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THE CONCEPT OF SOCIAL CITIZENSHIP OF THE EUROPEAN UNION IN THE LIGHT OF THE PHENOMENON OF SOCIAL TOURISM[1]

The basic assumption adopted in this article is that EU citizenship is derived from the special status that individuals have enjoyed within the internal market from as early as the 1980s. As a consequence of this origin, contemporary EU citizenship has a special relationship with the freedoms of the single market and its sources in the rulings of the ECJ. Therefore, any violation of the central and primary nature of EU citizenship, i.e., the principle of equal access to, among other things, social rights, constitutes a regression in the process of integration. However, the counteracting of the phenomenon of so-called social tourism may also be evaluated as an expression of the dynamics of the integration processes. This is also accompanied by the renaissance of balanced rulings by the Court in Luxembourg regarding the evaluation of social rights of economically inactive migrants.

This article poses the thesis that the Court in Luxembourg still extends special protection to those citizens of member states who have exercised one of the freedoms of the internal market. This status quo persists, although over the last decade there has emerged a dominant trend to consistently legitimise activities undertaken by member states in order to control the motivations of migrating populations. Consequently, the Court accepts certain activities which limit the access of EU citizens to some social benefits if they are migrants from other member states. Of course, the Court does so under many conditions, predominantly through the investigation of the proportionality of actions undertaken by the member states.

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1. INTRODUCTORY REMARKS

European integration is a project forged by the continent's elites, an effect of pragmatic aspirations and political compromises. The first two decades of the Communities' existence (between 1945 and 1975) are known as the period of "economic glory". The European integration brought with it economic benefits, and with time transformed the initial political motivation into an economic one. It was then possible to combine the elite's project with tangible benefits for societies, as well as to secure a broad support for other initiatives undertaken as part of integration. From the beginning of the European integration process, the driving force of the entire project was its economic dimension. This was to be reflected through the establishment of the common market and by ensuring that individuals could exercise their economic freedoms[2]. That is why the introduction and protection of economic freedom became the priority of the community's institutions and courts.

Over the years, a specific "market citizenship" developed. The year 1993 marked the establishment of formal EU citizenship and, subsequently, special relations were forged between the earlier status of the individual, a subject of internal market freedoms, and the notion of political EU citizenship. The social and welfare rights of individuals – both EU citizens and residents – were strengthened, thus enabling a deeper integration. The social rights in the EU's legal system play a special role in the construction of EU citizenship as they add meaning to the notion of citizenship and go beyond the traditional, economic dimension of integration. This is the case because ensuring equal access to social rights provides individuals with a sense of participation and, consequently, shifts the essential meaning of free movement of people within the EU. Free movement of people has therefore been promoted to represent a much broader category of human rights, according to which it seems natural to include the migrating individuals in the host community, not just the host community's economy. What links the constructs of market citizenship and social citizenship is the strong emphasis on the individual's right to their status, and to rights which can be exercised effectively[3].

Recently, political and economic citizenships have merged. However, this process has been confronted with resistance from some member states, particularly the ones with wealthy social protection systems. This has been caused by the abuse of rights by migrants from other member states, i.e., through so-called social tourism. Social tourism is currently regarded as a significant threat to the financial stability of national social systems, and as a violation of the principle of fairness. The notion of social tourism most probably appeared for the first

[2] G. Majone, *Europe as the Would-be World Power*, Cambridge 2009, pp. 43–45.

[3] E. M. Poptcheva, *Freedom of movement and residence of EU citizens. Access to social benefits*, European Parliamentary Research Service 10/06/2014, 140808REV1, p. 4.

time in the Advocate General's opinion in the *Trojani* case, in 2004[4]. The ruling in the case indicated, among other things, that social security systems of the member states – which are coordinated by EU law – are not being harmonised, and that this has led to their diverse structures. This, according to the Court, may lead employees to prefer some geographical areas – not as a natural consequence of a prospering market, however. The essence of the problem of social tourism is that freedom of movement is frequently overused in order to extort social benefits in host countries. In recent years the ECJ has ruled (see also the analysis later in this article) that EU citizens who are not involved in remunerated employment and reside in the territory of a different member state exclusively in order to avail themselves of its social protection system may be excluded from the possibility of taking advantage of some benefits not related to social contributions paid in the host country.

2. THE NOTIONS OF THE EU MARKET AND POLITICAL CITIZENSHIPS IN EU LEGISLATION AND ECJ RULINGS

EU citizenship is a dynamic institution which has evolved along with the development of the integration process. Sources of EU citizenship should not only be linked with the actual introduction of citizenship into the treaties that established the EU. This is because EU citizenship stems from the special status of citizens of the member states which created their internal market as early as in the 1980s. Market citizenship defines the position of the individual and their relationship with the community based on the community's forms of protection of the individual from discrimination in each of the four free circulations. These instruments, formally contained in the treaties, were dynamically developed by ECJ in the 1980s.

When EU citizenship was formally established in 1992 by the Treaty of Maastricht, it belonged to the sphere of political rhetoric and was an expression of the quest for the political legitimacy of integration[5]. However, in the Treaty of Amsterdam (1999), in the Treaty of Lisbon (2009) and in the EU's Charter of Fundamental Rights (2009), the rights of EU citizens were additionally strengthened. Currently, citizenship is an autonomous institution with a well-grounded scope of rights resulting from its status.

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[4] Trojani v Centre public d'aide sociale de Bruxelles (CPAS), C-456/02, ECLI:EU:C:2004:488.

[5] J. H. H. Weiler in 1996 commented on the appointment of EU citizenship as a manifestation of cynicism of the political elite, see J. H. H. Weiler, *Citizenship and Human Rights*, (in:) J. A. Winter, J. A. Curtin, A. E. Kellermann, B. de Witte (eds.), *Reforming the Treaty on European Union*, London 1996, p. 68.

So far it has been EU citizenship that allowed incoming citizens in the same situation as the citizens of the host country to enjoy the same treatment, regardless of their country of origin. This approach has been confirmed by the Court many times. One of the most interesting rulings was the one in the *Grzelczyk* case on social rights, where the Court stipulated that "(...) article 20 of the TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"[6]. The introduction of EU citizenship, therefore, significantly strengthened the rights of individuals. In particular, the Court ruled that citizenship is a sufficient reason for citizens to have the right to remain in the territory of another member state; thus, the Court regarded EU citizenship as the source of the right to freedom of movement[7].

The relationship between EU citizenship and market citizenship, with its social dimension, is dynamic, just as European integration and legislation are dynamic. The dynamic and evolving nature of both these statuses is expressed particularly strongly in the gradual process of achieving the full form of EU citizenship. The key rulings for the process are *Cowan*, *Gravier* or *Luisi and Carbone* (market citizenship[8]), as well as *Martínez Sala*, *Bickel* and *Franz*, *Collins*, *Zhu* and *Chen* or *Zambrano* (EU citizenship)[9]. However, in 1998 EU citizenship as an autonomous standard of EU law was still a fragmented concept, only partially indicated in the Court's rulings in the *Martínez Sala* case and in the opinion of the Advocate General and position of the Commission in the *Sala case*[10].

Initially, the ECJ referred to the provisions of citizenship only in order to strengthen the exercise of the stipulations of treaties regarding the freedoms of the single market. In the *Sala* case, EU citizenship was for the first time referred to as an autonomous foundation of an individual's rights.

However, we had to wait for most of (though not all) the elements of a consistent interpretation until 2001, when the Court issued its ruling in the *Grzelczyk*[11] case. The ruling must be interpreted as a shift in the relationship between the treaty-based institution of EU citizenship and the directives on the right of resi-

[6] Case C-184/99 Grzelczyk, ECLI:EU:C:2001:31.

[7] Case C-413/99 Baumbast, ECLI:EU:C:2001:7091, item 84, as well as C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi, ECLI:EU:C:2002, p. 1177.

[8] Case 186/87 Cowan v Tresor Public, ECLI:EU:C:1989; Case 293/83 Gravier, ECLI:EU:C:593, Cases ECLI:EU:C:82 and ECLI:EU:C:83 Luisii Carobone v Ministero del Tresoro.

[9] See María Martínez Sala v Freistaat Bayern, C-85/96, ECLI:EU:C:1998, Case C-274/96 Bickel, ECLI:EU:C:1998; Case C-92/92 Phil Collins and Patricia Im- und Export v Imtrat and EMI Electrola, ECLI:EU:C:2011:5145; Case C-200/02, Zhu and Chen, ECLI:EU:C:2002:26; Case 34/09 Gerardo Ruiz Zambrano v Office national de l'emploi...

[10] M. Żuk, *Relacja między obywatelstwem Unii Europejskiej a swobodami rynku wewnętrznego*, Warsaw 2013, p. 12.

[11] Case C-184/99 Grzelczyk, ECLI:EU:C:2001:31; ECLI:EU:C:2001:458.

dence[12]. In its ruling, the Court developed the claim of the Sala case, i.e., that an EU citizen who legally resides on the territory of a host EU member state can invoke art. 18 TFEU in all situations which fall within the scope of the *ratione materiae* of EU law. The Court also indicated that such situations shall include situations associated with the exercise of the right to freedom of movement and residence on the territory of a different member state, as granted by art. 21 TFEU. However, the most recent rulings by the ECJ in the relevant cases seem to be more flexible than the above-mentioned ruling, or even seem to be shifting away from it.

3. EU CITIZENSHIP: ITS INSTITUTIONAL AND MATERIAL MEANING

EU citizenship meets the traditional tripartite definition of citizenship formed by participation in a democratic political community, commonality of interests and rights, and participation in social, economic and political processes taking place within the EU. The scope of membership is defined by art. 20.1 sentence 2 of the TFEU: "*Every person holding the nationality of a Member State shall be a citizen of the Union*". This is a definition of EU citizenship in its legal and institutional meaning and, at the same time, a foundation of the definition of EU citizenship in its material meaning[13].

If an individual finds themselves in a particular situation, this fact may mean for them that their institutional and legal citizenship can be accompanied by the material dimension of the citizenship. In other words: an EU citizen in the material meaning is only such a citizen of an EU member state whose legal situation is within the scope of application of the EU's material law. A citizen of a member state in their purely internal/domestic situation is an EU citizen only in the legal and institutional (formal) meaning. Consequently, it is not always the case that an individual may find themselves in a situation where they can avail themselves of the material dimension of EU citizenship. This is still a source of many debates

[12] In particular, this pertains to Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, (Official Journal of Laws L 158), and Council Directive 2003/86/EC on the right to family reunification (Official Journal 251, p. 12) and Council Directive 2003/109/EC of November 25, 2003 concerning the status of third country nationals who are long-term residents (Official Journal 2004, L 16, p. 44). See more in M. Żuk, *Relacja między obywatelstwem...*, p. 17.

[13] M. Żuk, *Relacja między obywatelstwem...*, p. 7.

and disputes concerning both doctrine and practice[14]. If an individual is in a situation where EU law is applicable (i.e. the material meaning of citizenship applies), then this individual as an EU citizen who wishes to move in order to work or study in a different member state or enter into an international marriage, receive their pensions abroad, purchase and inherit property, vote or perform everyday activities such as online shopping from entities from other member states, is covered by the prohibition of discrimination stipulated in the treaties.

So far the Court has applied the construct of EU citizenship in a very instrumental manner, while still being able to achieve the just goal, i.e., the extension of the protection of the individual. However, the Court has most of all strived to extend the scope of application of EU law and, consequently, its own authority[15]. This idea stems from the incomplete and complicated scope of application of EU material law, in particular regarding the freedoms of the internal market. In EU law we can distinguish between *purely internal situations*, i.e., factual states in particular member states, and situations involving a broadly understood cross-border component. In the first case we are dealing with (generally speaking) EU citizenship in its material meaning, while in the second case we are faced with EU citizenship in its institutional and legal meaning[16]. The Court's intention is for a maximum number of situations to be covered by EU law through a broad interpretation of EU law and cross-border components which constitute the elements linking national and EU law. Consequently, the Court strengthens EU citizenship in its material meaning.

The cross-border component occurs when a certain legal and factual situation goes beyond the territory of one member state. The qualification of a case as an EU case or a purely internal case is, in practice, under the authority of the national court or administrative body (whether central or local) which applies the law. According to existing rulings by the ECJ, this qualification requires that specific criteria be taken into account. First of all, purely internal situations are beyond the scope of application of EU material law. Therefore, it is not admissible for an individual to invoke in their claims treaty regulations pertaining to the freedoms of the single market. In such cases, the right to issue pre-judicial legal questions to the ECJ is also excluded. The consequence of the adoption of the purely internal situation is the phenomenon ofreverse discrimination, which consists in an inferior treatment (e.g. through the application of higher productivity indices or service provision indices) of one's own goods, employees or entrepreneurs. This inferior treatment results from the fact that in purely internal situations individu-

[14] See A. Frąckowiak-Adamska, *O istocie praw wynikających z obywatelstwa Unii*, "Europejski Przegląd Sądowy" 2012, No. 10, p. 21 et seq.

[15] S. Prechal, *Competence Creep and General Principles of Law*, "Review of European Administrative Law" 2010, No. 3, p. 5.

[16] R. Grzeszczak, *Zakres zastosowania prawa Unii Europejskiej*, (in:) A. Zawidzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne Unii Europejskiej*, 3rd ed., Warsaw 2013, p. 16 et seq.

als cannot derive their rights from EU law, i.e., they cannot refer to EU regulations when acting against their own state (so-called *á rebours,* or reverse, discrimination)[17]. The Court is consistently broadening the scope of application of EU law to include situations that do not fit within the internal affairs/EU affairs formula described above. By doing so the Court also strengthens the material dimension of EU citizenship[18].

4. FROM MARKET CITIZENSHIP TO EU CITIZENSHIP

The notion of "market citizenship" underlines the position of the addressee of the norm in the EU as regards the freedom of movement of persons (employees, service providers, entrepreneurs), or as a direct beneficiary of defined subjective freedoms, i.e., the freedom of movement of goods and capital. Despite the real protection that the EU law ensures for an individual, EU citizenship is limited to treating a person as a *homo economicus.* The protection covers the extent to which this also served the fundamental goal of the Union which, before the Maastricht Treaty entered into force, was the construction of the internal market[19].

Economic freedoms of a market citizen, accompanied by a broad spectrum of regulations of the rights of individuals, are often guaranteed by the direct effectiveness of the norms. That is why market citizenship is reflected particularly strongly in the manner and intensity of rulings as implemented by the ECJ – which provides a narrow interpretation of exceptions from treaty-based freedoms. Moreover, in order to ensure the effectiveness of these freedoms, the Court has shifted from thinking in terms of prohibition of discrimination to thinking in terms of the doctrine of market access. In cases which can be regarded as exemplifying the "market citizenship" approach[20], the Court significantly expanded the earlier scope of application of the treaty in order to provide safeguards for the economic activity of individuals. The concept of market citizenship is at the foundation of the success of EU integration and boils down to two theses: firstly, the only effective tool for the construction of an internal market is market citizenship; secondly, market citizenship has one objective: to construct the internal market. Integration at this stage of development of the EU is objectively deep-reaching,

[17] Case 175/78 Regina v Saunders, ECLI:EU:C:1979, p. 1129.

[18] R. Grzeszczak, *Zakres*..., (in:) A. Zawidzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne*..., p. 14.

[19] A. Root, *Market Citizenship: experiments in democracy and globalization*, London 2011, p. 85.

[20] Predominantly: the ruling of November 30, 1995 in case C-55/94 Gebhard, ECLI:EU:C:1995:411, p. 37, Case C-415/93 Bosman and others, ECLI:EU:C:1995:463, pp. 92–104, 116–120.

as it creates the freedoms for market citizens – and these freedoms can be applied in a broad spectrum of legal situations; at the same time, however, it is subjectively narrow when compared to the scope of state citizenship or EU citizenship[21].

The Court gradually expanded the status of an EU citizen by constructing market citizenship (*Cowan, Carbone*), combining it with the prohibition of discrimination (e.g., in the *Martinez Sala* ruling) delineating the scope of the treaty through the fact of movement (as in *Bickel* and *Franz)*, and finally by stipulating (in the *Grzelczyk* case) that EU citizenship is the fundamental status of the EU's legal system. The freedom of movement of citizens was defined as the fifth fundamental and directly effective treaty freedom only later, in the *Baumbast* case ruling[22]. The ruling was of a ground-breaking nature for the development of the institution of EU citizenship – the Court ruled that art. 21 TFEU was directly effective. The Court also decided that the provisions of the Article were clear and precise and that they granted each EU citizen the right to stay within the territory of other EU member states. Therefore, the conditions of direct effectiveness were met. According to the Court, therefore, an EU citizen may invoke this article before national courts and administrative bodies. Consequently, the conditions of exercising this law as provided by the EU's derivative legislation or national legislation are exceptions to the rule of primary law and, as such, they must meet the condition of proportionality, i.e., they must be necessary and appropriate for the attainment of their goal. Due to the length constraints of this article, subsequent rulings of the Court will only be mentioned briefly. An interesting case, which complemented the interpretation of the notion of citizenship and the nature of the rights resulting from EU citizenship, was the *D'Hoop* case[23] in which the Court allowed the citizen of an EU member state to invoke the prohibition of discrimination resulting from EU citizenship. For some time now we have been able to prove that there is a lack of subordination of EU citizenship to the freedoms of the internal market. This is indicated by the most recent rulings by the ECJ, particularly in the *Zambrano* case where the court stated that "(...) article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". However, it must also be underlined that in subsequent cases, particularly in the *Dereci*[24] and *McCarthy*[25] cases, the Court emphasised the special and unique character of situations where the Zambrano criteria may be applied. Recently, in the O, S[26], case, the Court

[21] M. Żuk, *Relacja między obywatelstwem*..., p. 21 et seq.

[22] Case C-413/99 Baumbast and R v Secretary of State for the Home Department, ECLI:EU:C:2002:493.

[23] Case C-224/98, Marie-Nathalie D'Hoop v Office national de l'emploi, ECLI:EU:C:2002:432..

[24] Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres ECLI:EU:C:2011:734.

[25] Case C-434/09 McCarthy, ECLI:EU:C:2014:2450.

[26] Combined cases C-356/11 and C 357/11, *O S*., ECLI:EU:C:2012:776.

confirmed that the principles set out in the *Zambrano* ruling are to be applied only in exceptional circumstances.

5. THE EU MODEL OF INTEGRATED SEPARATENESS AND THE RESULTING DIFFICULTIES IN THE PRACTICE OF THE APPLICATION OF THE LAW ("SOCIAL TOURISM")

Over recent years the trend of convergence, integration or even unification of market freedoms has grown stronger due to the evolution of the format of EU citizenship. As internal market freedoms can be split into subjectively formulated freedoms (i.e., freedoms of movement of persons) and objectively formulated freedoms (i.e., freedom of movement of goods and capital), it is understandable that the relationship between these subjective freedoms and EU citizenship is much stronger. It also materialised in a more direct and complex manner. Consequently, the relationship between internal market citizenship and EU citizenship can currently be described as a model of "integrated separateness"[27]. It is, therefore, not a unification of citizenship and internal market freedoms. Rather, it is a reflection of "integrated sovereignty" which characterises legal and political relations between member states and constitutes an EU-specific solution.

In the EU, the integration of diversity gives rise to structural problems and the separateness of a range of policies, as well as varied perspectives and interests[28]. The Union's integration of diversity instead of unification refers to the rhetoric of integrated and separable sovereignties of the member states. For some time now this model has described the legal and political relationships within the EU and the EU's relationship with the member states, which is particularly visible during the current economic crisis. The model also means that at one moment of its development (the 1990s), the EU became the antithesis of a national state (member state)[29]. Although this subject is academically interesting, it extends beyond the limitations of this article. However, it must be underlined that the 1990s were a critical moment for the definition of the Union's system, as it was during this time that an economic structure with a model of integration adopted in the 1950s began to turn into a hybrid political entity. This status quo has persisted and the evolution of EU citizenship seems to be the best proof of its persistence.

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[27] M. Żuk, *Relacja między obywatelstwem*..., p. 13.

[28] M. Knodt, S. Princen (eds.), *Understanding the European Union's External Relations*, Routledge 2005, p. 22 et seq.

[29] D. Wincott, *National States, European Union and Changing Dynamics in the Quest for Legitimacy*, (in:) A. Arnull, D. Wincott (eds.), *Accountability and Legitimacy in the European Union*, Oxford University Press, Oxford 2002, p. 488.

6. OPENING THE SYSTEMS OF SOCIAL CARE FOR MIGRANT WORKERS AND ECONOMICALLY INACTIVE PERSONS: THE SOURCE OF THE PROBLEM

The problem of the provision to migrants from other member states of access to host countries' social systems became particularly clear precisely when, upon the introduction of EU citizenship, freedom of movement ceased to be guaranteed solely through work or economic activity. The consequent conclusion was that the right to benefits or even social assistance could not be limited solely to so-called economic migrants. Thus, a person's status as economically active ceased to be decisive.

Consequently, the Court's rulings gradually shifted away from linking full and equal access to all rights to remunerated employment or benefits paid out as a result of having employment. Today it in fact covers everything offered by the social protection system of the host country. This includes benefits which are independent of classic types of social insurance and granted regardless of the status of the insured[30]. As a result, persons without any sources of income – due to the continuation of their studies or because they are a jobseeker – have also been granted benefit privileges. Naturally, such persons are much more interested in social support of this kind. This whole situation has posed a challenge for national social protection systems, not just from the point of view of financial stability, but also from a political point of view. Serious doubts have been voiced as to the grounds for granting such benefits – they are funded from separate national budgets which are created from domestic tax revenue[31]. If we add the phenomenon of social tourism, i.e., taking advantage of the systems of wealthier countries and the general economic crisis, and view this coupled with anti-integration sentiment, we get a picture of an acute crisis of the key value and identity of integration, i.e., the principle of equal treatment and solidarity.

7. THE DYNAMISM OF ECJ RULINGS

Currently, Directive 2004/38[32] is of key significance for the problem of social benefits and the right to stay in a foreign country. This act of law codifies the

[30] R. Geiger, D.-E. Khan, M. Kotzur (eds.), *European Union Treaties. A Commentary. Treaty on European Union, Treaty on the Functioning of the European Union*, Hart 2015, p. 253 et seq.

[31] See D. Schiek, *Perspectives on social citizenship in the EU – from status positivus to status socialis activus via two forms of transnational solidarity*, "CETLS Online Paper Series" 2015, Vol. 4, issue 1, p. 14.

[32] Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 on the right of citizens of the Union and their family members to move and reside freely within the

relevant earlier rulings by the Court. It is also a living document and one of the most frequently cited documents in the Court's rulings concerning the movement of workers and also economically inactive persons. The directive is very dynamic as its content is shaped by rulings from Luxembourg. Without going into the details of directive 2004/38, it can be said that the document makes the legality of a stay within a host nation conditional on the caveat that non-economic migrants shall not become a threat to the social protection system of their host country. Such migrants, therefore, must be in possession of minimum resources in terms of maintenance and health insurance. Moreover, there should be a real link between these persons and the labour market or a certain degree of integration of these persons within the society of the host country. Moreover, the directive introduced a clear departure from the principle of equal treatment in social protection within the first three months of the stay, or even longer if the interested person is continuing their job-seeking efforts. Additionally, also in the wake of the *Grzelczyk* case, it was made more precisely clear that students, prior to the acquisition of the right to permanent stay – after (as a rule) five years – are not entitled to acquire assistance (in the form of grants or student loans) to cover the cost of their maintenance during their studies, including vocational training. However, due to the Court's approach to the interpretation of the directive, it was very difficult to maintain a balance between the right to receive benefits and the protection of the funding of national social protection systems. This pertains, in particular, to situations where such privileges were taken advantage of by those who abused the law and whose objective was not to integrate with a host country's society but to avail themselves of the social benefits offered by the wealthier country (i.e., social tourism – this issue will be elaborated on below).

The development of the interpretation of directive 2004/38 is marked by a few key rulings. In the *Bidar*[33] case, the Court decided that the exceptions from the directive did not constitute an effective barrier to challenging the refusal to grant assistance in the form of a preferential student loan prior to the expiry of the period specified in the directive as the period necessary for integration within a local community. Similarly, in the *Vatsouras*[34] case ruling job seekers were able to acquire support measures that were typically granted to all the local citizens in the same situation. This ruling resulted from a broad interpretation of the directive. In turn, in the *Trojani*[35] case the Court applied a highly formal

territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Official Journal of Laws L 158 from April 30, 2004, pp. 77–123.

[33] The Queen, upon a motion by Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, case C-209/03, ECLI:EU:C:2005:169.

[34] Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) versus Arbeitsgemeinschaft (ARGE) Nürnberg 900, combined cases C-22/08 and C-23/08, ECLI:EU:C:2009:344.

[35] Case *Trojani* v Centre public d'aide sociale de Bruxelles (CPAS), ECLI:EU:C:2004:488.

approach to the principle of equal treatment and detached it from the requirement of a legal stay, as stipulated by the directive, where the requirement was not met by the applicant. Moreover, as suggested by the ruling in the *Baumbast*[36] case, the Court expected national authorities to respect the principle of proportionality understood as the basis for tolerating a situation where an interested party has problems meeting all the requirements stipulated in the directive, e.g., full health insurance. This approach was also applied in the *Brey*[37] case and its ruling, which demanded that a host country investigate diligently and individually the situation of each applicant. The authorities of a host country, therefore, must not set up a general principle or procedure according to which an applicant is automatically determined to not meet the requirement of having their own financial means and, consequently, lawfully refused access to such means. The ruling was inevitably criticised as it imposed extensive administrative burdens of the national authorities resulting from the necessity to investigate each case individually, without a possibility of applying a more standardised approach[38].

In summary: the Court's tendency to expand the scope of equal rights is currently complemented with, or even replaced by, a more conservative approach to the obligation of retaining the openness of the national social protection system. We will be able to evaluate the final outcome of the evolution in a few years' time. However, it is now (i.e., in 2016) possible, to define the interpretative approach which can be referred to as the social tourism approach.

8. CONSERVATISM OF LUXEMBOURG RULINGS

We have been able to observe the Court's shift away from very broad interpretations for some time now. A good example of this shift is the ruling in the *Förster*[39] case, dating back to 2008, where the refusal to grant a benefit to a German student studying in Holland was not challenged due to the fact that the student had not resided in the host country for at least 5 years. Interestingly, the Court did not issue the ruling on the basis of directive 2004/38 (which clearly makes the equal rights of students conditional on the right of permanent residence). Instead, to achieve a similar effect in the ruling it was sufficient for the Court to apply a more conservative interpretation of treaty-based guarantees. It also seems that the ruling was one of the first signs of a retreat from the single-track approach

[36] Case C-413/99 Baumbast, ECLI:EU:C:2002:493.

[37] Pensionsversicherungsanstalt v Peter Brey, Case C-140/12, ECLI:EU:C:2013:565.

[38] G. Davies, *The process and side-effects of harmonisation of European welfare states*, "Jean Monnet Working Paper" 2006, No. 2, p. 5.

[39] Förster v Hoofddirectie van de Informatie Beheer Groep, C-158/07, ECLI:EU:C:2008:630.

of covering migrant citizens with protection nearly on a par with the standards applied to the host country's own citizens. The ruling also attached more importance to the significance of maintaining the stability of public finances, and the importance of the migrants' integration with the local market, or at least the local society.

Concerns regarding social tourism, however, have influenced the most recent rulings by the Court of Justice. This shift is visible, in particular, in the judgments in the following cases: *Brey*[40], *Dano*[41], *Alimanovic*[42] and *García-Nieto*[43]. In these cases, the Court ruled that an EU citizen may demand equal treatment in access to social benefits (equalling that of the citizens of the host country) only if his or her stay on the territory of the host country meets all the criteria set out in Directive 2004/38[44].

This results in the conclusion that each situation where an EU citizen who has not yet acquired the right to permanent stay loses his or her means of maintenance results in the loss of the right to stay and the right to exercise non-discrimination laws[45]. It seems that the judgments are an effect of a certain paradigm shift as regards the interpretation of the substance of EU citizenship and the right to freedom of movement. This is reflected in a shift away from the premise that lay at the foundation of the previous rulings (i.e., the longer the stay of a person and their family in a host country, the better their integration with the society of the host country). Currently, integration is a pre-condition that facilitates the acquisition and maintenance of the right to stay and to equal treatment. Therefore, we can even say there is an obligation to strive for integration with the society of a host country. Moreover, integration is no longer perceived solely as the existence of an economic and personal bond with a host country, but also as subordination to the values of the host society[46].

If host countries are not obliged to show responsibility and financial solidarity with EU citizens who may be in financial trouble, the question that should be asked is whether such an obligation should always rest on the country of origin.

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[40] Case C-140/12, *Brey*, ECLI:EU:C:2013:565.

[41] Case C-333/13, *Dano*, ECLI:EU:C:2014:2358.

[42] Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

[43] Case C-299/14, *García-Nieto*, ECLI:EU:C:2016:114.

[44] See D. Kramer, *Had they only worked one month longer! An Analysis of the Alimanovic Case [2015] C-67/14*, September 29, 2015, http://europeanlawblog.eu/?p=2913 (visited January 17, 2017).

[45] M. Gniadzik, *The development of the concept of EU citizenship through incremental acceptance of citizens' rights*, (in:) R. Grzeszczak (ed.), *Challenges of good governance in the European Union*, Baden-Baden–Nomos 2016, pp. 117–118; see also H. Verschueren, *Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?*, "Common Market Law Review" 2015, Vol. 52, issue 2, p. 370 et seq.

[46] M. Gniadzik, *The development of the concept...*, (in:) R. Grzeszczak, (ed.), *Challenges...*, p. 118.

The answer to this question is provided by the Court's rulings concerning the systems of support for students who study abroad. In the judgment in *Martens*[47], the Court ruled that a member state may verify whether there are any links between a beneficiary and the society of the paying state; however, this verification must not be based only on one criterion, such as place of residence or length of residence. Among the circumstances to be taken into account by the host country, the Court listed, among other factors, citizenship, followed by the course of education, family bonds and professional links, and knowledge of foreign languages. The Court's position, therefore, seems to be that countries of origin are in principle responsible for the provision of financial assistance to their own citizens – due to the link resulting from citizenship. However, the Court also deems it possible for member states to withhold support for persons who are unable to show evidence of a link with a host country – as long as the general provisions of EU law are complied with. It must also be noted that the Court's position is highly similar to the one it initially presented in its judgments concerning host countries.

However, the current line of ruling may lead (in extreme situations) to an EU citizen being declared (in his or her specific situation) to be not linked to any of the member states and, consequently, deprived of the right to social protection, among other rights. At the current developmental level of EU legislation, EU citizen status will not protect this person from the consequences of the situation he or she is in[48].

In summary: the judgments issued by the Court over the last decade, in particular the *Dano* case ruling, are treated as benchmarks for the new approach and a way to overcome the ambiguity of the previous, highly dynamic rulings. The new approach makes it much more difficult to challenge the authority of member states to undertake the relevant protective measures for their respective social systems. The process is ongoing and its outcomes may prove even more surprising in the light of strong political pressure, Brexit and the economic crisis within the EU.

In the doctrine there is widespread agreement that citizens constitute the focal point of European integration and that they shall remain the central focus[49], where the word *citizens* here means EU citizens and long-term residents. However, the problem of social tourism presented in this article and the Court's reactions to the phenomenon also need to be recognised as a specific sign of the times. We have witnessed an inhibition within the process of equalising of the sta-

[47] Case C-359/13, *Martens*, ECLI:EU:C:2015:118.

[48] See M. Gniadzik, *The development of the concept...*, (in:) R. Grzeszczak, (ed.), *Challenges...*, pp. 116–118.

[49] Report from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Citizenship 2013 EU citizens: your rights, your future, Brussels, May 8, 2013, COM(2013) 269 final, p. 1.

tus of migrant EU citizens and the status of host country citizens. This tendency fits within a broader tendency to curb the ambitions for integration, which may be referred to as a re-nationalisation of the integration processes.

The analysis presented in this article suggests that the rights of "market citizens" have been gradually extended by the treaties and derivative legislation. These rights are of a strictly functional nature and are directly linked to the economic character of the tasks undertaken by migrants. Beyond doubt, citizenship is gaining substantial importance. Furthermore, as a carrier of concrete rights and freedoms, it has facilitated the creation of transnational social solidarity. Additionally, it has impacted on the interpretation of the freedoms of the single market. Although the aim of integration was not to grant the "market citizens" their concrete and individual rights, the task of these citizens has been to manifest the functioning of the EU market. The adaptation of social citizenship within the EU's legal order leads to a higher level of EU integration than the primary level of "market citizenship". The question remains open, however, as to whether member states are ready to embrace such a level of integration.

As indicated by this analysis of the most recent interpretations from Luxembourg, full equality of social rights is no longer treated as the only possible objective, contrary to the previous evolution of at least some of the rulings from the Court. The Court's line of interpretation most definitely confirms the lack of truly common social rights for all EU citizens. In particular, the protection of economically inactive migrants is being limited and measured out, and the separate nature of the status of such migrants is beginning to be much clearer when compared with the status of employed EU citizens.

THE CONCEPT OF SOCIAL CITIZENSHIP OF THE EUROPEAN UNION IN THE LIGHT OF THE PHENOMENON OF SOCIAL TOURISM

Summary

The year 1993 marked the establishment of formal EU citizenship and, subsequently, special relations were forged between the earlier status of the individual, a subject of internal market freedoms, and the notion of political EU citizenship. The social and welfare rights of individuals were strengthened, thus enabling a deeper integration. The social rights in the EU's legal system play a special role in the construction of EU citizenship as they add meaning to the notion of citizenship and go beyond the traditional, economic dimension of integration. What links the constructs of market citizenship and social citizenship is the strong emphasis on the individual's right to their status, and

to rights which can be exercised effectively. Recently, political and economic citizenships have merged. However, this process has been confronted with resistance from some member states, particularly the ones with wealthy social protection systems. This has been caused by the abuse of rights by migrants from other member states, i.e., through so-called social tourism.

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