

‘Benefit tourism’ post-Brexit: tackling the ghost by more EU social engagement

KONSTANZE VON PAPP*

Keele University

Abstract

This article argues that welfare migration, although ill-defined and yet to be proven empirically, needs to be addressed by the EU. The negative perception of immigration has given rise to anti-EU, nationalist sentiment. Financial solidarity between EU citizens is subject to caveats, although there is hope for increased solidarity between pro-EU citizens post-Brexit. The EU should foster this by introducing ‘associate citizenship’. It can take guidance from the USA and provide for basic EU social standards while guaranteeing free movement for the rich and the poor.

Keywords: migration; social benefits; solidarity; federalism; *Dano*; social union; associate citizenship; EU minimum social standard; EU funding

Introduction

In a federation or organisation of states based on free movement of citizens, people can make their living wherever they think they and their families will thrive best. This is typically incentivised insofar as migrants contribute to the host society. But what about those who are not yet, or not currently, providing for themselves in terms of housing, basic income or health insurance? Such migrants are typically deterred in one form or another, for example by limiting social protection in the host state, or by limiting free movement of those who are not self-sufficient. Challenging such practices, it will be argued that deterring migration of poor people in a ‘federal’ system¹ with otherwise open borders is neither workable nor can it be a valid policy option.

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1 Following James Madison (*The Federalist* No 39), power in a ‘federal system’ lies in more than one central governmental unit. The reference to federal *systems* as opposed to federal *states* is meant to capture the supranational structure of the EU. Functionally, the EU is a federal system, regardless of whether it achieves the same level of integration as a nation state: see Ingolf Pernice, *Harmonization of Legislation in Federal Systems* (Nomos 1996) 9, 15. Employing a political science perspective, see Ernest A Young, ‘What Can Europe Tell Us about the Future of American Federalism’ (2017) 49 *Arizona State Law Journal* 1109, 1110: both the EU and the USA fulfil the criteria of geopolitical division, independence (i.e. different bases of electoral authority), and direct governance.

When newcomers to a country with relatively high social standards claim public benefits, their entitlement is often questioned. At worst, they are suspected of having moved solely in order to enjoy this higher social standard compared to their home country (pejoratively referred to as ‘social tourism’, or ‘benefit tourism’): the larger the group of benefit recipients, the bigger the risk of a decrease in social standards in the affected countries. Although not uncontroversial, this might ultimately lower the overall standard within the federation or organisation, as no country wants to attract more poor people than its neighbouring countries (in a ‘race to the bottom’).

This is not a new problem for the EU. The (failed) EU constitutional project, including the separately adopted Fundamental Rights Charter, and the EU Citizenship Directive² prompted discussion of the Member States retaining powers to limit their financial exposure. However, the problem has been aggravated since the Brexit referendum campaign, in which ‘benefit tourism’ served as a tool to discredit the freedom of movement and the authority of the Court of Justice of the European Union (CJEU). Euroscepticism may well showcase an increased reluctance vis-à-vis international law and cooperation more generally.³ However, the focus in this article will be on the ‘cultural backlash’ that is caused by public resentment against immigration.⁴ Drawing on sociological research and a comparative outlook into US law, I will argue that if free movement is coupled with equal access to social benefits this needs to be combined with minimum social provision at the EU level.

1 The empty slogan of ‘benefit tourism’

There is no empirical proof that people move across borders in order to improve their social status by obtaining benefits in another country. At best, the evidence is mixed.⁵ However, policymakers appear to take the possibility of welfare migration into account when regulating, even if this may be more of a perceived than a real risk.⁶ The fear of

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- 2 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: OJ L 158/77, 29 April 2004.
 - 3 Catherine E De Vries, ‘Waning Public Support for International Cooperation? Some Lessons from Europe’ (6 October 2017), essay prepared for the ‘Challenges to the Contemporary World Order’ Workshop, Filzbach, 6–7 October 2017 <<http://ssrn.com/abstract=3082899>>, uses voting patterns for Eurosceptic parties across the EU as different explanations for Brexit: an economic ‘interest explanation’ (people feeling ‘left behind’ by globalisation), an ‘identity explanation’ (people feeling exclusively national), and ‘risk-taking’ or ‘benchmarking’ (comparing the situation of third countries such as Norway and Switzerland). See also Catherine Barnard, ‘(B)Remains of the Day: Brexit and EU Social Policy’ in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 477.
 - 4 Ronald Inglehart and Pippa Norris, ‘Trump, Brexit, and the Rise of Populism: Economic Have-nots and Cultural Backlash’ (Harvard Kennedy School Faculty Research Paper Series, August 2016) <<https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>>.
 - 5 Regarding the USA, see A P van der Mei, ‘Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law’ (2002) 19 *Arizona Journal of International and Comparative Law* 803, 822–3 with further references; regarding the EU see Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 73 with further references.
 - 6 Jan K Brückner, ‘Welfare Reform and the Race to the Bottom: Theory and Evidence’ (2000) 66 *Southern Economic Journal* 505 (for the USA). For the EU, see Charles R Bean, Samuel Bentolila, Giuseppe Bertola and Juan Dolado, *Social Europe: One for All?* (Monitoring European Integration 8, Centre for Economic Policy Research 1998) 39ff, 83. More recently, see Stephanie Reynolds, ‘(De)Constructing the Road to Brexit’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity within the EU* (Hart 2017) 55, 82 with further references. D Thym (ibid 2) illustrates this with German policies explicitly directed at disincentivising welfare migration in 2013.

migration suggests a 'downward bias' simply because there is the perception that benefits need to be capped so as to avoid them becoming a 'welfare magnet'.⁷

However, even in theory it is not clear what 'benefit tourism' is supposed to mean. In EU law, one very broad definition can be found in the *Trojani* case, where Advocate General Geelhoed defined 'social tourism' as 'moving to a Member State with a more congenial social security environment' (*Trojani*-test).⁸ While this is a clear-cut objective test, it would catch all scenarios in which an EU citizen from a poorer Member State moves to a richer one. At least, one must add the condition that the newcomer claims social benefits in the richer Member State. But even this leaves an over-inclusive definition that potentially applies to students, jobseekers, and former workers or service providers who are currently on leave (voluntarily or involuntarily), or in transition between jobs, and pensioners with a low income. This goes too far as it does not account for either the length of or reason for economic inactivity. Therefore, the EU citizen's situation at the point in time he or she actually entered the host Member State becomes crucial. The *Trojani*-test makes sense only if limited to people who *already at the time of entry into the host state* are either economically inactive or already in receipt of benefits. The objective factors thus narrowed down would require that a citizen from a Member State with a less congenial social environment moves to another Member State at a point in time where he or she is not self-sufficient, and then claims benefits in the host Member State.

This sharpens the focus on people like family members, students or jobseekers; in other words, EU citizens who at the time of entry were 'economically inactive'. All these might qualify as potential 'social tourists' – at least as soon as they claim benefits in a Member State richer than their home state. This shows that there is an important element missing so far: an inquiry into the state of mind within which the non-active EU citizen exercised his or her free movement rights. A different test, looking at subjective factors, would address this element. One example is the relevant provision of the German Social Code at the heart of the *Dano* case, which will be analysed in more detail below. It excluded from the right to social assistance 'foreign nationals who have entered national territory *in order to* obtain social assistance . . . and their family members'.⁹ The obvious downside is that it will normally prove very difficult, if not impossible, to determine the precise intentions with which someone moves from one country to another. For example, a jobseeker by definition does not have a secured income yet. Do jobseekers who know or should know that their chances of finding employment in the host Member State are extremely low already meet the subjective threshold? There will typically be more than one motivating factor for the move to another country; so how should one determine which one is the paramount factor? Any workable test should therefore combine objective and subjective analysis.

One important objective factor is the overall amount of benefits received, contrasted with the overall amount of taxes paid by (a specific group of) migrants. Worth noting is

7 Brückner (n 6) 507–8, 519 (USA). For the EU, see Giuseppe Bertola, Juan F Jimeno, Ramon Marimon and Christopher Pissarides, 'Welfare Systems and Labor Markets in Europe: What Convergence before and after EMU? (MIT 2000) <www.frdp.org/be/file/_scheda/files/copy_0_report1_3luglio99.pdf> with the example of actual reduction in German unemployment benefits due to increased labour migration following the Single European Act (75). See generally Hans Werner Sinn and Wolfgang Ochel, 'Social Union, Convergence and Migration' (CESifo Working Paper No 961, June 2003).

8 Opinion of Advocate-General Geelhoed in Case C-456/02 *Trojani* [2004] ECR I-07573 para 13.

9 Case C-333/13 *Dano* ECLI:EU:C:2014:2358 para 26 (emphasis added), referencing para 23 of Book XII of the German Social Code (SGB XII).

the empirical study by Dustmann and Frattini,¹⁰ based on data from 2000 onwards. It showed that foreigners from the European Economic Area (EEA) in total contributed positively rather than burdened the UK economy. This suggests that at least in overall fiscal numbers there has been no ‘social tourism’ of migrants from the EEA within the UK. With regard to out-of-work benefits, the *Financial Times* in September 2017 published a figure of only 1.9 per cent (for the year 2015/2016) that were claimed by EEA nationals.¹¹ Again, this shows that the numbers of individual EU citizens that may (or may not) classify as ‘benefit tourists’ is low. This is important because the CJEU case law suggests that the ‘burden’ on public resources is the *sum* of benefit claims.¹²

This much-criticised case law¹³ has implicitly followed an approach very similar to the one suggested here: it has looked at *objective* factors of integration of EU citizens – either with regard to the employment market, or with regard to the society of the host state more generally. It appears to have done so with a view to establishing the *subjective* mindset of the migrant, which may make sense as a matter of theory. But in practice, as an analysis of *Dano* will show, people are likely to have better reasons for migration than merely reaching out for higher social standards.

2 Waiting requirements for new residents?

Welfare migration needs to be tackled since it is a perceived (‘ghost’) problem that policymakers address. It will now be argued that this cannot be done by disincentivising migration of the poor.

2.1. US LAW AS POINT OF COMPARISON

Although there remain important differences between the USA and the EU, the former can well serve as a point of comparison for the EU since both are structured as federal systems.¹⁴ Welfare migration in both systems has already been compared from a constitutional law point of view.¹⁵ The aim here is to add a sociological perspective, with particular regard to the events leading to and following the UK’s decision to leave the EU.

The – perceived¹⁶ – problem of ‘social tourism’ exists in the USA to the extent that social policies and some benefits remain within the power of the states, leading to a divide between states with robust social welfare systems and those with weaker ones. Therefore, similarly to the EU, the question became whether states could protect their public finances against claims by new arrivals. In the 1969 case of *Shapiro v Thompson*¹⁷ the US Supreme Court had to decide whether Connecticut, Pennsylvania and the District of Columbia could lawfully limit access to social welfare by requiring new residents to wait for one year before making claims. The US Supreme Court held that they could not:

10 Christian Dustmann and Tommaso Frattini, ‘The Fiscal Effects of Immigration to the UK’ (2014) 124 *Economic Journal* 563.

11 Gavin Jackson, ‘EU Migrants’ Claims for Unemployment Benefits Fall’, *Financial Times* (London, 2 September 2017) < www.ft.com/content/520f183e-8bdd-11e7-9084-d0c17942ba93>.

12 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597 para 62.

13 See e.g. Herwig Verschueren, ‘Preventing “Benefit Tourism” in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*’ (2015) 52 *Common Market Law Review* 363.

14 See n 1 above.

15 For an in-depth discussion, see van der Mei (n 5). For a discussion from an EU fundamental rights perspective, see Konstanze von Papp, *Die Integrationswirkung von Grundrechten in der Europäischen Gemeinschaft* (Nomos 2006) 246–89.

16 See nn 6–7 and accompanying text.

17 394 US 618 (1969).

On the basis of this sole difference [between those who have already resided for at least a year and those who have not] the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life.¹⁸

It added that:

If a law has no other purpose than to chill the assertion of constitutional rights [here, the right to travel within the US from one state to another] by penalising those who choose to exercise them, then it [is] patently unconstitutional.¹⁹

Even the narrower question of whether combatting 'social tourism' in the subjective sense (people who move with the intention of claiming higher benefits in another state) might constitute a legitimate purpose of state legislation was answered in the negative. First, the legislation at stake applied to all new residents, irrespective of their qualifying as 'social tourists'. Second, it was legitimate for US citizens to have regard to the standard of living and welfare when choosing their place of residence.

By contrast, the Supreme Court held that the introduction of an objective test of residency, fraud prevention and encouraging early entry into the workforce were legitimate aims. However, the legislation remained unconstitutional because it was not rationally related to either of these purposes. Some of the reasoning here could well be extrapolated into the EU context.

In 1999, the Supreme Court scrutinised a Californian law that limited benefits for new arrivals in their first year to the amount they would have received in the state of their former residence. While this legislation had been enacted with federal approval, it was obviously motivated by the narrower aim of discouraging 'social tourism': there is no windfall immediately to be obtained in the new state, so people are either moving for reasons other than higher social standards, or show a willingness to fully integrate. Nevertheless, the Supreme Court in *Saenz v Roe*²⁰ still found this unconstitutional since by discriminating against newcomers (who did not get the higher Californian welfare rate) it created a 'hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence'.

The US Supreme Court clarified that:

Were we solely concerned with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits . . . But since the right to travel embraces the citizen's right to be treated equally in the new state of residence, the discriminatory classification is itself a penalty.²¹

Whereas the precise doctrinal basis for the holding in *Saenz v Roe* is a different one from that employed in *Shapiro*, the ultimate outcome in both cases rests on a somewhat stricter scrutiny applied to the equal protection clause.²²

The CJEU has based its case law on the same link between citizens' free movement rights and non-discrimination.²³ Does this mean that, as in the USA, deterring welfare migration as such is not a valid policy option in the EU?

18 Ibid 627.

19 Ibid 631, with reference to *United States v Jackson*, 390 US 570 (1968).

20 526 US 489 (1999).

21 Ibid 504ff.

22 See von Papp (n 15) 261–7. The limits of an analogy with EU free movement law are discussed *ibid* at 269–86.

23 Case C-85/96 *Sala* [1998] ECR I-2691 para 62. See also Cases C-184/99 *Grzelezyk* [2001] ECR I-6193 and C-140/12 *Brey* ECLI:EU:C:2013:565 para 44.

2.2. POLITICAL THEORY UNDERLYING THE ACCESS-TO-WELFARE CASES: CAN THE EU BE COMPARED TO THE US?

In the words of Justice Cardozo, quoted by the Supreme Court in *Saenz*:

The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.²⁴

The Supreme Court thus relied on equal citizenship rights as a matter of political philosophy or theory. The question becomes whether a similar understanding of EU citizenship is possible, applying equal treatment strictly to social rights. Despite the similar doctrinal approach – tying free movement and non-discrimination – it is questionable whether this originates from a similar political theory in the EU. In the absence of a European ‘nation’, the somewhat vague notion of EU ‘solidarity’²⁵ would arguably come closest to building the necessary bridge to such a unionist philosophy.²⁶ It is here understood as preparedness to *share public resources*.

2.2.1. EU solidarity in theory

It can be left open here whether solidarity has any legal bite, for example by amounting to a general principle of EU law.²⁷ Solidarity in the literature is often discussed hand-in-hand with citizenship²⁸ and hence ultimately the democratic legitimacy of the EU given its (lack of) *one demos*.²⁹ It is important, however, to differentiate, since associative relationships as the basis for solidarity can be described at different levels. We are here looking not at the political, but at the societal level into what could be labelled *communitarian solidarity*.³⁰ The assumption is that the place of residence – more precisely, *actual* or *bona fide* residence – serves as one important point of reference for people of all nationalities because they have a natural interest in local (and eventually, national) matters that affect them. Societal bonds thus exist between people belonging to the same community, with smaller communities potentially yielding the stronger bonds.³¹ Residents in a particular place are normally recognised as legitimate ‘stakeholders’ with very close to equal rights when compared to full citizens.³² This makes sense from a *fairness* perspective,

24 *Baldwin v GAF Seelig, Inc*, 294 US 511, 523 (1935), which is quoted at 526 US 489, 511 (1999).

25 See the literature review by Dimitri Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?’ (2013) 62 *International and Comparative Law Quarterly* 97, 123ff. See also Malcolm Ross, ‘Solidarity – A New Constitutional Paradigm for the EU?’ in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010).

26 Frank Vandembroucke, ‘The Idea of a European Social Union’ in Vandembroucke et al (n 3), distinguishes an ‘idealised’ EU social model (transferring redistributive policies to the EU level) from a ‘realist’ model (leaving these with the Member States, but tasking the EU with enabling the actual achievement of social justice).

27 See Catherine Barnard, ‘Solidarity and the Commission’s Renewed Social Agenda’, in Ross and Borgmann-Prebil (n 25).

28 Dagmar 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 vol 4, 2015); see also the collection of essays by Thym (n 6), and n 62 below.

29 Peter L Lindseth, ‘European Solidarity and National Identity: An American Perspective’ (2012) *Berliner Online-Beiträge zum Europarecht* Nr 79. See section 4 below.

30 de Witte (n 5). Communitarian solidarity can be seen as playing out on a ‘societal’ level, thus distinct from ‘market solidarity’ and ‘political solidarity’. *Ibid*.

31 See section 2.2.2 below.

32 Peter Spiro, *Beyond Citizenship: American Identity after Globalization* (Oxford University Press 2008) 81; Pavlos Eleftheriadis, ‘The Content of European Citizenship’ (2014) 15 *German Law Journal* 777, 792.

since there is some basic level of reciprocity between all permanent residents (and citizens) as 'cooperative agents' in the respective state.³³

On an abstract level, solidarity can be contrasted with market dynamics. As such it plays a role in different contexts of EU law.³⁴ The context of specific interest here is free movement and citizenship law to the extent it dealt with access to social benefits in actual cases. In the landmark case involving a French student in Belgium, the court famously held that '*Union citizenship is destined to be the fundamental status of nationals of the Member States*';³⁵ and '*there is a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties . . . are temporary*.'³⁶ The court clearly postulates some form of financial solidarity – but does this exist in reality?

2.2.2 'Financial solidarity' between residents?

The Court in *Grzeleczyk* explicitly addressed solidarity not between EU Member States, but between *people* in the Member States. Therefore, I will focus on *solidarity between EU citizens*. More precisely, the question is whether there is financial solidarity between *actual residents*. There may be a plausible argument that some solidarity between national and non-national residents within a community exists at least at the local level.³⁷ The fact that EU citizens as residents have active and passive voting rights in municipal elections (Article 22 Treaty on the Functioning of the EU (TFEU)) illustrates this. Similarly, the court may be implicitly acknowledging the importance of attachment to a place when relying on (lawful) residency as a basis for an equal treatment claim to social benefits.³⁸ More specifically, a case that was handed down very shortly before the 2016 UK referendum found room for Member States subjecting *in-work* benefits such as child benefits to a habitual residence requirement.³⁹ This corresponds with the sociological insight that the prerequisite of solidarity is social freedom,⁴⁰ which in turn is strongest in places where people know each other.⁴¹ The particular importance of small communities in this respect is evidenced by empirical research in the US, where sociologists have concluded that solidarity-building is one purpose of civic engagement on the local level.⁴² The same is true for the EU,⁴³ and also globally.⁴⁴

33 Eleftheriadis (n 32).

34 Especially EU asylum policy and the monetary union in times of crises. See e.g. Daniel Thym and Lilian Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 *Maastricht Journal of European and Comparative Law* 605; and the collection of essays by Amandine Crespy and Georg Menz (eds), *Social Policy and the Eurocrisis* (Palgrave Macmillan 2015).

35 Case C-184/99 *Grzeleczyk* (n 23) para 31 (emphasis added).

36 *Ibid* para 44 (emphasis added).

37 This is where the notion of 'communitarianism' (n 30 above) is most convincing.

38 Case C-85/96 *Sala* (note 23) para 63.

39 Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436 (finding an indirect discrimination that is justified). For a detailed critique see Jaan Paju, *The European Union and Social Security Law* (Hart 2017).

40 This goes back to Emile Durkheim, referenced by Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 266.

41 *Ibid* 265.

42 Gianpaolo Baiocchi et al, 'The Civic Imagination: Political Culture in Contemporary American Cities' (*American Political Science Association* 2013) 25–9 <<https://ssrn.com/abstract=2304198>>.

43 Tom Inglis and Susie Donnelly, 'Local and National Belonging in a Globalised World' (2011) 19 *Irish Journal of Sociology* 127 (based on data collected between 2000 and 2007): despite increased mobility, the level of identification with national and local places is high. It is evidenced regarding 'deep rooted belonging' (people brought up in one place) and 'elective belonging' (people who chose to move there).

44 As illustrated by the resurgence of area studies, see the collection by Tony Chafer, 'Area Studies in the Global Age: Community, Place, Identity' (2017) 25 *Journal of Contemporary European Studies* 510.

However, the crucial question is the following: from which point in time do nationals of the host state consider newcomers as sufficiently integrated in the sense that they are seen as entitled to social benefits? From the point of arrival? Or should newcomers have to earn their social entitlement? Empirical research in the EU points to the latter, as is revealed in particular by the data underlying the afore-mentioned study by Dustmann and Frattini:⁴⁵ according to a European Social Survey dating from 2008, only 8 per cent of EU citizens thought that newcomers should have access to social welfare from the point of arrival. At the opposite end of the spectrum, another 8 per cent thought that immigrants should never have the same rights as natives. But there is a broad consensus among the remaining majority that migrants must demonstrate that they deserve social benefits in the host state. However, this majority is almost evenly split between those who believe newcomers have earned their rights to social benefits once they have worked and paid taxes for a year (38%); and those who believe that access to welfare should be limited to those who have acquired citizenship of the host state (37%). Hence, there is an obvious problem of defining the exact point in time from which migrants can generally be regarded as sufficiently integrated into the host society, so that the local population is willing to let them share in social benefits. Defining this point in time correctly is particularly challenging given that the range is between one year and the acquisition of full citizenship. This can best be seen in cases involving students, where other indicators (such as taxpaying) normally do not apply.

The presumption of financial solidarity with a foreign student in Mr Grzelczyk's situation arguably falls within these parameters for two reasons. First, when Mr Grzelczyk claimed benefits he had been studying in Belgium for three years. He could thus have achieved what the court in later case law referred to as a '*real and effective degree of connection*'⁴⁶ with the host state. Apart from education in the relevant state, the court in other student cases saw the following elements as indicative of such a real connection: 'family, employment, language skills or the existence of other social and economic factors'.⁴⁷ Second, students from other EU Member States have a special status in the sense that they are not expected to fully integrate into the host society as they might ultimately complete their education elsewhere, and/or enter their respective professions in their home state. But what about other non-active citizens?

3 Ms Dano as prototype of the not deserving,⁴⁸ non-active citizen?

While case law at some point loosened the 'lawful residence' requirement,⁴⁹ the court in *Dano* reaffirmed its importance regarding rights of non-active EU citizens. In addition, *Dano* exemplifies a line of enquiry into the proximity between the relevant EU citizen and the host state. This case will now be analysed in more detail for two reasons: first, its

45 See n 10.

46 Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* para 37ff (emphasis added) (maintenance grant requests from the *home* state for studies abroad).

47 *Ibid.*

48 Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship through its Scope' in Dimitri Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2016). See also Dion Kramer, 'Earning Social Citizenship in the European Union' (2016) 18 *Cambridge Yearbook of European Legal Studies* 270.

49 Contrast Case C-127/08 *Metock* [2008] ECR I-6241 para 62 with Case C-109/01 *Akrich* [2003] ECR I-9607 paras 53ff.

theoretical reasoning constitutes an important breaking point with earlier case law;⁵⁰ second, its factual background illustrates how wrong the presumption of 'benefit tourism' can be. It will be argued that the court's reasoning is sound in theory, but it fails to account for Ms Dano's real-life situation.

3.1 *DANO*: THE FACTS

Ms Dano was a very young Romanian mother who, at the age of 20, had a baby son born in Germany in 2009. While her original arrival date remained unclear, she last entered Germany in late 2010. At this point she received an unlimited residence certificate from the city of Leipzig in mid-2011, followed up by a duplicate certificate in early 2013. Ms Dano had moved in with her sister in Leipzig, who was supporting her and the child. Ms Dano, who was in receipt of federal child benefits (€184 per month) and social assistance by the city for children and young people (€133 per month), then applied in vain for basic provision under the German Social Code. This was denied by reference to para 23(3) of the relevant part of the Social Code SGB XII, excluding foreign nationals from claims if they entered German territory to obtain social assistance.⁵¹

3.2 *DANO*: THE JUDGMENT BY THE CJEU

The CJEU held that excluding Ms Dano from these benefits was lawful. There was 'nothing to indicate that Ms Dano has looked for a job', so she was 'not seeking employment and . . . did not enter Germany in order to work'. This is an inference from objective factors to Ms Dano's subjective mindset. Having been in Germany for longer than three months but shorter than five years, her residency status under the EU Citizenship Directive 2004/38 was subject to Articles 7(1) and 14(2) (sufficient resources); and specific regard was due to recital 10 in the preamble (not becoming an unreasonable burden). The court held that under the Directive, 'economically inactive Union citizens [are thus prevented] from using the host Member State's welfare system to fund their means of subsistence'. While this may be true – although the primary objective of the Directive according to its recital 3 could be understood as facilitating free movement – the question that would normally have followed is whether primary law requires an exception, given the individual circumstances.⁵² A right to reside may also have followed from the national residency certificate⁵³ which Ms Dano had.

The court in *Dano* did not, however, follow these lines of enquiry, and instead based its conclusion solely on secondary law: since Ms Dano was making a request for basic provision, she did not have sufficient resources. If she did not have sufficient resources, she did not have a right to reside as a non-economic active EU citizen. This kind of circular reasoning has been technically ruled out since *Grzelezyk*, at least for temporary neediness. A preferable approach would thus have been the one followed by the

50 *Dano* went straight to the problem of whether an EU citizen can become an illegal resident in the host state merely due to insufficient financial resources. Subsequent cases such as Case C-67/14 *Alimanovic* (n 12) and Case C-299/14 *Garcia Nieto et al* ECLI:EU:C:2016:114 are less significant in that they concerned newly arrived migrants, confirming the general rules under the Citizenship Directive. See also the analysis by F Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-*Dano* Era' in Thym (ed) (n 6) 171.

51 See n 9 above.

52 Case C-140/12 *Brey* (n 23).

53 Case C-456/02 *Trojani* (n 8) paras 20–4 (minimally remunerated services as part of a social reintegration programme might constitute employment). Mr Trojani's situation warranted access to welfare on the basis of lawful residence, derived from a national permit. The outcome in this case can well be understood to be influenced by Mr Trojani's services to society.

Advocate-General in reliance on previous case law: even though Ms Dano may still be lawfully resident and thus have the right to equal treatment, her exclusion from benefits may be justified by showing a burden on the social assistance system of the host state, and by demonstrating that the criterion used by the national legislator in order to establish a 'genuine link' between the EU citizen and the host Member State is proportionate.

3.3 *DANO*: OBJECTIVE FACTORS DEMONSTRATING (IN)SUFFICIENT SOCIETAL INTEGRATION

The CJEU relied on findings by the German court that Ms Dano had neither completed school education, nor undergone any professional training, nor ever had a job. Moreover, while her oral understanding of German seemed sufficient, she could not write in German and her ability to read texts was limited. Assuming that Ms Dano did not qualify as a jobseeker, the court considered not her chances of finding employment, but other factors such as education and language skills (with an emphasis on reading and writing in German). Whereas language skills are one of the traditional requirements for demonstrating societal integration,⁵⁴ the consideration of Ms Dano's level of education could be taken as inquiring into her *potential* for qualifying as a jobseeker at some later point, or her *potential* to contribute to the society of the host Member State in some (other) way. Seen in this light, her lack of sufficient language skills could also be understood as showing that she *currently* did not contribute to German society. It seemed therefore plausible to conclude from these objective factors that Ms Dano *intended* to move to Germany for benefit purposes. Although the decision does not explicitly rest on it, this intention must be inferred in order for Ms Dano to fall under the relevant German law.⁵⁵

3.4 A CRITIQUE OF *DANO*

Ms Dano was a young and single immigrant mother raising a small child. Hence, she suffered multiple disadvantages on grounds of age, ethnicity and gender, which put her in one of the structurally weakest groups in society.⁵⁶ Childcare obligations at least provide a solid reason for not being in paid employment. Alternatively, childcare for one's own child born in the host state could qualify as a societal contribution, which would have allowed Ms Dano to be treated more like Mr Trojani or Mr Baumbast.⁵⁷ Moreover, Ms Dano's young age rendered it unlikely that she would qualify as a former worker.⁵⁸ Looking at this real-life scenario behind her appearance as 'economically inactive', one could have argued that her need was only temporary in the *Grzelczyk* sense, that is, until her son was at school and she able to find low-skilled part-time work and attend German language classes.

Moving on to the subjective mindset – the question of why Ms Dano moved to Germany – are there any motives other than 'benefit tourism'? Ms Dano had joined her older *sister* in Germany. This could have been a straightforward case of family reunification. However, the Citizenship Directive 2004/38 does not recognise the bond

54 Spiro (n 32).

55 See n 9 above.

56 See generally Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (European Commission 2016) 11: 'Migrant women with childcare obligations have particular difficulty in accessing ways of learning the dominant language, compared to migrant men, and non-migrant women.' More specifically, see Philip Martin, Lisa Scullion and Philip Brown, 'Roma Persons and EU Citizenship' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Elgar 2018) 173.

57 Eleftheriadis (n 32). For *Trojani*, see n 53.

58 Case C-507/12 *St Prix* ECLI:EU:C:2014:2007 shows a much more generous approach to economic inactivity due to the constraints of late pregnancy and childbirth.

between siblings as strong enough to warrant derived rights of residence automatically (had Ms Dano joined her parents in Germany upon whom she depended for a living, she would have benefitted from a right to reside under Article 2(2)(c)). Nevertheless, according to recital 6:

... in order to maintain the unity of the family in a broader sense ... the situation of those persons who are not included in the definition of family member ... and who therefore do not enjoy an automatic right of entry and residence ... should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted ... taking into consideration [the] relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen (see also Article 3(2)).⁵⁹

This makes perfect sense given that family ties are the strongest bond of solidarity⁶⁰ within any broader parts of society.

Hence, there were strong indications that Ms Dano was *not* a benefit tourist. Although portrayed as a typical case of 'economic inactivity', one could well have argued temporary financial solidarity. This shows that the formal dichotomy active–inactive cannot fully address people's real situations. Tackling migration by denying social rights to perceived benefit tourists is therefore not an appropriate tool.

4 Access to benefits: the citizenship angle

To recap, solidarity can be looked at from either an economic, a societal, or a broader political perspective.⁶¹ Moving on to the latter, the question is whether we can assume solidarity between EU citizens that is independent from their attachment to the market or a local community. Therefore, the notion of EU citizenship becomes important, but from a *functional* perspective rather than an examination of its precise content, following different citizenship models.⁶² The question is: what role can EU citizenship play when it comes to welfare migration and its public perception?

4.1 THE DECLINE OF THE IDEA OF NATION-BUILDING?

The traditional view is that, in contrast to the USA, the EU does not constitute a nation since the socio-political requirements necessary for the emergence of a pan-European society are lacking.⁶³ This is also why solidarity on a political level has been referred to as 'aspirational' only.⁶⁴ On a theoretical level, one could counter this by saying that European nation-building in a traditional sense is *not* (necessarily) the purpose of EU

59 Case C-83/11 *Rahman et al* ECLI:EU:C:2012:519 stresses the duty to facilitate effectively the entry and residence of other family members.

60 Jürgen Habermas, 'Democracy, Solidarity and the European Crisis' in Anne-Marie Grozelier et al (eds), *Roadmap to a Social Europe* (Social Europe Report 2013) 4, 10 <www.socialeurope.eu/wp-content/uploads/2013/10/eBook.pdf>, sees the family as 'quasi-natural' community with *ethical* obligations as a strong basis for solidarity.

61 See n 30 above.

62 Contrast 'market citizenship' (e.g. Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review*. 1597) with 'social citizenship' (e.g. Kramer (n 48); Schiek (n 28)). Functionally, citizenship is the basis for EU democracy (e.g. Gareth Davies, 'Social Legitimacy and Purposive Power' in Gráinne de Búrca and Dimitry Kochenov (eds), *Europe's Justice Deficit?* (Hart 2015)); or federalism (Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Kochenov (n 48)).

63 E.g. Stefano Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15 *German Law Journal* 935.

64 de Witte (n 5).

citizenship.⁶⁵ From a global perspective, one could argue that the assimilation of the legal position of permanent residents to that of nationals (as is the case under EU law) goes some way towards diminishing the importance of the nation state.⁶⁶ But apart from its structural role,⁶⁷ EU citizenship also has a specific function ensuring fairness in a more substantive sense.⁶⁸ Seen in this way, it is the potential driving force for developing solidarity within European societies.⁶⁹ I am here following Ulrich Beck's suggestion that the 'horizontal'⁷⁰ level of Europeanisation (deriving from the actual lives of people) is the most important element in achieving solidarity. Jürgen Habermas'⁷¹ proposal to foster solidarity simply by improving EU democratic structures ('vertical' Europeanisation in Beck's terminology) appears too theoretical and overly optimistic. In other words, I understand the purpose underlying EU citizenship along the lines of *transnational fairness*, while relying overall on the structural framework originating in the literature on EU democratic deficit. This means that we are looking at the potential of EU citizenship to bring about a 'European way of life' that includes people embracing a social safety-net for all EU citizens as such. What is the impact of Brexit on such a vision?

4.2 BREXIT AS A BREAKING POINT

Brexit stands as a synonym for 'taking back control' and hence the return of the nation state. With specific regard to migration, it is revealing the limits of European integration – or, more broadly, globalisation – by reasserting the power of the state. What does this imply for solidarity between EU citizens as such? One possible line of argument would see Brexit as ending this aspiration, stressing the anti-globalisation and anti-EU sentiment (from both the political left and right) that Brexit stirred in the UK and elsewhere. However, from a political theory perspective, this does not necessarily have to mean the end of a European collective identity: arguably, it is still better to have a *pan*-European discourse than to have none at all, even if this discourse is 'contest-driven' instead of searching for a consensus.⁷² At least in the UK, awareness and knowledge of the EU have been increasing since June 2016. Nevertheless, the problem is that anti-EU sentiment has also led to strong election results for nationalist parties in countries such as France, Germany and Austria – although immigration from outside the EU appears to have played a major role here. It is generally acknowledged that the public perception of immigration as a 'threat' to either the culture or the economy is a *salient* factor for the rise of right-wing parties.⁷³ Even proponents of a more controversial political discourse acknowledge that in federal systems⁷⁴ this poses the risk of eventual disintegration of the central unit, in particular if there is an exit option such as Article 50 of the Treaty on

65 Eleftheriadis (n 32) 783.

66 Spiro (n 32).

67 See above text accompanying n 62ff. It can be left open here whether this role should be modelled against the template of national democracies, or designed as post-national citizenship. See Somek (n 40) 205, 261ff.

68 Eleftheriadis (n 32).

69 On a philosophical level, this would correspond with the 'bottom-up' approach ensuring the democratic basis of EU integration, see Ulrich Beck, *German Europe* (Polity Press 2013) 76 with further references.

70 Ibid 71.

71 Jürgen Habermas, 'Core Europe to the Rescue: A Conversation with Jürgen Habermas about Brexit and the EU Crisis' (12 July 2016) <www.socialeurope.eu/core-europe-to-the-rescue>.

72 See generally for this distinction Andreas Follesdal, 'Democracy, Identity and European Public Spheres' in Thomas Risse (ed), *European Public Spheres: Politics Is Back* (Cambridge University Press 2014) 247.

73 Lewis S Davis and Sumit S Deole, 'Immigration and the Rise of the Political Right: The Role of Cultural and Economic Concerns over Immigration' (2015) <<https://papers.ssrn.com/abstract=2641016>>.

74 See n 1 above.

European Union.⁷⁵ If nationalism is the alternative to the EU (instead of EU reform), the risk of failure of the EU project is real. So this would corroborate an argument *against* EU citizenship as a solid pathway to solidarity after Brexit.⁷⁶

Another, more optimistic line of thought would see Brexit as a breaking point in a promising sense: faced with a choice, 48 per cent of UK voters overall wanted to remain part of the EU. Those of them who are convinced Europeans ('remainers', in contrast to 'soft remainers' without a real sense of belonging) have teamed up with EU citizens elsewhere – i.e. not along but *across* national boundaries. They have spoken out more loudly in favour of the EU than ever before. This can be evidenced, for example, by the rise of the newspaper *The New European* and, most recently, by the foundation of Renew (a new anti-Brexit party),⁷⁷ as well as Our Future Our Choice (OFOC) (a new campaign group initiated by young people opposed to Brexit).⁷⁸ Given the crucial role of the media and campaigning with respect to people forming a political opinion, this allows for a pan-European political discourse that consolidates knowledge about the EU, and is also consensus-driven⁷⁹ since it aims to foster the EU project. In other words, there is now a basis for more solidarity among those parts of European societies who have been rendered more aware of the advantages of the EU and have elected (or would elect) to stay European. I will refer to them as 'new EU citizens'.

4.3. THE CASE FOR INCREASED SOLIDARITY AMONG THE NEW EU CITIZENS

Sociologists associate identity with the feeling of belonging to a certain culture and social psychology.⁸⁰ While it has become evident that European societies are divided, Brexit is likely to strengthen the sense of belonging to the EU amongst the new EU citizens. This article's argument is that the bond between new EU citizens has larger potential than the diffuse anti-EU sentiment, which superficially unites UK 'leavers' and EU-critics elsewhere. This can best be seen when looking at EU citizens in the UK and UK citizens in other Member States following Brexit: these feel the immediate consequences of the 2016 referendum, which has put their vested EU rights and hence their legal status in jeopardy. Their interests in preserving as much of the status quo as possible are aligned perfectly with territorial focus on the EU. In other words, European society is divided, but not along national frontiers. There is now realisation of a new form of discrimination in the UK against EU citizens as a group. This is cause for concern,⁸¹ but also noteworthy in that 'EU nationals'⁸² are treated as one group. Immigrants in the UK are being singled out not for being foreign (i.e. non-UK), nor for being from *another Member State*, but for being *European*. The alarm or even shock over this experience is being absorbed by new pro-EU activist groups, both in the UK (e.g. the3million) and abroad (e.g. British in Europe and Pulse of Europe). In short, Brexit nurtures solidarity amongst the new EU citizens.

75 See Follesdal (n 72).

76 See the less optimistic analysis by Dora Kostakopoulou, 'What Fractures Political Unions? Failed Federations, Brexit, and the Importance of Political Commitment' (2017) 42 *European Law Review* 339.

77 James Torrance, 'This Is Why We've Set Up Renew – The New Political Party That Will Stop Brexit', *The Independent* (London, 21 February 2018) <www.independent.co.uk/voices/renew-britain-party-new-brexit-uk-politics-end-eu-why-a8221141.html>.

78 See the general information available under <www.ofoc.co.uk>.

79 See above, text accompanying n 72.

80 Kenneth L Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale University Press 1989) 13.

81 'Feindbild Europäer?' *Frankfurter Allgemeine Zeitung* (FAZ) (10 January 2018) <www.faz.net/aktuell/politik/brexit-sorgt-fuer-anfeindungen-gegen-europaeer-15398223.html>.

82 'EU Nationals Facing Rising Discrimination' *The Guardian* (London, 12 September 2017).

Solidarity may also increase with changing business structures *post*-Brexit. The risks associated with an exit from the EU and existing models of affiliation with the Internal Market, including the Customs Union, is prompting firms and EU agencies in the UK to reconsider their location. Ironically, Brexit is triggering *more* free movement in the sense that businesses need to find territorial bases in the EU to ensure continued access to the EU market. This increases the chances of UK citizens living and working abroad, thus experiencing the economic benefits of the EU and becoming embedded in the societies of other Member States. Recent empirical evidence suggests that the use of ‘opportunity structure’ for social interaction is to a certain extent related to a country’s level of economic interactions and the process of economic integration.⁸³ This cautious conclusion is based on data from 2007 to 2011, so may be influenced by the financial crisis. In any event, Euroscepticism is relatively low amongst those who are mobile across national borders, or those who have lived in another EU country: the more ‘transnational’ in that sense an individual is, the more pro-European he or she is likely to be.⁸⁴ So the level of Europeanisation, which in the UK is lower than in other EU Member States,⁸⁵ is likely to improve for those UK citizens who following Brexit are willing to relocate with their jobs.

4.4 BREXIT AS A SHARED MEMORY

From a sociological perspective, the above-mentioned factors support the argument that despite its divisional force there is also promise in Brexit. This is because solidarity (sometimes also referred to as ‘trust’) requires a collective identity, which presupposes some form of self-awareness that is construed vis-à-vis ‘the other’,⁸⁶ and a collective memory.⁸⁷ The unfolding of Brexit – the debate, the choice, the consequences – will constitute such a collective memory for people in the UK and the EU. It is likely to be strongest for UK citizens in the EU and EU citizens in the UK who (together with UK remainers) feel immediate consequences. Their collective memory is thus sharper and likely to be more powerful, especially if it continues to be echoed among wider parts of (pro-)EU societies. In any event, whether as a positive or negative image, Brexit will shape public opinion and hence the collective memory of people in the EU.⁸⁸

4.5 THE IMPACT OF INCREASING NUMBERS OF DUAL NATIONALS

The impact of new EU citizens with a European sense of belonging is likely to deepen in the longer run. This is because mobile EU citizens directly affected by Brexit are now much more likely to apply for a second passport in light of the uncertainties for residency and other rights following Brexit. This is generally evidenced by the rising number of citizenship applications in the UK: Home Office statistics published by the BBC in

83 S Israel, F Butler, C Ingensiep and C Reiman, ‘Connected Europe(ans): Does Economic Integration Foster Social Interaction?’ (2017) 25 *Journal of Contemporary European Studies* 88 (although sociological studies do not fully corroborate the traditionally presumed link between economic and social integration).

84 Theresa Kuhn, *Experiencing European Integration: Transnational Lives and European Identity* (Oxford University Press 2015) 64ff (based on evaluation of *Eurobarometer* data between 2006 and 2008).

85 Israel et al (n 83).

86 Karst (n 80). There is a relational component for the sense of belonging that may lead to ‘interlocking’ identities, depending on the chosen comparator (local or national outsider). See Inglis and Donnelly (n 43) 140.

87 Ireneusz P Karolewski, *Citizenship and Collective Identity in Europe* (Routledge 2010) 8ff.

88 Similarly De Vries (n 3).

August 2017 have shown the number of citizenship applications by EU nationals almost doubling, rising from 15,871 in 2015/2016 to 28,502 in 2016/2017.⁸⁹ These numbers focus on the UK only, but there is also evidence of rising citizenship applications by British nationals in other EU Member States, totalling 6555 in 2016 (up from 2478 in 2015).⁹⁰ Even if this does not lead to dual nationality in all cases, there will be a political voice for pro-European citizens in the UK that was formerly lacking in the 2016 referendum. The same is true for UK expats in other Member States. This may well confine or reduce the current role of anti-EU, nationalist parties: people with two nationalities embody an understanding of different cultures – they can bridge discrepancies or misunderstandings. In other words, the more shared (national) identities there are, the clearer becomes the awareness of ‘the other’, which will increase tolerance⁹¹ and, ultimately, mutual trust.

Moreover, if these increased applications do lead to dual nationality, those EU citizens would then have the right to vote in more than one Member State, thus increasing their voice within the EU as a whole. It remains for the EU Member States to decide whether they want to relax their regulations regarding the possibility of dual citizenship, which has traditionally been discouraged. However, there are signs that in the aftermath of Brexit some EU Member States will allow for dual nationality of their citizens in the UK,⁹² or UK citizens abroad.⁹³ While the underlying motive for the increase in passport applications is likely to be a pragmatic desire for security, this does not exclude that at some point there has been, will be, or still is a genuine feeling of belonging to the EU and the host state. Crucially, EU citizens with a second nationality will become fully integrated *politically*, forming part of the future electorate of their second home country.

Thus, there is a case for increased solidarity between (new) EU citizens following Brexit. This would have to be acknowledged in future case law in a way similar to the US metaphor of ‘sinking or swimming together’.⁹⁴ The question remains whether the increase in tolerance and political participation will be enough to change attitudes towards ‘benefit tourism’, or migration that may be perceived as such. It has been shown by analysing *Dano* that tackling migration of poor (inactive) people relies on inapt tools and can cause unfair results. The circuitous reasoning of *Dano* can render a migrant poor EU citizen illegal under EU law. It would be an interesting question for further empirical

89 ‘EU Applications for UK Citizenship up 80% since Brexit’ (*BBC News*, 25 August 2017) <www.bbc.co.uk/news/uk-41053684>.

90 Federica Cocco, ‘Britons Seeking EU Citizenship More Than Doubles’, *Financial Times* (London, 9 April 2018) <www.ft.com/content/6e0dd592-3c05-11e8-b7e0-52972418fec4>, based on Eurostat data showing most applications in Germany (2704, up from 594), Sweden and the Netherlands.

91 Karst (n 80) 96ff.

92 *The Guardian* reported on 10 October 2017 that the Dutch government assured its citizens in the UK that they would be allowed dual UK/Dutch citizenship *post*-Brexit, see Daniel Boffey, ‘Brexit: Dutch Nationals Living in Britain Will Be Allowed Dual Citizenship’, *The Guardian* (London, 10 October 2017) <[www.theguardian.com/world/2017/oct/10/durch-nationals-living-britain-allowed-dual-citizenship-brexit](http://www.theguardian.com/world/2017/oct/10/dutch-nationals-living-britain-allowed-dual-citizenship-brexit)>.

93 The BBC quoted the former German Minister for Foreign Affairs (Sigmar Gabriel) in July 2016 as considering this, see Claudia Allen, ‘Brexit: Dual Nationality Available for Britons?’ (*BBC News*, 4 July 2016) <www.bbc.co.uk/news/uk-politics-eu-referendum-36703037>.

94 See n 24. Brexit alone will give rise to many lawsuits that could find their way to the CJEU. One example is the need for clarification of the status of British nationals in the EU (n 110) and EU nationals in the UK post-Brexit. Regarding the latter, concerns that vulnerable people may not be able to secure their status have been voiced by Madeleine Sumption and Zovanga Kone, ‘Unsettled Status? Which EU Citizens Are at Risk of Failing to Secure their Rights after Brexit?’ (Report of the Migration Observatory, University of Oxford, 12 April 2018) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Unsettled_Status.pdf>.

research whether new EU citizens directly affected by Brexit are now more likely to empathise with Ms Dano – having experienced how quickly one could become an ‘illegal migrant’. However, if the cautious optimism regarding solidarity between (new) EU citizens as such does not necessarily extend to *financial* solidarity and sharing of public benefits. This will be addressed with some general caveats, which underlie the conclusion in the final section that more EU social engagement is needed, either in some form of minimum harmonisation and/or financing.

5 Limits of financial solidarity: more EU social engagement?

5.1 THE LIMITS OF FINANCIAL SOLIDARITY IN FACT AND IN LAW

The first caveat is that the new EU citizenry might to a large extent consist of people who have previously enjoyed free movement. By definition, these are likely to be part of a particular ‘class’⁹⁵ of what could be referred to as a global ‘elite’, or more neutrally, ‘transnationally mobile’⁹⁶ people – namely those who can afford to travel and most easily fulfil the requirements that EU law imposes on free movement.⁹⁷ Unless they have experienced temporary financial distress themselves (e.g. caused by job loss, change in status, or illness), they might not necessarily feel increased *financial* solidarity with fellow EU citizens.

The second caveat results from the fact that burden-sharing within any given society is easier in economically robust times.⁹⁸ There is generally a connection between a rights-based, generous approach by the judiciary and the economic climate in which the relevant cases reach the courts. The *Dano* case exemplifies this.⁹⁹ Hence, there is a concern that in the aftermath of severe EU crises (stretching from the financial and Euro crises to Brexit itself) state funds will remain strained, and it will be unlikely that people are prepared to share.¹⁰⁰ As indicated above,¹⁰¹ simply improving democratic structures within the EU – albeit a necessary start – is not sufficient to remedy this.

Thirdly, it must be noted that, as a matter of legal doctrine, the case for a strict application of equality of EU citizens in *all* circumstances is weaker than in the USA, where the Supreme Court held in *Saenz* that ‘the discriminatory classification [of US citizens as either newcomers or more established residents] is itself a penalty’.¹⁰² Attempting a similar argument for the EU would face the problem that the principle of non-discrimination on grounds of nationality applies similarly to EU fundamental rights

95 Charlotte O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53 Common Market Law Review 937.

96 Kuhn (n 84). See also N Fligstein, *Euroclass: The EU, European Identity, and the Future of Europe* (Oxford University Press 2008).

97 Fritz Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’ (2010) 8 Socioeconomic Review 218.

98 Karst (n 80). This can be corroborated by the so-called ‘group threat theory’, see Davis and Deole (n 73).

99 See also M Seeleib-Kaiser, ‘Citizenship, Europe and Social Rights’ in S Seubert et al (eds), *Moving Beyond Barriers: Prospects for EU Citizenship?* (Elgar 2018) <www.researchgate.net/publication/318745118>.

100 On the upside, crises arguably bring people closer together: see Beck (n 69) on the basis of a global risk society (e.g. there is now an EU-wide understanding of the Greek economy). While this argument may be generally valid, it does not necessarily lead to people sharing *money*.

101 Text accompanying n 70ff.

102 US 489, 504ff (1999). See n 20ff above.

only 'within the scope of EU law'. Although this can be a very low threshold at times,¹⁰³ it remains an important signpost that can be put into practice where needed. This also means that Member States may ultimately deport illegal migrants from other Member States – a possibility that appears more than merely theoretical following *Dano*, which strictly subjects free movement to narrowly interpreted secondary law.

5.2 THE NEED FOR INSTITUTIONAL ACTORS TO FACILITATE AND PROMOTE EU SOLIDARITY

This is where actors other than the citizens themselves are called for. Solidarity can be incentivised as a matter of governance, namely either by the Member States or the EU itself. My argument is that solidarity should be especially incentivised by the EU. The role of the Member States is limited given that they use 'benefit tourism' as a narrative to depict themselves as victims: the very purpose is finding the stopping point for a state's financial exposure. But in terms of solidarity on the political level, Member States can – and do – play an important role. By increasingly allowing for dual nationality,¹⁰⁴ Member States can abolish a traditional hurdle that had assumed an individual's indivisible (national) identity. More flexibility here would pave the way for the above-mentioned diversification and sharing of identities that enables tolerance and trust amongst the new EU citizens.

For the same reasons, the EU could play an important part by offering UK citizens an optional 'associate EU citizenship' post-Brexit. Although the proposed amendment to the treaties¹⁰⁵ appears to be withdrawn,¹⁰⁶ the idea itself should remain under consideration.¹⁰⁷ It would demonstrate a concern of the EU for its citizens, which could greatly enhance the public perception of the EU as more than one central administration based in Brussels.¹⁰⁸ Moreover, it would create an EU citizen 'by choice'. One critical factor will be the costs for this ('membership fee'),¹⁰⁹ which carries the risk that only those who are well off could afford it. This concern could be tackled by drawing the financing into a wider EU-level action plan (see below).

Alternatively, solutions could be developed by case law, starting with *vested rights* of British expats in the EU. The pathway to such a solution may have been opened since the

103 See A G Bobek in Case C-298/16 *Ipsas* ECLI:EU:C:2017:650 paras 32–65. More recently, Case C-64/16 *Associação Sindical dos Juizes Portugueses* suggests an even lower threshold, at least insofar as judicial protection is concerned. For a critique of *Dano* from a fundamental rights perspective see K von Papp, 'A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Rights' (2018) 43 *European Law Review* (forthcoming).

104 See the Dutch and German examples at nn 92–3.

105 Arguably there is no need for treaty revision, see Volker Roeben, Jukka Snell, Petra Minnerop, Pedro Telles and Keith Bush, 'The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit: A Study for Jill Evans MEP' (Swansea University 2017) 34ff <www.open-access.bcu.ac.uk/5590>.

106 See 'My Plan for Associate EU Citizenship' by MEP Charles Goerens (*PanEuropean*, 30 April 2017) <<https://thepanuropean.eu/2017/04/30/my-plan-for-associate-eu-citizenship-mep-charles-goerens>>.

107 See European Parliament resolution of 5 April 2017 on negotiations with the UK following its notification that it intends to withdraw from the EU (2017/2593(RSP)) para 27 ('mitigating' the loss of EU citizenship for UK citizens).

108 See Lindseth (n 29), noting the risk of a 'persistent disconnect' between EU citizens and 'Brussels bureaucracy'.

109 'Can Britons Keep their EU Citizenship after Brexit?' *The Economist* (London, 12 April 2017) <www.economist.com/news/britain>.

issue of the exact consequences of Brexit for EU citizenship of UK citizens in the Netherlands has been considered by the Dutch courts.¹¹⁰ The EU law protection of *dual* nationals is already quite robust, as can be seen from the case of Ms Ormazabal, a Spanish national who after her studies in the UK remained as a worker in the UK, acquired British nationality in addition to her Spanish nationality, and could still successfully rely on EU (primary) law regarding derivative rights for her Algerian husband:

[i]t would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights – in particular the right to family life in the host Member State – because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.¹¹¹

5.3 THE CASE FOR MORE SOCIAL ENGAGEMENT AT THE EU LEVEL

At the societal level and as a matter of EU policy, it would be important to enable free movement of all – the rich and the poor. This is because the EU is based upon free movement and anti-discrimination. If this causes a perceived risk for a decline in social standards and hence a reaction by policymakers (see section 1), this ‘ghost’ can only be tackled by increased social engagement at the EU level.¹¹² Acknowledging that EU competences in the area of social policy are limited,¹¹³ there is still an economic argument that as long as states fear (negative) spill-over effects of national regulation, this constitutes a collective action problem that can only be solved at a central level.¹¹⁴ In EU terminology, this would suggest a need for minimum harmonisation.

From a political philosophy perspective, a similar argument could rest on the need to create more democratic structures at the supranational level in order to constrain a pure market rationale by political considerations of non-economic interests. Habermas’ conclusion regarding the implications of the financial crisis can be generalised for the place of social policies in an economically highly integrated system: ‘welfare state and democracy together form an inner nexus that in a [currency] union can no longer be secured by the individual nation state alone’.¹¹⁵ As indicated above,¹¹⁶ formal improvements to EU democracy are a necessary but not sufficient condition for achieving

110 Lisa O’Carroll, ‘British Group Wins Right to Take Brexit Case to European Court’, *The Guardian* (7 February 2018) <www.theguardian.com/politics/2018/feb/07/british-group-wins-right-to-take-brexite-case-to-european-court>. The Amsterdam Court of Appeal decided that the case cannot (yet) be referred to the CJEU, given the ongoing Brexit negotiations: ‘Appeal Judges Reject British EU Citizenship Claim, Won’t Refer to EU Court’ (*DutchNews*, 19 June 2018) <www.dutchnews.nl/news/2018/06/appeal-judges-reject-british-citizenship-claim-wont-refer-to-eu-court>. But the court acknowledged that the case raised questions of EU law: decision of 19 June 2018. See <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2009&showbutton=true>>.

111 Case C-165/16 *Toufik-Lounes* ECLI:EU:C:2017:862 para 58.

112 Regarding increased calls for more EU intervention in the social policy field following the Eurocrisis and the effects of austerity, see e.g. Ben Crum, ‘A Multi-layered Social Europe? Three Emerging Transnational Social Duties in the EU’ in Crespy and Menz (n 34), referencing Maduro’s proposal of an EU employment agency, training and mobility programmes. However, the idea of more EU social responsibility is older than this, see e.g. the proposal of an EU minimum welfare scheme by Bertola et al (n 7) 86 with further references.

113 Geert De Baere and Kathleen Gutman, ‘The Basis in EU Constitutional Law for Further Social Integration’ in Vandenbroucke et al (n 3) 344.

114 Robert D Cooter and Neil S Siegel, ‘Collective Action Federalism: A General Theory of Article I, Section 8’ (2010) 63 *Stanford Law Review* 115.

115 See n 71 above.

116 Text accompanying nn 69–71.

more fairness in the EU: it is also essential that the EU takes on some financial responsibility for realising social rights. This could be done by redirecting *existing* EU finances such as the Structural and Cohesion Funds, which could focus on disadvantaged *EU citizens* instead of *EU regions*.¹¹⁷ Alternatively, one could consider setting up *new* EU funds, either tax-based,¹¹⁸ or financed from membership fees for 'associate EU citizenship' (while ensuring that there is a waiver system in place for people who cannot afford this fee). This proposal ties partially with the more general call for an EU tax based on citizenship that Stiglitz made in the wake of the Euro crisis.¹¹⁹ It does not necessarily call for fully Europeanised social redistribution. Instead, special funds could be allocated to the Member States whose public resources are 'unreasonably burdened'¹²⁰ to ensure an EU-defined minimum social standard.

In the longer run, one could consider combining some basic financing with flexible forms of EU regulation, for example by taking guidance from the US Medicaid programme: this has become the most important block of the controversial Affordable Care Act,¹²¹ but – unlike social security – is *not* fully federalised. Instead, it relies on cooperation with states by offering federal grants for financing state health insurance plans that broadly match federal definitions.¹²² Calling for EU social engagement does not yet have to side with either a 'unionist' perspective, favouring Europeanisation of social standards including redistribution by EU policies,¹²³ or the traditional decentralised model, seeing social redistribution as a quintessential power of states. While the latter would appear more realistic in the short term,¹²⁴ working towards the former should be a mid- to longer-term task. The EU needs to provide the necessary policy objectives and resources to accommodate the losers of free trade and open borders.¹²⁵

Finally, one could also define as a matter of EU (case) law what minimum social standard an EU citizen is entitled to (in abstract terms such as basic claims to food, shelter, clothes, health coverage etc.). The amount necessary to finance this basic standard could vary from one Member State to another (depending on effective purchasing power). This would ideally be combined with the suggested EU financial assistance described in

117 The implementation could either be left to the Member States, or regulated EU-wide, e.g. by way of EU 'basic income'. As to the latter (on a global scale) see Philippe Van Parijs and Yannick Vanderborght, 'Basic Income in a Globalized Economy' in Reza Hasmath (ed), *Inclusive Growth, Development and Welfare Policy: A Critical Assessment* (Routledge 2015) 229. For the EU see C Bruzelius, C Reinprecht and M Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) *Journal of Common Market Studies* <<https://onlinelibrary.wiley.com/doi/abs/10.1111/jcms.12555>>.

118 Beck proposed a European financial transaction tax to support a new 'Social Contract' between debtor and creditor EU countries (n 69) 85.

119 Joseph E Stiglitz, *The Euro and its Threat to the Future of Europe* (Penguin Random House 2016) 261.

120 See n 12.

121 Edward Berkowitz, 'Getting to the Affordable Care Act' (2017) 29 *Journal of Policy History* 519. One important goal of the Trump administration was to limit Medicaid, see most recently the Presidential Order requesting policy changes to put recipients into work: Glenn Thrush, 'Trump Signs Order to Require Recipients of Federal Aid Programs to Work', *New York Times* (New York, 10 April 2018) <www.nytimes.com/2018/04/10/us/trump-work-requirements-assistance-programs.html>.

122 Brietta R Clarke, 'Medicaid Access and State Flexibility: Negotiating Federalism' (Legal Studies Paper 2017–41, Loyola University 2018) <<https://ssrn.com/abstract=3056532>>.

123 See Helder De Schutter, 'The Solidarity Argument for the European Union' in Vandenbroucke et al (n 3) 68, 74ff.

124 Maurizio Ferrera, 'The European Social Union: A Missing but Necessary Political Good' in Vandenbroucke et al (n 3) 47, 63ff.

125 See generally Joseph E Stiglitz, *Globalization and its Discontents* (Norton 2002). Similarly with regard to the EU, see Dagmar Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) 13 *European Constitutional Law Review* 611.

the preceding paragraph. I would base this least intrusive proposal, variations of which can be found in the literature since the late 1990s and early 2000s,¹²⁶ on an analogy to the Californian legislation at stake in *Saenz v Roe*.¹²⁷ Member States would remain free (e.g. in an explicit derogation from the otherwise applicable equal treatment principle) to provide a higher standard above this EU minimum to their own nationals and to permanent residents. This would give some comfort to the richer Member States and, at the same time, secure free movement and equal rights to basic necessities for all. Achieving this has become more important post-Brexit than before.

¹²⁶ Bertola et al (n 7) 76ff, 86ff with further references.

¹²⁷ See n 20.