Reframing EU Citizenship as Stakeholder Constituency, Or…Why the Court of Justice Got it Right on Economically Inactive EU Citizens following *Dano*

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1. Introduction

Inviting the reader to engage with a chapter on why a court's decision was the correct one may seem like a futile academic exercise. Indeed, as legal scholars we spend most of our energies on debating the soundness of judicial judgments and on deconstructing or even contesting the reasoning of the courts. And yet, when large part of the academic literature has one of its rare moments of convergence – in this instance, on its condemnation of the Court of Justice's case law on economically inactive citizens after its *Dano* decision[1] – there is a clear value in reflecting on the methodological and normative grounds on which the judgments have been based. Could it be, instead, that the Court has got it right after all? It is an important question because it allows revisiting not only the merits of the Court's jurisprudence, but also its wider implications for European integration and its fundamental tenets, such as citizenship, solidarity and economic constitutionalism.

European Union citizenship has been interpreted as a multilevel concept that designates the membership of individuals in more than one polity, the national and post-national.[2] The rich literature on the concept of EU citizenship following its inclusion in the Maastricht Treaty has revolved around the substantive political and social rights deriving therefrom; its potential to consolidate and expand the free movement of persons and their integration in the labour markets of host Member States; as well as its role in constructing a European identity beyond national borders.[3] Two rather diverging paradigms have dominated the discourse in the legal literature with the objective to explain the function of EU citizenship and its effect in structuring the relations between EU citizens, Member States and EU institutions. One paradigm relates citizenship to the promotion of social solidarity. The other one rejects such a

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[1] Judgment of 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, Case C-333/13, ECLI:EU:C:2014:2358 (hereinafter '*Dano*').

[2] Rainer Bauböck, 'The Three Levels of Citizenship in the European Union' (2014) 15 *German Law Journal* 751; Michael Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 *European Law Review* 613. For a general overview of the concept, see Stefan Kadelbach, 'Union Citizenship' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 433.

[3] Indicatively see Jo Shaw, 'Sovereignty at the Boundaries of the Polity' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 461; Percy B Lehning, 'European Citizenship: Towards a European Identity' (2001) 20 *Law and Philosophy* 239; Jürgen Habermas, 'Citizenship and National Identity' in Bart van Steenberg (ed), *The Condition of Citizenship* (SAGE 1994) 20; Kalypso Nicolaidis, 'The New Constitution as European "Demoi-cracy"' (2004) 7 *Critical Review of International Social and Political Philosophy* 76; Katherine E Tonkiss, 'Post-national Citizenship without Post-national Identity? A Case Study of UK Immigration Policy and Intra-EU Migration' (2013) 9 *Journal of Global Ethics* 35.

potential but links citizenship, in functional terms, to the participation and inclusion of individuals in different social spheres at the supranational level.

First, those who seek greater protection for social rights at the European level argue that the function of EU citizenship should be conceptualised in terms of enhancing social solidarity between EU nationals and Member States.[4] Union citizenship has brought about guarantees beyond the economic freedoms, transcending the economic rationality of the internal market in order to expand the protection of social rights for EU citizens residing in a Member State other than the one of their nationality.[5] In this sense, EU citizenship has promoted a degree of social solidarity, which derives from 'the existence of a common identity forged through shared social and cultural experiences, and institutional and political bonds',[6] and leads to distributive justice in the Union through the protection of EU citizens in need. An evaluation of the extent to which social solidarity has been attained in the context of economic integration rests upon diverse theoretical traditions regarding citizenship and rights beyond the state; be it driven for instance by a cosmopolitan vision of supranational democracy or by a focus on the integrative force of the juridification of rights. In broad terms however, at a normative level, EU citizenship is viewed as capable of supplementing the free movement of persons with the notion of social solidarity of the host Member States towards EU citizens irrespective of their position as economically active or inactive actors. At the operational level, and in accordance with developing secondary EU law, it could potentially enable economically inactive persons in the host State to have a claim to social assistance solely by virtue of their status as Union citizens.

Second, those who focus on the impact of EU citizenship on economic freedoms highlight that it has primarily succeeded in increasing the participation of individuals in the internal market.[7] Economic freedoms are constructed as fundamental rights stemming from Union citizenship in order to ensure that all citizens can pursue cross-border economic activities and take up employment and residence in the Member State of their choice.[8] In contrast to the above paradigm, EU citizenship does not constitute an independent source of social protection and social policy at the supranational level nor does it entail an entitlement to access the welfare system of the host State. An extension of Union citizenship to encompass non-economic

[4] Tamara Hervey, 'Social Solidarity: A Buttress Against Internal Market Law' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 31; Síofra O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in Gráinne de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press 2005); Naimh N Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597.

[5] In general, see Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) University of Iowa Legal Studies Research Paper Number 07-13; Floris de Witte, 'EU Law, Politics, and the Social Question' (2013) 14 *German Law Journal* 581; Dion Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *Cambridge Yearbook of European Legal Studies* 270.

[6] Michael Dougan and Eleanor Spaventa, '"Wish You Weren't Here...": New Models of Social Solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 181, 185.

[7] In general, Alina Tryfonidou, *Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016).

[8] The EU Charter of Fundamental Rights reinforces this and includes the freedom to choose an occupation and right to engage in work (Article 15 which partially supports the free movement of factors of production), the freedom to conduct business (Article 16) and the right to property (Article 17). For a variation of this argument, see the 'republican interpretation' of EU citizenship as a right to participate in the EU's multilevel governance, Ernst-Ulrich Petersmann, 'EU Citizenship as a Constitutional Restraint on the EU's Multilevel Governance of Public Goods' EUI Working Paper LAW 2017/12 available at <https://cadmus.eui.eu/bitstream/handle/1814/47505/LAW_2017_12.pdf?sequence=1&isAllowed=y> accessed 20 April 2020.

protections may derive, for example, from the principle of equal treatment and from secondary EU law. Nevertheless, this is envisaged only to the extent that such protections facilitate an economic activity and integration of economically active persons in the economic and social life of the host State.

Based on this rather 'thinner' scope, EU citizenship lacks the potential to promote the emergence of a European social identity. Tuori's construction of the multiple constitutions of Europe, for example, highlights the interlinked communicative processes – and not a full-fledged collective – that shape the constitutional structure of the Union. He identifies in particular the absence of a normative vision for a social Europe and explains that one of the pivotal aspects of European constitutionalism is that the EU's economic and social policies have so far relied on, and been supplemented by, the redistributive mechanisms and fiscal resources of the national welfare systems which have not lost their primacy in delivering redistributive policies.[9] Given that the EU develops a networked, heterarchical model of governance that encompasses fragmented societal processes of self-organisation, it does not produce an overarching 'common stake' on which a deep level of social solidarity could be grounded.[10] This then shifts the focus to a functional conceptualisation of citizenship that reflects the overlapping and fluctuating constituencies of the Union's fragmented social systems.

Against this background of the debate regarding the proper function and scope of EU citizenship, a rich body of literature has emerged concerning the line of case law of the CJEU on economically inactive EU citizens and their entitlement to social assistance since the *Dano* judgment in 2014. In a close interpretation of secondary law on EU citizenship, the Court in *Dano* made explicit that Member States can refuse the provision of social benefits to economically inactive persons and persons who do not retain the status of a worker.[11] Critical accounts of the judicial decisions diagnose a marked shift in the Court's approach, from an expansive to an unjustifiably restrictive interpretation of the rights of economically inactive persons and the scope of Union citizenship. Shuibhne has noted, for example, that the post-*Dano* case law has 'induced the systemic spasm that has profoundly altered the legal trajectory of citizenship'[12] and Spaventa has observed that the CJEU has entered a 'reactionary phase' and excluded social considerations from the remit of citizenship.[13] A point which has been overlooked, however, is that much of the debate on Union citizenship and, more specifically, the right of economically inactive persons to welfare assistance is anchored in a notion of centralised or hierarchical political constitutionalism in the context of which citizenship contributes towards the foundation of a social collective order at the supranational level. Therefore, the criticisms directed to the relevant cases of the CJEU remain bound within an integration model oriented towards the building of Europe as a social state, which is not intrinsic to the current constitutional architecture of the Union.[14]

In light of this, there are two aims in this chapter. The first is to reconstruct the concept of EU citizenship as 'stakeholder constituency', building on the 'thin' scope of citizenship described

[9] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 227-268.
[10] Karl-Heinz Ladeur, '"We, the European People . . ."—Relâche?' (2008) 14 *European Law Journal* 147, 158.
[11] Ibid., paras. 78-80.
[12] Niamh N Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889.
[13] Eleanor Spaventa, 'Earned citizenship – Understanding Union Citizenship through its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 204.
[14] See Karl-Heinz Ladeur, 'Towards a Legal Theory of Supranationality – The Validity of the Network Concept' (1997) 3 *European Law Journal* 33, 40-43.

above. The chapter draws insights from the systems theoretical approach focusing on the functional differentiation of social systems, such as the economy, politics and law, that can help illustrate the fundamental characteristics of EU governance and hence, the role of citizenship within it. It is demonstrated on this basis that the construct of Union citizenship should be placed within the complex form of governance at the supranational level characterised by an advanced and well-structured economic system at its core and a more embryonic political system at its periphery.[15] Even though the political system and its balance with the economic one is evolving,[16] this does not affect the analysis here. Within the limited scope of social assistance for economically inactive citizens, this evolution has, for now, not promoted a coherent vision of how social citizenship should develop or how to influence the interpretation of particular elements of EU law in this area. The Member States view 'social policies as a vital part of their self-understanding' and of their democratic foundations and have so far resisted integration in the sphere of their welfare systems.[17]

The chapter deploys the notion of economic constitution to highlight the level of autonomy reached by the EU economic system, as opposed to the political, and its contribution to enabling citizens' participation in the supranational sphere. The argument put forward is that under conditions of functional differentiation, the key element of Union citizenship is the integration of nationals of Member States to self-organisational networks that characterise the constitutional landscape of the EU's economic system. In this sense, citizenship becomes less fundamental in determining the relationship between the individual and the state[18] and instead, designates the partial and multi-functional integration of actors in different roles in society. It is argued, therefore, that Union citizenship should be understood as 'stakeholder constituency' of the EU economic system and that, this way, it remains bound within its functional economic configuration.

The second aim of the chapter is to examine the case law on economically inactive EU citizens, with a particular focus on the decisions in *Dano, Alimanovic*,[19] *Garcia Nieto*[20] and *Commission v UK*,[21] and to explore whether there has been a transformation in the approach of the Court. Contrary to the strong criticisms expressed in the academic literature, it is argued here that the reasoning of the Court is consistent with its previous decisions. The post-*Dano* case law demarcates and clarifies, rather than overturns, the rights of economically inactive persons and

[15] Achilles Skordas, 'Is Europe an Aging Power with Global Vision – A Tale on Constitutionalism and Restoration,' (2005) 12 *Columbia Journal of European Law* 241, 288; Poul Kjaer, 'The Transnational Constitution of Europe's Social Market Economies: A Question of Constitutional Imbalances?' (2019) 57 *Journal of Common Market Studies* 143, 155.

[16] See in general, Armin von Bogdandy, 'Editorial: Unsere europäische Gesellschaft und ihr öffentliches Recht' (2021) 60 *Der Staat* 171 and Section 2 below.

[17] Ulla Neergaard, 'Europe and the Welfare State—Friends, Foes, or . . .?' (2016) 35 *Yearbook of European Law* 341, 350.

[18] Karl-Heinz Ladeur, 'The State in International Law' CLPE Research Paper No 27/2010, *Osgoode Hall Law School* 3 available at <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1094&context=clpe> accessed 3 April 2020. See Neil Walker, 'The Territorial Dimensions of Citizenship in Recent Academic Literature' in Ayelet Shachar, Rainer Bauboeck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 554.

[19] Judgment of 15 September 2015, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, Case C-67/14, ECLI:EU:C:2015:597 (hereinafter '*Alimonovic*').

[20] Judgment of 25 February 2016, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, Case C-299/14, ECLI:EU:C:2016:114 (hereinafter '*Garcia-Nieto*').

[21] Judgment of 14 June 2016, *European Commission v UK and Northern Ireland*, Case C-308/14, ECLI:EU:C:2016:436 (hereinafter '*Commission v UK*').

thereby, the boundaries of EU citizenship become more visible. More importantly, this case law reveals the fault lines of the construct of EU citizenship. The different categories of individual status under EU citizenship,[22] such as first-time jobseekers, jobseekers who have previously been employed in the host State for less than a year and those who have worked for more than a year, students, persons with sufficient resources or the economically inactive, demonstrate how different treatment is inevitable under secondary EU law, and is, in fact, sanctioned by the Lisbon Treaty. As will become clear, it is not possible to discern in the pre-*Dano* jurisprudence a linear normative expansion of the content of EU citizenship that reflects a common paradigm of social ordering and a collective social identity in the Union nor to identify a subsequent retreat from such paradigm in the judicial interpretation of the Court. Instead, the Court manages to develop a trajectory of Union citizenship with respect to economically inactive persons that fits well within the pluralistic and heterogeneous construction of the EU's constitutional framework. Social solidarity, therefore, does not constitute an overarching principle that steers the judicial interpretation of EU citizenship, nor can it be used as a yardstick to evaluate the trajectory of the relevant case law.

To demonstrate these points, the chapter is structured as follows. First, the concept of the EU economic constitution is introduced and placed within the broader academic debate on social solidarity in Europe. Its nature and function are examined in order to analyse how citizenship as 'stakeholder constituency' fits within the constitutional structures of the Union (Section 2). Second, the case law with respect to economically inactive persons and their access to social assistance in the host Member State is explored with a view to explaining its compatibility with the previous jurisprudence of the Court and with citizenship law and to tracing how it relates to the system of EU governance (Section 3). The analysis includes some broader considerations on a soft version of solidarity as a corrective mechanism that enables the management of structural shortcomings in both Member States and the Union as a whole, and is concluded with some brief reflections on this form of 'corrective' solidarity in the context of the initial EU measures in response to the Covid-19 pandemic (Section 4).

2. The EU Economic Constitution and Citizenship

Following the sovereign debt crisis in the Eurozone, the issue of solidarity has become pressing. It has offered a prism through which the responses to the crisis and the longer-term prospects of reforming the Union can be assessed so as to render it more resilient in the face of future challenges.[23] An expansive view may be identified, which regards solidarity as entailing a deep interest of the members of a political community in the integrity of social living conditions that are acceptable on the basis of distributive justice.[24] Solidarity, in this sense, is rooted in the attitudes of mutual cooperation, concern and obligation that members in a political community have. It is associated with 'the appeal to some image of decent, good or just society'[25] that motivates people to support others in that community in times of need. For

[22] See Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States (29 April 2004) OJ L/158/77 (hereinafter 'CRD' or 'Directive').
[23] This debate has resurfaced in the context of the EU responses to the Covid-19 pandemic; see Section 4 below.
[24] Jürgen Habermas, *The Lure of Technocracy* (Polity Press 2015) 23.
[25] Keith Banting and Will Kymlicka, 'Introduction' in Keith Banting and Will Kymlicka (eds), *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (Oxford University Press 2017) 1, 6. In general, Maurizio Ferrera and Carlo Burelli, 'Cross-National Solidarity and Political Sustainability in the EU After the Crisis (2019) 57 *Journal of Common Market Studies* 94; Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 *Maastricht Journal of European and Comparative Law* 965.

Habermas, this ideal of solidarity does not currently exist in the Union, which risks becoming a 'technocracy without democratic roots'.[26] It can only be realised under conditions of deep transformation of the monetary union into a 'real' political union backed by social welfare through a process of political re-foundation of the EU.[27] The decision to implement such change would signify that the 'red line of the classical understanding of sovereignty would be crossed' and 'the idea that the nation states are "the sovereign subjects of the treaties" would have to be abandoned'[28] in order to construct a politically constituted transnational democracy. This would contribute to the legitimation of EU integration by enhancing the European public sphere and providing the appropriate conditions for cosmopolitan discourse ethics.

In this analysis, one of the core functions of solidarity is fair distribution of income, property, public services and public goods. It is assumed that solidarity cannot be fully realised when social inequalities between Member States persist and therefore, EU citizens and Member States should accept the redistribution of burden across national borders in order to achieve equal living standards across the Union.[29] It is the implementation of such a normative conception of solidarity that, according to this perspective, has the potential to strengthen the substance of EU citizenship and provide the impetus for political integration and democratic will-formation in Europe. Considerations of a protective Europe permeate policy proposals for developing uniform minimum social standards across the Union, setting a minimum wage and supporting a move towards convergence in social policy.[30]

Taking account of an alternative construction of the Union's governance however, its complexity is manifested in its systemic differentiation. The differentiation that exists in the social systems, such as the economy, politics, law, science and education, are linked to the semantics of constitutionalism to designate the levels of autonomy that these systems have achieved in the supranational context. As a structural coupling between the specialised and relatively autonomous functional setting of the economy and law, the economic constitution of the Union has both a constitutive and a limitative function. In the first sense, it guarantees the autonomy of the economic system, which operates on the basis of market rationality and the generation of profit. In the second sense, it establishes limitations on the excessive power of economic actors that can be socially harmful and aims to preserve the compatibility of the economic system with the rest of society.[31] As Kjaer notes:

> constitutions simultaneously constitute internal order within their respective functional areas and establish the possibility of stabilised linkages with other fields through the invoking of rights. They are simultaneously oriented towards the reduction of internal volatility and the safeguarding of autonomy vis-à-vis the outside world through targeted measures which aim to reduce asymmetries and crowding-out effects […].[32]

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[26] Habermas (n 24) 11.
[27] Ibid., 9 and 14.
[28] Ibid., 14.
[29] Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalisation of International Law' (2012) 23 *European Journal of International Law* 335, 348.
[30] E.g., President Emmanuel Macron, 'Speech on New Initiative for Europe' 26 September 2017 available at <https://www.elysee.fr/emmanuel-macron/2017/09/26/president-macron-gives-speech-on-new-initiative-for-europe.en.> accessed 3 April 2020.
[31] Poul F Kjaer, *Constitutionalism in the Global Realm* (Routledge 2014) 125. See Gunther Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011) 3.
[32] Poul F Kjaer, 'Law and Order within and Beyond National Configurations' in Kjaer, Teubner and Febbrajo ibid., 395, 412. For functional connections between politics and economy, see Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020).

The functional system of the economy includes the entire population of the Union's territory, albeit to the extent that they act as economic agents. As follows, the constituency of the economy is not equated with the political constituencies of the Member States or their citizens. Its constituency rather encompasses individual economic actors, such as national and foreign investors, workers, traders and consumers, as well as enterprises and public or governmental bodies in their role in regulating and participating in the economy.[33] More broadly, it includes any action and communication undertaken by natural or legal persons with the purpose of the gainful exchange of goods or services in the marketplace. The constituency of the economy thus relies on a 'functional constituent power', which emerges as a socially adequate order of communications and actions supported by economic rights and freedoms.[34]

In a broad array of literature, the evolution of economic constitutionalism in Europe has come under a strong criticism which points out the submission of social rights to the economic freedoms by the CJEU,[35] the restriction of national labour policies by the integration of the internal market[36] and its neoliberal bias.[37] For Giubboni, the constitutional structures that have emerged should be characterised 'as a monumental exercise undertaken by "the economic" to rule "the political."' [38] The emergence of the Union's economic constitution has indeed signified a de-coupling of the economic sphere from the welfare systems of Member States within which economic processes were embedded at the domestic level.[39] While it has promoted the autonomy and expansion of the internal market, it would not be accurate to view the economic constitution only as a tool of deregulation at the supranational level, given that it is accompanied by mechanisms that enable it to operate and establish interactions with other social fields.[40]

In this sense, the EU economic constitution rests on the guarantee of economic freedoms and trade, the rules of financial stability and regulation of competition but is also supplemented by rules in a variety of policy areas, including fundamental rights, consumer protection and non-

[33] James M Buchanan, 'Distributional Politics and Constitutional Design' in Vitantonio Muscatelli (ed), *Economic and Political Institutions in Economic Policy* (Manchester University Press 1996) 70, 82-4.
[34] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford University Press 2012) 62-63; Marc Amstutz, 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Journal of International Law* 766, 775.
[35] For example, Fritz W Scharpf, 'The Asymmetry of European Integration, Or Why the EU cannot be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211; Cathrine Barnard, 'Social Dumping or Dumping Socialism? Case Note on Laval and Rüffert' (2008) 67 *Cambridge Law Journal* 26; Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval'* (2009) 15 *European Law Journal* 1.
[36] Phil Syrpis, 'The EU and National Systems of Labour Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 944, 958; Claire Kilpatrick and Bruno de Witte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges' EUI Working Paper LAW 2014/05 available at <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1&isAllowed=y> accessed 3 April 2020.
[37] Stephen Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3 *New Political Economy* 5.
[38] Stefano Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15 *German Law Journal* 935, 957. See Fritz W Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy' in London School of Economics 'Europe in Questions' Discussion Paper Series No 36/2011, 31; Francis Cheneval and Kaplypso Nicolaidis, 'The Social Constriction of Demoicracy in the European Union' (2016) 16 *European Journal of Political Theory* 235.
[39] Kjaer, *Constitutionalism* (n 31) 125.
[40] Ibid.

discrimination. They operate as supporting structures which contribute towards rendering the economic principles and processes of the economic system compatible with non-economic objectives. This can be clearly observed in relation to the economic freedoms of the internal market and their effects in social fields. For instance, the right to receive cross-border healthcare without undue delay has been developed under EU law through a web of judicial decisions on the free movement of services.[41] Moreover, the principle of equal treatment has been applied to social assistance for specific categories of EU citizens within the framework of the free movement of workers and has required domestic authorities to reconsider whether and how they have taken into account the rights and interests of affected nationals of other Member States.[42] Similarly, the insertion of fundamental rights into the law of the internal market has been a significant achievement of the Court that clearly show that the internal market is 'porous'[43] to non-economic principles. Cases, such as *AGET Iraklis*[44] and *Commission v Hungary*,[45] illustrate that there is no fixed prioritisation between economic freedoms and fundamental rights and that symmetric interaction between them is possible.[46]

On the contrary, the political system of the Union is less advanced and is internally differentiated into individual segments corresponding to the Member States. The heterarchy of political authority within the Member States and EU institutions sheds light on the interactions between them in terms of horizontal cooperation and mutual accommodation. Therefore, the Union's political system remains entangled with the governments of the Member States even though its 'pluralistic complexity and functional differentiation of horizontally linked social subsystems means a departure from the nation state and its sovereignty as a unified system of representative authority in full territorial and political control'.[47] This creates a sense of complementarity in the political structures and legitimacy of the Union which is documented by its multilevel structures. In the absence of a fully formed, single European demos, notions of democratic legitimacy are still largely revolving around the domestic demoi – e.g., as the

[41] Judgment of 12 July 2001, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, Case C-157/99, ECR 2001 I-05473, ECLI:EU:C:2001:404; Judgment of 13 May 2003, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, Case C-385/99, ECR I-04509, ECLI:EU:C:2003:270; Judgment of 16 May 2006, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, Case C-372/04, ECR I – 4376, ECLI:EU:C:2006:325.

[42] Grainne de Burca and Oliver Gerstenberg, 'The Denationalisation of Constitutional Law' (2006) 47 *Harvard Journal of International Law* 243, 260-1; Raphaële Xenidis, 'Transforming EU Equality Law? On Disruptive Narrative and False Dichotomies' (2019) *Yearbook of European Law* 1.

[43] Stephen Weatherhill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 139.

[44] Judgment of 21 December 2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, Case C-201/15, ECLI:EU:C:2016:972.

[45] Judgment of 18 June 2020, *European Commission v Hungary*, Case C-78/18, ECLI:EU:C:2020:476. For earlier cases, Judgment of 12 June 2003, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, Case C-112/00, ECR I-05659, ECLI:EU:C:2003:333; Judgment of 14 October 2004, *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, ECR I-09609, ECLI:EU:C:2004:614.

[46] See Charles F Sabel and Oliver Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511; Oliver Gerstenberg, 'Fundamental Rights and Democratic Sovereignty in the EU: The Role of the Charter of Fundamental Rights of the EU (CFREU) in Regulating the European Social Market Economy' (2020) *Yearbook of European Law* 1; Kaarlo Tuori, 'The Many Constitutions of Europe' in Oxford Handbooks Online (2016) available at <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-23?print=pdf> accessed 3 April 2020.

[47] Jiří Přibáň, 'The Self-Referential European Polity, its Legal Context and Systemic Differentiation: Theoretical Reflections on the Emergence of the EU's Political and Legal Autopoiesis' (2009) 15 *European Law Journal* 445, 459; idem, 'Multiple Sovereignty: On Europe's Self-Constitutionalization and Legal Self-Reference' (2010) *Ratio Juris* 41.

involvement of national parliaments in the Union's governance and opt-out policies demonstrate[48] – and EU citizens represent the constituent power at the EU level but only acting as peoples within their Member States.[49]

To be sure, there are different institutions and numerous processes of cooperation that enhance the representation, accountability, deliberation and transparency of the Union's political decision-making – one need not look further than Articles 2 and 9-12 TEU.[50] Significant as they are in enhancing the EU's democratic legitimacy in executive and legislative procedures, they do not arm Europe and its peoples with a centralised constitutional authority or a demos. Overall therefore, EU governance simultaneously operates within a multiplicity of functionally differentiated settings. It is supported by an economic system, which is capable of developing constitutional principles for its internal stabilisation and compatibility with non-economic values, and a political system characterised by differentiation, which 'rules out the possibility of a new political centre' beyond those of the Member States at the current stages of integration.[51]

The above observations show that constituting normative and institutional political hierarchies is not an attainable task within the decentralised character of the EU. As Ladeur has convincingly noted, the increasing heterogeneity among Member States makes it impossible to establish collective conceptions of common good and stable patterns of action for the development of social policies at the supranational level.[52] This puts into question the viability of a centralised economic and political constitutional framework beyond the nation-state and brings into the fore the necessity for a flexible and acentric system of governance in Europe. From this point of view, heterogeneity in the constitutional landscape of the Union's economy needs to be preserved. Rather than replacing the organically grown varieties in the economic institutions and welfare systems of the Member States,[53] networked-type economic governance in the Union can maintain diversity and experimentation in the adjustment of Member States.

Against this background, the question is raised as to how EU citizenship should be conceptualised in structuring the relationships that emerge between EU citizens and Member States other than that of their nationality. It also presents a mechanism for reflection on the diverse standards of social protection in the Member States and on the legal tools for overcoming undesirable obstructions to the integration of EU citizens in host States. The discussion below presents EU citizenship as 'stakeholder constituency' to address these issues.

2.1 EU Citizenship as 'Stakeholder Constituency'

Citizenship may be viewed either from the lens of common identity and sentiments of social solidarity or as a functional construct that enables the participation of individual actors in

[48] Ibid., 458.
[49] See Achilles Skordas, 'Self-determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance' in Nicholas Tsagourias (ed), *Transnational Constitutionalism* (Cambridge University Press 2007) 207, 247.
[50] Armin von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations' (2012) 23 *European Journal of International Law* 315.

[51] Přibáň (n 47) 459. See more recently, Jiří Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2021).
[52] Ladeur (n 10) 158.
[53] Gosta Esping-Andersen, *Three Worlds of Welfare Capitalism* (Polity Press 1990); Eyal Benvenisti and Georg Nolte (eds), *The Welfare State, Globalisation and International Law* (Springer 2004).

societal spheres of action. In Kymlicka's terms, the former approach refers to membership in a political community with ethnic and cultural ties.[54] This does not necessarily require homogeneous and deep-rooted ethno-cultural bonds, nor does it preclude diverse cultural and religious practices. On the contrary, it is an inclusive model of citizenship that accommodates ethnic diversity and develops within a multicultural model of statehood and community membership. Citizenship in this context is characterised by nation state frames; it consolidates and diffuses the territorial state rather than transcending it. While citizenship presupposes a shared identity and a community, its constitutional function is that it structures the relationship between the nation state and citizens. In doing so, it generates 'solidarity between strangers'[55] that makes them responsible for each other and develops a force of social integration that is most clearly manifested in the operation of the welfare state.[56] It thus promotes the expansion of social rights with a primary focus on the redistribution of resources of the welfare state and, as Habermas put it, forms a 'mechanism by which the legal and material infrastructure of actually preferred forms of life is secured'.[57]

From this perspective, the construct of EU citizenship would rest on a collective social identity at the supranational level and collective conceptions of common good. Solidarity would constitute the basis of social policy and an overarching principle which could raise the expectation that conflicting social visions would be resolved in favour of upholding an obligation to support EU citizens in need. When it comes to the analysis of the CJEU case law on economically inactive EU citizens, social solidarity would mandate an expansive interpretation of their rights to enable them to access social assistance on an equal footing with the citizens of the host States and hence, provide a step towards the conceptualisation of a European welfare state. On the basis of these assumptions, when in *Dano* the Court recognises the right of Member States to refuse social assistance to economically inactive citizens (discussed in Section 3 below), its decision is viewed with scepticism because it retreats from a progressive reading of European citizenship and from strengthening the social bonds of EU citizens.

In the systemically differentiated model of EU governance however, a normative principle such as social solidarity cannot be viewed as having a stabilising function in determining the rights of EU citizens. The latter, functional approach to citizenship offers an explanatory framework that enables a recalibration of Union citizenship. Instead of relying on the 'normatively-demanding'[58] process of collective identity formation, Thornhill has observed that the edifice of citizenship rests upon the fragmentation of post-modern society into functional sectors and has criticised its conflation with nationality and ethno-cultural allegiance:

> In different societies, […] we can now identify certain domain-specific modes of citizenship practice, in which individual social agents act as the citizens of separated functional spheres - for example, the

[54] Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352; idem, 'Liberal Nationalism and Cosmopolitan Justice' in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism* (Oxford University Press 2006) 128. In general, see Richard Bellamy, 'Modern Citizenship' in Richard Bellamy, Dario Castiglione, Emilio Santoro (eds), *Lineages of European Citizenship, Rights, Belonging and Participation in Eleven Nation-States* (Palgrave 2004).
[55] Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 *Ratio Juris* 125, 132.
[56] Ibid., 132-135.
[57] Ibid., 132.
[58] Kjaer, *Constitutionalism* (n 31) 91.

> environment, medicine, education - and they create hard norms for these domains by linking inner-societal demands to rights constructed in the global legal system.[59]

In light of this, Union citizenship becomes disentangled from the territorial limitation of statehood and its link to nationality and can be understood in terms of 'stakeholder constituency'. [60] 'Stakeholder constituency' designates the partial and multi-functional integration of actors in differing societal roles who have a stake in participating in functionally limited domains of action and have a right to be taken into account in decision-making processes. For example, within the functional system of the economy, citizenship represents the status of individuals as workers, consumers, investors, traders, service providers and shareholders.

By conceptualising citizenship in this way, it is not the same as denying non-economic forms of participation or claiming that economic citizenship is, in itself, self-sufficient for European integration. Political citizenship may be a viable counterpart to economic citizenship, but it would have to be reconstructed within the Union's political system. This re-framing of citizenship exposes its partial and fragmented elements within social systems and moves away from a traditional notion of citizenship as a bundle of rights presumed to be conferred to individuals by virtue of their nationality. It is for this reason that the term 'constituency' rather than 'citizenry' is used here, as it signals a greater break from the connotations of actors who have a stake in a polity solely because of their nationality. Two important dimensions of stakeholder constituency are highlighted below.

First, it does not designate an institution of membership in a European demos whereby criteria of membership and substantive rights and duties are determined by central political decisions. It is evolving through multiple networks and functionally differentiated rationalities and therefore, adapts to the multidimensional and multitemporal processes of constitutionalisation in Europe. Even though Tuori does not adopt a systems theoretical approach, he identifies the potential of these processes to enrich the position of individuals vis-à-vis the European polity by adding supplementary layers of citizenship – what he calls market, political, juridical and social forms of citizenship – and thus by increasing the possibilities of action.[61] EU citizenship enables participation in the spontaneous spheres of social systems and facilitates the enforcement of the associated rights and obligations regardless of the social attributes and national identity of the individual. As alluded to above, these rights can operate as constitutionally supported irritants within social systems, in general, and the economy, in particular, and orient them towards environmental compatibility.

Second, by increasing inclusion in societal activities or communications, Union citizenship renders the EU's fragmented governance more open towards the interests of its addressees. In a different context, Teubner has reframed the principle of political representation in nation states and replaced it by the principle of self-contention of transnational regimes by their

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[59] Chris Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy' (2018) 45 *Journal of Law and Society* 73, 91. See also Joseph H H Weiler and Joel P Trachtman, 'European Constitutionalism and its Discontents' (1997) 17 *Northwestern Journal of International Law and Business* 354, 375; Opinion of Advocate General Miguel P Maduro in *Janko Rottman v Freistaat Bayern* (30 September 2009) Case C-135/08, para. 23.

[60] Kjaer, *Constitutionalism* (n 31) 89. See Karl-Heinz Ladeur, 'Constitutionalism and the State of the "Society of Networks": The Design of a New 'Control Project' for a Fragmented Legal System' (2015) 2 *Transnational Legal Theory* 463; idem, 'A Critique of Balancing and the Principle of Proportionality in Constitutional Law – a Case for 'Impersonal Rights'?' (2016) 7 *Transnational Legal Theory* 228.

[61] Tuori (n 9) 110-111 and 336.

constituencies, as a way of dealing with the absence of a unified collective identity.[62] Through their intertwined interactions, these constituencies articulate their interests and mobilise internal self-contestation. This sheds light on the overlapping constituencies that emerge within the highly diverse and specialised functional spheres in the EU and that reshape the links between stakeholders, the supranational institutions and the Member States. EU citizenship as systemic participation, therefore, may be considered as a source of inducing legitimacy to EU governance through procedures that do not presuppose consensus-building but provide opportunities for dissent and the generation of knowledge.[63]

Viewed in these terms, an economic form of citizenship has been deployed by the EU Treaties and the CJEU to designate how EU law conveys the capacity of individuals to participate in the internal market through the guarantee of economic freedoms and judicial remedies. It creates a field of action which is based on the organising principles of the internal market concerning free movement and thus, represents the constituency of the economic system. At the same time, through its strong focus on non-discrimination, the Court has established the compatibility of Union citizenship also with non-economic objectives relating to access to social assistance for economically active persons and those lawfully residing in the Member State, even if they are economically inactive. In this way, the Court has been a driving force entrenching the relevant rights under a conceptualisation of EU citizenship that is disentangled from strong normative expectations.[64]

Having discussed the constitutional structures of the Union and the construct of citizenship, the section below explores the recent case law of the CJEU on economically inactive persons. It illustrates that the judgments retain the functional economic configuration of Union citizenship and delimit its parameters without reversing earlier, well-established jurisprudence.

3. The Boundaries of Economic Citizenship: The Case of Economic Inactivity

In a number of judgments – *Dano*, *Alimanovic*, *Garcia Nieto* and *Commission v UK* – the key issue was whether the principle of equal treatment between national citizens and citizens from other Member States applied in the case of economically inactive persons residing in a host Member State so as to entitle them to social assistance – in the form of special non-contributory benefits in the first three cases and social security benefits in the last one. The conflict between the 'economic' dimensions of EU citizenship and its 'social' aspects, as manifested in the application of the principle of equal treatment on economically active and inactive persons, has been a central aspect of these decisions.

The construction of EU citizenship by the CJEU has been criticised for its apparent insufficient scrutiny of Member State policies on refusing social assistance to economically inactive EU citizens and for not following a rigorous application of the proportionality test. In turn, this has

[62] Gunther Teubner, '*Quod Omnes Tangit*: Transnational Constitutions Without Democracy?' (2018) 45 *Journal of Law and Society* 5; Jiří Přibáň, 'Constitutional Imaginaries and Legitimation: On *Potentia*, *Potestas*, and *Auctoritas* in Societal Constitutionalism' (2018) 45 *Journal of Law and Society* 30.

[63] Karl-Heinz Ladeur, 'Globalisation and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?' EUI Working Paper LAW 2003/4 available at <https://cadmus.eui.eu/handle/1814/199> accessed 24 April 2020. In relation to participation and 'access justice' in European private law, Hans-W Micklitz, 'Social Justice and Access Justice in Private Law' EUI Working Papers 2011/02 available at <https://cadmus.eui.eu/handle/1814/15706> accessed 24 April 2020.

[64] For the role of courts and rights discourse in the evolution of transnational constitutionalism, Chris Thornhill, *A Sociology of Transnational Constitutions* (Cambridge University Press 2016).

meant that the Court has failed to effectively reinforce social solidarity at the Union level.[65] The criticism is primarily based on the assumption that the initial case law appeared to be surrounded by a tissue of normativity that offered support to the emergence of social solidarity among EU citizens and Member States.[66] To this extent, critical accounts of the CJEU emphasise that the earlier case law had 'the merit of universalising the logic of social integration' and that access to the social protection systems of Member States would become 'an autonomous constitutive element of Union citizenship' that would transcend the 'mercantile *ratio* and the original idea of *homo oeconomicus*.'[67] Evidence to support this view is based on previous judgments, such as that of *Martínez Sala*,[68] *Grzelczyk*[69] and *Brey*.[70] In these three cases, in particular, the Court accepted that access to social assistance should not be automatically rejected by domestic authorities in situations where the claimant was not categorised as economically active. By recourse to the principles of equal treatment and proportionality, the Court established that students (*Grzelczyk*), pensioners (*Brey*) and persons who lawfully reside in the host Member – even if not economically active (*Martínez Sala*) – may have an entitlement to social assistance. Following from this, the post-*Dano* decisions have been presented as diverging from previous judgments.

A close reading of the trajectory of the case law demonstrates, nevertheless, that the substantive content of citizenship law does not create an expectation of social solidarity nor does it indicate that the Court had previously followed a linear expansion of EU citizenship as a source of social solidarity in the Union. Earlier case law constituted a necessary development stage in which the Court incrementally introduced the pillars and different categories of EU citizens, such as students and jobseekers, based on the factual circumstances of the cases and the parallel orientation of secondary EU law in the field. With the post-*Dano* case law, EU citizenship enters a consolidation phase so that its limits are clarified within the growing level of unstructured complexity of EU governance and national welfare states. Even though not explicitly, the Court rejects a construction of EU citizenship within a form of political constitutionalism associated with the nation-state and upholds the flexibility of the functional and fragmented notion of EU citizenship with regard to the categorisation of the status of citizens and the varieties of domestic welfare systems.[71]

Drawing on the analysis in Section 2 above, the concept of EU citizenship is not developed by the Court via a stable frame of reference to represent the role of EU citizens in a fully formed constitutional polity. In addition, it does not provide the ground for a comprehensive judicial

[65] Giubboni (n 38). See Vassilis Hatzopoulos, 'From Economic Crisis to Identity Crisis: The Spoliation of EU and National Citizenships' College of Europe', *European Legal Studies Research Papers in Law* 1/2017 available at <http://aei.pitt.edu/86618/1/researchpaper_1_2017_vassilis_hatzopoulos.pdf> accessed 4 April 2020.

[66] See Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *The Modern Law Review* 233; Pauline Phoa, 'EU Citizens' Access to Social Benefits: Reality or Fiction? Outlining a Law and Literature Approach to Citizenship' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar 2018) 199, 219-223.

[67] Stefano Giubboni, 'Free Movement of Persons and European Solidarity Revisited' (2015) 7 *Perspectives on Federalism* 1.

[68] Judgment of 12 May 1998, *María Martínez Sala v Freistaat* Bayern, Case C-85/96, ECR I-2691, ECLI:EU:C:1998:217 (hereinafter '*Martínez Sala*').

[69] Judgment of 20 September 2001, *Rudy Grzelczyk v Centre Public d'aide Sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99 ECR I-06193, ECLI:EU:C:2001:458 (hereinafter '*Grzelczyk*').

[70] Judgment of 19 September 2013, *Pensionsversicherungsanstalt v Peter Brey*, Case C-140/12, ECLI:EU:C:2013:565 (hereinafter '*Brey*').

[71] In general, Thornhill (n 59); Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 *Journal of Law and Society* 258.

viewpoint regarding the permanent prioritisation between the conflicting rationalities of the economic and social aspects of citizenship. Two arguments are put forward in this section. First, the decisions of the Court do not constitute a marked shift from its previous case law nor a 'long jump'[72] in its rationale. The Court, instead, demonstrates continuity in its reasoning by clarifying and demarcating the parameters of the equal treatment principle with respect to the position of economically inactive persons. Second, the Court gives up the impossible pathway of creating a common discourse of social solidarity and attempts to manage the conflict between the economic and the social dimensions of the cases via the normatively thin principles of legal certainty and transparency. Its reasoning is underpinned by the notion of certainty in the relationships between citizens, the EU institutions and Member States that emerge in these cases and by the avoidance of the prospect of direct redistributive policies at the EU level across the social security systems of Member States.

3.1 Delimiting the Parameters of Economic Citizenship

In its 2014 decision in *Dano*, the Court clarified that, according to Article 7 of Directive 2004/38, Member States have the right to refuse social assistance to economically inactive persons exercising their right to free movement *solely* for the purpose of obtaining that assistance.[73] It then continued by stating that the financial situation of each person must be examined *specifically*, without taking into account the social benefits claimed. Despite the fact that the Court did not refer to the principle of proportionality, this formulation clearly corresponds to a balancing test pertaining to the application of proportionality in order to determine whether the EU national meets the requirement of sufficient resources and hence, qualifies for a right of residence under Article 7(1)(b) CRD.[74]

In line with previous case law, the CJEU stressed that, pursuant to Recital 10, the purpose of the Directive is to prevent EU nationals from becoming an unreasonable burden on the social assistance systems of Member States. Article 7, including the subparagraphs that relate to economically inactive persons and jobseekers, concretises this objective. Economically inactive persons are required to have sufficient resources and comprehensive health insurance in order to reside lawfully in a Member State and thus, the interpretation of what constitutes sufficient resources depends on an assessment by the host State on a case-by-case basis.[75] With respect to jobseekers, in particular, the wording of the Directive is not open-ended and does not leave room for discretion to domestic authorities or to the Court. Under Article 7(3), jobseekers who have previously worked in the Member State for less than one year retain their status of worker for no less than six months and therefore, can rely on the principle of equal treatment and access social assistance in that period.[76] However, if they have been employed for more than a year before being involuntarily unemployed and are registered as jobseekers, the Directive does not specify a time limitation to the retention of the status of worker.

The core issue in *Alimanovic* was whether EU citizens classified as first-time jobseekers could be excluded from entitlement to certain non-contributory benefits. The claimants, who were

[72] Koen Lenaerts, 'EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach' (2015) 1 *International Comparative Jurisprudence* 1,1.
[73] *Dano* (n 1) para. 78.
[74] Ibid., para. 80.
[75] Article 7(1)(b) CRD.
[76] Judgment of 4 June 2009, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Joined Cases C-22/08 and C-23/08, ECR I-04585, ECLI:EU:C:2009:344, para. 32 (hereinafter '*Vatsouras*') and *Alimanovic* (n 19) para. 54.

Swedish nationals, were employed for 11 months in Germany and, after their employment had ended, they received social assistance for six months on the basis of their status as workers. By relying on the derogation of Article 24(2), the national authorities terminated the claimants' access to social benefits after the completion of the six-month period, given that they no longer retained the status as workers but were instead classified as first-time jobseekers. The Court confirmed that access could be refused under these circumstances and further ruled that the application of proportionality was not necessary with respect to the issue in the main proceedings. The reason was, according to the Court, that the relevant provisions of the Directive provide a gradual system of protection taking into account the individual situation of the claimant and the duration of the economic activity. As the Directive itself integrates the evaluation of proportionality under Article 7(3), the Court seeks to uphold the legal certainty and transparency achieved by enabling states and citizens to know, without ambiguity, their rights and obligations in the context of social assistance.[77]

At a methodological level, the refusal of the Court to apply in this case the principle of proportionality beyond the wording of the Directive in this case has been strongly criticised. It has been perceived as a deviation from the earlier decision in *Brey*, discussed in this section below, where the Court had laid down detailed criteria that must be considered with regard to the proportionality test.[78] Especially if the facts of *Alimanovic* are closely examined, recourse to proportionality has been advocated as appropriate and even morally imperative: if the claimants had worked for one more month and had completed one year of employment in Germany, they would have been entitled to retain the status as workers and access to social assistance for as long as they were registered as jobseekers with the relevant employment office pursuant to the CRD.[79] Nevertheless, there are three factors as to why the rights and obligations deriving from EU citizenship restricted the Court's interpretation to the outcome of the *Alimanovic* decision. These factors are examined below: the first relates to the application of the provisions of the CRD, the second to the application of the proportionality principle and the third to the differentiated treatment of persons and the emphasis of the Court on their economic integration.

First, the Court recognised that legal certainty and deference to the legislature would contribute to a more effective protection of rights and hence, to the rule of law. By relying on the purpose of the Directive, the CJEU emphasised that the CRD provides a single legislative act and a gradual system of remedies to EU citizens, determined on the basis of a sector-by-sector approach. It should be noted that legal certainty and transparency of the applicable criteria operate in a distinct 'Janus-faced' manner with respect to the provisions of the Directive. The host Member State is in a position to refuse social assistance after six-months of unemployment to jobseekers who have worked for less than a year (Article 7(3)(c)), but may not do so for those who have completed one year of employment (Article 7(3)(b)). The effect of the provision in the latter case is that the persons enjoy retention of the status of workers and domestic authorities have no discretion to evaluate whether they become an unreasonable burden on public finances. Introducing a more flexible interpretation of Article 7(3)(c) by

[77] *Alimanovic* (n 19) para. 61. For an explanation that the Directive provides codification of the previous case law of the Court and, in particular, incorporates the principle of proportionality in its provisions, see Ferdinand Wollenschläger, 'The Judiciary, the Legislature and the Evolution of Union Citizenship' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 302, 330.

[78] See Anastasia Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment' (2016) 53 *Common Market Law Review* 1007.

[79] Article 7(3)(b) and (c) CRD. See Michael Blauberger and Susanne K Schmidt, 'Free Movement, the Welfare State, and the European Union's Over-Constitutionalisation: Administrating Contradictions' (2017) 95 *Public Administration* 437.

resorting to proportionality could, however, risk unsettling the certainty and long-term social protection under the principle of equal treatment of persons falling within the scope of Article 7(3)(b). It could induce states to also review whether the latter category of persons may become an unreasonable burden and lead to restrictions on free movement. It becomes apparent, therefore, that financial obligations of Member States towards EU citizens are not dismissed by the Court; they are delineated within the framework of the Directive. In this way, the Court succeeds in structuring the principle of proportionality in a polycentric context of conflicting interests – the promotion of transnational mobility of EU citizens and the maintenance of financial stability of domestic welfare systems – and to defer to the EU legislature and to the Member States when the wording of the Directive is not ambiguous and does not leave room for interpretative discretion.[80]

In light of the above, the decision in *Garcia Nieto* confirms this approach by adding that the assessment of individual circumstances is not necessary in the case of economically inactive persons residing in the host Member State for less than three months. Introducing an obligation for host Member States to be responsible for the provision of social assistance of persons within the first three months could, according to the Court, potentially upset the financial equilibrium of the national welfare system.[81] More importantly though, an entitlement to social assistance for persons in the first three months of residence would emerge at a lower threshold than for persons residing for more than three months: under the Directive the latter would still be required to demonstrate sufficient resources and have medical cover, but the former would not be bound by such a requirement. If this approach were to be endorsed, it could push towards introducing conditions under domestic law in cases of residents claiming social benefits in the first three months and thereby, risking the predictability and consistency of the relationship between economically inactive citizens and Member States.

Read in conjunction with the subsequent decision in *Commission v UK*, the Court's interpretation of the Directive provides some insight into how Member States can preserve their capacity to manage a degree of inequality with respect to the treatment of economically active and inactive persons in the area of social benefits that is integral under EU law.[82] In *Commission v UK* it was determined that the UK's requirement – i.e., that claimants of social security benefits must have the right to reside – would in principle constitute indirect discrimination. This measure was justified however, because it pursued the legitimate aim of protecting public finances in accordance with proportionality. The verification of residence was not carried out systematically, but only if the domestic authorities had reasonable doubt, and therefore, the national requirement complied with Article 14(2) CRD.[83]

Second, the Court's reasoning in *Dano* and *Alimanovic* should be carefully distinguished from the earlier decision in *Brey*. Lanceiro has noted that *Dano* and *Alimanovic* present a methodological departure from *Brey* that is manifested in the way the Court approached the principle of proportionality and positioned EU citizenship in the constitutional framework of

[80] The Court's rationale on legal certainty and transparency has been followed by the Commission in its proposals to clarify the rules on economically inactive persons. See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council' COM(2016) 815 final 2-3 and 6-9.
[81] *Garcia-Nieto* (n 20) para. 45.
[82] *Dano* (n 1) para. 77.
[83] *Commission v UK* (n 21) para 83-85. For a critical perspective, see Herwig Verschueren, 'Recent Case Before the Court of Justice of the European Union' (2017) 19 *European Journal of Social Security* 71; Niamh Nic Shuibhne, 'What I Tell You Three Times is True': Lawful Residence and Equal Treatment after *Dano*' (2016) 23 *Maastricht Journal of European and Comparative Law* 908; Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom'* (2017) 54 *Common Market Law Review* 209.

EU law.[84] A more nuanced reading of the judgments, however, illustrates that the divergence from *Brey* was pertinent in light of the facts of the subsequent cases and does not provide conclusive evidence of a shift in the methodology of the CJEU *per se*.

The claimant in *Brey* was a German national residing in Austria who received his invalidity pension and care allowance from Germany. He requested a non-contributory benefit from the Austrian authorities in order to augment his pension which was not sufficient to ensure the minimum means of subsistence. The contribution of the judgment is that it clarified whether a claim to benefits would prove lack of sufficient resources. If an individual is eligible for benefits in light of low pension, then, as stated by the Court, he or she might not have sufficient resources so as not to become a burden on public financial resources. Nevertheless, an overall assessment of the specific burden by reference to personal circumstances of the individual's situation must be conducted by the domestic authorities.[85] The Court provided a detailed account of the factors that need to be considered for the purposes of the proportionality test, such as whether the difficulties are temporary, the length of residence and the amount of assistance granted. Automatically barring access to social benefits, without an overall assessment of individual circumstances determining a person's right to reside, would be contrary not only to the principle of proportionality, but also to Articles 7(1)(b) and 8(4) CRD.[86]

The key here, of course, is that in contrast to the factual circumstances in *Dano* the claimant in *Brey* had *some* resources, as he received about 1,000 euros a month from the German state, and the host Member State had to determine whether these were *sufficient*. Rather than making itself an evaluation, the CJEU deferred to the referring domestic court to decide how the individual assessment should be applied to the facts. The Court's reasoning may as well be applied in a way that would not permit access to social assistance for the claimant. The interpretation of proportionality in the judgment was very carefully couched with the statement that the financial difficulties of the claimants must be temporary so that they do not become an unreasonable burden.[87] The emphasis on temporary hardship as a central factor in the application of proportionality is closely in line with the seminal decision in the *Grzelczyk* case.[88] Unlike *Grzelczyk*, which concerned a student who was working for three years before he applied for temporary assistance, the applicant in *Brey* was a pensioner with no intension to resume work. It cannot be precluded therefore that his hardship seemed rather long-term in the absence of an attempt to seek employment and that this factor could have proven detrimental for him. Davies explains that the facts of the case in *Brey* are what make this judgment exceptional, in that, the claimant made his application to social assistance from the moment he arrived in the host State, not after some period of residence and employment before falling into hardship.[89] He convincingly argues, thus, that it was the judgment in *Brey* which appears to be a deviation from earlier cases such as *Grzelczyk*, rather than the decisions in *Dano* and *Alimanovic*.

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[84] Rui Lanceiro, '*Dano* and *Alimanovic*: The Recent Evolution of CJEU Case-Law on EU Citizenship and Cross-Border Access to Social Benefits' (2017) 3 *UNIO - EU Law Journal* 63, 68-9.
[85] *Brey* (n 70) paras. 69-72.
[86] Ibid., para. 77.
[87] Ibid., paras. 57 and 72.
[88] *Grzelczyk* (n 69).
[89] Gareth Davies, 'Migrant Union Citizens and Social Assistance: Trying to be Reasonable about Self-Sufficiency' *European Legal Studies Research Papers in Law* 2/16, 12-13 available at <http://aei.pitt.edu/85829/1/researchpaper_2_2016_davies.pdf> accessed 4 April 2020. More recently idem, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 *Journal of European Public Policy* 1442.

On this basis, the arguable departure of *Dano* also from the judgment in *Martínez Sala* is not substantiated as the two cases are distinguishable and hence not comparable. In line with *Martínez Sala*, the Court in *Dano* confirmed that the principle of equal treatment with respect to access to social benefits applies only if the claimants lawfully reside in the Member State and that it must defer, where possible, to the national courts to determine the status of claimants as workers or other categories recognised under EU law.[90] What constitutes a deviation from *Martínez Sala* is the fact that the CJEU has now clarified that lawful residence must be in compliance with the conditions of the Directive, not national law. The claimant in *Martínez Sala* resided legally in Germany as a result of the German authorities issuing her a residence permit in accordance with national law that brought the claimant within the scope of EU law. In subsequent cases, however, the Court has repeatedly emphasised that the conditions of lawful residence must be determined on the basis of the Directive in order to ensure the interpretation of free movement rights in a uniform and predictable manner across Member States.[91] The comparison with *Martínez Sala* therefore, a pre-CRD judgment concerning a claimant who lived in Germany since 1968 and had worked at various intervals for ten years, seems that could not have worked in favour of the claimants in *Dano* and in *Alimanovic*.

An additional point of distinction in the reasoning of the Court in *Brey* is the link drawn between access to social assistance and expulsion. Whereas in *Dano* and *Alimanovic* the CJEU focused exclusively on whether economically inactive persons could access social assistance in the host state, in *Brey* it also relied on Articles 8(4) and 14(3) to determine whether the expulsion of the claimant should be automatic on the basis that he claimed social assistance in Austria. Clearly emphasising that automatic expulsion on these grounds would be contrary to the Directive, the Court explained that consideration of individual resources – and thus a proportionality test – are required by Article 8(4).[92] The Court recognised that the right of residence of the claimant was not directly at issue in the proceedings, but went on to reformulate the question of the referring national court so as to render it a relevant factor in the context of specific legislative provisions under Austrian law. Therefore, the focus was placed on whether recourse to social assistance could determine that the claimant did not have sufficient resources and, as a consequence, could be expelled.[93] The reformulation of the issues of access of economically inactive persons to social assistance and expulsion seems to have led the Court to a widening of the proportionality principle by comparison to preceding and subsequent case law.

Third, even before the *Dano* and *Alimanovic* judgments, the Court had equated integration of EU citizens in host Member States with economic participation and not with social solidarity. For example, the assistance guaranteed to first-time jobseekers by EU law clearly demonstrates this point. EU citizens falling within this category are entitled to benefits of a financial nature that facilitate their access to employment, but Member States have the possibility of refusing social assistance. In addition, the domestic authorities may require the establishment of a 'real link' of jobseekers with the labour market before providing access to such financial benefits. The link can be demonstrated by genuinely looking for a job for a reasonable period,[94] but not

[90] *Martínez Sala* (n 68) para. 45. See also *Vatsouras* (n 76) para. 31.
[91] Judgment of 21 December 2011, *Tomasz Ziolkowski and Others*, Joined Cases C-424/10 and C-425/10, ECR I-14035, ECLI:EU:C:2011:866, paras. 32-33 (hereinafter '*Ziolkowski*'). See Recital 17 and Article 24 CRD.
[92] *Brey* (n 70) paras. 29 and 67. The Court confirmed this in *Alimanovic* (n 19) para. 59.
[93] Ibid., paras. 30 and 32.
[94] Judgment of 23 March 2004, *Brian Francis Collins v Secretary of State for Work and Pensions*, Case C-138/02, ECR I-02703, ECLI:EU:C:2004:172, para. 37 (hereinafter '*Collins*'); *Vatsouras* (n 76) paras. 36-8. For students, who need to demonstrate a 'certain degree of integration', see Judgment of 15 March 2005, *The Queen (on the*

via personal or family ties.[95] Integration through work, not through welfare support, has been the basis of the Court's construction of EU citizenship and thus, functional integration carries the weight rather than 'thick' membership bonds to a European social order. Even though not explicitly stated, the CJEU's approach appears to be in the same line as that of the German Federal Constitutional Court (FCC) in the *Treaty of Lisbon* judgment. In the latter case, the FCC explained that welfare policy lies within the responsibility and decision-making of the state, given the lack of a European demos, and of the relevant competencies of EU institutions.[96]

A final point that should be addressed with respect to the reasoning of the CJEU in *Alimanovic* is whether the fact that the Court omitted to refer to EU citizenship as the fundamental status of citizens and to Article 20 Treaty on the Functioning of the European Union (TFEU) is problematic. While the use of language and the choice of the Court not to refer to Article 20 could, in principle, signal a normative transformation in its approach, in this instance it would not be possible to reach such a conclusion. The reason for this is twofold. First, the CJEU has not refrained from reiterating that EU citizenship is destined to become the fundamental status of citizens of the Union after the *Alimanovic* judgment in cases concerning economically inactive citizens such as students.[97] Second, the absence of a reference to Article 20 does not appear to be detrimental to the claimants, as it is highly doubtful that it could have changed the outcome of the case. Since Article 20 explicitly recognises that the rights derived from EU citizenship must be exercised in accordance with the conditions and limits incorporated under secondary EU law, the Court expounds and consolidates the application of these conditions on the different treatment of the categories of persons under the framework of EU citizenship.[98] That way, secondary EU law does not supersede nor is 'hegemonically'[99] attributed supremacy over primary EU law, but gives concrete expression to the right to move, to reside and to be treated equally on a sector-by-sector basis. As jobseekers are treated as economically active for the purposes of granting them assistance on the basis of the length of their previous employment in the host State and have the potential of economically integrating and contributing to the public finances, the nature of the link with the host State differs from that of economically inactive persons.[100] Once the claimants in *Alimanovic* seized to be categorised as such, the limits of the CRD applied to their situation.

3.2 The Court's Measured Response to Calls for Social Solidarity

application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills, Case C-209/03, ECR I-02119, ECLI:EU:C:2005:169, para. 57 (hereinfter '*Bidar*').

[95] See decision in *Garcia-Nieto* (n 20). The statement of the Court was made in relation to those residing within the first three months in the Member State. The situation should be distinguished from students given that it is not comparable with that of workers or jobseekers. Students may be required to have a 'certain degree of integration into society' or a 'genuine link' with the host state which can be established if they have resided in the Member State for a certain period of time. See *Collins* ibid.; *Bidar* ibid.; Judgment of 18 November 2008, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, Case C-158/07, ECR I-08507, ECLI:EU:C:2008:630.

[96] Federal Constitutional Court of Germany, *Treaty of Lisbon* (Judgment) (30 June 2009) 2 BvE2/08, para. 259; Daniel Thym 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *Common Market Law Review* 17, 31.

[97] Judgment of 2 June 2016, *European Commission v Kingdom of the Netherlands*, Case C-233/14, ECLI:EU:C:2016:396, para. 75 (hereinafter '*Commission v Netherlands*').

[98] See Francis G Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 *European Law Journal* 591, 592.

[99] See Shuibhne (n 12) 890.

[100] See in general, Koen Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudence* 397.

In addition to the reservations in academic literature regarding the methodology of the Court discussed in the section above, scepticism has been expressed with respect to the wider normative implications that the judgments could have on the notion of social identity in Europe. In this light, Iliopoulou-Penot has criticised the Court for backtracking 'from its previous vision of citizenship, construed as a "status of social integration", empowering weaker individuals to live in conditions of dignity in the host state'. [101] Moreover, in her evaluation of the judgments, O'Brien has argued that they have the effect of reconstructing free movement rights as the corollary of class. She concludes that the Court prioritises free movement and equal treatment for 'capitalist-class workers' and leaves the 'working proletariat at great risk of poverty'.[102] The case law of the CJEU, however, does not marginalise less profitable activities given that the status of worker includes those who work on zero-hour contracts (*Levin*), receive below the national minimum wage (*Nolte, Kempf, Bernini*) and receive remuneration in kind (*Trojani*).[103] Significantly therefore, the exercise of EU citizenship rights is not reserved for those who are financially independent or 'well-off', but allows persons such as the claimants in the abovementioned circumstances to exercise their free movement rights, including an entitlement to receive welfare support by the host State in light of the principle of equal treatment.

Despite the broad interpretation of 'worker' which enhances free movement, it should be recalled that the Directive aims to strike a balance between two divergent policy goals, that is, the facilitation of transnational mobility and the prevention of an unreasonable burden on the domestic welfare states in order to preserve their effectiveness.[104] With regard to the latter, the Lisbon Treaty makes a clear distinction between the Union's competencies on welfare rights and economic freedoms. According to Article 153(4) TFEU, the EU has no competence on social security and shall not affect the fundamental principles and financial equilibrium of the national social security systems. More significantly however, these opposing policy objectives do not merely reflect a conflict between individual rights and state interests in controlling public finances. They provide room for accommodating the different 'paradigms of social ordering'[105] that shape the function and organisation of welfare systems in Member States. In light of this, it is not possible to discern a universal right to social assistance for EU citizens under EU law,[106] but a particularistic interpretation based on technical grounds which do not raise stable expectations of social solidarity in Europe.[107]

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[101] Iliopoulou-Penot (n 78) 1021 (footnotes in original excluded). See however, Ferdinand Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-Dano Era' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 171.

[102] Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review* 937, 941. See Sandra Mantu and Pau Minderhoud, 'EU Citizenship and Social Solidarity' (2017) 24 *Maastricht Journal of European and Comparative Law* 703.

[103] Judgment of 23 March 1982, *D.M. Levin v Staatssecretaris van Justitie*, Case 53/81, ECR I-01035, ECLI:EU:C:1982:105; Judgment of 14 December 1995, *Inge Nolte v Landesversicherungsanstalt Hannover*, Case C-317/93, ECR I-04625, ECLI:EU:C:1995:438; Judgment of 3 June 1986, *R. H. Kempf v Staatssecretaris van Justitie*, Case 139/85, ECR-01741, ECLI:EU:C:1986:223; Judgment of 26 February 1992, *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen*, Case C-3/90, ECR I-01071, ECLI:EU:C:1992:89; Judgment of 7 September 2004, *Michel Trojani v Centre public d'aide sociale de Bruxelles*, Case C-456/02, ECR I-07573, ECLI:EU:C:2004:488.

[104] See Thym (n 96) 27 and Daniel Carter and Moritz Jesse, 'The "*Dano* Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3 *European Papers* 1179. See more recently, Judgment of 11 April 2019, *Neculai Tarola v Minister for Social Protection*, Case C-483/17, ECLI:EU:C:2019:309.

[105] Ladeur, 'Impersonal Rights' (n 60) 249 and 246.

[106] See Regulation (EC) No 883/2004 of the European Parliament and of the Council on the Coordination of Social Security Systems (29 April 2004) OJ L166/1 and *Commission v UK* (n 21) para. 63.

[107] See, in general, Achilles Skordas, 'The European Union as Post-national Realist Power' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar

The Court, therefore, defers to EU legislation and to the national referring courts in order to preserve legal certainty and the rule of law. This is even demonstrated in the decision in *Grzelczyk* in which the CJEU referred to the existence of a 'certain degree of financial solidarity between nationals of the host Member State and nationals of other Member States.'[108] While this appeared to be a step towards universalising a social vision of EU citizenship, the Court carefully presented a narrow interpretation of financial solidarity that is confined to cases where the difficulties of an applicant are not long-term. In doing so, the Court identified the possibility of restrictions in the exercise of rights derived from EU citizenship.[109] The restrictions and the balance, which is reflected in EU citizenship law and continuously reviewed on a case-by-case basis, are most lucidly exemplified in *Dano*. The same could be said about the more recent decision in *CG*,[110] concerning an economically inactive citizen with a temporary right to reside in the UK under national law (i.e., pre-settled status). The Court confirmed the approach set out in *Dano* and added a layer of nuance. It directed the national court to consider that the state's refusal to provide social assistance did not violate the claimant's rights under the Charter of Fundamental Rights (right to live in dignity, right to private and family life and the best interests of the child), as she was a mother of two young children who had fled her violent partner. The Court also specified that any other resources that were available to her by national law should be taken into account, and thus, it carefully reiterated its balancing approach within the complexities of this case.

Had the Court taken the view in *Dano* that EU citizenship encompassed social solidarity in the form of guaranteeing social allowances to economically inactive persons residing in a host Member State, it would have tilted the application of the concept of EU citizenship in favour of redistribution of resources to assist Union citizens. According to the CJEU, a system of social welfare is based on social solidarity if it:

> is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income.[111]

2018) 394. A clear illustration of the particularistic interpretation of the right to receive social benefits in the host state is provided by Judgment of 4 October 2012, *European Commission v Republic of Austria*, Case C-75/11, EU:C:2012:605 and *Commission v Netherlands* (n 97). On a first reading of the two judgments, the Court arrives at opposite conclusions in relation to the exact same type of social assistance relating to reduced transport fares for students. However, the technical conditions of the assistance schemes under national law proved to be the determinant factor in the reasoning of the Court. It is worth noting that the interpretation of the students' entitlement to receive such benefits based on the principle of equal treatment was, in each case, dependent on the variations of the regulatory framework that the state had opted for and not on the normative disposition of the Court. More recently, Judgment of 6 October 2020, *Jobcenter Krefeld - Widerspruchsstelle v JD*, Case C-181/19, ECLI:EU:C:2020:794, paras. 67-75, where Article 24(2) CRD did not apply in the case of an EU national who claimed social assistance while he was unemployed, because his right of residence and that of his children were established under Article 10 of Regulation 492/2011.

[108] *Grzelczyk* (n 69) para. 44.

[109] Opinion of Advocate General Wethelet in *Florea Gusa v Minister for Social Protection and Others* (26 July 2017) Case C-442/16, ECLI:EU:C:2017:607, para. 52. For an analysis that the decision in *Dano* is not an 'about-turn' in the interpretation of the CRD, see also paras. 54-55.

[110] Judgment of 15 July 2021, *CG v The Department for Communities in Northern Ireland*, Case C-709/20, ECLI:EU:C:2021:602.

[111] Judgment of 17 June 1997, *Sodemare SA, et al v Regione Lombardia*, Case C-70/95, ECR I-03395, ECLI:EU:C:1997:301, para. 29. See Judgment of 20 December 2017, *Florea Gusa v Minister for Social Protection and Others*, Case C-442/16, ECLI:EU:C:2017:1004, para. 44: 'Such a difference in treatment would

Such a conception of social solidarity carries with it decisions on the redistribution of resources and necessitates competencies on general taxation and social assistance. The CJEU, instead, has repeatedly confirmed that the preservation of economic viability and financial balance is a legitimate aim pursued by the Member States as a derogation from the right to free movement. This approach was not first introduced in *Dano*; the Court had previously emphasised that the financial responsibility incurred by the host Member States towards EU nationals should be interpreted flexibly in order not to unsettle the capacity and management of domestic welfare systems.[112] In *Dano* however, a concrete illustration of such an approach was provided possibly for the first time and the boundaries of citizenship law were clearly demarcated.

Especially relevant here is the empirical analysis of the Court's jurisprudence after the financial crisis by Šadl and Madsen as it highlights that there is no evidence of a shift in the treatment of EU citizens and their access to social assistance. The authors argue that the CJEU's interpretation of primary and secondary citizenship law continues to lead to pro-individual outcomes in the category of social advantages granted to EU citizens and does not indicate a reversal in its approach. They further observe that the Court demonstrates deference to national courts concerning the determination of factual circumstances on the status of claimants as workers and concepts such as that of sufficient resources.[113] Significantly however, it cannot be concluded that the Court has changed the core aspects of citizenship law by merely allowing a degree of leeway to the EU legislature and to domestic authorities to decide on the factual particularities of the case. This feature rather points to the non-hierarchical and experimentalist characteristics of the Union.[114]

The promotion of social policy could be institutionalised at the EU level via the implementation of a comprehensive welfare system scheme for EU citizens, thereby creating a minimum safety net common to all citizens. Potential redistributive policies generated by the case law or put in place by EU institutions would necessitate risk pooling at the supranational level, alongside common unemployment regulation and minimum requirements on the quality of the welfare systems of Member States (for example, requirements on activation and coverage of allowance) in order to guarantee their stability and effectiveness.[115] As follows however, the lack of recognition of a right to social assistance to economically inactive persons is not associated with the neoliberal orientation of EU citizenship, as O'Brien argues, but with the territorial fragmentation of the welfare systems and their retained capacity to address redistribution policies on the basis of available resources. The Court accepts the multiplicity of domestic welfare states and their historical and cultural embeddedness despite the

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be particularly unjustified in so far as it would lead to a person who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system.'

[112] See *Ziolkowski* (n 91).

[113] Urška Šadl and Mikael R Madsen, 'Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis' (2016) 22 *European Law Journal* 40. In contrast to cases concerning EU citizens, the authors explain that the fraction of positive outcomes in relevant cases with respect to the application of citizenship rights to third-country nationals has been lower after the financial crisis.

[114] Oliver Gerstenberg, 'The Justiciability of Socio-economic Rights, European Solidarity, and the Role of the Court of Justice of the EU' (2014) 33 *Yearbook of European Law* 245.

[115] Frank Vandenbroucke and Chris Luigjes, 'Institutional Moral Hazard in the Multi-Tiered Regulation of Unemployment and Social Assistance Benefits and Activation: A Summary of Eight Country Case Studies' (2016) *Centre for European Policy Studies and European Commission* 39-40 available at <https://pure.uva.nl/ws/files/2487133/173750_CEPS_Institutional_moral_hazard.pdf> accessed 4 April 2020.

Europeanisation of the economic and legal spheres,[116] and provides a clear avenue for integration of citizens in a flexible system of governance in the EU. It thus acts as a mediator of the national rules on social benefits, the social ordering of welfare systems in Member States and EU citizenship law.

4. A Corrective Form of Solidarity in the EU

The question of the place and function of solidarity in the Union is not merely confined to citizenship law. It is still central to the broader policy debates on future reforms in the Eurozone area in order to reinforce financial stability and deliver growth. In the context of both the sovereign-debt crisis and the Covid-19 pandemic, solidarity was mediated through the political institutions of the Union to address the respective crises. The expression of the principle remained short of a social dimension and did not disrupt the asymmetry between the economic and political systems discussed above.

The sovereign-debt crisis, in particular, changed political causality between those responsible for the governance dysfunctions within some Member States and those responsible for providing financial assistance. If the roots to the crisis were located in some Member States, other States and EU institutions assumed a central role in addressing such failures. Hence, externalities of domestic governance failures and political accountability for the response measures were diffused to the whole of the Eurozone area.[117] In addition, structural shortcomings in the design of the monetary union were brought to the fore as 'blind spots' in the Union's economic system that contributed to the crisis, and the absence of stabilising response mechanisms fuelled the rise of populism and nationalism in Member States. On the one hand, proposals premised on a broad view of social solidarity suggested more effective risk sharing among Member States and longer-term redistribution mechanisms supported by the establishment of a common budget for the Eurozone area and social contributions that would go towards a solidarity fund for less wealthy countries.[118] On the other hand, a focus on stronger enforcement tools of fiscal responsibility and on market discipline was favoured by the practice of the EU institutions to avoid permanent transfers and the moral hazard.[119]

From the considerations developed here it follows that a soft version of solidarity as a corrective mechanism can be conceived in order to deal with the problems of protracted socioeconomic stagnation in Member States.[120] Such a conceptualisation of solidarity fits well

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[116] Gunther Teubner, 'Transnational Economic Constitutionalism and Varieties of Capitalism' (2015) 1 *Italian Law Journal* 219; Hugh Collins, 'European Private Law and the Cultural Identity of States' (1997) 5 *European Review of Private Law* 353; Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 90 *American Journal of Sociology* 48. See also Maurizio Ferrara, 'The "Southern Model" of Welfare in Southern Europe' (1996) 6 *Journal of European Social Policy* 17; Paul Pierson, 'Fragmented Welfare States: Federal Institutions and the Development of Social Policy' (1995) 8 *Governance* 449; Silvana Sciarra, 'Social Values and the Multiple Sources of European Social Law' (1995) 1 *European Law Journal* 60.

[117] Miguel P Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012/11) *EUI RSCAS Policy Papers* 1. On changes to the EU's economic constitutional structures, see Michael Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis' (2016) 53 *Common Market Law Review* 1237.

[118] Macron (n 30).

[119] See Centre for Economic Policy Research, 'Reconciling Risk Sharing with Market Discipline: A Constructive Approach to Euro Area Reform' (2018) available at <https://cepr.org/active/publications/policy_insights/viewpi.php?pino=91> accessed 14 April 2020.

[120] For a theoretical analysis and practical proposals on how solidarity in the Eurozone can be linked to corrective rather than distributive justice, see Pavlos Eleftheriadis, 'Solidarity in the Eurozone' (2019) *Bank of Greece Working Paper* 256.

within a system of European governance based on systemic differentiation because it seeks to exert external pressure on the Union's economic system in order to address excessive growth compulsions and to render it responsive to its environment. It aims to rectify structural causes both in the Eurozone and in Member States that contribute to asymmetric risks and opportunities among the euro area Member States[121] without prescribing a political rationality to the economic constitution and curbing its autonomy. In turn, 'corrective' solidarity would safeguard the diversity of national welfare states and strengthen the capacity of domestic authorities to design viable social policies. Measures that have already been implemented, such as supervision of national budgets and the Macroeconomic Imbalance Procedure, and others that have been adopted in some Member States such as the National Productivity Boards[122] should be seen as part of a wider framework that benefits individual states and facilitates the wider goals of sustainable development of Europe's integration. Solidarity therefore encompasses a flexible policy toolbox which aims to manage risks by improving governance in each Member State and the EU as a whole 'in order to create an environment of mutual trust, contributing to further development of mutual assistance.'[123]

The recent EU responses to the economic crisis that is precipitated by the Covid-19 pandemic cast old questions under new light.[124] Should, for example, the most appropriate instruments to deal with the economic consequences include debt mutualisation with joint liability? Or should they be underpinned by conditionality-based measures under the European Stability Mechanism? Indeed, the parallels of the policy debates regarding the requisite degree of risk mutualisation with earlier calls for debt restructuring and burden-sharing during the Eurozone crisis are obvious. Even though the pandemic has been a symmetric shock across all Member States, its economic effects are asymmetric depending on, among others, the initial conditions of domestic economies, the available room for fiscal policy responses and the impact of the containment measures on specific sectors.[125] Solidarity – and the extent to which it should underpin the EU responses – has therefore featured once again as a central principle in legal debates. Assumptions of its normative reach often shape the tone of the debate.[126]

At the domestic level, Member States adopted emergency welfare measures at an unprecedented speed and scale. Italy, France, Germany and Spain, for instance, introduced work-schemes to support the payment of employees' salaries whose working hours have been reduced or suspended; while Spain also provided a means-tested minimum income guarantee and a relaxation of the conditions of contributory unemployment benefits. From the perspective of EU economic integration, the domestic policies clearly demonstrate – and risk exacerbating

[121] Cf. ibid., 52-53.
[122] Council Recommendation of 20 September 2016 on the Establishment of National Productivity Boards OJ C349/01; European Commission, 'Reflection Paper on the Deepening of the Economic and Monetary Union' (2017) available at <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf> accessed 4 April 2020.
[123] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust (2 December 2011) COM(2011) 835, 2.
[124] Only developments that have taken place until 21 June 2020 have been taken into consideration in this section.
[125] European Commission, 'European Economic Forecast: Spring 2020' Institutional Paper 125 (May 2020) 2-3 available at <https://ec.europa.eu/info/sites/info/files/economy-finance/ip125_en.pdf> accessed 19 May 2020.
[126] See the interview of Emmanuel Macron on the coronavirus crisis and European solidarity by the Financial Times: Victor Mallet and Roula Khalf, 'We are at a Moment of Truth' *Financial Times* 17 April 2020 available at <https://www.ft.com/content/317b4f61-672e-4c4b-b816-71e0ff63cab2> accessed 14 May 2020; Ulla Neergaard and Sybe de Vries, '"Whatever Is Necessary...Will Be Done" - Solidarity in Europe and the Covid-19 Crisis' *EU Law Live* (24 April 2020); Christian Calliess, 'Auf der Suche nach der europäischen Solidarität in der Corona-Krise: Von Corona-Bonds zum Europäischen Finanzminister?' *Verfassungsblog* (22 April 2020).

– the divergences between Member States and put the single market under severe strain: while in some countries the measures were initially limited to providing emergency aid, in Germany a fiscal stimulus package had been made available to hasten the country's economic recovery.[127]

Against this backdrop of national stimulus policies, the EU's recovery plan has offered a way forward for an ambitious and large-scale programme that combines the 'Next Generation EU' instrument of non-repayable contributions and loans to Member States with other support packages. One aspect of the recovery plan that is of particular relevance to the foregoing discussion is the *instrument for temporary support to mitigate unemployment risks in an emergency* (SURE) that has been adopted by the Council.[128] The financial assistance under SURE comes in the form of loans to Member States to combat unemployment through short-term work schemes, that is, where national expenditure has increased suddenly in order to compensate workers for the hours not worked in case their working hours are reduced or suspended (Preamble, paragraph 7, and Articles 1 and 2). The Commission has the power to raise the resources from capital markets and to distribute them as loans to Member States which, in return, provide voluntary guarantees proportional to their relative share to the total gross national income of the Union. The measure will enable Member States to better alleviate the impact of the pandemic on domestic labour markets by helping employees retain their jobs, as well as to mitigate the socio-economic effects that large-scale unemployment could bring about across the EU.

At the time of writing, it is still very early to arrive at concrete conclusions on whether the EU responses to the crisis will lead to any structural changes. SURE constitutes a 'tangible expression of Union solidarity'[129] according to the Commission, and this raises the question whether it is a step towards an effective compensation system for individuals in Europe. SURE reflects the form of 'corrective' solidarity discussed above, perhaps in a more refined and apparent way, given that it is not attached to strict conditionality clauses as many of the measures during the Eurozone crisis.[130] This is so for two main reasons. Firstly, by supporting those Member States whose expenditure has increased suddenly, SURE contributes to the overall rationale of reducing the risk that divergences between Member States are aggravated. The financial assistance for States mostly in need seeks to provide redress for their asymmetric losses within the structures of cooperation and interdependence in the Union; and at the same time it is temporary and remedial in nature in order to tackle the direct socioeconomic consequences of the pandemic.[131] Second, as is clear from its scope, SURE does not establish an unemployment insurance scheme at the EU level. It takes place outside the remit of EU citizenship and does not have an impact on the rights conferred to EU citizens. The short-term nature of the instrument, moreover, and its legal basis under Article 122 TFEU would suggest that the financial aid does not extend beyond situations of unemployment that are not related to the pandemic.

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[127] Guy Chazan, 'German Stimulus Aims to Kick-start Recovery 'with a ka-boom'' *Financial Times* 4 June 2020 available at <https://www.ft.com/content/335b5558-41b5-4a1e-a3b9-1440f7602bd8> accessed 5 June 2020.

[128] Council Regulation of 19 May 2020 on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) following the COVID-19 Outbreak OJ L159/1.

[129] European Commission, 'Proposal for a Council Regulation on the Establishment of SURE' (2 April 2020) COM(2020) 139, 2.

[130] On the rebalancing between national responsibility and solidarity during the pandemic, see Michael Ioannidis, 'Between Responsibility and Solidarity: Covid-19 and the Future of the European Economic Order' (2020) 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 773.

[131] For example, SURE includes a sunset clause and is available until December 2022 (Article 12). For the temporary increase in the ceiling of the EU's own resources, European Commission, 'Amended Proposal for a Council Decision on the System of Own Resources of the EU' (28 May 2020) COM(2020) 445.

From the prism of the Covid-19 pandemic therefore, a spirit of 'corrective' solidarity as generated under the sphere of European integration can be traced in the adopted measures. It has taken a meaningful form in the practice of financial assistance that is necessary in order to increase the room for fiscal policy in Member States, to redress their asymmetries in their capacity to provide emergency programmes and to manage their longer-term economic recovery. 'Corrective' solidarity, thus, serves the strategic objectives of the Union. By relying on its hetararchically organised interrelationships, it enhances its resilience so that its members individually and collectively as a whole can cope with the high-risk trajectory of uncertainty. At this juncture of supranational integration, the measures that could be seen as giving effect to a notion of solidarity are left to the processes of bargaining and deliberation at the level of the political institutions. A change to the rationality of 'corrective' solidarity in the future would necessitate an act of political decision-making – possibly of constitutional proportions. But in the absence of federal transfers toward a European welfare system it is rather difficult to anticipate, for the time being, a fundamental shift in the nature of European solidarity.

5. Conclusion

It has been argued in this chapter that EU citizenship represents a constitutional status of EU citizens as stakeholder constituents of the Union's economic system and that the CJEU has advanced a conception of EU citizenship that is compatible with the systemic differentiation of European governance. While more clarity on the rights of economically inactive citizens with respect to social benefits would be desirable, the Court has taken a step towards legal certainty by applying the clear rules under the Directive relating to economically inactive citizens with no sufficient resources and no intention of seeking employment, to unemployed persons previously working in the host state for less than a year and to economically inactive persons in the first three months of residence. Such an interpretation does not contradict its previous case law on students and jobseekers. More importantly, it does not prevent the Court from providing free movement-friendly judgments and from applying the proportionality test in situations that are left open or are not exhaustively determined by secondary legislation.[132]

In this light, the CJEU has supported the preservation of self-regulatory capacity of Member States over their welfare systems to manage a degree of separate treatment between economically active and inactive persons to the extent that it offers a measured response for a long-term sustainable open migration policy of Member States.[133] By clarifying the parameters of EU citizenship and removing barriers to market access and to integration in the labour markets of host States, the Court's jurisprudence avoids a one-sided orientation towards either the formulation of a collective social order or excessive deference to domestic authorities.

[132] See Wollenschläger (n 101) 190. See *Jobcenter Krefeld* (n 107).
[133] See Achilles Skordas, 'Immigration and the Market: The Long-Term Residents Directive' (2006) 13 *Columbia Journal of European Law* 201, 226; Robin Ca White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54 *International and Comparative Law Quarterly* 885.