘argument that the link in question is not so much with the Member State as it is a link with the situation of the comparator, who may be a national of or a non-mover within the Member State where access to social benefits is claimed’.

4.3.3 Genuine and effective employment activities: L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte

In the case of L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte the facts themselves were quite straightforward. Mr N entered Denmark in June 2009 as a worker. After a couple of months he left the job to begin studies at the Copenhagen Business School, where he enrolled in March 2009. In August 2009 he applied for a study grant, at that time he was still a full time worker. Mr N was part-time employed alongside his studies. The Danish scheme provided education assistance to students in Denmark or abroad under the conditions laid down in EU law and the EEA Agreement. EU and EEA citizens who are not workers or self-employed persons in Denmark become entitled to this education assistance only after five years of continuous residence in Denmark. The application of Mr N was refused; according to the Danish authorities he entered Denmark primarily for the purpose of pursuing studies, which placed him outside the scope of Article 45 TFEU and within the scope of the Citizens’ Rights Directive.

The Court underlined its settled case law Grzelczyk, D’Hoop, Martinez Sala, Bidar and the more recent case of Commission v Austria. The Court stated that every EU citizen within the scope of EU law could rely on the equal treatment guarantee of Article 18 TFEU. Those situations include the exercise of the fundamental freedoms conferred by inter alia Article 45 and 21 TFEU. The Court went on to state that ‘it does not follow that a citizen of the Union who fulfills the conditions to satisfy Article 7(1) of the Citizens’ Rights Directive’s thereby automatically precluded from having the status of ‘worker’ within the meaning of Article 45 TFEU’. Mr N may have been both a student and a worker. The Court did not preclude Mr N from the status of ‘worker’ and used the opportunity to repeat the basic definition of ‘worker’. The Court took the opportunity to clarify the role of individual conduct in that definition ‘in order to assess whether employment is capable of conferring the status of worker within the meaning of Article 45 TFEU, factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of that article. Such factors are not in any way related to the objective criteria referred to in the case law’. The only test allowed by the national authorities is to establish that the work activities are ‘effective and genuine’ and not ‘on such a small scale as to be regarded as purely marginal and ancillary’, as had already been stated in Levin. ‘Once that condition is satisfied, the motives which may have prompted a person to seek employment in another Member State are of no account and must not be taken into consideration’. Intention is not part of the test to determine whether a person possesses the status of a worker. The status of worker may not be made conditional on the different objectives pursued by a person that wants to enter the territory of a host Member State.

This case may have severe implications. If EU students who increasingly work to support themselves can show that they pursue effective and genuine employment activities, which is one objective amongst many, a student who also works will satisfy the test as a worker and thereby gain access to workers’ rights under EU law. It is up to the national court to determine whether a person

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203 Neuvonen 2014, p. 126-127 and 130.
204 Case C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte [2013] judgment of 21 February 2013 (ECJ), not yet reported.
205 Case C-46/12 L. N. v Styrelsen, par. 36.
206 Case C-46/12 L. N. v Styrelsen, par. 39-41.
207 Case C-46/12 L. N. v Styrelsen, par. 46.
208 Case C-46/12 L. N. v Styrelsen, par. 47.
will be considered a worker.

### 4.3.4 Taking the circumstances of the case into account: Brey

In the recent case of *Brey*, the Court ruled on the case of Mr Peter Brey and his wife, both German nationals, who moved to Austria in March 2011. Mr Brey received invalidity pension and care allowance. Mr Brey applied for a pension ‘compensatory supplement’ from the Austrian Authorities. The Austrian authorities refused the benefit, because Austrian residence law provided that a person would not have a right to reside if he or she did not have comprehensive sickness insurance cover and sufficient resources during their period of residence. The Austrian Supreme Court wanted to establish whether the ‘compensatory supplement’ could be regarded as ‘social assistance’ for the purposes of Directive 2004/38. From the perspective of Regulation 883/2004, the pension supplement was a special non-contributory benefit and for that reason could not be designated as social assistance.

The relation between the Coordination Regulation and the Citizens’ Rights Directive is a controversial one, especially with respect to whether recourse to special non-contributory benefits under the Regulation leads to economically inactive EU citizens losing their residence rights under the Directive. The Court held in *Brey* that, because the purposes of Directive 2004/38 and Regulation 883/2004 differed, the concept of ‘social assistance’ has to be interpreted differently in these two legislations. The compensatory supplement could be interpreted as social assistance under Directive 2004/38. The Court furthermore found that neither the Regulation nor the Directive requires a Member State to abandon residence conditions when it comes to entitlement to such a benefit. However, the Court did make clear which method Member States should use to establish whether someone has sufficient resources. This method is an individualised approach to the burden each claim places on the national social system. The need for such an approach stems from the fact that claiming social rights could according to Article 14(3) of the Directive not automatically lead to expulsion of a EU citizen. Article 7(1)(b) of the Directive provides that economically inactive migrant EU citizens must have sufficient resources after three months of residence. The purpose of this article is to prevent these EU citizens to become an unreasonable burden to the social system of the Member State concerned.

When a national of another Member State that is not economically active may be eligible to receive that benefit, this could be an indication that this person does not have sufficient resources. Why else would a person claim social benefits? Moreover, Article 8(4) provides that ‘Member States may not lay down a fixed amount that has to be regarded as sufficient resources, but must take into account the personal situation of the person concerned’. It must be examined whether this person will become an unreasonable burden. The national authorities first have to perform an overall assessment of the specific burden and take the personal circumstances of the person concerned into account. The factors that have to be taken into account are ‘the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him’. The Court also stated that it might be relevant ‘to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State’.

It can be concluded from the *Brey* case that Member States are still free to determine the conditions that economically inactive migrant EU citizens have to meet to receive social benefits. However, some of these economically inactive migrant EU citizens can be entitled to benefits to which the right to reside test applies. The Court found that national authorities have to take into account whether awarding benefit would constitute a burden on the social assistance system to consider the proportion of claimants of a particular benefit who would be economically inactive EU migrants.

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209 *Case C-140/12 Pensionsversicherungsanstalt v Peter Brey* [2013], judgment of 19 September 2013 (ECJ), not yet reported.
210 *Case C-140/12 Brey*, par. 15.
211 *Case C-140/12 Brey*, par. 39, 42 and 44.
212 *Case C-140/12 Brey*, par. 53.
213 *Case C-140/12 Brey*, par. 54.
214 *Case C-140/12 Brey*, par. 63.
215 *Case C-140/12 Brey*, par. 67.
216 *Case C-140/12 Brey*, par. 64 and 77.
217 *Case C-140/12 Brey*, par. 64 and 78. The Court suggested that it might be relevant to assess whether awarding benefit would constitute a burden on the social assistance system to consider the proportion of claimants of a particular benefit who would be economically inactive EU migrants.
218 *Case C-140/12 Brey*, par. 78.
account several factors, such as the specifics of the benefit that is claimed. The national authorities first have to assess whether the granting of this benefit will pose an unreasonable burden to their social system and take personal circumstances into account. The appropriate method to assess whether a person has sufficient resources is the method of the Directive.\(^{217}\)

4.3.5 More export of study grants: the cases of Thiele Meneses and Elrick

Another interesting case is the case of Thiele Meneses.\(^{220}\) This case was about a German national, who was born in Brazil and lived in Istanbul. Mr Thiele Meneses completed his high school education in Istanbul and Barcelona. He also completed a three-month internship in Chile. In 2010, he began to study law at the University of Würzburg. After a period of three months, he switched to the University of Maastricht to study European Law. Since then he also resided in Maastricht. In August 2010, he applied for a study grant in Germany. This application was refused as German legislation only awarded these study grants under very special circumstances. According to the German Authorities, these special circumstances were undetectable in this case. Mr Thiele Meneses appealed against this decision based on his EU citizen status under Articles 20 and 21 TFEU.

The Court again, by referring to its earlier case law, stated that ‘it may be legitimate for Member States to grant assistance only to students who demonstrated a certain degree of integration into society’.\(^{221}\) The proof required to demonstrate the ‘real link’ must not be too exclusive or unduly favour one element that is not representative of the ‘real link’ with the society of the Member State concerned.\(^{222}\) The German Government stated that the derogation provided for in the BÄföG is interpreted strictly and applies only to situations where the applicants for a study grant are unable to carry out their studies in Germany.\(^{223}\) According to the ECJ, ‘the condition of permanent residence at issue remains at too exclusive and too arbitrary in that it unduly favours an element which is not necessarily representative of the degree of integration in the society of the Member State at the time of the application for the grant’. The German legislation could not be considered proportionate to the objective of integration into society.\(^{224}\) The national court has to assess the facts of the case at hand.

The Court additionally stated that the condition of permanent residence was in any event too general and too exclusive in nature, despite the derogations thereto.\(^{225}\) A justification relating to the promotion of student mobility could constitute an overriding reason of public interest to justify this kind of restriction. Still, the right to move and reside freely for EU citizens can only be restricted when this is ‘appropriate for securing the attainment of the legitimate objective pursued and if it does not go beyond what is necessary in order to attain it’.\(^{226}\) The Court found that Article 20 and 21 TFEU must be interpreted as precluding the legislation at hand.

Elrick\(^{227}\) is another case in which export of study grants was assessed. Mrs Elrick is a German national who was refused a grant by the Bezirksregiering Köln, a local Administrative Authority, for an educational course pursued in the UK. Since 1998, Mrs Elrick had resided mainly in the UK, but she had her permanent residence at her parents’ home in Germany. Mrs Elrick concluded her secondary school education in the UK and also enrolled for a one-year study at South Devon College, for which she applied for a study grant. The grant was refused by the Authorities in Köln. Mrs Elrick argued that she would have qualified for a study grant when she had undertaken a comparable course in Germany. According to her, her right to move and reside freely under Article 20 and 21 TFEU was unreasonably restricted on grounds that were not objectively justified.

The Court mentioned that EU Law does not confer a right to export study grants; only when a Member State provides the possibility to export these grants, the conditions of the export of study grants can be scrutinized for compatibility with EU law.\(^{228}\)

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217 See also Thym 2015, p. 23.
220 Case C-220/12 Thiele Meneses [2012], judgment of 24 October 2013 (ECJ), not yet reported.
221 Case C-220/12 Thiele Meneses, par. 35.
222 Case C-220/12 Thiele Meneses, par. 36.
223 Case C-220/12 Thiele Meneses, par. 39.
224 Case C-220/12 Thiele Meneses, par. 40 and 50. The Court also referred to Case C-542/09 Commission v the Netherlands.
225 Case C-220/12 Thiele Meneses, par. 46.
226 Case C-220/12 Thiele Meneses, par. 49; see also Case C-542/09 Commission v the Netherlands, par. 73.
227 Case C-275/12 Elrick [2013], judgment of 24 October 2013 (ECJ), not yet reported.
228 Case C-275/12 Elrick, par. 25.
The Court ruled that Article 20 and 21 TFEU must be interpreted as precluding the legislation at issue, because a study grant would have been awarded if she had chosen to undertake a course in Germany equivalent to the one she wished to pursue in the UK and which would take less than two years.  

4.3.6 Another case on residence conditions for Member States’ own nationals: Martens

Very recently, on the 26th of February 2015, the Court ruled in the case of Martens.\textsuperscript{220} Mrs Martens is a Dutch national who has lived in Belgium from the age of six and attended primary and secondary school in that Member State. She wanted to claim portable study finance for her studies in Curacao (the Netherlands Antilles). The father of Mrs Martens had been a part-time frontier worker in the Netherlands for two years; he also worked in Belgium and still works and lives there. Mrs Martens was denied study finance for the remainder of her studies once her father ceased to be a frontier worker in the Netherlands. The aforementioned three-out-of-six-years rule was applied to Mrs Martens, even though the Court held this rule was indirectly discriminatory. She did not satisfy this rule, although she stated in her application for the study funding that she did. The ‘Centrale Raad van Beroep’ (the Dutch Administrative High Court) particularly asked whether the father of Mrs Martens could rely on the rights derived from the free movement of workers after ceasing to be a frontier worker, and if not, whether Mrs Martens could rely on her EU citizenship rights. AG Sharpston argued that when a ‘frontier worker ends his employment in the Netherlands and exercises his freedom of movement for workers in order to take up full-time employment in another Member State, and irrespective of his place of residence, Article 45 TFEU precludes the Netherlands from applying measures which, unless they can be objectively justified, have the effect of discouraging such a worker from exercising his rights under Article 45 TFEU and causing him to lose, as a consequence of the exercise of his free movement rights, social advantages guaranteed them by Netherlands legislation, such as portable study finance for his dependent child’.\textsuperscript{221} AG Sharpston did not think that it was necessary for the Court to answer the question regarding EU citizenship, as Articles 20 and 21 TFEU find specific expression in Article 45 TFEU and Mr Martens may continue to rely on the latter provision.\textsuperscript{222}

The Court rephrased the questions asked to one question, namely whether EU law precluded such a residence condition and began by stating that Mrs Martens is a EU citizen according to Article 20 TFEU that could rely on the rights conferred by that status. Furthermore, the Court recalled that EU citizenship is destined to become the fundamental status of the Member State nationals. The Court recognized that the Member States still have the competence to fill in the funding of their education systems; EU law does not impose the obligation on Member States to provide for such a system. However, when they do have such a system, Member States have to ensure that the rules for awarding the funding not create an unjustified restriction to the rights of the EU citizen.\textsuperscript{223}

The three-out-of-six-years rule places certain nationals at a disadvantage, even though it applies without distinction to Netherlands nationals and other EU citizens, it constitutes a restriction on the right to free movement pursuant to Article 21 TFEU.\textsuperscript{224} The Court already held in cases such as D’Hoop, Prinz and Seeberger and Thiele Meneses that Member States may limit the granting of study support to students with a ‘real link’ with that Member State’s society when it is based on objective considerations of public interest capable to justify the requirement. The requirement must not be ‘too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection, to the exclusion of all other representative elements’. Member States have a broad discretion in determining which criteria have to be applied when assessing the ‘real link’. A requirement based solely on the residence status risks excluding students who

\textsuperscript{220} Case C-275/12 Elrick, par. 34.
\textsuperscript{221} Case C-359/13 B. Martens v Minister van Onderwijs, Cultuur en Wetenschap [2015], judgment of 26 February 2015 (ECJ), not yet reported.
\textsuperscript{222} Opinion of Advocate General Sharpston delivered on 24 September 2014 in Case C-359/13 Martens, par. 113.
\textsuperscript{223} Opinion of Advocate General Sharpston delivered on 24 September 2014 in Case C-359/13 Martens, par. 99.
\textsuperscript{224} Case C-359/13 Martens, par. 24.
nevertheless have genuine links with that Member State from funding.\textsuperscript{235} In \textit{Commission v Netherlands}, the Court already ruled that the three-out-of-six-years rule made an unjustifiable inequality between Dutch and migrant workers residing in the Netherlands.\textsuperscript{236} In \textit{Martens} the Court found the Dutch legislation, as long as it constitutes a restriction on the free movement rights of EU citizens, ‘too exclusive because it does not make it possible to take into account other factors which may connect a student’ such as Martens to the Member State providing the benefit. These factors were already mentioned in \textit{Prinz and Seeberger}, being the nationality of the student, his schooling, family, employment, language skills or other social and economic factors. Likewise, ‘the employment of the family members on whom the student depends in the Member State providing the benefit may also be one of the factors to be taken into account in assessing those links’.\textsuperscript{237} The Dutch court will have to consider the possible factors connecting Mrs Martens to the Netherlands. The Court stated that she was a Dutch national born in the Netherlands, her father worked in the Netherlands from 2006 to 2008 and she herself is currently working in the Netherlands.

### 4.4 A strict approach on social tourism

#### 4.4.1 The much awaited Dano case

The \textit{Dano}\textsuperscript{238} case stands at the heart of the debate on social tourism. One year after \textit{Brey}, the Court tried to redefine the link between Directive 2004/38 and Regulation 883/2004. Mrs Dano is a Romanian national living in Germany with her son Florin. The sister of Mrs Dano provides for her and her son. Mrs Dano was a lawful resident in Germany, as the city of Leipzig issued her a residence certificate of unlimited duration. Mrs Dano applied for a jobseeker benefit in Germany, although she had never been employed in Germany or Romania, and she was also not looking for a job. The type of benefit Mrs Dano applied for was a subsistence benefit. Besides that, she applied for social allowance for her son, as well as for a contribution to accommodation and heating costs. The claimed benefit was a ‘special non-contributory benefit’ under the Coordination Regulation. The Citizens’ Rights Directive does not oblige Member States to provide this kind of social assistance. The question was whether Article 18 TFEU, the Regulation or the Charter of Fundamental rights did oblige the Member States to provide this assistance to economically inactive EU citizens who reside in a Member State other than that of origin.

The German national legislation at hand, the ‘Grundsicherung für Arbeitsuchende’, excluded foreign nationals from social assistance for jobseekers when these jobseekers enter the territory of Germany with the idea to obtain such assistance, or, when a right to reside in Germany is based solely on the status of being a jobseeker. The social assistance in question was refused to Mrs Dano, exactly for the reasons mentioned. The question is whether this refusal is in line with EU law.

Again, the Court stated that ‘citizenship of the Union is destined to be the fundamental status of nationals of the Member States’, enabling EU citizens to enjoy equal treatment when they fall within the scope of EU law. These EU citizens can rely on Articles 18, 20 and 21 TFEU.\textsuperscript{239} The principle of non-discrimination laid down in Article 18 TFEU is ‘given expression by Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation’.\textsuperscript{240}

The Court first states that ‘special non-contributory cash benefits’ of the Regulation fall within the concept of ‘social assistance’ within the meaning of Article 24(2) of the Directive.\textsuperscript{241} While Article

\textsuperscript{235} Case C-359/13 Martens, par 36-39.
\textsuperscript{236} Case C-359/13 Martens, par 40.
\textsuperscript{237} Case C-359/13 Martens, par 41.
\textsuperscript{238} Case C-333/13 Elizabeta Dano, Florin Dano v Jobcenter Leipzig [2014], judgment of 11 November 2014 (ECJ), not yet reported.
\textsuperscript{239} Case C-333/13 Dano, par. 58 and 59.
\textsuperscript{240} Case C-333/13 Dano, par. 61.
\textsuperscript{241} Case C-333/13 Dano, par. 63.
24(1) of the Directive and Article 4 of the Regulation reiterate the prohibition of discrimination, Article 24(2) contains a derogation from that principle.\(^{242}\)

The Court stated that during the first three months of residence, under the Citizens’ Rights Directive Member States are not obliged to grant social assistance. In the present case, Mrs Dano lived in Germany for a period longer than three months, but less than five years. The Directive lays down certain conditions for the right to residence for economically inactive persons; these persons must have sufficient financial resources.\(^{243}\) The idea behind this condition is ‘to prevent economically inactive citizens from using the host Member State’s welfare system to fund their means of subsistence’.\(^{244}\) Member States must have the possibility to refuse granting social benefits to economically inactive EU citizens without sufficient resources and therefore no right of residence in that state.\(^{245}\) In some cases, these citizens only exercise their right of free movement to receive social assistance in a host Member State. Mrs Dano did not have sufficient resources; therefore she could not invoke the equal treatment rule of the Directive.\(^{246}\) While Article 8(4) of the Directive is rather flexible as regards what can be considered as sufficient resources, the Court is clear. Mrs Dano does not have sufficient resources and for that reason does not fall under the scope of the Citizens’ Rights Directive.\(^{247}\) Even though she was lawfully residing in Germany on basis of the national legislation, this did not mean she fell within the scope of the Directive.

According to the Court, ‘Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State’.\(^{248}\)

Thus, the right to a special non-contributory benefit falls under the equal treatment principle of Article 4 of the Coordination Regulation. A EU citizen can only rely on this principle to be treated equally in a host Member State when this citizen’s residence fulfills the conditions laid down in the Directive. Lawful residence could in this regard only be derived from EU Law, the conditions of Directive 2004/38 had to be fulfilled. EU citizenship did not save Mrs Dano, being a EU citizen was not enough. The Court deviated from Martínez Sala and Trojaní, where the Court established that lawful residence under national law was enough for a EU citizen to rely on the Article 18 TFEU equal treatment right.

In Dano the Court ruled that unequal treatment was an ‘inevitable consequence’ of EU law. According to Dano, Member States can decide to exclude inactive EU citizens from accessing non-contributory benefits when they do not have a right of residence under the Directive. It would be contrary to the goal of the Directive when an inactive EU citizen such as Mrs Dano could rely on the non-discrimination principle in these specific circumstances. Each case must still be assessed individually.\(^{249}\) An issue that remains unclear is what Dano means for the ability of the Member States to expel EU citizens without sufficient resources.

4.4.2 Alimanovic: yet another step in countering social tourism?

Advocate General Wathelet delivered his opinion in the Alimanovic\(^{250}\) case on the 26th of March 2015. According to the AG, EU citizens that go to another Member State in order to seek work may be excluded from entitlement to certain social benefits. However, if this EU citizen has already been

\(^{242}\) Case C-333/13 Dano, par. 64.
\(^{243}\) Article 7(1)(b) of Directive 2004/38 and Case C-333/13 Dano, par. 73.
\(^{244}\) Case C-333/13 Dano, par. 76.
\(^{245}\) Case C-333/13 Dano, par. 77-78.
\(^{246}\) Case C-333/13 Dano, par. 79-81.
\(^{247}\) Case C-333/13 Dano, par. 81.
\(^{248}\) Case C-333/13 Dano, par. 84.
\(^{249}\) The Court did not consider the Charter of Fundamental Rights to be applicable on the situation of Mrs Dano, as a Member State is not implementing EU law when laying down conditions on the granting of the benefits concerned as they fell outside the scope of the Regulation. Case C-333/13 Dano, par. 90-92.
\(^{250}\) Opinion of Advocate General Wathelet in Case C-67/14 Jobcenter Berlin Neukölln v Nazifa Alimanovic and others of 26 March 2015.
employed in that Member State, the EU citizen may not automatically be refused social benefits. This opinion goes further than Dano, where the Court ruled that Member States have the possibility to exclude EU citizens that do not intend to seek work from entitlement to social assistance. In Alimanovic the Court will have to rule on the question whether a job seeking EU citizen may be withheld benefits when already having worked in the host Member State for a certain period.

Mrs Alimanovic and her three children are all Swedish nationals. The children were born in Germany. In June 2010, the family re-entered Germany, after having lived abroad for a long time. Mrs Alimanovic and her eldest daughter worked in Germany in short-term jobs. From December 2011 to May 2012, they received subsistence allowances. The two youngest children also received social allowances. Jobcenter Berlin Neuköln stopped paying these allowances, as the Jobcenter was of the opinion that the Alimanovic family was not entitled to these allowances. German legislation does not give non-nationals and their family the right to claim such benefits when their right of residence arises solely from their jobseeker status. The Bundessozialgericht asked whether this exclusion is in accordance with EU law.

In his Opinion, AG Wathelet states that the benefits at issue in Alimanovic, just as in Dano, are in the first place intended to guarantee the means necessary to live under humane conditions, and not to facilitate access to the German labour market. Those benefits must be regarded as social assistance benefits under the Citizens’ Rights Directive, and also as special non-contributory benefits under the Coordination Regulation. AG Wathelet states that the exception to the non-discrimination principle must be interpreted strictly and proposes to distinguish between three situations. First, as the Court ruled in Dano, EU citizens who enter the territory of a host Member State without the aim of seeking a job may legitimately be excluded. Second, EU citizens who move to another Member State in order to seek a job may be excluded in the home Member State. Third, EU citizens who stay for more than three months in a host Member State, while having worked in that State, may not automatically be excluded. The AG mentions that EU citizens could, in accordance with EU law, lose the status of worker when being unemployed for at least six months. Still, the principle of equal treatment does not allow automatic exclusion when the EU citizens are involuntary unemployed for six months after having worked for less than one year, when the EU citizen is not given the opportunity to demonstrate a ‘real link’ with the host Member State. AG Wathelet states that such a link could be demonstrated by the fact that Mrs Alimanovic has been seeking work. The AG also touches upon the rights of the children to have access to education. We will have to wait for the Court’s ruling to see whether the opinion of AG Wathelet is the one to be followed.

4.5 Conclusion

After Förster the Court ruled in a number of cases on EU citizens claiming social rights, both economically active and inactive, claiming social rights. All of these cases contributed to the development and the specification of the ‘real link’. The five-year residence condition in Förster is a rather static but clear requirement, as an argument against an individual approach is that it could undermine legal certainty. However, in cases after Förster other factors have been taken into account to assess whether the economically inactive migrant EU citizen is integrated into society. The restrictive interpretation of the Court in Förster made it clear that access to social benefits for inactive EU citizens is not easily granted. Economically inactive EU citizens are subordinated to various conditions and limitations relating to both lawful residence requirements and the equal treatment guarantee.

EU citizens are for instance considered to have a ‘real link’ with society through a minimum period of residence, having substantial parts of secondary education in a Member State, through marital or job-seeking status. Furthermore, being a worker, former worker or a family member of a migrant or frontier worker can be an indication of a ‘real link’ with society. According to L. N. v Styrelsen someone can be considered a worker very easily.

251 Opinion of Advocate General Wathelet in Case C-67/14 Alimanovic, par. 88-93.
252 Opinion of Advocate General Wathelet in Case C-67/14 Alimanovic, par. 94-98.
253 Opinion of Advocate General Wathelet in Case C-67/14 Alimanovic, par. 99-111.
The key of the ‘real link’ test established by the Court is the proposition that only proportionate justifications for unequal treatment between EU citizens can be accepted under EU law. **Prinz and Seeberger** contributed to what is regarded to be proportionate, as this case demonstrates that assessing whether there is a ‘real link’ can be extended beyond strictly formal residence requirements. The Court, as in **D’Hoop** and other cases, held that the requirement of a ‘real link’ must be regarded as ‘too general and exclusive in nature if it unduly favours an element, which is not necessarily representative of the real and effective degree of connection’. The **Prinz and Seeberger** judgment provides a more detailed analysis of those economic and social factors that may count for ‘other representative elements’ when assessing whether a EU citizen has a ‘real link’ to the Member State in question, even in the absence of residence. Also **Martens** confirms this more flexible approach to the ‘real link’, especially when it concerns a Member States’ own non-resident national. In **Commission v Austria** the Court underlined that the definition of a ‘real link’ should not ‘be fixed in a uniform manner’, but should depend on ‘the constitutive elements of the benefit in question’. By choosing a strictly temporal approach to the requirement of a ‘real link’ in **Förster**, the Court did not address the question of whether other factors could indicate a ‘real link’ of integration in a society. Still, the Court’s interpretation of the ‘real link’ test is based on the rationale that economically inactive EU citizens must not become an unreasonable financial burden on the social system of the Member State that grants the benefit. Both **Brey** and **Dano** concerned the right of residence and equal treatment of economically inactive EU citizens. In **Brey** the Court continued the individual approach of the case law after **Förster**. **Dano** provides more legal certainty. When it is apparent that an applicant does not meet the conditions set out in the Citizens’ Rights Directive, having sufficient resources and not become an unreasonable burden on the social system of the Member State, this EU citizen does not fall within the scope of the equal treatment guarantee of this Directive. When it concerns social benefits, a EU citizen cannot claim equal treatment in the host Member State once established that the residence right in that State does not comply with the conditions imposed by Directive 2004/38. It is likely that **Alimanovic** and other upcoming cases will shed more light on the possibilities of countering social tourism.

Secondary EU law and the Court’s case law do not support an argument that the innovative nature of EU citizenship will grant universal access to social benefits in other Member States for all EU citizens. The ‘real link’ test may have considerable implications for the status of EU citizenship in so far as it defines what is required from the EU citizens to be treated equally with nationals of the host Member State or with non-migrant citizens in the home Member State. The question is whether the concept of EU citizenship can become one of the principal standards under which unequal treatment of EU citizens must be reviewed.

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255 Case C-224/98 D’Hoop, par. 39.
256 Case C-75/11 Commission v Austria, par. 63.
257 Case C-158/07 Förster, par. 54–55. Directive 2004/38 was not applicable to the facts in the main proceeding, but the Court, nonetheless, used it as a tool of analysis.
5 Analysis: developing social EU citizenship, a never-ending story?

5.1 A short recap: barriers towards social EU citizenship

Access to social benefits for jobseekers and economically inactive EU citizens is a controversial issue. As discussed in the previous chapters, in the case law after Martinez Sala the Court developed a EU idea of social solidarity. EU citizens have a right of residence in host Member States as long as they ‘not become an unreasonable burden on the social system’. Through the case law of the Court, the concept of EU citizenship has been gradually expanded so as to guarantee protection of certain social rights to EU citizens. EU citizens have a right to equal access to social benefits. Still, Member States may require a degree of integration into their society, a ‘real link’, before granting these social benefits. This ‘real link’ is a compromise formula developed by the Court and will mostly be based upon an economic or family connection or a period of residence within the Member State where the claim is made. In many of the Court’s cases on EU citizens claiming social rights, the ‘real link’ is an important element. As there is no EU wide social system, EU citizens still have to claim social rights at national level. In the case of economically inactive EU citizens and also in many jobseeker cases, Member States only have to provide equal access when a ‘real link’ can be demonstrated. It is important to notice that the Member States remain sovereign in determining on EU citizens’ access to social rights on their territory or on the export of these social rights.

The ‘real link’ is not limited to economically inactive EU citizens or jobseekers. The ‘real link’ was indeed developed for these categories of EU citizens; however, the Court used the formula also in other cases, such as in Giersch. In Dano the Court interpreted the equal treatment guarantee of Article 18 TFEU analogous with Article 14 of the Citizens’ Rights Directive, Article 4 of the Coordination Regulation and Article 8 of Regulation 492/2011. This interpretation could have consequences for the free movement rights of workers, whose right to equal treatment is regarded unconditional.

Member States have the freedom to determine the conditions for assessing the ‘real link’. This could create inequality between EU citizens and constitutes a barrier to free movement of EU citizens. For that reason it would be helpful to construe a European definition of the ‘real link’. A clear method to fill in the ‘real link’ provided by the Court might offer a solution. It could be questioned whether a rather flexible ‘real link’ approach is the approach to be taken to give a more substantial meaning to the concept of EU citizenship within the context of social rights.

Several findings can be extracted from the previous chapters. The important question to be answered in this chapter is what the ‘real link’ actually means and whether this ‘real link’ approach is the path to be followed. This last chapter assesses the criticism on the ‘real link’, analyses the Court’s case law, mentions challenges to a more social EU citizenship concept and undertakes a short case study on the impact of the EU law on the social systems of the Member States. The final conclusion will be made in chapter 6.

5.2 Barriers remain

5.2.1 Composite EU citizenship and the ‘real link’

Article 20 TFEU explicitly states that a person cannot be a EU citizen if that person is not also a national of one of the Member States. EU citizenship is of a composite nature, it gives a new understanding to the concept of citizenship as it goes beyond the citizen’s own Member State, and creates a relation with other Member States. The concept of EU citizenship creates a lot of difficulties. Solidarity within the EU is based on the equal treatment principle. EU citizens should have equal access to social benefits in other Member States; however, access can be refused when this is objectively justified. This means that EU citizens are never fully equal compared to Member States’

258 Van Eijken 2014, p. 140.
259 See also Thym 2015, p. 17.
260 Thym 2015, p. 44-45.
own nationals. ‘Equal’ or ‘social’ EU citizenship has not been fully developed; the question is whether it will and should be. Could the concept of social EU citizenship potentially be the most important standard against which the justification grounds for unequal treatment of EU citizens in the field of social rights should be scrutinized?\textsuperscript{263}

The manner in which EU citizens have the possibility to claim social rights reveals the composite nature of EU citizenship. The case law on the ‘real link’ makes a difference between the responsibilities of the EU and the Member State towards EU citizens. EU law only requires equal treatment and equal access.\textsuperscript{264} Member States can use a lack of a ‘real link’ as a justification ground to deny these social rights to EU citizens and can set conditions to assess whether there is in fact a ‘real link’. EU law sets certain guidelines and boundaries on the interpretation of the ‘real link’. Granting social rights is in principle based on the substantial social choices of the Member State. Member States may adopt the ‘real link’ in their national requirements in a manner that does not collide with their national interests. This flexibility is needed to effectively cope with the differences between the individual Member States within the EU. The requirement to prove a certain economic or social link will assure a relationship between the EU citizen and the Member State.\textsuperscript{265} Physical presence of EU citizens within a Member State on itself is not enough for the EU citizen to access social benefits in that Member State. The ‘real link’ does create differences between EU citizens. When a EU citizen becomes an unreasonable burden to the Member State, that Member State does not have to grant social benefits when there is no ‘real link’.

In fact, the ‘real link’ ensures that EU citizens can depend on a certain level of EU solidarity. EU citizenship in combination with a ‘real link’ with the society, which is based on a number of factors not only constituting residence periods, could ensure the right for EU citizens to claim social benefits in a host or home Member State.\textsuperscript{266}

5.2.2 Remaining differences: economic links and real links

The Court continues to make a difference between economically active and inactive EU citizens. The difference between the economically active and inactive is based on whether the EU citizen makes a contribution to the labour market and therewith has established a ‘real link’ with society of the Member State where the social benefit is claimed. The economically active EU citizen is considered to contribute financially to the social system, whereas the economically inactive EU citizen probably will not do so. According to Pennings, this line of reasoning does not take into certain case specific circumstances, as it may very well be possible that the economic contribution to the social system does not outweigh the financial burden of the benefit claimed.\textsuperscript{267}

Both the Coordination Regulation and the Regulation 492/2011 do not require a period of employment before an economically active EU citizen has the possibility to claim social benefits in the Member State of employment. According to Thym, applying the ‘real link’ to workers would be contradictory to the EU free movement principles.\textsuperscript{268} Still, both economically active and inactive EU citizens can be denied access to social benefits. There must be an overriding reason of public interest, which is legitimate to the aim of the measure and can also be considered proportional. The criteria to secure the aim must not be too general and exclusive. Member States can decide which persons their social system covers and can exclude those persons who for instance make a marginal and ancillary contribution to the labour market of a Member State. When there is a weak economic link, for certain benefits, a Member State may require certain residence conditions are met before it awards social benefits to a EU citizen. This was the case in Geven.\textsuperscript{269} Still, Geven is applicable only in respect of special benefits requiring a link with the Member State where the benefit is claimed.

In some of the cases mentioned in the previous chapters special non-contributory benefits are claimed. For these benefits the Coordination Regulation provides a special system. These benefits

\textsuperscript{263} See for instance Neuvonen 2014, p. 132-133.
\textsuperscript{264} Van Eijken 2014, p. 236.
\textsuperscript{265} Davies 2004, p. 214.
\textsuperscript{266} Dougan 2009 (B), p.158; O’Brien 2008, p. 643.
\textsuperscript{267} Pennings 2012 (B), p. 22.
\textsuperscript{268} O’Leary 2009, p. 182-191.
\textsuperscript{269} Case C-213/05 Geven.
have a special social character and purpose, for this reason a residence condition that assures a link with the Member State of residence, might be allowed.270 This might be contradictory to the economic idea of free movement, because the status of migrant worker should provide sufficient proof of the existence of a ‘real link’. It looks like the Court’s approach, in attempting to satisfy the Member State concerns on social tourism, in some cases fails to consider that economically active and inactive EU citizens are equal, but also unequal.271 The European Commission could in this regard try to create some rules on the ‘real link’ criteria, which would benefit free movement. This will be touched upon in the last paragraph of this chapter.

In the case of L. N. v Styrelsen the Court decided that once the conditions of establishing ‘effective and genuine’ employment activities are satisfied, the motive of the person to seek employment in that Member State must not be taken into consideration. This means that the reasons someone has to go to and work in another Member State do not influence the conclusion that this person has to be considered a worker or not. Mr N might have only worked in Denmark to get access to the social system; it does not make a difference whether he actually was a worker there. Even when the remuneration paid is below the minimum necessary for subsistence, this does not have a consequence for the EU citizens’ status of worker. In a number of cases on jobseekers, such as D’Hoop, Vatsouras and Koupatantze and Prete, the Court brings jobseekers into the scope of the freedom of movement for workers. First-time jobseekers do not have access to social assistance in the host Member State during the first three months. However, they have to be treated equally as nationals with regard to ‘benefits intended to facilitate access to the labour market’, when they have a ‘real link’ with the labour market of the host Member State. This link can be demonstrated by having genuinely sought work in the host Member State. In some Member States, jobseekers’ benefits are special non-contributory benefits, for which different rules apply.272 Cases such as Ibrahim, Teixeira and Alarape and Tijani ascertained the right of family members of (ex) workers to access social benefits, even when they are not living together in the host Member State.273 Dano does not deal with EU citizens who can rely on the status of worker and therefore does not depart from Vatsouras and Koupatantze and L.N. v Styrelsen on this issue, as Dano does not question the broad definition of ‘worker’ the Court has always maintained.274 Articles 7(1) and 14(1) of the Citizens’ Rights Directive do not require a EU citizen to have sufficient resources when this is an economically active or job seeking EU citizen or a family member. In contrast to Vatsouras and Koupatantze, where the EU citizens retained the status of worker, Mrs Dano was economically inactive and appeared to have moved only to access social assistance.

For those EU citizens that do not qualify as workers, self-employed, family members, or temporary service recipients, there are more strict requirements on the objective justification a Member State relies on when denying access to its social system. The freedom of movement of these EU citizens is, most of the time, made conditional upon having sufficient resources.275

The difference between economically active and inactive EU citizens is not entirely satisfactory, as it imposes obstacles to the EU idea of free movement of persons. Free movement of workers is based on the consideration that workers and self-employed must be treated equally. Looking at the economic rationale of the free movement rights, it is understandable that working in a Member State is enough to establish a link with the society of that Member State. For economically active EU citizens a link is more difficult to prove. These EU citizens still face obstacles, however, as has been argued above, these obstacles can be reasonable.

Not all of the Court’s cases seem to be in line, as the outcomes of many cases are very fact specific. According to Giersch, Member States can still require from economically active migrant EU citizens to show a ‘real link’ with the Member State where the benefit is claimed when deciding

270 In Case C-160/02 Slatika [2004] ECR I-56, the Court considered that ‘such a benefit is always closely linked to the socio-economic situation of the country concerned and its amount, fixed by law, takes account of the standard of living in that country’. See also Pennings 2012, p. 328.


272 Case C-224/98 D’Hoop, par. 38; Case C-138/02 Collins, par. 56; Joined Cases C-22 and C-23/08 Vatsouras and Koupatantze, par. 36–37 and Case C-367/11 Prete, par. 25 and 33.

273 Verschueren 2015, p. 376. Case C-310/08 Ibrahim, par. 50, Case C-480/08 Teixeira, par. 61 and 86 and Case C-529/11 Alarape and Tijani, par. 26–28.

274 Verschueren 2015, p. 376.

275 Thym 2015, p. 20.
whether to grant social benefits. In *Giersch* the Court stated that a ‘frontier worker is not always integrated in the Member State of employment in the same way as a worker that is resident in that State’. A number of factors of the *Giersch* case are important to consider in the context of this thesis. It has to be noted that cases on frontier workers are rather exceptional; the outcomes of these cases are very dependent on the facts. Frontier workers differ from migrant workers and sometimes it is more complicated to access social benefits in the Member State of work. This is a bit controversial since Article 7(2) of Regulation 492/2011 should equally benefit migrant and frontier workers. Due to the cases on jobseekers and frontier workers the distinction between economically active and inactive EU citizens has become vague. In cases such as in *Hartmann* and *Geven* the Court introduced the requirement for frontier workers that was earlier confined to economically inactive EU citizens to have a genuine link with the Member State from which the benefit is claimed. When comparing the *Giersch* case with the *Commission v Netherlands* case, the Court appears to make a presumption that a frontier worker is not always integrated in the Member State of employment, whereas a migrant worker is assumed to be integrated by residing within the State of employment. It is important to mention that when it comes to the examination of the objective justification and proportionality of the applicable restrictions, a distinction is made between migrant and frontier workers.

O’Leary argues that the reasoning in *Giersch* seems to be specific to Luxembourg, because almost half the Luxembourg population is non-national. There may be arguments which favor a requirement for students to pay back the Member State that finances their studies, the other side of the story is that parents that worked in that Member State have contributed to the social system. Furthermore, O’Leary states that the *Giersch* case underlines the difficulties in applying the ‘real link’ test which has been developed by the Court, as in today’s EU several factors could demonstrate a ‘real link’ with society, such as nationality, residence, employment, payment of taxes, the birth and education of children, property ownership or other personal and social connections with the Member State in which the benefit is claimed. A very complex set of EU guidelines now govern the rules relating to the free movement of persons, especially the movement of students and other economically inactive EU citizens. These rules have been built upon the free movement of workers and their family members, the equal treatment principle of Articles 18 TFEU and the provisions on EU citizenship in Article 20 and 21 TFEU and secondary legislation.

In *Commission v the Netherlands*, the Court stated that a derogation from the frontier or migrant workers right to profit from the same social benefits as national workers could be justified, but the measure should not prioritize ‘an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State’. This means that Member States may have to make a case-by-case assessment of whether refusal of a social benefit to economically active EU citizens is justified when looking at the personal circumstances of the EU citizen and the special characteristics of the benefit.

### 5.2.3 Residence conditions of host and home Member States and the ‘real link’

According to *Fürster* not only new students, but also EU citizens that have been residing in a host Member State for a long period falling short of the five-year residence condition, can be refused access to student loans and grants, even when this EU citizen is considered to be integrated in the society of the host Member State based on other factors. The *Fürster* criteria are not surprising when one considers the burden EU students may pose on the Member States’ social system. However, equating a ‘real link’ with the period of residence required for acquisition of a permanent residence right is not necessarily proof that a ‘real link’ exists. In *Fürster* the ‘real link’ appears to be equated with a requirement of long-term or permanent residence. When a host Member State uses such a residence condition, this Member State could automatically comply with the proportionality principle. The reasoning in *Fürster* indicates that the derogation of the equal treatment principle in Article 24(2)

276 As became evident in Case C-280/12 *Giersch*.
278 Case C-542/09 *Commission v the Netherlands*, par. 86.
279 Pennings 2012, p. 328.
280 Case C-158/07 *Fürster*, par. 59.
of the Directive is a reflection of the ‘real link’. It is understandable that Member States want to ensure that foreign students do not become a burden on their social system. Nevertheless, these foreign students might have a ‘real link’ with the host State society based on factors other than five-years of residence. After Förster it was questioned whether the Courts’ ‘real link’ had been rejected. The strict approach in Förster did not leave much room for personal circumstances of EU citizens or other factors that could prove a ‘real link’.

In subsequent case law, the Court interpreted EU citizenship as a more flexible ‘real link’, which takes personal circumstances into account. However, the Court did not overrule Förster in its subsequent case law. In Vatsouras and Koupatantze the Court applied a different reasoning then in Förster and ruled in favour of EU citizens claiming social benefits, in this case jobseekers. As Vatsouras and Koupatantze would make an economic contribution to the society of the Member State once they started working, a five-year residence condition was not allowed. Vatsouras and Koupatantze were considered jobseekers, who the Court considers to be different from students. It has been argued that the Court did not take recital 21 of the Citizens’ Rights Directive into account in the Vatsouras and Koupatantze case, as this recital does not support a difference between jobseekers and students. According to Recital 21, ‘it is up to the Member States to decide whether they will grant social assistance to Union citizens during the first three months of residence, or for longer periods in the case of jobseekers, as well as maintenance assistance for studies’. What could be derived from this case is that the Court makes a difference between jobseekers and real economically inactive EU citizens. However, as is shown by the reflection on the Dano case in paragraph 4.4, someone claiming a jobseeker benefit might not be a jobseeker.

While the ‘real link’ requirement is often materialized by a residence period, the Court also made clear that the ‘real link’ must be interpreted more broadly. Other representative elements can be taken into account. This became apparent in cases such as Collins, Commission v Austria, Commission v the Netherlands, Prete, Prinz and Seeberger, Brey and Martens. In Prete the Court underlined that family circumstances could demonstrate a ‘real link’ between the EU citizen and the host Member State. The existence of close ties of a personal nature could contribute to the connection with the Member State society. In Commission v Austria the Court made clear that the ‘real link’ requirement ‘must not be fixed in a uniform manner for all benefits, but should be established according to the constitutive elements of the benefit in question’.

The case of Prinz and Seeberger also gives way for other factors besides residence conditions than Förster did, but there is an important difference between these cases. In Förster the equal treatment exclusion based on Article 24(2) of the Citizens’ Rights Directive was limited to those EU citizens that wanted to claim social benefits within a host Member State. A five-year residency requirement for economically inactive EU citizens is allowed when the requirement is legitimate, appropriate and proportionate. As was the case in Prinz and Seeberger, Thiele Meneses and Elrick, in order to claim social benefits from the home Member State, EU citizens do not have to comply with a five-year residence requirement. In these circumstances, other factors may be proof of a sufficient link with the Member State in question. It is understandable that a Member State will choose to set a lower limit to its own nationals that go abroad and become a burden on the home State’s social system, since there will be a link between the migrating citizen and its Member State based on nationality.

In Martens the Court, as it did in previous cases such as Prinz and Seeberger and Commission v the Netherlands, ruled that only requiring a residence period is a too exclusive condition. Existence of a residence requirement is not appropriate when the case concerns frontier workers or migrant workers. When a residence condition does not make it possible to take account of other factors which could link the EU citizen to the Member State that provides the benefit, such as nationality, education, family, employment (of family members or the EU citizen), language skills or other economic or social factors, only requiring such a condition is not allowed. Martens is also interesting, as the Court...

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283 Case C-367/11 Prete, [par. 50.
284 Case C-75/11 Commission v Austria, par. 63.
285 See also Van Eijken 2014, p. 133.
bases its decision on Article 20 and 21 TFEU instead of on Article 7(2) of Regulation 492/2011. Also, Mrs Martens was a Dutch national working in the Netherlands, which could be considered to be a link.

The ‘real link’ with a host Member State will mainly be tested by the period of residence, while the ‘real link’ with the home Member State will most of the time also be assessed by other factors. In my opinion host Member States should also take due account of these other factors. EU citizenship affected access to social rights within the EU by granting access to the territory of a Member State and contributes to a notion of EU solidarity. For economically active EU citizens, most of the time an economic link will be enough to claim social benefits immediately after arrival, whereas the inactive will have to prove they have a ‘real link’ based on the employment of their family members, past employment, jobseeker status, nationality, past residence or other factors. Thus, the ‘real link’ has implications for both leaving and incoming EU citizens. It seems coherent that the Court allows for instance students to export study grants, when host Member States can deny them to access their study finance systems.

The Court should, according to Thym, provide clarity on the precise definition of the ‘real link’, thereby leaving no room for the Member States. In Collins, the Court held that Member States must base their decision on ‘clear criteria known in advance’. However, the Court does not give Member States well-defined principles for interpreting and applying the ‘real link’. This can be illustrated by the load of case law on different groups of EU citizens. First, workers and their family members are considered to be integrated from the first day of their stay, as has also been mentioned in Commission v the Netherlands. Second, frontier workers have to be treated equally with nationals of the Member State in most cases. Yet, as became apparent in Giersch, they can be excluded. Third, in the case of jobseekers Member States will have to consider a number of factors, as mentioned in Prete. Fourth, various factors have to be considered when determining lawful residence of economically inactive EU citizens, whilst they may not constitute an unreasonable burden. This was also mentioned in Brey. A possible problem in this regard is the uncertainty of the definitions of ‘unreasonable burden’ and ‘sufficient resources’. Finally, in Dano the Court ruled that those EU citizens that do not have a residence right under EU law, can be excluded from equal treatment altogether.

5.2.4 Implications for Member States and non-migrant EU citizens: social tourism

The vast majority of nationals of the EU Member States that are economically active have never exercised their rights to free movement under Articles 20, 21, 45, 49 and 56 TFEU. EU citizenship is partially meant to bind the nationals of the Member States as EU citizens. Although EU Law affects the daily lives of those that do not – or cannot – exercise their rights to free movement, many of those non-migrating nationals cannot identify themselves with the EU or with other EU citizens. Non-migrating EU citizens have to share welfare provided by their Member State with migrant EU citizens and may believe that (economically inactive) migrant EU citizens will be a threat to their national social system. This could in turn lead to an ‘erosion’ of the concept of EU citizenship. The Court introduced the ‘real link’ to balance the equality between EU citizens and the protection of the social systems of the Member States. EU citizens that migrate to another Member State cannot just claim social benefits on the basis of being a EU citizen. Whenever there is a ‘real link’ between the EU citizen and the Member State concerned, whether with the home or host Member State, access to social benefits should be allowed equally.

According to EU free movement law, EU citizens have the right to move and reside freely between the EU Member States and apply or search for jobs, without having to apply for a work permit. Fear of social tourism is more likely to be justified in the case of economically inactive EU citizens, since these EU citizens do not contribute economically to the Member State society. The UK, the Netherlands and Germany have sent a letter to the Commission warning that some of their cities

286 Thym 2015, p. 36-37.
288 Thym 2015, p. 46.
289 Barnard 2013, p. 431.
290 Van Eijken 2014, p. 129.
291 See Letter sent in April 2013 from Johanna Mikl-Leitner (Minister of the Interior, Austria), Hans Peter Friedrich (Minister of the Interior, Germany), Fred Teeven (Minister for Immigration, Netherlands) and Theresa May (Home Secretary, UK) to the President of the Justice and
were under a considerable strain from migrant EU citizens claiming social benefits. In these Member States social tourism is much debated, as mostly Eastern, and to a lesser extent Southern, Europe EU citizens migrate to these Member States. The European Commission argues there is little evidence of social tourism in Europe.\textsuperscript{295} The Commission claims that the majority of those moving to another Member State are moving for employment purposes and not for the sole purpose of claiming benefits. Also, according to the Commission host Member States social systems are actually benefiting from migrating EU citizens. This is precisely the idea behind free movement, free movement should benefit both EU citizens and the society of the EU Member States. A report commissioned in the UK came to the same conclusions, but Prime Minister Cameron challenged this report.\textsuperscript{293}

Many Member States eagerly awaited the \textit{Dano} judgment. \textit{Dano} contributes to preventing economically inactive EU citizens to rely on the social system of a host Member State. The Court has set a limit on EU citizens equal treatment rights: Member States may, within the scope of EU law, decide who receives social benefits and who does not. According to Thym, the equal treatment guarantee only embraces those with a lawful residence right under EU law.\textsuperscript{294} \textit{Dano} applies to economically inactive EU citizens without sufficient resources.\textsuperscript{295} A derogation of the equal treatment principle will only be possible in situations in which the EU citizen only moves to another Member State to obtain social benefits and do not have the intention to establish a real link with the host society. Such a limitation can be justified, as these limitations are intended to prevent social tourism and EU citizens becoming an unreasonable burden on the host Member State’s social system.

The relation between \textit{Dano} and \textit{Brey} is not entirely evident. \textit{Brey} seems to require Member States to assess proportionality in each case, while in \textit{Dano} the Court does not require a proportionality test. As the proportionality principle is a key principle in balancing competing interests, this principle may only be disregarded in self-evident situations. The facts of the case showed that Mrs Dano does not really seem willing to be integrated within the German society. This also contributed to the absence of a proportionality test. In all other cases, limiting the equal treatment principle should be subject to a proportionality test. Therefore, \textit{Brey} and \textit{Dano} can be interpreted in the same manner.\textsuperscript{296}

\textit{Brey} also answered to criticism on the assessment of the impact of individually claimed social benefits on the host Member State social system as a whole, as individual EU citizens will probably not be an unreasonable burden. Therefore many, such as O'Leary,\textsuperscript{297} have argued that the total number of claims of EU citizens has to be taken into account when assessing whether EU citizens become an unreasonable burden. For that reason, national authorities should be allowed to make a global assessment of the unreasonable burden.\textsuperscript{298} In \textit{Brey} the Court concluded that it might be relevant to determine the proportion of the beneficiaries of that benefit that are Union citizens in receipt of a retirement pension in another Member State\textsuperscript{299} to ascertain what burden granting a social benefit places on the national social system. However, taking the trend into account does not mean that a global assessment of the impact of benefit claims would replace the case-by-case analysis. The Court also mentioned that national authorities still have to take account of the personal circumstances when assessing whether there is an unreasonable burden.

The right to access a special non-contributory benefit may, according to the Court in \textit{Dano}, be subjected to a residence right for a EU citizen based on the Citizens’ Rights Directive. When a EU citizen does not have sufficient resources and has resided for a period of less than five years, this EU

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\textsuperscript{290} Home Affairs Council and to Commissioners Viviane Reding, Cecilia Malmström and László Andor regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the response of Czech, Hungarian, Polish and Slovak ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies.


\textsuperscript{293} Thym 2015, p. 39.

\textsuperscript{294} Thym 2015, p. 40-41.

\textsuperscript{295} Thym 2015, p. 42.

\textsuperscript{296} O’Leary 2011, p. 518.


\textsuperscript{298} Case C-140/12 Brey, par. 78.
citizen does not have a right to reside under this Directive. Furthermore, the intentions of EU citizens to move to another Member State can play a role in determining whether this EU citizen enjoys a right to equal treatment when claiming social benefits. This is actually in contrast with the case law on the free movement of workers, for example in L.N. v Styrelsen the motives of a person could not be taken into account.

From Dano some authors have deducted that EU citizens that are not entitled to any social benefits still cannot be expelled when they do not constitute an unreasonable burden to the Member State, for example in the case of Mrs Dano, her sister looked after her and her son. A EU citizen in a similar situation could lawfully reside under national law in a host Member State, but still be denied equal access to social rights. Another important critic is how the judgment in Dano affects access to social rights of jobseekers. This probably will have to be assessed on a case-by-case basis. The benefit in Dano was considered a social advantage by the Court, which did not fall within the scope of EU law. However, as in Vatsouras and Koupatantze, the benefit concerned might facilitate access to the labour market and would therefore fall within the scope of EU law. This remains uncertain until the Court rules in yet another case, the awaited Alimanovic case might provide more clarity.300

A strict interpretation of the derogation of the principle of equal treatment in Dano is more in line with the free movement principles. Derogation to the principle of equal treatment has to be defined strictly and must be proportionate. A strict interpretation of Dano would mean that social tourism would be countered when EU citizens comes solely to a Member State in order to obtain social assistance.301 Other situations would under a strict interpretation, not be qualified as social tourism too easily.

Dano reminds EU citizens that they cannot claim EU solidarity when they do not have a right to reside under EU law in the Member State of residence. Although this finding is in line with Article 21 TFEU, which does not promise unconditional free movement, in my opinion the Court could have better explained the relation with EU citizenship.

5.3 The ‘real link’: the path to be followed?

5.3.1 Criticism on the ‘real link’

The foundations of the social dimension of the EU still rest on economic integration rather than on the creation of a ‘Social Europe’.302 In general, contrasting interests characterize the area of social policy. On the one hand, the Member States sovereignty, on the other, the interest of promoting free movement and strengthening the protection of social rights of EU citizens. Each Member State retains the ultimate control over defining the link it has with EU citizens on their territory. The Court’s test provides for the procedure that requires and ascertains a ‘real link’, it does not prescribe the substantive choices Member States should make on how the ‘real link’ is to be construed.

The Court did provide some guidelines in its case law on the ‘real link’; however, the substance of the ‘real link’ is not completely concretized in the Court’s case law, neither in academic literature nor in EU legislation.304 In academic literature, the ‘real link’ is criticized. On the one hand, there is the approach that the ‘real link’ is an effective way to recognise the interests and concerns of the Member States. This is in spite of the fact that the actual content of the ‘real link’ is still not entirely certain.305 On the other hand, some authors describe the ‘real link’ as a way to give the Member States the opportunity to rely on conditions, which are potentially indirectly discriminatory and limit EU citizens’ access to social benefits.306 For instance, the fact that residence requirements will apply to both nationals and non-nationals does not mean that imposing a residence condition on EU citizens is

300 Currently, Case C-67/14 Jobcenter Berlin Neukölln v Nazifa Alimanovic and others is pending before the Court. This case might shed some light on this problem.
301 Case C-333/13 Dano, par. 78.
302 Verschueren 2015, p. 376. Case C-310/08 Ibrahim, par. 50, Case C-480/08 Teixeira, par. 61 and 86 and Case C-529/11 Alarape and Tijani, par. 26–28.
303 Daminjovic, and De Witte 2008.
305 White 2005, p. 905.
not an obstacle to free movement under Article 21 TFEU. O’Brien argues that the ‘real link’ requirement possibly arises ‘from the fact that, while ‘nationally defined exclusions still exist, they must now be based on something other than nationality’. 307 Pennings has argued that the Court’s ‘real link’ approach ‘has been consistent in letting the national systems of the Member States remain intact by ‘merely interpreting the provisions in view of the promotion of free movement rules’. 308 Some scholars argue that the ‘real link’ is a guarantee against social tourism and it balances the solidarity of a Member State with the integration of the (economically inactive) migrant EU citizen in the Member State concerned. Others, like Neuvonen, argue that the ‘real link’ opens up the Member States social systems to EU citizens. 309 It can be concluded that a lot of differences in opinion on the ‘real link’ test remain, but there are also similarities in opinions. 310

5.3.2 A social EU citizenship identity or combining EU citizenship with the ‘real link’?

An important question is whether the concept of EU citizenship could generate a sense of belonging and identity needed to create a ‘European People’. It has to be noticed that the ‘real link’ approach is not adopted within the context of third-country nationals. When applying for permanent residence, a third-country nationals must prove they have ‘stable and regular resources, which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.’ 311 Thus, in case of third-country nationals Member States may limit equal treatment. According to O’Brien this suggests that the ‘real link’ is not just about a person’s integration into a Member State society, but it is a special link for EU citizens. 312

There is no unanimity when it comes to assessing the position of EU citizenship in relation to a European identity of the nationals of the Member States. One approach is that ‘a European identity’ can be established by developing social EU citizenship. In short, this approach suggests that in order to construe a European identity, market citizenship needs to be strengthened with political and social rights through which EU citizens could develop a true sense of belonging. 313 The second line of reasoning is the ‘compromise position’. This suggests that the existence of the concept of EU citizenship plays a vital role in the establishment of a sense of belonging and European identity, while at the same time the mechanisms that generate a European sense of belonging and identity add meaning and value to the concept of EU citizenship. Shaw supports this approach; she argues that EU citizenship constitutes a dynamic and an ever-expanding concept that is never fully realized. 314 A final approach can be the one that considers EU citizenship to have a merely symbolic and ancillary role in the creation of a European identity. 315 These authors argue that EU citizenship is nothing more than a ‘market plus’ status. 316

The Court’s case law provided a better understanding of the potential, role and meaning of EU citizenship. It is clear when looking at all the aforementioned case law that there is no separate identity for EU citizenship (yet). Instead, there can be limitations to EU citizens’ access to the social system of a Member State other than the home Member State, when these limitations are objectively justified. In the case law of the Court these objective justifications are particularly relevant in case of economically inactive EU citizens, as they were mainly used to avoid unreasonable burdens on the Member State’s social system. It is legitimate for a Member State to only grant social benefits to EU citizens that have demonstrated a certain degree of integration into the society of that Member State, in other words,

308 Pennings 2012, p. 332.
310 See for instance O’Leary 2005, p. 73.
313 Advocate General Jacobs made an interesting suggestion in his opinion on the Konstantinidis case. He argued that European people should be able to say ‘Civis Europaeus Sum’ – I am a European citizen – therefore I should have certain rights. Perhaps this could also be applied in the case of social rights for European Citizens. Case C-168/91 Christos Konstantinidis [1993] I-01191.
those EU citizens that have a ‘real link’. This link is required as part of the objective justification of the relevant measure.

EU citizenship gives access to the society of a Member State. Based on the equal treatment principle, this access is compulsory for economically active EU citizens. However, when it concerns economically inactive EU citizens Member States can argue these citizens do not (yet) belong to their society, and thus restrict their access to social rights. The link EU citizens must have to get access to the social system of a Member State and the examination of the Court of this link are in fact the way in which EU citizenship in the context of social rights has been shaped. EU citizens cannot claim social rights solely based on their EU citizen status. Nevertheless, Member States should explain why they exclude or respectively allow certain categories of EU citizens. A new identity for EU citizens has not proved necessary to give EU citizens access to social benefits in another Member State; the principle of free movement and in particular the equal treatment principle are sufficient.

The important developments of the concept of EU citizenship took place in the area of social rights. The potential of the concept of EU citizenship became apparent in the case law of the Court. Some surveys seem to show that EU citizens desire an expansion of EU solidarity and the social dimension of the EU; this would be an important factor in developing the EU citizen identity.317

5.3.3 Assessment of the ‘real link’ and the concept of EU citizenship

Articles 18 and 21 TFEU can be broadly applicable, but they allow Member States the possibility to restrict access to their social systems provided that they have a legitimate reason, and the measure is appropriate and proportionate. Consequently, Member States can explain why a ‘real link’ with their society is needed and can in this way, when they succeed in their argument, keep control on granting access to their social system. The ‘real link’ additionally explains why Member States sometimes have to pay for social benefits to their own citizens that go abroad, specifically when there still is a link. When the link with society is substantial, a host Member State should take over the responsibility and grant access to its social system. In Förster this link was considered to be strong enough after five years.

The Förster judgement was criticised because of the proportionality test the Court used and the ‘static’ use of the ‘real link’. According to the Court, the five-year residence requirement was proportionate. The Court found that the requirement could not be excessive, as this was also a requirement laid down in the Citizens’ Rights Directive.318 By choosing a residence period in Förster the Court did not address whether other factors could also be an indicator of a sufficient degree of integration within the society of the host Member State, such as the personal circumstances of the EU citizen concerned.319 Advocate General Mazák did address these other factors in his Opinion on the case.320 The residence period required by the Netherlands in Förster still seems a fair requirement. The Court used a really marginal test on the link, which is said to be there when a person has resided in the Netherlands for five years. Five years might be a long period, but students are inherently mobile and can become a financial burden on the Member states. It is not excessive for a Member State to ask for a certain period of residence in their society. Still, a residence period can be regarded as a too exclusive factor to examine whether a ‘real link’ exists.

Cases such as Prinz and Seeberger and Martens added more substance to the ‘real link’ and answered in part the question on what type of belonging and integration can be regarded as a condition for equal treatment between EU citizens in the context of social rights.321 These cases provide more economic and social factors that can be other representative elements in the examination of the ‘real

318 Case C-158/07 Förster, par. 54–55. Directive 2004/38 was not applicable to the facts in the main proceeding, but the Court, nonetheless, used it as a tool of analysis.
320 Opinion of Advocate General Mazák in Case C-158/07 Förster, par. 41.
link’. For instance, in Martens other factors include nationality, family bonds, employment status, education and also language skills. Also, other relevant social and economic factors may be relevant in this perspective. In Prinz and Seeberger the Court pointed out that all of these factors must be seen in light of national legislation. The interpretation of the Court in Förster remains important. In my opinion, cases such as Prinz and Seeberger open the possibility to a more flexible ‘real link’ in cases where EU citizens claim social rights in a host, and not in a home, Member State.

Thus, in the case law after Förster the Court confirmed that only a residence condition would not be a ‘satisfactory indicator’ of the ‘real link’. In Commission v Austria, the Court ruled that not just one element would suffice for establishing whether there is a genuine or ‘real link’ when this element was ‘to the exclusion of all other representative elements’. This would be contradictory to the EU equal treatment principle. Furthermore, the Court stated that the definition of a ‘real link’ with the society ‘should not be fixed in a uniform matter, but should depend on the constitutive elements of the benefit in question’. The Court confirmed these criteria in other cases.

It has to be examined whether the Court’s ‘real link’ gives more substance to the concept of EU citizenship, which, according to the Court is ‘destined to be the fundamental status of all Member State nationals’. The ‘real link’ test has implications for the concept of EU citizenship as it defines what is required from the EU citizens to be treated equally with nationals of the host Member State or with non-migrant citizens in the home Member State. The Court did not touch upon the question what the ‘real link’ test means for the understanding of concept of EU citizenship in Prinz and Seeberger nor in Dano, even though the Court mentioned that EU citizenship was ‘destined to be the fundamental status of the nationals of the Member States’. The facts of the case in Prinz and Seeberger might be the reason for not mentioning this problem, as the residence condition was applied without making a difference between EU citizens and German nationals. Also, it concerned a social benefit from the home Member State; Article 24 of the Citizens’ Rights Directive was not applicable. However, the Court did apply a similar logic in Collins, Bidar and Förster, where host Member States imposed the requirements on EU citizens. It could be that Prinz and Seeberger is a basis for a more flexible approach on economically inactive EU citizens claiming social benefits in host Member States. In the recent case law of the Court, the Court emphasized that Article 24 of the Citizens’ Rights Directive is an expression of the equal treatment principle and that the derogations of Article 24(2) should be interpreted narrowly and in accordance with the Treaty.

As the Court’s cases are very much dependent on the facts, the facts of the case can lead to an unusual outcome. Decisive criteria should be rational and reflect some consideration of material circumstances such as the EU citizens’ economic history with the host or home Member State as the Court did in Grzelczyk and L.N. v Styrelsen. Furthermore, the assessment of the ‘real link’ should be individual and differ depending on the status of the EU citizen and the type of benefit claimed. Jobseekers, frontier workers, migrant workers and students must face a test that is appropriate to their own situation. However, individual assessment might pose heavy (administrative) burdens on the Member States.

Member States have discretion in defining the ‘real link’, as long as they follow the guidelines of the Court. These guidelines are that the ‘real link’ required by the Member State must be appropriate, accurate, rational, flexible and most of all proportional. The Court uses its proportionality test to balance EU citizens’ interests when claiming social rights and the concerns of the Member States in protecting their social system against EU citizens that do not have a ‘real link’ with their society. Yet, in Dano the proportionality test was not present.

The ‘real link’ approach could offer a framework for the further development of social EU citizenship. For now the ‘real link’ approach is a compromise. On the one hand, Member States may continue to refine their criteria that allow access for EU citizens to their social systems, the test of these criteria will create more clarity about when and under what conditions they are entitled to access another Member State’s social system. On the other hand, the EU legislature may also make further

322 Joined Cases C-523/11 and C-585/11 Prinz and Seeberger, par. 38.
323 Case C-75/11Commission v Austria, par. 62.
324 Case C-75/11 Commission v Austria, par. 63.
326 See Case C-138/02 Collins; Case C-209/03 Bidar; and Case C-158/07 Förster.
rules, as has already happened in certain parts of the Citizens’ Rights Directive.

5.4 Challenges

The challenges mentioned in this thesis are certainly not exhaustive, however, they will try to provide an overview of a couple of the most important challenges to EU citizens that claim social rights within the EU.

5.4.1 Challenges created by the ‘real link’

A very real challenge for the Member States is to provide equal treatment to all EU citizens on their territory. The ‘real link’ approach does not challenge national social systems to a far-reaching extent, nor does it replace national social systems with a EU wide solidarity system. Actually, the opposite is true, as it allows EU citizens to claim social rights when they are sufficiently integrated without treating these EU citizens unequally in an unjustified manner. The ‘real link’ leaves it up to the Member States to have the final say in where the line of exclusion of social benefits lies.327 This does seem fair when considering the interests of both EU citizens and Member States. Member States have discretion in defining the ‘real link’, as long as they follow the guidelines of the Court mentioned in the previous paragraphs. The ‘real link’ must not be construed by a too exclusive and too general single rule and must be based upon ‘clear criteria known in advance’. It is difficult to assess whether in practice Member States will take the different factors mentioned by the Court into account when assessing whether there is a real link, certainly with regard to host Member States.

Some authors consider the ‘real link’ is not even a test, as it is too broad and Member States decide on its substance. Certainly in the case of jobseekers, whose contribution to a society is potential, such a link is difficult to examine. However, most agree that only granting benefits to EU citizens that contribute economically to a Member State does not reflect solidarity. The ‘real link’ has to assure that excluding EU citizens from the Member States’ social system is justified. Assessment of the ‘real link’ creates several challenges. First of all, while there might be a comprehensive ‘real link’ condition, in practice a Member State could still rely heavier on one specific factor or use a standard procedure of assessment that does not take the specific circumstances of a case into account. As the criteria defined in the case law of the Court and Directive 2004/38 are quite vague, it might be very difficult for a EU citizen to prove a Member State did not make a real consideration before denying social benefits and maybe also repealing residence rights. If a Member State sets the bar too high, the principle of proportionality might help EU citizens to get access to social benefits. An important limitation is that assessment of whether there is a ‘real link’ by taking all individual circumstances into account could be unreasonable. Case-by-case decisions could create high (administrative) burdens for Member States. The problem of a more procedural assessment is that this would mean less flexibility for the individual case.328 Brey implies that Member States, in order to determine more precisely the extent of the burden the individual EU citizen places, it can be appropriate to make a global assessment on how many EU citizens would claim the benefit in question. This assessment mentioned in Brey does not replace a case-by-case analysis. The remaining individual factors will still need to be taken into account in the assessment of the national authorities.

Some regard the individualized approach of the Court in cases such as Brey to the relationship between residence rights and access to social benefits as necessary, because free movement has to be guaranteed to EU citizens. Others claim it places a too heavy (administrative) burden and this approach led to the Court shaping the EU social system by individual cases.329 The case-by-case approach of the Court in applying the ‘real link’ has shaped a system of EU solidarity based on individual cases rather than on legislation. In defense of the Court, some authors argue that the current Citizens’ Rights Directive leaves much room for interpretation, which was left for the Court to fill. Member States now have to deal with the consequences of these rulings. Some authors and Member States think the Court has stretched EU solidarity beyond its intended purpose with its case law. They

think the Court is attempting to create a EU social system.330 However, there are others that opt for a more social EU.331

The question is whether cases such as Prinz and Seeberger open the possibility to a more flexible ‘real link’ in cases where EU citizens claim social rights in a host, and not a home, Member State. It seems that also in host Member States’ these others factors can be taken into account and the flexible ‘real link’ is the most suitable and desirable approach. Furthermore, it seems that a focus on individual circumstances of EU citizens prevails above a more procedural assessment of the real link. In my opinion this is a legitimate approach, however, it should not be stretched too far, as this could pose high (administrative) burdens on the Member States and this could lead to too fact specific outcomes. Still, the line is difficult to draw.

When looking at the Court’s case law, one should recognize that the principles developed by the Court could have a different impact on the different Member States. For instance cases on export of study grants have a higher impact on the Netherlands than on the UK, as UK Law does not provide for export of student support. As long as there is no EU wide social system, cases of the Court will remain Member State specific. The affected Member States will particularly adapt their national laws when the Court’s ruling directly addresses them. When Member States are not addressed, they often do not change their legislation.

5.4.2 Challenges posed by social tourism: interpreting Dano

Since the introduction of EU citizenship, various authors made recommendations on the filling in of this concept in the context of social rights. As mentioned, a new identity of EU citizens on the bases of which an economically inactive EU citizen could claim a social right has not been created. The question is whether such an identity is desirable. Member States will certainly plead against such an identity, as they fear social tourism. Concerns on social tourism – using free movement law to profit from host Member State social system – have been pushed by the UK, Germany, Austria and the Netherlands onto the EU agenda.

Dano poses different challenges to the EU, EU citizens and Member States. The judgment could on the one hand be interpreted strictly, which interpretation would be based on the principle that there are just a few possible limitations on the freedom of movement. On the other hand, a more flexible and broad interpretation of Dano could offer Member States the possibility to restrict EU citizens’ rights to equal treatment when accessing social benefits. Both these interpretations can be deducted from the Dano ruling. The appropriate interpretation is not clear for the Member States, even after Dano.332 Alimanovic could shed some light on this issue.

A strict interpretation of Dano can be based on the previous case law of the Court. In many cases the Court interpreted EU citizens’ right to move and reside freely broadly. Dano explicitly refers to the Court’s statement in Grzelewczuk, that EU citizenship is ‘destined to become the fundamental status’ and to the principle of equal treatment irrespective of exercising an economic activity.333 These statements have also been made in cases such as D’Hoop, Collins, Prete, Prinz and Seeberger and Elrick.334 In the opinion of AG Wathelet, the questions raised in the Dano case had to be answered in light of the proportionality principle and the Court’s case law on the ‘real link’. According to the AG, who specifically referred to the case law on study grants and jobseeker benefits, the economically inactive EU citizens’ entitlement to social benefits is generally dependent on the degree of integration into society.335

This strict interpretation seems the right interpretation from a legal perspective. Yet, Member States may believe a strict interpretation of Dano will not suffice. The argumentation of the Court in

330 Spaventa 2010.
332 Verschueren 2015, p. 370.
333 Case C-333/13 Dano, par. 58-60; See also Verschueren 2015, p. 371.
334 Case C-184/99 Grzelewczuk, par. 31; Case C-224/98 D’Hoop, par. 28; Case C-138/02 Collins, par. 61; Case C-367/11 Prete, par. 24; Joined Cases C-523 and C-585/11 Prinz and Seeberger, par. 24 and Case C-275/12 Elrick, par. 19.
335 Opinion of AG Wathelet in Case C-333/13 Dano, par. 126.
Dano leaves room for a more flexible and broad interpretation to the possibility to derogate from the principle of equal treatment when foreign economically inactive EU citizens want to claim social benefits. The Court stated that EU citizens could only claim equal treatment when their residence in a host Member State complies with the requirements of the Citizens’ Rights Directive.

The Court stated that ‘Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence’, without making any reference to a proportionality test, which the Court did use in Brey. The Member States could interpret the Court’s analysis of the Citizens’ Rights Directive broadly. This interpretation would allow Member States to refuse social benefits to economically inactive EU citizens that do not have sufficient resources and therefore do not have a lawful residence right under Directive 2004/38. This means that when a EU citizen’s right to reside is not based on the Directive, the EU citizen cannot claim equal treatment under EU law. Such a broad interpretation would be contradictory to many of the Court’s cases where access to social benefits is granted by other EU instruments like in Ibrahim, Teixeira and Alarape, or under Article 45 TFEU as in Saint-Prix, or on national law which is more favourable to the EU citizen, for instance in cases such as in Martinez Sala and Trojanj. A broad interpretation of Dano of the possibility to derogate from the equal treatment principle would challenge the objectives and provisions of social security coordination in the Coordination Regulation and other EU law instruments, and also to the idea laid down in the Court’s earlier case law that exceptions to the equal treatment guarantee should be interpreted narrowly. This could in turn lead to the situation that only those who have sufficient resources and therefore do not need any social assistance can use their right to free movement.

5.4.3 Unclear differences and definitions

EU citizens also face lots of other challenges when claiming social rights. Unclear definitions and conditions laid down in the Court’s case law and in EU legislation are certainly a challenge. The Citizen’s Rights Directive contains inconsistencies; therefore, the Court was confronted to rule on the gaps of the Directive.

Another problem is that distinguishing between jobseekers and economically inactive EU citizens poses a challenge to national authorities. Jobseekers have a right to equal treatment, but only with regard to access to the labour market. The difference is not always clear. Someone who is looking for work will not automatically qualify as a jobseeker. According to Dano, a EU citizen will acquire jobseeker status when this citizen can ‘provide evidence that he or she is continuing to seek employment and that has genuine chances of being engaged’. This gives yet another unclear definition, as it is unclear what can be regarded a genuine change of being engaged. Jobseekers residence rights do not depend on whether they have sufficient resources. Only when they do not have a jobseeker status, the sufficient resources requirement comes into play. Member States must take personal situations of the EU citizen into account and cannot lay down a fixed ‘sufficient resources’ amount. According to Article 8(4) of the Citizens’ Rights Directive the amount indicating ‘sufficient resources’ may not be higher than the eligibility threshold for social assistance for the host Member State nationals.

Additionally, sometimes it is a challenge to decide whether someone has to be regarded a worker. The Court defended a low threshold of regular employment of six hours a week. This may lead to undesirable outcomes, as these EU citizens could claim social benefits based on the status of worker that would not be in line with the income they generate. A EU citizen will acquire the status of ‘worker’ when this person performs ‘genuine and effective’ activities, which are not ‘ancillary and marginal’. This formula has not been changed, but gives rise to lots of interpretation difficulties.

Moreover, the legal and practical conditions for determining lawful residence remain ambiguous. A ‘right-to-reside’ test, which makes access to certain social benefits conditional upon the prior possession of free movement rights, is already incorporated in the UK. Dano poses difficulties to the

337 Case C-333/13 Dano, par. 76.
338 Verschueren 2015, p. 381.
339 Case C-333/13 Dano, par. 74 and 76.
argument that this test violates EU law, as the Court emphasized that those EU citizens without a EU residence right cannot claim equal treatment under EU law.\textsuperscript{340} It is clear that an economically inactive EU citizen loses the right to reside when this citizen is an unreasonable burden. Legal uncertainty remains when EU citizens cannot be sure what constitutes an unreasonable burden and what are sufficient resources.\textsuperscript{341} Special non-contributory benefits also have led to several challenges in a number of cases. For entitlement to these benefits, only residence in the host Member State is not sufficient. Furthermore, these benefits can be deemed social assistance under the Citizens’ Rights Directive, whereas the Coordination Regulation implies they cannot. This problem was touched upon in Brey and Dano, where the free movement of persons was distinguished from social security coordination.

5.4.4 Challenges and solutions at national level: coping with EU citizens and the Court’s case law

Although the Member States remain competent as regards the organisation of their social systems, they must exercise that competence in compliance with EU law, especially with EU citizens’ right to move and reside freely as laid down in Article 21 TFEU.\textsuperscript{342} In the following sections a short assessment of the impact of some of the Court’s cases and challenges to the national social systems of the Netherlands, the UK and Luxembourg will be made to outline the challenges Member States (believe they) face.

5.4.4.1 Dealing with students in the Netherlands

The overall development of having to establish a ‘real link’ with society before claiming social rights can be observed in the area of student support. In this area, the Court based its cases partly on the requirement that EU citizens should not become an unreasonable burden for the social system of the Member State granting student support, and also provided limitations for the application of this requirement. A couple of the Court’s cases on social benefits, such as Förster and Commission v Netherlands, concerned Dutch rules on student support. The case Commission v Netherlands was not on the access to study grants, but on the export of these study grants.

The current Wet Studiefinanciering 2000\textsuperscript{343} sets out the conditions for the funding of studies in the Netherlands and abroad.\textsuperscript{344} In the case of Commission v Netherlands, the Court held that the existence of a residence requirement to prove the required link in order to receive social benefits is in principle inappropriate when the persons concerned are migrant workers or frontier workers.\textsuperscript{345} The European Commission regarded the three-out-of-six rule\textsuperscript{346} rule to be contrary to Article 45 TFEU. The Netherlands could not prove in the case of Commission v the Netherlands, or in the Martens case, that there was no less restrictive alternative, and thereby violated the proportionality requirement.\textsuperscript{347} The Court limited itself to the freedom of movement of workers in Commission v the Netherlands; because EU workers working in the Netherlands are active on the labour market, they are inherently integrated in society. To these economically active EU citizens the three-out-of-six rule therefore does not apply. The question whether this applies to economically inactive EU students that are only subject to the EU citizenship rules the Court did not answer in Commission v the Netherlands. The Netherlands referred in this regard to the Bidar and Förster cases, in which the Court accepted that Member States could require a certain degree of integration of EU students before they are entitled to a study grant, like

\textsuperscript{340} Thym 2015, p. 42-44.
\textsuperscript{341} Thym 2015, p. 49.
\textsuperscript{342} Case C-11/06 and C-12/06 Morgan and Bucher, par. 24; Joined Cases C-523/11 and C-585/11 Prinz and Seeberger, par. 26; Case C-359/13 Martens, par. 23.
\textsuperscript{343} Law on Study Finance, ‘the Wsf 2000’.
\textsuperscript{344} As of September 2015, after a lot of debate, a major change will be made in the system, as the current study grants system (‘studiefinanciering’) will be changed to a “social loans system” (“sociaal leenstelsel”). These social loans will replace all basic study grants by a social loan that has to be repaid after graduation.
\textsuperscript{345} O’Leary 2014, p. 609.
\textsuperscript{346} Article 2.14 (2) of the WSF 2000; this provision applies only to students who were enrolled after 31 August 2007 on a higher education course outside the Netherlands.
\textsuperscript{347} Schrauwen 2012, p. 336; Case C-542/09 Commission v the Netherlands, par. 65-66; See also District Court Den Haag, 29 January 2013 ECLI:NL:RBDHA:2013:BZ1725 where it is assumed that the three-out-of-six rule is only important for migrant workers.
requiring a period of residence in the host State. The Court highlighted that those cases concerned students that were no migrant workers, nor family members of migrant workers. Following this case, the Dutch government decided to entirely delete the three-out-of-six rule for migrant and frontier workers and their children, while introducing a financial ceiling for portable study grants. Article 2.14 WSF 2000 now provides that students that fall within the scope of Article 45 TFEU, or those who are equated according to EU law, are eligible for a portable study grant. It seems like the three-out-of-six-rule will only apply to economically inactive students that fall under Articles 20 and 21 TFEU and want to export study grants.

After Commission v Netherlands, where a clear difference was made between the economically active and their family and the economically inactive, it seemed that the three-out-of-six rule was permissible in case of economically inactive EU citizens. However, following Prinz and Seeberger, only a residence condition for the right to export study grants for students that only fall under Articles 20 and 21 TFEU could be too general and exclusive. Also, in Martens the Court stated that the same three-out-of-six rule was an obstacle to free movement and a too exclusive requirement. There must also be the possibility to show a sufficient degree of integration on the basis of other factors. Normally economically inactive EU citizens will have to reside in a host Member State for five years before having access to these social benefits or have a real link with the home Member State that provides such benefits. It could be argued that EU citizens with a ‘real link’ with the Netherlands could have a right to export study grants, even though they do not satisfy the three-out-of-six-rule. Still, the student concerned has to be entitled to receive a study grant before they can export them at all. Migrant workers and their family members already did not have to meet the three-out-of-six-rule to claim portable study grants. After Commission v the Netherlands, the Dutch policy rule for frontier workers may no longer be applied to migrant and frontier workers. The Dutch government has reacted by setting a ceiling for the amount of students that can access portable study grants and loans; students that have already been awarded portable grants continue to use this type of study grants.

5.4.4.2 Fears of social tourism in the United Kingdom

The Bidar case concerned UK law on EU citizens’ access to study grants. Based on UK law a person could get a student loan if he or she was ordinary resident in the UK for the three years immediately before the application, and his or her stay in the UK was at no time during those three years wholly or mainly intended to follow full-time education. Thus, under UK law nationals from other EU Member State could as a student not acquire the status of a settled person in the UK.

In Bidar, the Court found that residence conditions could be justified. However, the justification ground used by the UK government was not accepted. Member States may require a degree of integration within their society before granting finance for the students’ maintenance costs. A Member State may not require that students have a link with their labour market, but a residence period for students could show a link with society. UK law at that time made it impossible for EU citizens to acquire settled status as a student. Non-national students would never receive study grants and loans from the UK, regardless of the degree of integration into the UK society. The UK therefore had to amend its rules.

According to UK law, UK students are UK nationals or persons that have a ‘settled status’. Economically inactive migrant EU students that are enrolled at a UK university have to do a ‘habitual

548 Case C-542/09 Commission v the Netherlands, par. 59-60.
549 See the Law of 25 April 2013 amending the WSF 2000 in connection with the creation of the possibility of maximizing the use of portable study finance. (Wet van 25 april 2013 tot wijziging van de Wet studiefinanciering 2000 in verband met het creëren van de mogelijkheid tot maximering van het gebruik van meeneembare studiefinanciering (Stb. 2013, 180)).
550 Minister of Education, Culture and Science of 17 December 2009, nr. HO&S/BS/2009/178030, ‘Uitzondering verblijfsvereiste voor studenten in de grensgebieden’. (Exception residence requirement for students in the border areas); The ending date of the policy rule for residents of the border areas was 1 January 2014. Prior to 1 January 2014, the three-out-of-six-rule did not apply to students (irrespective of nationality) who asked to export study grants and loans in order to pursue higher education in the ‘border areas’ of the Netherlands.
551 Act of April 25, 2013 amending the Student Finance Act 2000 in connection with the creation of the possibility of maximizing the use of portable study finance (Wet van 25 april 2013 tot wijziging van de Wet studiefinanciering 2000 in verband met het creëren van de mogelijkheid tot maximering van het gebruik van meeneembare studiefinanciering) (Stb. 2013, 180).
552 UK Government, The Education (Student Support) Regulations 2011, No. 1986, PART 2 Eligible students, Regulation 4; The Education (Student Support) Regulations 2011, No. 1986, SCHEDULE 1. People normally living in the England and been living in the UK, the Channel Islands or the Isle of Man for three years before starting the course. Non-nationals of the UK must have this settled status on the first
residence test’, which includes a ‘right to reside test’. Before accessing social benefits, including study finance, this test must be passed. This right to reside test has been challenged by the Commission.

The UK government has proposed to change the ‘settled status’ from three to five years, which is in accordance with Directive 2004/38. UK law does not provide the possibility to export study loans and grants. As soon as a person decides to study outside the UK, the UK government will not provide financial support, except when a person goes abroad on an exchange program. Although the UK has signed up to a commitment to portability of educational loans and grants, this has not yet been implemented. UK students studying abroad are reliant on local study finance arrangements.

In 2013, the UK made some changes with regard to the period that job seeking EU citizens must wait before claiming jobseeker benefits. For example, the habitual residence test was amended. Initially, jobseeker benefits were capped at six months, but as from November 2014, they are reduced to three months, unless the EU citizen can show that he or she has genuine chances of getting a job.

Another interesting point is that the UK government has proposed to introduce a minimum income threshold for EU citizens that are working or want to work in the UK, before they are considered a worker. Therefore, they will have limited access to social benefits in the UK. As has already been mentioned, the UK welcomed the Dano judgement. It is possible the UK will interpret this judgment broadly.

5.4.4.3 Frontier and migrant workers in Luxembourg: answering to Giersch

Luxembourg is a special Member State with a very high percentage of non-nationals residing and/or working in Luxembourg, the geographical location and a long tradition of nationals studying abroad; Luxembourg serves as the main source of economic prosperity for a large border region covering four different Member States. In the Giersch case, the Court ruled that not only Luxembourg residents, but also children of frontier workers could be entitled to student loans and grants from Luxembourg. This case might not be very surprising, as the free movement of workers assures this right. A residence condition is deemed discriminatory and in violation of EU worker regulations. The residence condition exceeded its purpose - student loans and grants are aimed at increasing the number of university graduates that will then be available to the Luxembourg labour market. Thus, it went beyond what was necessary. Frontier workers, by definition not residing in Luxembourg, were excluded from the scope of the Law of 22 June 2000 on Student Financial Aid for higher education.

day of the first academic year of the course to claim student support. Under the terms of the Immigration Act 1971, that is that there are no restrictions on the persons residence period.


European Commission 2013, Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards. Press Release, IP/13/475. Brussels: European Commission. The Commission was arguing that the criteria in the habitual residence test under the coordination rules were strict enough to ensure that certain UK social security benefits (i.e. State Pension Credit, income-based JSA, Child Benefit and Child Tax Credit) are only granted to those genuinely residing habitually within their territory. However, the Commission subsequently altered its position following the ruling in Brey. However, when the case was eventually issued in June 2014, the proceedings in European Commission v United Kingdom of Great Britain and Northern Ireland (Case C-308/14) have been confined to Child Benefit and Child Tax Credits.


Frontier workers who were covered by the Luxembourg social security system received ‘family allowances’ for each child aged 18 and over who was pursuing higher education studies in Luxembourg or abroad. See Article 3(2) of the Law of 19 June 1985 concerning family allowances and establishing the National Family Allowances Fund (Mémorial A 1985, p. 680). The Law of 26 July 2010 changed the law in force and Article 271(3) of the Social Security Code so far as, thereafter, the right to family allowances for children aged 18 and over was retained only for those pursuing studies at secondary or technical secondary level (and not higher level), irrespective of the place chosen for study. The Law of 26 July 2010 Mémorial A 2010, p. 2040, forms the legal basis of the present aid system and provides that EU citizens residing in accordance with Luxembourg law may apply for study finance. EU citizens have a residence right in Luxembourg when they are workers, self-employed or enrolled at a public or private establishment authorized in Luxembourg in order primarily to study there. Students additionally have to guarantee that they have sickness insurance and sufficient resources to avoid them becoming a burden on the Luxembourg social system. Article 6(1) of the amended Law of 29 August 2008 Mémorial A 2008, p. 2024 (for the co-ordinated text, see
The Luxembourg legislature has modified the Financial Aid Law following the *Giersch* judgment by the law of July 24, 2014. As the Court held in *Giersch*, in order to avoid the risk of ‘study grant forum shopping’ and to ensure that frontier workers that are taxpayers and make social security contributions in Luxembourg have a ‘real link’ with the society, financial aid could be made conditional on the frontier worker, the parent of the student that does not reside in Luxembourg, having worked, at least part-time, in that Member State for a certain minimum period of time, which has been set on five years. *Giersch* was about economically active EU citizens that now have to satisfy a five-year work requirement. The Court appears to make the presumption that frontier workers are not automatically integrated in the Member State of employment whilst the residing migrant worker is. No provision is made for the children of self-employed non-residents and for Luxembourg nationals whose family members do not reside in Luxembourg. The Luxembourg legislature did not introduce a homecoming requirement as proposed by the Court. According to the government, with whom I agree, such a condition would risk creating further restrictions of the free movement of students.

As Luxembourg is not the ordinary Member State, it could be questioned whether the statements on objective justification and appropriateness mentioned in *Giersch* are specific to Luxembourg or whether they will have wider consequences for the access of EU citizens to social benefits. Apparently it is difficult to have a generous social system with a large amount of frontier workers, as well as a large resident population of EU officials whose employment status is a-typical.

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Law of 24 July 2014 concerning State financial assistance for higher education (Loi du 24 juillet 2014 concernant l’aide financière de l'Etat pour études supérieures). To access Luxembourg study finance, a person needs to be a Luxembourg national; a EU, EEA, a Swiss national working in Luxembourg; a family member of one of these mentioned persons; living in Luxembourg for the last five years; or a political fugitive.

The Minister for Education in her public statements, the Council of State, in its Opinion of 2 July 2013 on the draft law (n° 6585) and the travaux préparatoires accompanying the draft law, clearly indicate that the possibility of imposing a minimum period of employment in Luxembourg is suggested at par. 80 of the decision in *Giersch*. The travaux préparatoires even indicate that “the Court proposed a minimum delay of five years”.

When a person does not live in Luxembourg, Luxembourg law now requires that the student is a Luxembourg national or a EU, EEA or Swiss national working in Luxembourg. For family members, Luxembourg law requires that their Luxembourg, EU, EEA or Swiss national family members have worked in Luxembourg for at least five years in the last 7 years immediately preceding the application, or receives a pension or unemployment benefit or an orphan’s pension from the State of Luxembourg. Article 3 Loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures. Available on: www.cnap.lu (last visited 21 April 2015). Luxembourg Law makes it possible to also export student support. Law of 26 July 2010 Mémorial A 2010, p. 2040.


O’Leary 2014, p. 614. To the extent that they contribute neither income tax nor social contributions to the host Member State but pay these instead to the EU.
6 Recommendations and conclusions

6.1 Providing recommendations and solutions: a difficult task

6.1.1 Substantiating the real link

Of course, when assessing the ‘real link’, one wonders whether there could be an alternative that would better suit the interests of migrant and home-staying EU citizens and the interests of the Member States. An alternative to the ‘real link’ approach that would provide legal certainty, is flexible, does not pose high burdens on the Member States and that counters social tourism.

It has been proven hard to provide a clear and concrete idea about who should have access, under what circumstances, and to what benefits. As the Court’s case law is dependent on the facts of each different case, the facts of a case can lead to an unusual outcome. Decisive criteria should be rational and reflect some consideration of material circumstances such as the EU citizens’ economic history within the host or home Member State. Assessment of the ‘real link’ should be dependent on the type of EU citizen and the type of benefit claimed. Jobseekers, frontier workers, migrant workers and students must face a test that is appropriate to their own situation. As proposed by Thym, a solution can be offered by construing separate categories of ‘real links’ on the basis of the ‘constitutive elements of the benefit in question’ as mentioned in Commission v Austria.\(^{365}\) This makes sense, as it suggests that the Member States may establish stricter and different criteria for the ‘real link’ in the area of pension benefits then in the area of child-raising benefits. Access can be based on different factors, such as prior periods of residence, education or work, language skills, family links, contributions to the mandatory pension system and other economic or social factors. The ‘real link’ approach could allow such differentiation. A child-raising benefit is different from a pension benefit and should not be treated in the same way. In my personal opinion, this approach does answer to some challenges mentioned in the previous chapter. The Court, and consequently the Member States, should have to specify the criteria for access to the specific benefits by specific categories of EU citizens. According to Thym, the Court could provide more legal certainty by setting out criteria for the Member States’ to apply, which determine access to social benefits instead of using a ‘negative assessment of national rules that fall foul of EU standards’. Even though Member States enjoy a broad discretion, such criteria do not prevent the Member States from having a national regime when determining the conditions for access to social benefits in their national laws.\(^{366}\) The European Commission could also try to create some rules on the ‘real link’ criteria, because if the Court would set the criteria for the Member States it would ultimately decide on the limits of EU solidarity, which would be another controversial issue. The Member States and/or the European Commission have to determine the conditions for each benefit scheme, which the Court in turn could assess. Still, this could lead to legal uncertainty, since the conditions may vary for each benefit scheme. In my opinion the Court could contribute to the shaping of the criteria as it did in Giersch. A real solution or alternative is difficult to provide. Access to social benefits will ultimately be dependent on how the ‘real link’ in combination with the principle of equal treatment is applied.

A question posed by Neuvonen is whether the ‘real link’ should be interpreted in a more horizontal way in relation to other EU citizens, instead of vertically in relation to the Member State. Truly equal treatment should according to her be examined from the perspective of EU citizens. The ‘real link’ focuses on the link between the Member State and the EU citizen, instead of on the link between EU citizens. Perhaps, horizontal interpretation of the ‘real link’ could give more substance to the ‘real link’ approach and could also give a more substantial meaning to the concept of EU citizenship.\(^{367}\) The individual assessment of all relevant factors for establishing a link with society could establish comparability between national and non-national EU citizens. This could ensure equal treatment between nationals and non-nationals. A static assessment of the ‘real link’, as in Förster, could lead to unequal treatment if the national and non-national are in a comparable situation.

There are opposing theoretical views on the understanding of EU citizenship and the limits of EU

\(^{365}\) Thym 2015, p. 47-49.

\(^{366}\) Thym 2015, p.

\(^{367}\) Neuvonen 2014, p. 130.
solidarity. The ‘real link’, opposed to a residence condition, highlights the value of social integration and demands migrant EU citizens to develop links with the society where they want to claim social benefits. Thus, it specifically values the interests of the individual Member States. This is important, as the Member States economies and social protection systems can differ significantly. In Brey and Dano the limits and conditions of EU citizenship became clear. These cases affirm that EU citizenship in the area of social rights is to be construed by the ‘real link’. The ‘real link’ serves as a projection of the attempt of the Court to accommodate free movement and the social systems of the Member States. The uncertainty of the ‘real link’ reflects the general difficulty to develop a coherent approach. In Dano the Court tried to provide a clear answer to the facts of the case. In other scenarios the Court would have to face similar challenges. In its upcoming case law, the Court should develop the criteria of the ‘real link’. 368

6.1.2 More coordination of social solidarity within the EU

The issue of access to social benefits by EU citizens lies at the heart of the wider discussion about social solidarity in the EU. Member States are free to define their social system, as social systems are not harmonized but only coordinated within the EU. This coordination was established as a tool in order to remove obstacles that would stand in the way of free movement within the EU. It seems important to clarify the relation between the EU social coordination system and the right to move and reside freely of EU citizens, because Member States are afraid that their social systems will be threatened by migrating economically inactive EU citizens. The central concern of Member States seems to be that economically inactive EU citizens, and to a lesser extent also jobseekers, may access social benefits without ever contributing to the Member States’ public finances. These EU citizens only have to ensure they do not become an unreasonable burden on the national social system. Whether a EU citizen constitutes an unreasonable burden seems difficult to prove. 369 The relationship between the Coordination Regulation and the rules on EU citizenship is not flawless. Maybe, when these legislations would be amended, they could be better aligned.

The Court has been criticised for overstretching free movement rights. For example, national governments regard the principal requirement for EU citizens to have sufficient financial resources on its own unsuitable to prevent social tourism. This requirement alone does not ensure that the EU citizen and his or her family members will not become a financial burden to the Member State. Some Member States, for instance the UK, propose to change the current EU free movement rules and the social coordination rules to impose certain restrictions on access to social benefits, in particular a ‘waiting time before being entitled to benefits in the host Member State’. This would make residency, as well as access to social benefits, for EU citizens without sufficient resources dependent on very strict conditions. For that reason some experts have proposed to establish a compensatory mechanism. Such a mechanism should provide that the home Member State would reimburse the host Member State for the costs of the social benefits paid to economically inactive EU citizens and first-time jobseekers. 370 In answering the question whether such a compensatory mechanism should exist, Member States and the Commission should bear in mind that up till now no significant evidence has been found of the financial burden social tourism in fact poses on the society of the Member States. Restricting EU citizens in their free movement rights might also have a downside effect on the economies of the Member States, which in turn might be a heavier financial burden on the Member States’ economies than the costs of EU citizens claiming social rights. 371

368 Thym 2015, p. 47-49.
369 Dougan 2009 (B), p. 172-173.
371 Freedom of Movement and Residence of EU Citizens: Access to Social Benefits, European Parliamentary Research Service, In Depth Analysis, June 2014, available on: http://epthinktank.eu/2014/06/16/freedom-of-movement-and-residence-of-eu-citizens-access-to-social-benefits/ (last visited 21 April 2015). However, this research mentions that ‘Whilst studies do show little reliance of EU migrants on the social systems of the host Member States in absolute numbers, challenges are reported at local level where the concentration of EU migrants lacking financial means represents a burden on local infrastructure’.
In this context, several experts have proposed to create a EU unemployment benefits system. Others warn that establishing such a system would be too innovative for the current stage of EU integration. Some authors have argued that the EU could provide for a system based on EU solidarity in certain areas, for instance in the area of student support. EU redistributive solidarity could remove tensions between free movement and access to social benefits by EU citizens. O’Leary wonders whether a ‘set of coordinating rules, providing for rules on the exportability of certain benefits as well as reimbursement mechanisms, along the lines of those established in the field of social security or indeed recognition that budgetary considerations may, in certain circumstances, constitute a legitimate objective justifying restrictions of free movement rights, may be more respectful of the organization and structure of Member State education systems and their policy choices in this field’. O’Leary proposes better coordination rules in a response to challenges posed by foreign EU citizens. A coordination system in the area of economically inactive EU citizens may offer a better alternative to the legal uncertainty EU citizens’ experience. The ‘real link’ approach to the freedom of movement of economically inactive EU citizens can be compared with the coordination approach developed for economically active EU citizens. Under the coordination approach there is also no requirement for harmonization or for a new separate identity of EU citizens, there are only coordination rules in order to realize free movement. Such an approach could offer a solution, however, it is up to the Commission to establish such rules.

Interesting in this regard is a suggestion of Hoogenboom, who argues that promoting the free movement of students could be regarded as a ‘EU public good’. Hoogenboom suggests to establish a EU reimbursement scheme and/or a student loan system. According to Hoogenboom, the EU has the competence to adopt incentive measures in the area of education based on Articles 165 and 166 TFEU. Hoogenboom suggests a ‘state-to-state reimbursement system’ that is based on the principle that Member States have a responsibility towards their own citizens. Such a system would avoid social tourism. This system could only function if home Member States would be willing to reimburse the host Member State for the true financial burden posed by the student. Due to the likely event that a home Member States would not be willing to reimburse more than a student would be entitled to in its home Member State, Hoogenboom proposes a system where the student should bear the excess financial burden he or she imposes on the host Member State. It seems unlikely that both host and home Member States would be willing to cooperate in the setting up of such a system, due to the fact that the social systems of the Member States differ significantly and subsidized education is generally regulated by national guidelines and conditions. If a home Member State would make the decision on entitlement to student support, this would mean that the host Member State itself loses control over allocating its educational budget. In this regard, it should be kept in mind that the principle of loyal cooperation laid down in Article 4(3) TEU requires Member States to cooperate in finding a solution.

These proposed models are more integrative and could be a response to difficulties and unequal treatment within the EU. They also shed light on future possibilities of EU integration and will need to be debated throughout the EU. Future research should focus on the impact of these proposals.

6.1.3 Countering social tourism

The debate on social tourism became more intense since the accession of Romania and Bulgaria to the EU came closer. The joint letter of Austria, the UK, Germany and The Netherlands expressed this debate; it called for new legal rules to prevent social tourism and change the EU free movement rules regarding access to social benefits within the EU. This change would base access solely on

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373 Habermas, in contrast, argues that such ‘national state’ concepts may not be applicable to the EU. Habermas 1992, p.9.
375 Including rules on non-discrimination, aggregation of periods and export of benefits.
376 Hoogenboom 2013, p. 58. According to Hoogenboom this competence goes beyond the Erasmus measures. See also Case 242/87 Commission v Council (Erasmus) [1989] ECR 1425.
377 Hoogenboom 2013, p. 58.
378 See Letter sent in April 2013 from Johanna Mikl-Leitner (Minister of the Interior, Austria), Hans Peter Friedrich (Minister of the Interior, Germany), Fred Teeven (Minister for Immigration, Netherlands) and Theresa May (Home Secretary, UK) to the President of the Justice and
making an economic contribution to a Member State, rather than a broader inclusion of also those EU citizens that are not economically active.\textsuperscript{380} Slovakia, Poland, Hungary and the Czech Republic made a joint statement, which highlighted the positive impact of EU immigration on the national economies of the Member States. A study of trESS proposes the introduction of a certain ‘waiting period’ for entitlement to social benefits in the Member State of residence.\textsuperscript{381} The first three months of the residence would, for the purposes of the Coordination Regulation, not count as such. Another proposal is that the home Member State retains the responsibility for economically inactive EU citizens and first-time jobseekers. This should be assured by a reimbursement system that would compensate the costs of the host Member State. Furthermore, there are proposals for creating a ‘EU Mobility Fund’, which are aimed at assisting Member States with many incoming EU citizens that pose pressures on their social system and assisting the home Member States in avoiding all well-educated EU citizens leave that State.\textsuperscript{382}

The question is whether changing EU free movement law in order to accommodate the concerns of the Member States on social tourism is a realistic option. The Commission has mentioned it has no intention to change the free movement rules. The possibilities to limit the freedom of movement for certain types of workers or jobseekers will have to be examined with precaution. It is important that free movement remains free, but the assurance of the free movement rights has to be in accordance with the wishes of the EU citizens and the Member States. The general opinion within the EU seems to be that it is not feasible that free movement is only for those EU citizens with sufficient resources, while the rest of the EU single market is still promoted. When drawing a line for the free movement of persons the EU would be taking a step back. It does not seem likely EU free movement law would be changed in a limiting way. The idea of limiting free movement law is probably based on the ongoing threat of the withdrawal of the UK from the EU, which would be a rather drastic option.

When looking at the general principles of EU law, the free movement rights and the principle of proportionality, it seems that only a strict interpretation of \textit{Dano} would be possible. The strict interpretation means that a Member State may only refuse social benefits without making use of a proportionality test, if it is crystal clear that the EU citizen that moves to the host Member State only has the intention to benefit from the Member State’s social system and he or she has no intention to integrate into the host State’s society. A broader interpretation of \textit{Dano} could allow Member States to exclude all economically inactive EU citizens that reside on their territory for a period less than five-years and do not have sufficient resources for access to social benefits. Such a broad interpretation is contradictory to the EU free movement objectives, even when the case is about economically inactive EU citizens. Eurosceptics and Member States, such as the UK, will probably want to interpret \textit{Dano} broadly.\textsuperscript{383} This could possibly threaten the EU solidarity standards that have been created over the past five centuries and could also be a threat to the development of the concept of EU citizenship.

When \textit{Dano} is interpreted broadly, underprivileged EU citizens would be effectively excluded from free movement. The EU has adopted a number of strategies to counter social exclusion and poverty, such as the EU Employment Strategy and the Europe 2020 Strategy. The Member States have to implement the guidelines imposed by the 2020 Strategy.\textsuperscript{384} These initiatives aim to support the Member States in establishing national policies. Furthermore, the Open Method of Coordination can be used for political coordination by setting common objectives and indicators for certain aspects of social policy, while taking regional differences into account. However, these strategies and the Open Method of Coordination do not directly impact EU and Member State legislation. The objectives laid down in the Treaties, for example in Article 5(3) TFEU, which enables the EU to ‘take initiatives to ensure coordination of Member States’ social policies’, Article 9 TFEU and Article 3(3) TEU that underline the combat of social exclusion, Article 151(1) TFEU which also refers to it as an objective

Home Affairs Council and to Commissioners Viviane Reding, Cecilia Malmström and László Andor regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the response of Czech, Hungarian, Polish and Slovak ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies.

\textsuperscript{380} See also Guild 2013, p. 2.


\textsuperscript{382} Ibid.

\textsuperscript{383} Verschuere 2015, p. 389.

of the EU and the Member States, and Article 34(3) of the Charter of Fundamental Rights also reflects these goals and respects the right to social housing assistance for those who do not have sufficient resources, could all be used to define a more coherent social protection model at EU level for this area, because providing social protection to EU citizens touches on the aim to establish and maintain free movement.

6.2 Final conclusion

6.2.1 Research question and summarizing statements

A very complex set of conditions and guidelines govern the rules relating to the free movement of persons. These rules are built upon the right of free movement of workers and their family members, the equal treatment principle of Articles 18 TFEU, the provisions on EU citizenship in Article 20 and 21 TFEU and secondary legislation. The case law of the Court on EU citizens claiming social rights shows the tensions between realizing EU citizenship and national citizens’ interests. It is crucial to research this area to understand the obstacles EU citizenship faces. To come back to the main question of this thesis:

How does the case law on EU citizens claiming social rights contribute to the development of the concept of EU citizenship?

This thesis researched the role of the case law of the Court in the development of the concept of EU citizenship within the area of social rights. First of all, it seems apparent that the Court’s approach has changed over the past decades from an economic perspective to a more social perspective. Freedom of movement, and the status of economically inactive EU citizens, lay at the heart of many political and legal debates within the EU. EU law (currently) distinguishes between economically active and inactive EU citizens. Economically active EU citizens can rely on rules based on Articles 45, 49 and 56 TFEU, whereas economically inactive EU citizens can rely on the EU citizenship provisions on and the equal treatment principle of Article 18 TFEU when claiming social benefits in other Member States. These provisions impose thresholds for access to a social system of another Member State. The threshold of Article 45 TFEU is lower than that of Article 18 TFEU. This difference remains unchanged.

The establishment of the concept of EU citizenship placed EU citizens at the heart of EU integration. In Grzeleczyk, the Court stated that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’ and started to base the equal treatment guarantee on the status of EU citizenship in Martinez Sala. Worker status is not longer the sole condition for EU citizens’ access to social benefits in a host Member State. The development of the concept of EU citizenship within the context of social rights continued in cases such as D’Hoop, where the Court has allowed access to benefits for a former student in the home Member State, and Bidar, involving a migrant student who applied for a student loan. In Morgan and Bucher, the Court applied this ‘link approach’ on EU citizens that were treated unequally in oppose to those who stayed in their home Member State. Förster laid down important conditions for EU citizens’ access to social rights in host Member States and this remains of great importance. The case law after Förster developed and formulated the criteria for the ‘real link’.

Home Member States have to provide some social solidarity to their own nationals that go abroad. In some instances, they have to treat non-nationals equally if they fall within the scope of the free movement of workers. Frontier workers do not have to be treated equally with migrant workers or a Member State’s own nationals in every case. The following summarizes the rights to access social benefits of EU citizens in host Member States. First, workers or those who are unemployed after having worked for a year, and also those who have worked less than one year but retain the status of worker for six months have equal access to social benefits as national workers. They also have the right to child benefits when their children do not live in the host Member State. Second, first-time jobseekers do not have access to social assistance during the first three months. However, they have to be treated equally with nationals with regard to ‘benefits intended to facilitate access to the labour market’, when they have a ‘real link’ with the labour market of the host Member State. Member States
may require a ‘real link’ with their society as a justification ground, before EU citizens can claim these social benefits. This link can be shown by having genuinely sought work in the host Member State. However, in some Member States jobseeker benefits are special non-contributory benefits, for which different rules apply. Finally, economically inactive EU citizens, for example students, can access student grants only if they are no unreasonable burden on the national social system and have a ‘real link’ with the host Member States’ society. This ‘real link’ will generally be present when the student has lived in the host Member State for five years.

Access to social benefits for EU citizens, whether economically active or inactive, has been largely extended. The case law of the Court provides that a ‘real link’ may be required between a Member State and EU citizens, even when this would impose unequal treatment based on nationality. The ‘real link’ should meet the requirements identified in case law of the Court.

6.2.2 Drawing the main conclusions

In general, there has yet to be a clear understanding of how the link between EU citizenship and social rights has to be explained. Currently, the EU lacks substantial involvement in the area of social rights. In the context of the meaning of EU citizenship within the area of social rights, this means that the case law of the Court has been decided on a case-by-case basis. Martínez Sala and Grzelczyk were the first cases on EU citizenship; these cases linked EU citizenship to the principle of equal treatment. EU citizenship in the context of social rights has been developed by balancing the aim of promoting free movement and solidarity within the EU with avoiding unreasonable burdens on the Member State social systems. Between these two objectives, neither has priority. The case law of the Court on EU citizenship has made crucial steps towards equality of EU citizens. However, differences remain.

Denial of equal treatment to EU citizens that do not have sufficient resources is not the only problem EU citizens face. The Court recognizes certain limits to the principle of equal treatment. These limits are among others based on the sovereignty of the Member States to decide upon whom they wish to include and exclude in their national social systems. This is among others based on the protection of the Member States’ own nationals.

The prohibition of nationality conditions for access to social benefits under EU law did not lead to an opening up of the national social systems of the Member States. Lawful residence of an EU citizen does not automatically mean this citizen has unrestricted access to social benefits. Although EU citizens have a right to residence and equal treatment in all EU Member States, Member States may legitimately require a ‘real link’ with their society when access to social benefits is claimed. The Court uses its proportionality test to balance EU citizens’ interests when claiming social rights and the concerns of the Member States in protecting their social system against EU citizens that do not have a ‘real link’ with their society.

In Brey and Dano free movement of persons was distinguished from social security coordination. In Dano the Court clarified the rights of economically inactive EU citizens to access social benefits and the possibilities the Member States have to deny this access. Economically inactive EU citizens can only claim equal treatment if their residence right complies with Citizens’ Rights Directive. In the period between three months and five years of their residence in the host Member State, EU citizens must have sufficient resources. Member States can refuse access to social benefits when the EU citizen solely exercised the right to free movement to obtain social benefits. In cases of doubt, the ‘unreasonable burden’ formula determines whether EU citizens with limited resources have a right to free movement. Dano places an emphasis on the interests of the Member States, but uncertainties remain. Firstly, according to the Court’s case law there are two alternative ways how to assess whether EU citizens constitute ‘an unreasonable burden’. On the one hand, there is the case-by-case and individual assessment; on the other there is the more systematic and procedural assessment. The focus should lie on an individual assessment of cases, which takes personal circumstances into account. Secondly, EU citizens’ access to social benefits ultimately depends on the ‘real link’ approach of the Court when applying the equal treatment principle. Unfortunately, it remains difficult to discern a clear pattern from the case law on how to decide individual cases. In future cases such as Alimanovic, the Court will have to develop a clear path to follow.

The case law of the Court and the current provisions of secondary EU legislation do not support the idea that EU citizenship guarantees unconditional and universal access to social benefits for all EU
citizens in all Member States. However, the Court’s interpretation of the provisions on EU citizenship did extend the scope of the equal treatment principle. The ‘real link’ approach, which tests Member States’ requirements to exclude EU citizens of their social system strictly, could offer a framework for further development of social EU citizenship. The ‘real link’ emphasizes on the concept of integration within, rather than making a contribution to, a society. EU citizenship in the area of social rights does not mean more, or less, than the legal possibility to join the society of a EU Member State. This is consistent with the idea that EU citizenship is additional, and does not replace, national citizenship.

Yet, it is not entirely consistent with the idea that EU citizenship ‘is destined to become the fundamental status of the nationals of the Member States’. EU citizenship does have a considerable impact on access to social rights within the EU, mostly because of the equal treatment guarantee laid down in Article 18 TFEU. As there is no special or separate identity for EU citizenship in the area of social rights, the Court developed the ‘real link’ approach as a compromise between the interests of EU citizens and Member States. With the ‘real link’ approach, EU citizens could claim social benefits if they have a ‘real link’ and Member States can still refuse access to their social system when there is no proof of a ‘real link’. It is questionable whether a stringent reliance and application of a residence condition as used in Förster is a good way to assess the ‘real link’. The Court’s case law seems to require Member States to engage in a more extensive and wider examination of the degree of integration of the EU citizen within the host Member State than it did in Förster. On the one hand, Member States may continue to refine their criteria that allow access for EU citizens to their social systems. On the other hand, the EU legislature may also use this opportunity to make new and better-defined rules. There are different theoretical views on how EU citizenship and the limits of EU solidarity should be understood. The ‘real link’, contrary to only a residence condition, values social integration and requires migrant EU citizens to develop links with the Member State society before claiming social benefits. In Brey and Dano, the Court underlined the limits and conditions of EU citizenship. These cases confirm that EU citizenship in the context of social rights is to be construed by the ‘real link’. When it comes to determining whether there are alternatives to the ‘real link’, the mentioned possible solutions have to be further assessed by future research.

The debate on social tourism is characterised by claims that are not always substantiated with evidence. Some Member States have expressed their concerns on social tourism and think the Court overstretches the free movement provisions of the Treaties. These concerns are reasonable when taking in account the many differences between the EU Member States. The EU does not always take due account of the case specific differences of each individual Member State. Over time, EU citizens increasingly had the possibility to claim social benefits, as Member States legislation has to comply with the Court’s case law and EU legislation. The Citizen’s Rights Directive contains inconsistencies; in line of which the Court was confronted to rule on the gaps of the Directive. EU solidarity has moved in the direction of a nation state concept of social solidarity. The effect of EU solidarity may ultimately result in the Europeanization of the national social systems. For the present, social solidarity remains mainly within the competence of the Member States.

6.2.3 Providing answers

EU citizenship poses interesting questions on how Member States interact with their own nationals and with non-nationals. EU citizenship does not (yet) guarantee full membership of a Member State community. The flexible ‘real link’ approach seems the direction the Court currently has to follow to provide more substantial meaning to the concept of EU citizenship within the context of social rights. The ‘real link’ seems a compromise approach to deal with the different interests of EU citizens and the Member States. The journey started with nationality conditions. These nationality conditions were replaced by residence conditions and conditions on making an economic contribution. In many cases, the ‘real link’ or a degree of integration into society has replaced residence conditions. In other cases, residence conditions seem to remain as decisive elements in determining whether there is a ‘real link’ with society. Economic links and residence conditions can be part of the ‘real link’ test. Many cases still demand these links, however, they cannot be the sole conditions on which a decision is based. The ‘real link’ both protects national social systems against social tourism as well as EU citizens’ rights to access social benefits. EU citizenship in the context of social rights could be construed by the ‘real link’ a EU citizen has with the society.
Member States are restraint in granting access to their social system or searching for possible EU wide coordination, a EU reimbursement system or a EU social system. This is understandable when considering the burden certain categories of EU citizens and their family members will pose to their social systems. Cases such as Brey and Dano set limits and conditions on EU citizens’ access to social rights. The ‘real link’ is the path to follow. Unfortunately, the case law of the Court does not provide a clear method to be used when deciding each individual case. Member States have discretion in defining the ‘real link’, as long as they follow the guidelines set out by the Court. These guidelines are that the ‘real link’ required must be appropriate, accurate, rational, flexible and most of all proportional. The Court uses its proportionality test to balance EU citizens’ interests and the concerns of the Member States. The current approach in some cases fails to consider that economically active and inactive EU citizens are equal and unequal at the same time. A possible solution for the future may be to make distinction between the different categories of EU citizens and different kinds of benefits. The Court has been defining the ‘real link’ step-by-step in its case law and will probably continue to do so. Alimanovic will be the next case that could provide more substance.

The idea of EU citizenship could be a vehicle to ensure social inclusion for every migrant EU citizen. The case law of the Court contributed significantly to EU solidarity and assures a degree of social protection for all EU citizens. The current EU legal framework does not only facilitate access to the labour markets of the Member States, but to some extent also to their social systems. EU citizenship in combination with a ‘real link’ with the society, based on a number of factors which not only constitute residence periods, could ensure entry for EU citizens to claim social rights in a host or home Member State. Thus, social EU citizenship is not a stand-alone concept; it has to be read in conjunction with the ‘real link’. Combining EU citizenship and the ‘real link’ will grant access to a Member State social system. As there is no EU agenda for establishing real social EU citizenship, uncertainty and incoherency remain in the area of EU citizens claiming social rights. This is also why EU citizenship is still not the fundamental status of the Member State nationals. EU citizenship undoubtedly is a concept of great potential. What the future holds is uncertain. However, truly social EU citizenship, among others due to concerns on social tourism and the interests of the individual Member States, is not something to be established soon.

It is not an easy task to define the contours of the concept of EU citizenship. The link between EU citizenship and social rights certainly is not an illusion. Though, at the moment claiming social rights on the basis of being a EU citizen alone seems highly unlikely. The story on EU citizenship continues, where the story will end is something only time will tell.
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