# Free movement, citizenship and welfare benefits for the economically inactive: re-thinking the balance of interests in EU law.

A thesis submitted to The University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

2019

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Word Count: 90,720

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# Abstract

This thesis considers whether free movement law is sufficient for balancing the interests of Member States with fundamental EU objectives. Free movement law has expanded to allow non-economically active citizens to reside in another Member State; resulting in the possibility of financial responsibility for those non-national citizens shifting to the host Member State. The traditional boundaries of welfare systems rely on nationality and territoriality, in order to protect the finite resources of States to look after their citizens. This thesis will determine how EU law and the CJEU has addressed this clash of principles, in the development of secondary legislation and the case law on free movement of economically inactive citizens. Ultimately, it determines that there is a growing culture of imbalance in the law, with Member State interests being conflated and overly protected, to the detriment of free movement objectives. The legitimacy of this is reviewed by considering the different competences of the EU and Member States in the Treaties, in relation to free movement of inactive citizens.

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# Acknowledgement

Firstly and foremostly, I would like to thank my supervisor Dr Dimitrios Doukas, for his guidance and support over the last few years. I could not have hoped for a more diligent, kind and committed supervisor, and I feel incredibly lucky to have been his PhD student. Dimitrios has not only been a brilliant project supervisor, but also an incredible and inspiring academic mentor overall.

I would also like to take the opportunity to thank Dr Elly Aspey and Annette Nordhausen Scholes, for their invaluable contributions to my thesis in the form of helpful feedback. Overall, I have been priviledged to have a great supervisory team, which has made the process of writing this research much more enjoyable.

I am grateful to the University of Manchester School of Law, for providing me with the opportunity to write this thesis in such a vibrant learning environment. From the outset of my university education in 2011, the University of Manchester has been a brilliant place to be. I am grateful for the support from the PGR office, especially Jackie Boardman. As well as the amazing academics, that have enriched my time at the School of Law over the past years. Specifically, I would like to thank Dr Javier García Oliva for always supporting my academic aspirations, being an enthusiastic and supportive mentor, and even more importantly, a wonderful friend.

As part of the write-up of this thesis was conducted during my stay at the Max Planck Institute for European Legal History, I would like to thank the institute and Professor Stefan Vogenauer, for providing an inspiring and productive research environment that considerably aided my ability to finish this thesis. I am also grateful for the opportunity to develop my academic interests in European legal history, as well as exercising my own free movement rights to stay in the wonderful city of Frankfurt!

Finally, I must thank my amazing family and friends for their support and encouragement during the process of writing my PhD thesis.

# Introduction

Since its introduction in the Maastricht Treaty, EU citizenship has received an overwhelming degree of academic attention.[1] By far, the greatest focus regarding the effects of Union citizenship have been in the area of free movement of persons.[2] Articles 20 and 21 TFEU give every person holding the nationality of a Member State the right to move and reside within the European Union. This removed the economic restrictions on free movement, and opened up the possibility of residing in another Member State to all citizens, regardless of economic status.

The constitutional make-up of the EU shifted into more a quasi-federal structure, which did not come without issues. The EU is a guarantor of free movement rights, but not a guarantor of the welfare of the citizens exercising free movement.[3] The welfare state, its construction and its boundaries are still within the competence of the national Member State authorities.[4] However, a welfare dimension of EU law emerged because of the obligations to respect the free movement rights that had been granted Treaty status, as well as the principle of equal treatment.[5]

An incredible amount of case law continues to develop the scope and nature of the rights provided by EU citizenship.[6] This case law has been academically analysed in a plethora

[1] See generally, Guild, Rotaeche and Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014)
[2] Nic Shuibhne, '*The Outer Limits of EU Citizenship: displacing economic free movement rights?*' in Barnard and Odudu *The Outer Limits of European Union Law* (Hart 2009), pp167-195
[3] Spaventa, *Citizenship: Reallocating Welfare Responsibilities to the State of Origin,* in Koutrakos, Nic Shuibhne and Syrpis (eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016)
[4] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter 'TFEU'), Article 5
[5] de Búrca, EU law and the welfare state: in search of solidarity (OUP 2005); Dougan and Spaventa, *Social Welfare and EU law* (Hart 2005); Pennings, *European Social Security Law* (Ius Communitatis Series Vol 6, Intersentia 2015)
[6] C-85/96, *Martinez Sala* [1998] ECR I-2691; C-184/99 *Grzelczyk* [2001] ECR I-6193 C-413/99 *Baumbast* [2002] ECR I-7091; C-138/02, *Collins,* 2004 I-02703; C-209/03 *Bidar* [2005] ECR I-02119 para 38-40; C-158/07 *Förster* 2008 I-08507; C-333/13 *Dano* ECLI:EU:C:2014:2358 C-67/14, *Alimanovic,* EU:C:2015:597

of manners. Naturally, there have been discussions regarding the development of the scope of Citizenship itself, through case law.[7] Citizenship's ability to promote cohesion and EU-wide identities has been discussed.[8] There has been intense debate and deliberation about what kind of citizenship Art. 21 TFEU does and can provide.[9] Discussions also include the ability of the citizenship provisions to promote social justice,[10] the effect on coherence in EU law,[11] and the development of exceptions from free movement law.[12]

The contribution from this thesis is a determination of the sufficiency of free movement law, for the task of balancing the competing interests that arise within its tenets. This is important because on the one hand, the development of citizenship rights allowed important EU objectives to be more thoroughly realised.[13] However, on the other hand, legitimacy issues arose from the original encroachment of EU law into the realm of the national welfare state.[14] The landscape of citizenship case law has recently changed fundamentally; this has been considered as a step back from the CJEU as an actor of institutional change,

[7] See Spaventa, *Understanding EU Citizenship through its scope,* in Kochev, *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press 2017); Iliopoulou-Penot, *Deconstructing the former edifice of Union citizenship? The Alimanovic judgment* (2016) 53 CML Rev 1007; Nic Shuibhne, *The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice*, in Syrpis (ed.) *The Judiciary, The Legislature and The EU Internal Market* (Cambridge University Press 2012) p.331-62; O'Brien, *Civis Capitalist Sum: Class As the New Guiding Principle of EU Free Movement Rights* (2016) 53 CML Rev 937, p947-948; O'Brien, *I Trade, therefore I am: legal personhood in the European Union,* (2013) 50 CML Rev 1643; Jacobs, *Citizenship of the European Union – A Legal Analysis,* (2007) European Law Journal 13(5) pp581-610

[8] Cherry James, *Citizenship, Nation-Building and Identity in the EU,* (Routledge/ UACES 2019), p32-43; O'Leary, *Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship* (2008) 27(1) Yearbook of European Law, pp.167 – 193

[9] See Kostakopoulou, *Ideas*, *Norms and European Citizenship: Explaining Institutional Change,* (2005) 68(2) Modern Law Review pp233-267; Nic Shuibhne, *The Resilience of EU Market Citizenship* (2010) 47 CML Rev 1597; Kochenov and Plender, *EU Citizenship: from an incipient form to an incipient substance? The discovery of the Treaty text,* (2012) 37(4) European Law Review 369, p383-3844; Somek, *Solidarity decomposed: being and time in European citizenship*, (2007) 32(6) European Law Review 787, p807

[10] O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK,* Hart Publishing 2017

[11] Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013)

[12] Thym, *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017); Koutrakos, Nic Shuibhne & Syrpis (eds.), *Exceptions from EU Free Movement Law* (Hart 2016)

[13] Jacobs, *Citizenship of the European Union – A Legal Analysis,* (2007) 13(5) European Law Journal

[14] Hailbronner, *Union Citizenship and Access to Social Benefits* (2005) 42 CML Rev 1245, p1264

and a re-focus on the interests of Member States.[15] This thesis therefore seeks to understand how the concerns of Member States have been taken into account against the interests of EU objectives in the past, and how the fundamental shift that seems to be in their favour has taken place. The sufficiency of the law is judged by its ability to strike a fair balance between these two competing interests.

*Aims and research questions*

The ultimate research question of this thesis is: is EU free movement law sufficient for the purposes of striking a fair balance between EU objectives and Member State interests, in relation to welfare access for economically inactive citizens?

Three categories of citizens are analysed to answer this: jobseekers, students and economically inactive citizens. These categories are the subject of the greatest concerns from the Member States, as can be seen by the EU legislature laying down the limits and conditions of their residence and equal treatment in Directive 2004/38/EC[16] (henceforth 'the CRD'). Workers, self-employed citizens and family members of such are excluded from this analysis, as there is less Member State concern over their free movement; which is evidenced by the fact that citizenship of the Union only changed the scope of free movement in relation to non-economic migration. The interests of Member States in relation to citizens that are more likely to be economically dependent presents a deeper issue for citizenship, which therefore warrants more research.

The approach to answering the research question requires legislative and doctrinal analysis. The thesis looks at the overall right to free movement, as enshrined in the TFEU in Articles

[15] Iliopoulou-Penot (n.7)

[16] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ('CRD')

45 and 20-25, and considers whether it provides equal treatment for welfare access that can enhance the ability of free movement to aid EU objectives. In order to contemplate the balance between those objectives with Member State interests, the restrictions that may be placed upon that free movement are considered. Limitations and conditions on the right to move for the economically inactive have been enshrined in the CRD, therefore interpretations of the CRD by the CJEU are used to determine what kind of weight is given to Member State interests and determine what the overall balance of interests looks like.

Whether any potential imbalances are legitimate will depend upon the strength of EU objectives and Member State interests respectively. To answer this, the thesis will determine which EU objectives relate strongly to different categories of inactive citizens. The case law of the CJEU will be analysed to determine this, as well as policy considerations that can be highlighted from the Commission or European Parliament. A number of EU objectives require mobility of economically inactive citizens in order to be fully realised. For instance, there are important internal market objectives that require the free movement of persons, specifically workers in Art. 45 TFEU, which relies upon the free movement of future workers (jobseekers). The security of the competitiveness of the labour market requires free movement of students, and advancements to the quality and degree of education across the Union (Art. 165 TFEU). Furthermore, the Union has the goal of becoming 'ever closer', with enhanced solidarity and integration amongst the people of Europe (Art 3 TEU[17]).

The Member State interests in relation to EU law and citizenship largely relate to their competence and control over the borders of their welfare systems. Member States need to be able to definitively establish boundaries on their responsibilities to provide for those

[17] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (henceforth TEU)

who cannot provide for themselves. They have a finite level of resources.[18] Boundaries that have traditionally been drawn to protect the integrity of the welfare state are based upon territory and nationality.[19] The ability to protect those boundaries goes to the very heart of the legitimacy of a nation State; they provide economic security to their citizens by the provision of welfare.[20] Free movement law threatens to widen the scope of these boundaries, because it allows citizens who are not always economically active, to reside within the territory of the Member State and therefore may end up being a cost to the Member State.[21] The fundamental issue is that there is not enough social cohesion within the European Union to justify the opening of the Member State boundaries for their welfare systems. Three predominant interests can be identified: competence, economic viability and solidarity. EU law will be analysed in relation to how sensitive it is to these interests.

*Contribution to literature and thesis conclusions*

This thesis makes an original contribution to the literature in this area in a broad sense, as well as providing technical legal arguments and suggestions, which add to the landscape of research on EU citizenship.

Overall, the thesis has contributed a framework for determining the sufficiency of free movement law in the area of welfare access and economically inactive citizens. It contributes to the literature criticising the current reactionary phase of the CJEU, and provides a new dimension to the arguments against the CJEU's abandonment of its earlier case law methodology and citizenship-favoured approach: that proportionality assessments, particularly the necessity element, are pivotal for ensuring a fair and

[18] Dougan, '*Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?*' in Barnard and Odudu, *The Outer Limits of European Union Law* (Hart 2009)
[19] *Ibid*
[20] Snell, '*Economic Justifications and the Role of the State*' in Koutrakos, Nic Shuibhne & Syrpis, *Exceptions from EU Free Movement Law* (Hart 2016) p12-32
[21] Jacobs (n.13) pp581-610

legitimate balance between EU interests (objectives regarding free movement) and Member State interests (legitimate restrictions on welfare access).

By viewing free movement law through the lens of a balance of interests, the thesis provides a way of looking at the problem of welfare allocation and equal treatment in a Member State-focused manner. It creates a reasoned and pragmatic view of Member State interests, which legitimately require protection in free movement law. The defined interests can then be compared with how interests are considered in previous and current case law and legislation, which aids determination of the legitimacy of the balance of interests in this area.

As the thesis examines the free movement framework by approaching categories of economically inactive citizen, it provides two further contributions. Firstly, it accepts a level of stratification of citizenship, where rights are granted according to corresponding requirements being met. The acceptance of stratification is legitimised and justified by considering how EU competence, EU objectives, and the necessity of restrictions differs between the three categories. Thus, the thesis presents a view of the Citizens Rights Directive as a fundamental legal tool for ensuring effective and fair co-governance of the scope of EU citizenship. Secondly, the thesis conducts detailed examinations of all three legally established categories of economically inactive citizen, as well as providing a comparative analysis to the approaches taken to these categories. By accepting an established hierarchy of citizenship, based on the choices of the Member States, this thesis is able to provide an assessment of whether effective co-governance of citizenship has been achieved. Specifically, whether the hierarchy established by the Member States themselves is respected, and whether citizens with stronger links to EU competence and objectives, are accordingly awarded protection for their equal treatment rights. Following this, the thesis

provides some concrete findings regarding the current scheme of co-governing EU citizenship.

The thesis finds imbalances within the legal framework of free movement, which vary in degree. In relation to jobseekers, the imbalance is presented as the most extreme out of the three categories assessed. The thesis determines that jobseekers have a special link to the free movement of workers, highlighted by doctrinal analysis of case law which utilises Article 45 TFEU to expand the rights of work-seeking citizens. Due to the competence of the Union regarding the internal market, and the free movement of labour, this suggests that EU interests should play a vital and predominant role in the outcome of citizenship cases relating to jobseekers. This has not been the case. The thesis analyses the jurisprudence of the CJEU in relation to these citizens and finds that in the post-*Dano*[22] (2014) case law of *Alimanovic*[23] and *García-Nieto*,[24] the Court takes a broach approach to defining 'social assistance' within the CRD, with the effect of excluding most jobseekers from the benefits intended to support their subsistence during a search for employment.[25]

Furthermore, the Court does not appear to require the restrictions on jobseekers access to social assistance to be applied proportionately by Member States. This presents an imbalance in the law, as achieving the objective of free movement of labour is less likely under these circumstances. If citizens cannot gain some degree of financial support during their search for work, or would be unwilling to move and risk being financially vulnerable in another Member State, they are prohibited or deterred from exercising free movement. The thesis determines that such an imbalance would only be legitimate if it were necessary to protect Member States from an unduly high economic burden, caused by claims for

[22] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358
[23] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:210.
[24] Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto, Joel Peña Cuevas, Jovanlis Peña García, Joel Luis Peña Cruz*, EU:C:2016:114
[25] See Chapter 1 '*A new definition of social assistance*'

jobseeking benefits. Statistical data from Eurostat provides a rebuttal to any assumption that such a burden exists.

The use of mobility data in and of itself provides an original contribution from this thesis, as statistics are generally left out of discussions regarding the normative framework of free movement and equal treatment. The data assessed in this thesis shows that there is disparity in work-seeking mobility across the Union, and that generally very few unemployed citizens reside in a Member State that is not their home. It is concluded that the imbalance is unjustifiable, and that there should be more focus on the goals of the Union within the application of the law, which are achievable by the free movement of citizens seeking work elsewhere.

The thesis also makes a contribution to the literature in this area by suggesting ways of re-balancing these interests, or legitimising the current imbalance.[26] The thesis concludes that a re-balancing is desirable, and may be possible by the CJEU re-defining the scope of jobseekers' right to equal treatment using the principle of proportionality, including during any application of the restriction in the CRD (Art.24(2)). The thesis also suggests some changes to secondary legislation, to ensure that primary law rights are secured within the CRD. If this is not possible, the current imbalance could be legitimised only by a Treaty change to recognise the utmost importance of the protection of Member State welfare systems. Without such a Treaty change, the fundamental right to free movement as enshrined in the Treaties will continue to raise questions about the legitimacy of restrictions on jobseekers access to benefits intended to aid their search for employment in another Member State.

[26] See Chapter 4

Further imbalances occur in the application of free movement rules for student citizens. The thesis highlights how advancements in the case law regarding student citizens have relied upon shifts in EU policy regarding education. Important EU objectives, mainly increasing the level of educational quality and attainment, have inspired progress in the scope of citizenship to include equal treatment for student citizens. Student mobility is seen as imperative to the success of the European educational area, to securing a skilled and competitive labour market, and to forming a European identity with a sense of shared solidarity. However, this thesis has concluded that the current application of free movement under the Citizens Rights Directive law will reduce the likelihood of those objectives being achieved by student citizens. In *Bidar*[27] and *Förster*[28] the CJEU permitted rigorous restrictions to be placed upon mobile EU citizens' right to maintenance assistance within the host Member State, the latter case confirming that students can be precluded from claiming any maintenance assistance until they are permanently resident. The result of the stringent application of Article 24(2) of the CRD in *Förster* is that most students moving for the purposes of tertiary education will have no financial assistance in the host Member State. This may deter citizens from utilising the freedom of movement for the purposes of education. The consequential imbalance, between EU educational objectives and Member State interests in protecting their educational welfare benefits, is not generally supported by the mobility data on EU student citizens. The dispersing of student mobility is highly diverse, as is the general spending on educational benefits across the EU. Since only very few Member States would require a robust restriction on maintenance assistance access, it should be applied in a more flexible manner in order to accommodate for EU objectives.

[27] Case C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing,* EU:C:2005:169
[28] Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep,* EU:C:2008 :630

On the other hand, outside of the scope of the Citizens Rights Directive, EU objectives lie at the heart of decisions on exportable benefits.[29] The CJEU has been unwilling to accept restrictions on the access to these benefits, even where citizens are permanently resident in a Country that is not their home Member State. This creates an imbalance as it does not recognise the competence of Member States to determine their own welfare responsibilities, or determine who is integrated enough with their territory to claim expensive education benefits.

The thesis contributes some suggestions for re-balancing the interests in student case law, or for legitimising the current imbalance.[30] It is most desirable that the CJEU requires any reliance on the restriction on student maintenance to be done in a proportionate manner, only where it is necessary. Regarding exportable benefits, the CJEU should soften its proportionality requirement in order to allow greater recognition of Member State interests in restricting exportable benefits only to those with a degree of integration with their territory. If such a re-balance is undesirable, then changes to the Citizens Rights Directive should make it explicitly clear that students are required to not attempt to claim welfare assistance in order to retain their right of residency.

For all other economically inactive citizens, i.e. those who should have 'sufficient resources' to support their residency in another Member State, there are also imbalances. Although these citizens are the most removed from workers, and therefore are the least likely to be afforded strong protection by the EU institutions, they still comprise an important aspect of the internal market. The internal market relies upon the creation of an area where the free movement of persons is secured. Whilst the free movement of welfare-reliant individuals is not an explicit EU objective, and there is no EU competence to

[29] See Chapter 2
[30] See Chapter 4

determine policies redistributing resources, EU law should aid and encourage free movement as much as is reasonably possible. At present, it does not achieve this, as the requirements for residency in the Citizens' Rights Directive have been interpreted in a manner which makes them robust and automatically exclusionary. Member States can take the view that an application for benefits is tantamount to a failure to have sufficient resources, therefore removing the right of residency of citizens, and ultimately their right to equal treatment under the Directive.[31] Mobility data used in the thesis highlights that economically inactive citizens make up a minority proportion of residents in other Member States. This suggests that carte blanche denial of any right to equal treatment will create an imbalance between Member State interests in protecting their welfare systems, and EU objectives relating to free movement of persons. This is compounded by the fact that there are various types of economically inactive citizens that fall under the scheme of 'self-sufficiency'. Some may enter the workforce in the future, and some may always be reliant upon financial assistance once they have begun to claim it. Thus, there is an imbalance in the law as individuals who should be able to exercise free movement may cease to be able to do so because they are viewed automatically as an unreasonable burden, despite their circumstances suggesting they are not.

The thesis suggests rectifying this imbalance by applying the CRD in light of the principle of proportionality. Citizens should not be an 'unreasonable burden', i.e. should not be refused benefits or residency, unless their circumstances (i.e. their duration in the Member State, the likely longevity of their claim, and their personal links to the host Member State) suggest that this should be the case. Secondary legislation changes could be made so that the CRD reflects the CJEU decision in *Brey*[32] to ensure that an examination of an

[31] See Chapter 3 on automatic exclusions

[32] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565

‘unreasonable burden’ means an examination of such circumstances. If this is not possible, the thesis suggests legitimising the current imbalance, by reforming the CRD to explicitly state that claims for benefits will undermine a citizen’s right to reside. Furthermore, that citizens without the right to reside will be excluded from the Member State. Primary law should also be changed to recognise the importance of Member State competences regarding their welfare systems, so that there is no confusion about the status of the fundamental right to free movement.

## Layout of the Thesis and Methodology

The thesis comprises four substantive chapters. The first three chapters analyse the history of equal treatment to welfare access for the chosen three categories of economically inactive citizen.

Chapter 1 considers the EU objectives that underpin the right for jobseekers to move and reside in a Member State other than their home, by undertaking qualitative doctrinal analysis of CJEU case law to determine how the interpretation of the Treaties has extended free movement rights to jobseekers under Article 45 TFEU. The chapter then considers the equal treatment rights of jobseekers, and how this right has developed over time in the jurisprudence of the CJEU, and in legislative developments in Article 14(4)(b) and 24(2) of the CRD. The ability for jobseekers to claim equal treatment under these provisions, with regard to financial assistance, aids the interpretation of how much consideration is given to the EU objectives underpinning their free movement, as without such support those objectives may remain unfulfilled. Academic commentary provides an analysis of how that equal treatment could affect the interests of Member States, in retaining control over their welfare systems. Finally, the chapter considers the restrictions on equal treatment for jobseekers that have been permitted in EU law, in the case law of the CJEU. The extent to

which the CJEU is willing to accept restrictions provides the analysis of how much consideration is given to Member State interests in this area. Doctrinal analysis, as well as academic commentary, judges how well the permitted restrictions balance the need for free movement of jobseekers with the concerns of Member States. The legitimacy of those concerns is assessed using analysis of the Member States justifications for their restrictions, as well as academic literature on the case law.

Chapter 2 follows a similar structure. Firstly, it considers the developing case law of the CJEU in relation to students, in order to determine which EU objectives have underpinned the need for student mobility. Primary EU law, in the Treaties, is also considered to determine what Treaty rights and objectives are attained by student mobility.

Then, CJEU jurisprudence, as well as developments in secondary legislation under Article 7(1)(c) CRD, are used to confirm the current residency and equal treatment rights of EU citizens in a host Member State. Qualitative doctrinal analysis is again applied to the jurisprudence relating to the restrictions on that equal treatment, which determines what the interests of Member States are when they restrict those rights, and how much weight the CJEU affords to those concerns when it considers the justifiability of the restrictions. Academic commentary supports the analysis of the permitted restrictions.

Chapter 2 also looks at how CJEU jurisprudence has developed to allow Member State nationals to export benefits, in order to exercise their free movement to study. This doctrinal analysis confirms the existence of EU educational objectives, as well as providing an anlysis of the permitted restrictions on equal treatment and free movement rights flowing directly from primary EU law, without the conditions applied by secondary EU law. This also provides evidence of the Member State interests in this area, as restrictions are constructed by the individual Member States themselves. Once again, academic literature

aids the interpretation of the scope of restrictions, as well as the interpretation of the weight given to EU objectives within this line of case law.

Chapter 3 looks specifically at inactive citizens that are not subject to specific equal treatment conditions, and thus fall under the remit of Article 7(1)(b) of the CRD. The chapter firstly analyses the secondary legislation itself, in light of the citizenship provisions in the TFEU and the right to equal treatment. This provides a background for the development of Member State interests in this area, concerning 'benefit tourism' or unreasonable burdens on their welfare systems. A doctrinal analysis of interpretation of Article 7(1)(b) in the CJEU is then undertaken, in order to determine what level of protection the limits and conditions offer to Member States to exclude inactive citizens from their welfare systems. The developments in the CJEU are considered with academic commentary, in order to determine whether the level of restrictions is adequate to placate Member State concerns, but flexible enough to aid in the advancement of EU free movement objectives. Some comparative analysis is undertaken in relation to the interpretations of Article 7(1)(b), to show that the restrictions are at odds with principles of EU law in relation to direct discrimination and purely economic justifications under the overriding requirements doctrine.

In the final chapter of this thesis, the taxonomy of current restrictions on free movement for the different types of citizens considered, is presented and recapped. Eurostat statistics provide indicative data to aid the evaluation of the balance of interests. Statistics are used to analyse the level of risk that would be experienced by Member States if equal treatment to welfare benefits were unconditional. The level of risk aids the interpretation of whether the restrictions are sufficiently, or overly, protective. Primarily the objective of this is to show how restrictive EU laws are applied to highly marginal number of citizens, which suggests there are imbalances created by the framework of free movement. The chapter

then analyses the possible imbalances across the different categories of citizen, in light of the EU objectives and competences, as well as Member State interests, relating to them. The chapter uses qualitative analysis to weigh up the strength of EU objectives compared to Member State interests, and draws conclusions on the legitimacy or illegitimacy of those imbalances. Reforms are then suggested, in the form of re-interpretation of CJEU case law, secondary legislation reform and Treaty amendment, in order to re-balance those interests or at least further legitimise the current imbalance.

# Chapter 1

# Jobseekers and Ex-workers: from equal treatment to automatic exclusion.

## Introduction

Mobile EU work-seekers (or 'jobseekers') have provoked significant judicial activism from the Court of Justice of the European Union (CJEU), which has heavily shaped the parameters of citizens' rights regarding access to social benefits in Member States other than their home.

This category of citizen is discussed first because the most extreme shift in the extension, and subsequent restriction of rights, has occurred in the case law relating to jobseekers. Therefore, the case law best illustrates the different ways in which free movement rights have been interpreted by the CJEU, showing how weight has been differently apportioned in favour of EU objectives and Member State interests, as time has passed.

Another reason for starting with jobseekers is hierarchial. Rightly or wrongly, there is a hierarchy of citizens within the European Union legal framework. Workers are the only type of citizen with guaranteed extensive rights to equal treatment without conditions; and jobseekers are the closest category to workers. An anlysis of the level of restriction placed upon jobseekers' right to equal treatment to benefits access is a good starting point to compare with other categories of economically inactive migrants, as those further away from workers will be more justifiably restricted.

The following research will firstly determine which EU objectives underpin the free movement of jobseekers. Secondly, the CJEU case law concerning restrictions that have been placed on free movement will be analysed. The case law analysis will determine what kind of balance has been struck between Member State interests and EU objectives, as well as considering the sufficiency of EU law for sustaining a fair balance in the future.

## 1. EU Objectives justifying Jobseekers' Freedom to Move and Reside elsewhere:

Post-Maastricht Treaty, all citizens of the EU have acquired the rights to move and reside in another Member State. Articles 20 to 25 of the TFEU established citizenship within the European Union for "*Every person holding the nationality of a Member State*".[1] As per Article 21(1) TFEU, every citizen has the right to move and reside freely within the territory of the EU Member States, "*subject to the limitations and conditions laid down by the Treaties and by the measures adopted to give them effect.*" This includes jobseekers that are pursuing work in Member States other than their home.

These Treaty provisions suggest there is no differential treatment between citizens, regardless of their economic status or what category of residency they fall under. However, the 'limitations and conditions' mentioned above apply differently to different types of citizens. Jobseekers are subject to different legal limits on free movement than other economically inactive migrant citizens.

Historically, the Court has treated jobseekers favourably when interpreting free movement law. According to Dougan[2] this is because of their quasi-economic status, as those more

[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter 'TFEU'), Article 20

[2] Dougan, *The Court Helps Those Who Help Themselves…The Legal Status of Migrant Work-Seekers Under Community Law in the Light of the Collins Judgment,* 7(1) European Journal of Social Security (2005) p31

likely to contribute to the economic fabric of the Member State are more entitled to reside there.[3] The main objective relating to the free movement of jobseekers is the enhanced efficiency of the single market, made more achievable through free movement of labour. The case law discussed in the following section affirms this position.

The original position of jobseekers exercising free movement to another Member State was expressed in the pre-citizenship case of *Lebon*[4] judgment, jobseekers "*qualify for equal treatment only as regards access to employment*" and would not have equal access to welfare benefits.[5] Articles 2 and 5 of Regulation 1612/68[6] also provide jobseekers with a legislative right to equal treatment with nationals of the host Member State, with regard to accessing employment but not accessing benefits. The Court also noted that jobseekers had this right under Article 48 EEC Treaty (now Article 45 TFEU[7]), which established the right to free movement for workers. Jobseekers contrasted with workers, who would have equal treatment to the same tax and social advantages as national workers,[8] but there is evidence from the outset that these two types of citizens are inextricably linked under the Treaty and Regulation framework.

*Lebon* was strongly criticised by Dougan[9] for creating a gap between the legal right to move and seek work, and the actual reality of work-seekers being unable to do so without some financial support during their search for work. EU law as per *Lebon* would not encourage the free movement of jobseekers, to the detriment of the objective of filling employment

[3] *Ibid* p31
[4] Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR I-02811
[5] *Ibid* para 26
[6] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L257/2 ('Regulation 1612/68')
[7] TFEU, Article 45
[8] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ L141/1, Article 7 ('Regulation 492/2011')
[9] Dougan, *The Court Helps Those Who Help Themselves* (n.2) p8

gaps in markets where there were skill deficits.[10] Therefore, the original position of EU law was detrimental to EU free movement objectives, and was relatively cautious regarding free movement of the economically inactive. This would satisfy Member State interests more heavily, as economic migrants are the most desirable, because of their ability to contribute to public finances.

Jobseekers were the first economically inactive migrants extended the right to freely move and reside in another Member State. The CJEU's interpretation of the Article 45 TFEU (ex. Article 39 EC)[11] in *Antonissen*[12]*, Tsiotras*[13] *and Commission v Belgium*[14] gave jobseekers the right to move to, and stay in, another Member State for the purposes of seeking employment.[15] In *Antonissen,*[16] the Court found that a strict reading of the Treaty would suggest that the right to freedom of movement exists only in relation to EU migrants actually taking up employment opportunities, and that their right to remain in a State rests upon them being employed there. The Court found that a strict reading of the Treaty right to freely move *"would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective."*[17] The Court justified such a broad interpretation by re-stating the right to freedom of movement for *workers* is a foundation of the European Union and as such must be allowed a broad interpretation.[18] This confirms the necessity of free

[10] Dougan, *The Court Helps Those Who Help Themselves* (n.2) p8
[11] TFEU, Article 45
[12] C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745
[13] C-171/91 *Dimitrios Tsiotras v Landeshauptstadt Stuttgart* [1993] ECR I-1035
[14] C-344/95 *Commission v Belgium* [1997] ECR I-1035
[15] Dougan, *The Court Helps Those Who Help Themselves* (n.2) p8
[16] C-292/89 *Antonissen* (n.12)
[17] *Ibid*, para 12
[18] *Ibid,* para 11

movement of jobseekers for the success of the free movement of workers, a foundation of the entire EU project.

Despite their association with workers, jobseekers' rights to reside were limited from the outset. In *Antonissen*[19] the Court stated that jobseekers should be permitted a sufficient period of residency in a Member State to find employment, finding the UK's six month time limit sufficient for this. However, the judgment also held that time limits should not exclude a jobseeker from the host Member State if they can prove they are actively seeking employment and have '*genuine chances of being engaged'*.[20] This development was included in the drafting of the CRD, which codified the residency rights of all mobile EU citizens.[21] The CRD also links jobseekers with workers in the preamble, as neither can be expelled except on grounds of public policy or security.[22] The special status of jobseekers has been codified by the EU legislature, but without addressing the problem of lack of financial support for jobseekers.

It is evident from *Antonissen*[23] and the judgments that followed it, such as *Collins*[24] that jobseekers do not have the same rights as EU citizen workers, i.e. the rights to the same tax and social advantages as nationals provided for under Regulation 492/2011[25] (ex. 1612/68[26]). Therefore, Dougan's criticism remains and the balance of interests is unlikely to give fair consideration to EU objectives.

[19] *Ibid,* para 21
[20] *Ibid,* para 21
[21] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (henceforth 'CRD'), Article 14(4)(b), Recital 9 (preamble)
[22] CRD, Recital 16 (preamble)
[23] C-292/89 *Antonissen* (n.12)
[24] C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-12733, para 31
[25] Regulation 492/2011, Article 7(2)
[26] Regulation 1612/68, Article 7(2)

What jobseekers gain from the legislation relating to workers is a right to move and reside in another Member State, as confirmed in the CRD and the case law in *Commission v Belgium*[27], *Collins*[28], *Vatsouras and Koupatantze*[29] and *Prete.*[30]

The right to move and seek/undertake work is heavily reliant upon the right to equal treatment with regards to social benefits. Article 48 TFEU[31] makes clear that free movement of workers is reliant upon the co-ordination of social security regimes; Guild[32] notes that the arguments behind this are that the loss of social protection with dissuade workers from exercising their right to free movement. The EU prioritised social protection in the initial stages of free movement, which higlights its importance for achieving that goal.[33] If the free movement of workers is reliant upon the free movement of jobseekers, it can be inferred that the loss of social protection (or access to social assistance) for jobseekers is also a detriment to the free movement of workers. The rest of this chapter will therefore discuss whether the right to reside, the right to equal treatment with regards to access to social benefits, and the permitted restrictions upon those rights adequately balances the fundamental EU free movement objective with the interests of the Member States.

## 2. Equal Treatment for Access to Social Benefits for Jobseekers:

Equal treatment with regards to access to financial benefits for jobseekers was a product of EU citizenship. This was a Court-initiated advancement in EU law, made possible by

[27] C-344/95 *Commission v Belgium* (n.14), paras 14-15
[28] C-138/02 *Collins* (n.24) para 36
[29] C-22/03 and C-23/08 *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE)* [2009] ECR I-04585, paras 36-37
[30] C-367/11 *Déborah Prete v Office national de l'emploi* EU:C:2012:668, paras 21-22
[31] TFEU, Article 48
[32] Guild, *Does European Citizenship Blur the Borders of Solidarity?* in Guild, Rotaeche and Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014), p196
[33] *Ibid*

jobseekers falling under the provisions on workers (Article 45 TFEU), as well as developments in citizenship in Articles 20 and 21 TFEU, and the Treaty status awarded to equal treatment under Article 18 TFEU.

The first case relating to jobseekers, where the Court enforced the Treaty principle of equal treatment is *D'Hoop*.[34] Eligibility for social assistance aimed at jobseekers depended upon an educational requirement, recipients had to have completed their secondary education in an institution which was run, recognised or subsidised by Belgian authorities. This put Belgian citizens at a disadvantage if they chose to move to study elsewhere before joining the Belgian labour market. The Court interpreted this restriction in light of the Citizenship provisions, and held that "*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope ratione materiae of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*."[35] Ms D'Hoop was under the *ratione materiae* of the Treaty, by exercising her freedom to move and reside for the purpose of studying.[36]

The Court found that the right of freedom of movement would be seriously impeded and ineffective if Member States could penalise their nationals for exercising that right.[37] Therefore, the restriction was incompatible with EU law. The Court justified this empowerment of equal treatment and citizenship using the fundamental importance of free

[34] C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-06191
[35] C-224/98 *D'Hoop* (n.34), para 28
[36] *Ibid,* para 29
[37] *Ibid,* para 31

movement.[38] The Court also utilized the Union objective[39] of securing high quality education, by encouraging the mobility of students.[40]

In *Collins,*[41] the Court was able to give greater scope and focus to the equal treatment of EU citizens in a Member State other than their home. The Court held that jobseekers would fall under the remit of Article 48 EEC (now Art 45 TFEU) which granted them the right to reside in another Member State, so they would also enjoy the equal treatment rights under that provision.[42] The Court also read those provisions in the light of the general Treaty right to equal treatment, under Article 12 EC (now Art 18 TFEU).[43] The Court held that all citizens can rely on the right to equal treatment so long as their situation falls within the material scope of Community (EU) law, and those exercising their rights under Article 45 TFEU are considered within that material scope. The Court also reiterated the fundamental status of EU Citizenship and the necessity for equal treatment.[44]

Due to the development of EU citizenship in *Grzelczyk,*[45]which extended equal treatment with regards access to special non-contributory benefits to a mobile student;[46] the Court found that it was no longer possible to exclude "*benefits of a financial nature intended to facilitate access to employment in the labour market*" from the principle of equal treatment.[47]

[38] *Ibid,* para 30
[39] Treaty establishing the European Community [2002] OJ C325/33, Article 3(1)(q) and 149(2); see also TFEU, Article 165
[40] C-224/98 *D'Hoop* (n.34), para 32
[41] C-138/02 *Collins* (n.24)
[42] C-138/02 *Collins* (n.24), paras 60-62
[43] *Ibid*, para 57-60
[44] *Ibid,* para 61
[45] C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, see Ch 2
[46] C-138/02 *Collins* (n.24), paras 60-61
[47] *Ibid,* para 63

The prohibition of discrimination that resulted from the combination of jobseekers right to reside under the provisions of free movement of workers (Art 45 TFEU), citizenship and the equal treatment provisions (Art 18 TFEU) was upheld in cases such as *Ioannidis*[48], *Vatsouras and Koupatantze*[49] and *Prete*.[50] The CJEU provided greater protection for mobile citizens, thus making EU free movement objectives more attainable.

Meulman and de Waele[51] at the time voiced concerns that the Court was giving equal treatment that may cause a strain on national welfare systems, particularly since the jobseeking benefit could be applied indefinitely and could only be denied until the UK authorities were satisfied that Mr Collins was actually seeking employment. After which, Mr Collins would be able to claim the benefit so long as he was actively looking for work. There was some concern that the interests of the Member State were not taken into due regard.

This thesis disagrees with the aforementioned opinion. The cautious wording of the extension of equal treatment illustrates the Court's willingness to strike a balance between EU objectives and Member State interests. Equal treatment to access to benefits is extended only insofar as doing so will aid the search for work, as evidenced by only extending equal treatment to benefits intended to aid the search for work, and only extending residence to those with a genuine chance of engagement. The overriding objective of ensuring the free movement of labour is present, and it is only in strict relation to that objective that equal treatment to access to benefits exists. Contradictory to the "fundamental status" of EU citizenship, it is the jobseeking status of the individuals which produces their right to access

[48] C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECR I-8275
[49] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29)
[50] C-367/11 *Prete* (n.30), paras 21-28
[51] Meulman and de Waele, '*Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship'*, 31(4) Legal Issues of Economic Integration (2004) p257-288

to certain the benefits on the same grounds as nationals. Citizenship was a legal tool that allowed a broader interpretation of Article 45 TFEU and 18 TFEU.

Recently, Member States have utilized the cautious wording regarding the genuine chance of engagement caveat on residence for jobseekers. O'Brien[52] in particular notes the very stringent tests for 'prospects of work' that have been introduced in Belgium and, even more so, the UK. In Belgium, even holding employment (below the amount that would give 'worker' status) does not count as evidence of a genuine chance of engagement. The UK has legislated for a 'Genuine Prospects of Work' test[53] applied to all jobseekers after their initial three months.[54] A 'genuine prospect'is evidenced by a job offer with specific start date and a salary above a minimum subsistence threshold, or a significant change of circumstances within the previous two months which make the gaining of genuine and effective work more imminent.

O'Brien rightly asserts that the UK now demands a practical certainty of employment to allow a jobseeker residence. In the absence of guidance regarding what is a 'genuine chance of employment', other Member States may take the same steps to guard their interests. This is fundamentally against the objective that *Antonissen*[55] intended when allowing residency to continue for a period of longer than six months, where it was held that the Treaty provisions on free movement of workers would be rendered 'ineffective' if interpreted narrowly to exclude jobseekers. The effectiveness of the Treaty provisions depend upon the Member State giving citizens a reasonable time to find employment.[56] Three months, combined with the need of a secure job offer (of a certain type and amount

[52] O'Brien, '*Civis Capitalist Sum: Class as the new guiding principle of EU free movement rights'*, 53 CML Rev 937 (2016), p958-959
[53] The Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014 SI No.2761
[54] Originally after six months, see Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 (SI No. 3032)
[55] C-292/89 *Antonissen* (n.12), para 12
[56] *Ibid*, para 116

of work), surely should be considered to render Article 45 ineffective. The provisions are problematic in their own right,[57] something that it is outside the scope of this thesis to discuss, but in terms of ensuring the free movement of workers is as effective as possible, the UK is failing. The concerns of Meulman and de Waele have not been realised in relation to the UK.

Furthermore, in all of the above cases the Court has suggested that Member States are able to justify discrimination that may be imposed against EU work-seekers trying to claim financial benefits, which will be discussed in the following section of this chapter. Although there was an extended right of free movement, which includes equal treatment to 'benefits intended', the right was never unqualified, and Member State interests have always been taken into account in some manner.

The analysis of the restrictions in the following section will determine what the interests of the Member States are in cases concerning welfare access, and whether those interests have been sufficiently balanced against the promotion free movement objectoves.

## 3. Limits on the Rights of Jobseekers to Social Welfare Benefits:

### 3.1 "The Real Link Test":

The Court agreed there could be some public policy defence to restrictions on equal treatment for benefits access in *D'Hoop*,[58] and affirmed this in subsequent case law.[59] It is not uncommon for EU freedoms to be restricted, as Meulman and de Waele highlight that the Court utilized the mandatory (or 'overriding') requirements doctrine to allow

[57] O'Brien, *Civis Capitalist Sum* (n.52), p958-959; O'Brien, *Unity in Adversity* (Hart 2017) p138-148; Martin Williams - Child Poverty Action Group: "KPOW to the GPOW", advice on the test, 2015, available at < http://www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf> accessed on 12/02/19

[58] C-224/98 *D'Hoop* (n.34)

[59] C-138/02 *Collins* (n.24) para 67, C-258/04 *Ioannidis* (n.48), para 30, C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29), para 38

limitations on equal treatment.[60] The doctrine allows Member States to justify restrictions based on a legitimate aim, with clear criteria independent of nationality that EU citizens can be made aware of in advance and, above all, are proportionate to the aim. The aim of the restrictions will somewhat represent the Member States interests in these cases, so the greater weight the Court gives to those aims, the more Member State interests are supported.

The 'legitimate aim' in the cases concerning jobseekers equal treatment is the determination, by national authorities, of a 'real link' between the claimant and the geographical employment market. In *D'Hoop*[61] the Court found that the aim of the benefit was to facilitate access to employment, so it was legitimate to require jobseeking EU citizens to have some link to the employment market. The same sentiment was repeated in cases concerning similar benefits, such as *Ioannidis,*[62] *Prete,*[63]*Vatsouras and Koupatantze*[64] and *Collins.*[65]

The interests of the Member States appear to be an amalgamation of issues. The most obvious interests is control over their welfare states. In *Commission v Belgium*[66], the Belgian government argued that the principle of subsidiarity ought to be considered, and held that because Member States retain competence over their social policy they should have sufficient margin of appreciation concerning restrictions.[67] Minderhoud[68] notes Member States' wish to retain absolute sovereignty over their social security systems; evidenced by the failed European Constitution, where there was no appetite for a

[60] Meulman and de Waele (n.51), p277
[61] C-224/98 *D'Hoop* (n.34), para 38
[62] C-258/04 *Ioannidis* (n.48), para 30
[63] C-367/11 *Prete* (n.30), para 33
[64] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29), para 38
[65] C-138/02 *Collins* (n.24), para 67
[66] C-278/94, *Commission v Belgium* (1996) ECR I-04307
[67] *Ibid,* para 35
[68] Minderhoud, '*The "Other" EU Security: Social Protection',* 8(4) European Journal of Social Security (2006)

harmonized European social security system, and countries such as the UK and the Netherlands were concerned about their ability to protect the national welfare system.[69] This thesis agrees that Member States should retain ultimate competence in such a territorial and politically sensitive area, so subsidiarity should be a consideration in cases regarding restrictions on benefits access. However, interferences by EU law do not severely hamper that competence. Member States are still free to compose their social systems as they wish, there is no obligation to have in place particular types of benefits; EU law only ensures that methods of restrictions to equal access to benefits does not go beyond what is necessary to protect the Member State interests.

Over the course of the last twenty years, there has been a considerable shift in the reasonings behind restrictions on access to financial benefits. It is difficult to pinpoint exactly what Member State interests are. The Commission, in its submission in *Collins*[70], summarizes that Member State restrictions are intended "*to avoid 'benefit tourism' and thus the possibility of abuse by work-seekers who are not genuine*."[71] Giubboni also believes the 'real link' is there "*in order to prevent an opportunistic use of the freedom of movement for the mere sake of benefit tourism.*"[72] Although benefit tourism rhetoric has surrounded this area of EU law and national welfare policy (particular in the UK[73]), it is in the opinion of this thesis that such an abstract and politicized concept is unhelpful for assessing the balancing of Member State interests and EU objectives. The concept of widespread welfare abuse by EU citizens has never been evidenced,[74] so it cannot be said that Member State

[69] *Ibid,* p363
[70] C-138/02 *Collins* (n.24)
[71] *Ibid,* para 50
[72] Giubboni, '*European Citizenship and Social Rights in Times of Crises*' (2014) 15(5) German Law Journal 935, p944
[73] O'Brien, *Unity in Adversity* (n.57), p120
[74] O'Brien, *Unity in Adversity* (n.57), p120; Thym, '*The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*' (2015) 52 CML Rev 17, p21; Verschueren, '*Free Movement or Benefit Tourism? The Unreasonable Burden of Brey*' (2014) 16 European Journal of Migration and Law 147, p149; Dougan, '*National Welfare Systems, Residency Requirements And EU Law: Some Brief*

interests are founded in protecting themselves from benefit tourism. Moreover, the term is not easily justiciable and does not appear to fully represent Member State interests.

It is artificial to suggest that restrictions are only aimed at combatting welfare abuse, in reality they are intended to reduce the number of benefit claimants, to those who can make the most effective use out of the benefits. By requiring a link between the intended purpose of the benefit at hand, and the EU citizen attempting to claim it, a Member State ensures legitimacy and efficacy, not simply abuse prevention.

The Court did not utilize the notion of 'benefit tourism', nor did it provide a specific way for Member States to determine a 'real link' between a citizen and their employment market. De Witte criticizes[75] the lack of normative substance granted by the CJEU to the 'real link' test.[76] However, since the interests of the Member States are focused on ensuring legitimate claims to their social benefits, according to the purpose of those benefits, a level of flexibility is desirable. The benefits and their purposes are different across the variety of welfare systems within the EU. It would be unacceptable for the Court to have a definitive real link test to apply, as it is not up to the Court to decide national welfare policy. As Muelman and de Waele suggest, it is up to the Member States to take the tools the Court has given them and construct social security policy that are able to comply with the advancements of citizenship, whilst also realising the aims of the national welfare state.[77] It is also important to also recognise the long history of nationality and territoriality as

*Comments'* (2016) 18(2) European Journal of Social Security, page 102; BBC News 14th October 2013, *Benefit tourism claims: European Commission urges UK to provide evidence,* <http://www.bbc.co.uk/news/uk-politics-24522653> accessed on 21/11/17

[75] de Witte, '*The End of EU Citizenship and the Means of Non-discrimination'* (2011) 18 Maastricht Journal of European & Comparative Law 86

[76] *Ibid,* p104

[77] Meulman and de Waele (n.51), p287

borders of welfare responsibility;[78] so aligning welfare policy with EU citizenship goals will be slow and difficult.

Focusing on the efficacy of the benefits cuts down the range of beneficiaries that can claim them, which highlights the economic interests of Member States. The necessity for benefits only to be used for their intended purposes, in the most effective manner possible, flows from the fact that Member States' financial resources are finite[79] and any unnecessary pressure on them should be avoided.

In the first instances of the 'real link' being used as a concept for Member State restriction on jobseeking benefits, it appears to sufficiently balance the competing interests. The Court utilized the principle of proportionality in order effectively ensure this balance.[80] By asking whether the measure imposed by national authorities is absolutely necessary in order to show a link between the claimant and the geographical employment market, the Court rules out restrictions merely intended to make it very difficult for EU citizens to claim benefits.

Giubonni states that proportionality is essential because when free movement comes at a cost to welfare systems, the freedoms have to be restricted by Member States. There is no collective pot of finances at the EU level that may be redistributed to cover the cost of EU citizens in need, so instead there must be a balancing of interests weighing the need to protect fundamental freedoms against the general interest of protecting welfare systems.[81] Dougan also opines that after the creation of citizenship changed the threshold of EU

[78] Dougan, *Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?* in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Hart 2009), p119
[79] *Ibid*
[80] Agustín José Menéndez, *'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship'* (2014) 15(5) German Law Journal 907, p924
[81] Giubboni, *European Citizenship and Social Rights in Times of Crises* (n.72), p 944

competence to include welfare access,[82] so the balance of Member State interests and citizenship interests could only be legitimately undertaken by a proportionality review.[83]

The restrictions regarding the Belgian 'tide-over allowance' illustrate how this balancing act is undertaken. The benefit has been the subject of numerous judgments due to the apparent absence of proportionality of the restrictions placed upon it. The restrictions initially linked the grant of the benefit to the location of the claimant's secondary education.[84] This constituted indirect discrimination in the *D'Hoop*[85] judgment, as these requirements create a disadvantage for citizens who a) were not born in Belgium and b) were born in Belgium but subsequently utilised their freedom to move and completed education in another Member State.[86] The Belgian government attempted to justify the indirect discrimination, on the groups of requiring a link between the claimant and the benefit, but failed to successfully do so.

In *D'Hoop*[87] and other cases relating to the allowance, such as *Commission v Belgium*[88] *Ioannidis*,[89] and *Prete*,[90] the Court found that having local education does not show a 'real link' between the citizen and the labour market of that state.[91] The Court sufficiently balanced the interests of Belgium (ensuring benefit claimants are likely to enter the employment market), with the necessity to protect the efficiency of free movement, by ensuring that 'real link' determinents achieve their purpose rather than discouraging free

[82] Dougan, *Expanding the Frontiers of Union Citizenship* (n.78)
[83] Dougan, '*The Constitutional Dimension to the case law on Union citizenship'* (2006) 31(5) EL Rev 613, p632
[84] Article 36(1), first subparagraph, of the Royal Decree of 25 November 1991 on unemployment (*Moniteur belge* of 31 December 1991, p. 29888)
[85] C-224/98 *D'Hoop* (n.34)
[86] *Ibid,* para 34
[87] *Ibid*
[88] Case C-278/94 *Commission v Belgium* (n.)
[89] C-258/04 *Ioannidis* (n.48)
[90] C-367/11 *Prete* (n.30)
[91] C-224/98 *D'Hoop* (n.34), para 39

movement by making access to benefits impossible after exercising free movement to the Member State (*Ioannidis),* or upon return from another Member State (*D'Hoop*).

In *D'Hoop*[92] the Court found that the restriction as a single condition would be incompatible, as it excluded all other representative elements that *would* be able to show a link between the claimant and the employment market. If there was alternative ways for citizens to show their link to the employment market, the legislation would still be compatible with free movement law. The main interest of Belgium lay in ensuring only those who were capable of engaging with the employment market got the benefit that facilitated their doing so, but the place of education does not guarantee this. The Court in *Prete*[93] rightly stated that "*the knowledge acquired by a student in the course of his higher education does not in general assign* [citizens] *to a particular geographical labour market."*[94]

The balance will be more difficult to judge in cases where the restriction is not so obviously erroneous. Proportionality can hold Member State legislators to extremely high standards, depending on how the CJEU views the necessity of the provision it is assessing. If a restriction provision is fit for the 'real link' purpose, but could be less restrictive, it is then up to the CJEU to determine whether it can be deemed 'necessary' or not. The Court's interpretation will affect the subsidiarity interest of Member States, as finding restrictions that *do* enable the determination of a 'real link' to be unnecessarily restrictive and requiring the Member State to change their approach, encroaches more deeply upon the competence of the Member States to structure their welfare systems. Proportionality assessments will also affect the balance between effective free movement and Member State interests; for

[92] *Ibid*
[93] C-367/11 *Prete* (n.30)
[94] *Ibid,* para 45

example, if the Court determines single and discriminatory criteria for benefits access are not compatible with EU law, and instead requires the Member States to take into consideration a vast range of criteria when assessing the 'real link', this is a higher proportionality standard than requiring the Member State to have one or two factors that could determine a 'real link'. The more rigorously proportionality is applied, the less Member State interests are taken into account.

Giubboni[95] submits that a strict imposition of the principle of proportionality will be systematically biased against the Member States in favour of the European citizen. This is hard to disagree with, as proportionality assessments are designed to take a critical view of policies and question if they could have been less restrictive. Menéndez adds that the CJEU tends to give priority to the economic freedoms provided by the EU framework and sees any breach of these as having fundamental importance, rather than give equal weight to competing interests as national courts do.[96] The following analysis finds this to be somewhat true in the earlier cases regarding jobseekers. However, despite the somewhat intrusive nature of proportionality assessments, it is still in the opinion of this thesis that they are fit for the purpose of sufficiently regulating restrictions on free movement law; it is important to remember that there are limited options available for overcoming the tension between free movement and protection of the welfare state. Proportionality is flexible enough for the CJEU to give more weight to Member State interests where necessary, and it is a legal tool that Member States are familiar with. Therefore, the CJEU could strike a fair balance that Member States could understand and reasonably foresee.

[95] Giubboni, *'European Citizenship and Social Rights in Times of Crises'* (n.72), p945
[96] Menéndez (n.80), p926

After *D'Hoop,* the balance the Court strikes appears to shift dramatically. In *Ioannidis*[97] and *Prete*[98] the Court takes a more hard-line approach to the proportionality requirement on Member States. Later, in the post-*Dano*[99] case law of *Alimanovic*[100] and *García-Nieto,*[101] the proportionality pendulum swings the other way, and is barely applied at all.

The same restriction as in *D'Hoop*[102] applied in *Ioannidis,*[103] with the exception that citizens could claim the benefit if they had parents who were mobile workers in Belgium. The Court started to use proportionality to increase the rights of citizens; admitting that mobile worker parents could potentially show a link between the citizen and the employment market, but that the requirements would exclude citizens who do not have parents working in the host Member State, who may also have a different link to the employment market.[104]

This is a difficult balance to judge, on the one hand the interest of the Member State in ring-fencing its welfare benefits and ensuring it retains its full competence must be considered. On the other hand, Belgium could be hindering free movement of a large range of citizens, who could enrich its employment market in the way that the fundamental principle of EU free movement foresees and tries to attain.

It could be argued that the Court oversteps here. By finding the arguably acceptable criteria to be disproportionate, it appears to suggest that restrictions should determine a 'real link', *and* exclude only a low proportion of jobseekers. This gives little regard to the weight

[97] C-258/04 *Ioannidis* (n.48)
[98] C-367/11 *Prete* (n.30)
[99] C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (2014) EU:C:2014:2358, see Chapter 3 for analysis
[100] C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (2015) EU:C:2015:210
[101] C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* (2016) EU:C:2016:114
[102] C-224/98 *D'Hoop* (n.34), para 39
[103] C-258/04 *Ioannidis* (n.48)
[104] *Ibid,* para 33

Member States put on certain factors to determine integration in their own territiories. Therefore, in terms of respecting the subsidiarity and competence of the Member State, *Ioannidis* is certainly on the cusp of presenting imbalance, favouring EU objectives over Member State interests to an almost illegitimate degree (although, not unjustifiably so).

The first successful defence of a restriction on equal treatment for access to jobseeking benefits came from the UK in the *Collins*[105] case, where the Court found a durational residence requirement to be a proportional way of determining a link between the jobseeking citizen and jobseeker's allowance. The UK required EU jobseekers to be habitually resident ('in Great Britain') before claiming the jobseeker's allowance benefit.[106] The Court accepted that the existence of a link between claimant and the employment market could be determined by the person having genuinely sought work in the Member State for an 'appreciable period'.[107] However, durational residence requirements would only be justifiable if the requisite period did not go beyond what is necessary to show that a person has genuinely sought work in the host state.[108] Unfortunately, the period that would be 'necessary' remained undefined. Golynker[109] questions whether a brief search for work could demonstrate a link with the employment market, especially when those searches do not always lead to employment.[110] However, this appears to confuse the idea of a 'chance' of engagement with a 'certainty' of engagement; the free movement of workers requires citizens to be given a chance.[111] It would be ineffective if they required certainty.

[105] C-138/02 *Collins* (n.24)
[106] The Jobseekers Act 1995, section 1(2)(i); Statutory Instruments 1996 No. 207, The Jobseeker's Allowance Regulations 1996
[107] C-138/02 *Collins* (n.24), para 70
[108] *Ibid,* para 72
[109] Golynker, '*Jobseekers' rights in the European Union: challenges of changing the paradigm of social society*' (2005) 30(1) EL Rev 111, p118
[110] *Ibid*
[111] O'Brien, *Civis Capitalist Sum* (n.52)*,* p959

The Court struck a fair and reasonable balance between the interests of the UK and the interests of enhancing free movement. The subsidiarity interest is protected, by the UK having discretion on the length of the durational residency requirement, so long as it is not unduly restrictive. As Meulman and de Waele note, "*rather than putting flesh on the bones of Community citizenship, the case removes a rib and hands it back to Member States*"[112]. Davies also praises the case for confirming that equal treatment is not an absolute right in EU law the minute residency is established in another Member State.[113] It may be suggested that the Court simply avoids the apparent tension between EU and national law, by declining to take a stance on when a durational residence requirement will go beyond what is necessary. However, the Court can only rule on the proportionality of what the Member State has implemented, it is not open to the Court to create policies in areas that are almost entirely in the competence of national authorities. Furthermore, a softer approach to proportionality is required in sensitive welfare cases; it is reasonable for the Court to intervene only where 'real link' legislation is unduly restrictive, like in *D'Hoop,* or arguably *Ioannidis*.

After unsuccessful jusitification in the CJEU, Belgian law[114] was amended so that claimants could access jobseeker benefits if they completed six years of studies in a Belgian educational establishment. The Decree retained the original requirements from *Ioannidis* and *D'Hoop* as well. The updated restrictions were the subject of the *Prete*[115] judgment.

[112] Meulman and de Waele (n.51), p285
[113] Davies, '*Any Place I Hang My Hat?' or: Residence is the New Nationality'* (2005) 11(1) European Law Journal 43, pp54-55
[114] Article 36(1), first subparagraph, of the Royal Decree of 25 November 1991 on unemployment (*Moniteur belge* of 31 December 1991, p. 29888), as amended by the Royal Decree of 11 February 2003 (*Moniteur belge* of 19 February 2003, p. 8026, 'the Royal Decree')
[115] C-367/11 *Prete* (n.30)

The CJEU re-iterated that educational requirements, regardless of time limits,[116] are disproportionate, as they prevent any account being taken of other circumstances that could determine a real link between a citizen and the employment market.[117]

The wording of this judgment is important; the Court could have merely re-stated the *D'Hoop* finding, that educational requirements are not capable of showing a link between a citizen and the Member State's employment market. Instead, the judgment suggests that the restriction is incompatible because it fails to consider a range of other factors that would determine a link. This encroaches upon the subsidiarity and competence issue. The Court seems to lose sight of the Member State's concern to ensure efficacy and legitimacy of claimants, by suggesting that the authorities should have considered Mrs Prete's marriage to a Belgian national, and her settled life in Belgium after that marriage. She had also been registered with the employment service for a period of 16 months, and actively searched for work,[118] but the Court clearly stated that social factors are capable of determining a link to the labour market of the Member State and that this is supported by the Advocate General's opinion.[119] AG Cruz Villalón does not suggest that Mrs Prete's circumstances show that she is integrated with the Belgian labour market, instead suggests she is integrated with Belgian *society*.[120] The AG, arguably misguidedly, suggests that EU case-law allows Member States to require integration, rather than specific labour market integration, and that "*this may […]be the connection between the job seeker and the host society, whether through the existence of family or emotional ties […].*"[121]

[116] *Ibid,* paras 37-38
[117] *Ibid,* para 39
[118] *Ibid*, para 40
[119] *Ibid,* para 44
[120] C-367/11 *Prete* (n.30) Opinion of AG Cruz Villalón, para 48
[121] *Ibid,* para 39

There appears to be a requirement for Member States to take into consideration all factors that may determine the integration of the jobseeking citizen. AG Cruz Villalón suggests this, by stating that the fact that the legislation still found her to have an insufficient link, was proof that the legislation was disproportionate, as she was clearly integrated. The AG suggested that restrictions with a general nature that make it impossible to take into consideration the 'specific circumstances of each case', would always be disproportionate.[122] A similar argument was put forward by AG Wathelet in the opinion on *García-Nieto*;[123] where it was held that it is contrary to the principle of equal treatment under Article 45(2) to automatically exclude a citizen from a benefit "*without allowing that citizen to demonstrate the existence of a genuine link with the host Member State*" (note, not the *labour market* of the Member State).[124] In AG Wathelet's opinion, a singular requirement which would not allow for consideration of any other factors that could possibly determine the real link would fall foul of free movement legislation as it would undoubtedly go beyond what is necessary to determine the real link.[125]Such a determination would restrict Member State competence to decide how and when citizens become 'integrated' with their labour market (or societies, as it is suggested they should accept), replacing this with the Court's own view of integration and making it difficult to legislate with certainty.

The Court in *Prete* reiterates the judgment in *Collins* and suggests that the fact a citizen has resided for a certain amount of time in a Member State is sufficient to show a link with the labour market.[126] While this may be so, it should not be for the Court to push the UK's criteria for restriction on to Belgium even if it appears less restrictive, and therefore better,

[122] *Ibid,* para 50
[123] García-Nieto
[124] C-299/14 *García-Nieto* (n.101) Opinion of AG Wathelet, para 88
[125] *Ibid*, para 87
[126] C-367/11 *Prete* (n.30), para 47

in the eyes of the Court. A generalised system, requiring residency to determine the 'real link', would need to be legislated for at the EU level and set out exactly how long a jobseeker should be resident and actively searching for work in a Member State before they acquire a 'real link'.

Requiring Member States to consider all forms of integration before restricting equal treatment, shifts the focus of their interests from concerns about the legitimacy of claims to, and efficiency of the workings of, the social system, towards a much more theoretical and abstract concern about social solidarity. It is also likely to broaden the scope of beneficiaries that will be entitled to equal treatment to benefits access, and therefore is less capable of taking into consideration the economic interests of the Member States and their desire to protect their limited public finances. The Member State interests are therefore less likely to be promoted and considered by the free movement framework, resulting in possible imbalances.

The next section of this chapter will look at the possible reasons behind the Court's shift in attitude, and whether it can be justified by the necessity to achieve EU objectives.

*Legitimization of benefits claims through solidarity:*

There is an idea in the free movement literature that the combination of EU citizenship with a 'shared experience' between citizens and a host Member State has promoted the legitimacy of claims on the welfare system by mobile EU citizens.[127] Before the introduction of citizenship, it was accepted that economic activity within a host Member

[127] Dougan, *Expanding the Frontiers of Union Citizenship* (n.78), page 134; Guild, *Does European Citizenship Blur the Borders of Solidarity* (n.32); Barnard, *EU Citizenship and the Principle of Solidarity,* in Spaventa and Dougan (eds.), *Social Welfare and EU Law* (Hart 2005), pp165-166; Somek, '*Solidarity decomposed: being and time in European citizenship'* (2007) 32(6) EL Rev, pp787-818; Giubboni, '*Free Movement of Persons and European Solidarity'* (2007) 13(3) European Law Journal, pp360-379

State justifies claims to the social system of that State.[128] Without the economic activity, citizens need other justifications for claims made on the welfare system. Solidarity provides this, through the concept of looking after (in this case, funding, through taxation) those in a common group. Solidarity, despite Union citizenship, is not fully forthcoming across the EU Member States,[129] so extension of solidarity must be furthered justified by some other means, such as 'integration' that is shown through comparability (the 'real link' test, above).

The need for solidarity flows from the types of benefits that EU citizens may attempt to claim during their residency in a host Member State. De Witte[130] finds that the citizenship case law of the CJEU has transcended away from the traditional path of 'discrimination – justification – proportionality', into a more pragmatic test of comparability between free moving indigent EU citizens and the nationals of a host Member State in order to deal with this in a viable way.[131]National welfare systems, particularly in the form of social assistance (tax-funded benefits), are redistributed funds that are justified by symbolic notions of solidarity and belonging within the nation State.[132] Academics such as de Witte, Golynker[133] and O'Brien[134] note how the Court has utilized solidaristic notions to both legitimize and reduce claims on the welfare system. By determining the level of affiliation with a State, those from outside the inclusive group of national solidarity can justify financial claims on the State.[135] The real link recognises that EU citizens come from outside of the national scope of welfare access, and must provide some way of replicating the

[128] Dougan, *Expanding the Frontiers of Union Citizenship* (n.78), page 120
[129] See analysis below for further detail
[130] de Witte, *The End of EU Citizenship* (n.75)
[131] *Ibid,* pp93-94
[132] *Ibid*
[133] Golynker, *Jobseekers' rights in the European Union* (n.109)
[134] O'Brien, '*Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity*' (2008) 33(5) EL Rev 643, p643
[135] Golynker, *Jobseekers' rights in the European Union* (n.109), p120

closeness formed by national solidarity and therefore 'earn equal treatment'.[136] Obviously, the more factors that are open to comparison, the more beneficiaries will benefit from EU citizenship and equal treatment to welfare benefits. However, the more factors open to comparison, the less competence the Member States have over determining what constitutes integration with their territory.

De Witte uses the case law from *D'Hoop* to *Collins* to show how the Court successfully engages in comparability. The Court determines what kind of solidarity is a pre-requisite of the benefit at issue, and rejects any attempts to restrict the benefit in a way that does not allow determination of solidarity links, i.e. an educational requirement in *D'Hoop* could not show a link to the employment market.[137] The author also notes more 'intuitive' case law from the Court, which embarks upon a robust and pragmatic comparability exercise to determine solidarity: *Martinez Sala*[138] and *Grzelczyk*[139] (discussed in chapter two) are both examples of the Court considering the need for equal treatment of those in a similar situation to nationals. Ms Martinez Sala was deserving because she had worked for the majority of her lengthy residency in Germany, Mr Grzelczyk was because he had funded his first three years of study before asking for social assistance. However, de Witte notes that the pragmatic approach is found wanting in terms of normative elaboration.[140] *Prete* suffers from the same unfortunate pragmatism, as the Court utilizes personal circumstances to demonstrate a level of integration that warrants equal treatment to benefits access, conflating personal circumstances and the outcome of one particular case, with the necessity and proportionality of a restriction. Iliopoulou-Penot[141]points out that the Court

[136] O'Brien, *Real links, abstract rights and false alarms* (n.134), p649
[137] de Witte, *The End of EU Citizenship* (n.75), p104
[138] C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691
[139] C-184/99 *Grzelczyk* (n.45)
[140] de Witte, *The End of EU Citizenship* (n.75), p104
[141] Iliopoulou-Penot, *Deconstructing the former edifice of Union citizenship? The Alimanovic judgment* (2016) 53(4) CML Rev 1007, pp1011-1012

gave weight to 'imprecise concepts', leading to confusion within the national authorities, causing further litigation.[142] The author particularly notes how the administrative difficulty faced by the Germany authorities in applying EU law without uniformity lead to the reference of the *Alimanovic* case to the CJEU.[143]

It is actually suggested by O'Brien that the degree of flexibility required would not actually overburden authorities, as she draws analogy from the case of *Geven*[144] under Regulation 1612/68 where the Court found a real link test to be acceptable as it provided more than one way of accessing a benefit.[145] O'Brien submits that now it is well established that singular criterion tests are unacceptable, Member States will be able to redefine their real link tests to include more than one criterion and can generalise restrictions from that point.[146] At this point in the development of EU law, this thesis is inclined to disagree, as stated above, *Prete* seems to suggest a need to take into consideration the particulars of the case and if possible integration is not covered by a Member States' 'real link' legislation, the test will not pass a proportionality assessment. Furthermore, *Ioaniddis* is a clear example that it is not just the number of criterion or whether they are fit for purpose that matters, but also the degree of restriction of equal access to benefits.

De Witte finds good reasons for non-general approach to comparability, in cases such as *Collins;* in order to avoid great clashes between Member State interests and EU citizenship, specific types of solidarity should be recognised by looking at the solidaristic commitments that underlie a particular welfare benefit.[147] The author admits that this may be difficult in some cases,[148] due to the plethora of sociological underpinnings that may justify the

[142] *Ibid,* p1011
[143] *Ibid,* pp1011-1012
[144] Case C-213/05 *Wendy Geven v Land Nordrhein-Westfalen,* [2007] ECR I-96347, para 25
[145] O'Brien, *Real links, abstract rights and false alarms* (n.134), p651
[146] *Ibid*
[147] de Witte, *The End of EU Citizenship* (n.75), p94
[148] *Ibid,* page 95

provision of certain welfare benefits, but as already noted there needs to be some way to ease tensions in this area.

This thesis agrees that a principled, normative test of 'solidarity' is the best course of action in terms of balancing the interests of the Member States with the enhancement of free movement. Although general recognition of solidarity through personal ties may legitimise the CJEU's jurisprudence, it is obvious that there is no way to fully replicate belonging to a nation state, whereby a person is deserving of social welfare because of historical, cultural and community ties; and to realistically enable citizens to do so would involve rigorous, case-by-case assessments of their individual circumstances.[149] Such a requirement would restrict the Member States' ability to determine their own solidarity boundaries, as well as burdening their administrations. Personal circumstances should therefore not constitute a real link to the Member State's employment market. Instead of assessing restricitons on welfare access through considering the range of factors in a citizens personal circumstances that were taken into account by the Member State, the CJEU should consider whether the restrictions allowed a Member State to determine intergration (or 'solidarity') as required by the type of benefit at hand.

*The need to give credence and weight to EU citizenship:*

This reasoning for the shift in case law is linked to the above discussion of transnational solidarity, but unfortunately, as noted by Guild,[150] the overlap between the notion of citizenship and the theoretical underpinnings of the welfare state are complicated; it is therefore easier to discuss them separately whilst acknowledging some overlap. Barnard[151] presents an accurate picture of how solidarity is used as a concept to enhance citizenship:

[149] *Ibid,* page 106
[150] See Guild, *Does European Citizenship Blur the Borders of Solidarity* (n.32), pp190-192
[151] Barnard, *EU Citizenship and the Principle of Solidarity* (n.127)

the Court uses the citizenship provisions in Articles 20-21 TFEU to find a commonality between nationals of a Member State and EU citizens. It then legitimizes extension of rights to economically inactive citizens using the principle of (transnational) 'solidarity', which in turn makes Union Citizenship more robust, by harnessing greater solidarity amongst EU citizens that is akin to national solidarity.[152] Guild[153] also notes the special relationship between social solidarity and social cohesion, as redistribution of funds is based upon solidarity, a large degree of social cohesion is necessary before this can be achieved and may be something the CJEU is aiming for in its jurisprudence.

As noted in the introduction to this thesis, free movement law (particularly for the economically inactive) has often been analysed through the lens of its contributions towards Union citizenship. Guild notes how equality is a fundamental aspect of 'citizenship' as it is understood in the European sense; therefore the extent that all EU citizens are treated equally in terms of social solidarity is a useful measure for the success, or perhaps magnitude, of EU citizenship.[154]

Verschueren finds that the 'real link' is part of a functional approach by the court to give fuller effectiveness to the citizenship provisions in Article 21 TFEU (ex. Art 18 EC) and allow the free movement of the economically inactive as well as those who are involved in some economic activity.[155] Dougan also highlights how giving more meaningful value to EU citizenship is an important policy objective for the CJEU, and has been used alongside the idea of the real link (or 'shared experience') to legitimize extending the national welfare solidarity to EU citizens;[156] whilst also retaining a compromise, taking into consideration

[152] *Ibid,* pp174-175
[153] Guild, *Does European Citizenship Blur the Borders of Solidarity?* (n.32), p191
[154] *Ibid*
[155] Verschueren, '*European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems'* (2007) 9 European Journal of Migration Law 307, p332
[156] Dougan, *Expanding the Frontiers of Union Citizenship* (n.78), page 134

the unwillingness of the Member States to finance indigent EU citizens.[157] Dougan also notes how citizenship has been criticised because it has little implications for most EU citizens,[158] which is also noted by O'Brien who states that the 'euro-solidarity' imposed by the 'real link' tests are "*spiritually bankrupt and morally insipid"*,[159] a view that is shared by Somek,[160] and Kochenov and Plender.[161]

This is because 'solidarity', as seen above, depends on integration,[162] so there is no 'perfect assimilation' of EU citizens into the welfare states of host Member States.[163] Greater assimilation could therefore be a step forward in the fulfilment of meaningful European citizenship.

This thesis is of the opinion that pushing for the full realization of citizenship, though it may be a policy objective of the EU, detriments the interests of the Member States far too much to warrant the carte blanche expansion of equal treatment to welfare access. EU citizenship is not like national citizenship (and is not intended to be), is not born out of community social ties and history but out of normative factors, developed by judges as a way to legitimize and further integration, as noticed by de Witte.[164] Dougan rightly states that it cannot guarantee full political membership.[165]

It is arguably more appropriate for the Court to take a cautious approach to building citizenship, rather than enhancing social rights without the requisite social ties to do so.[166]

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[157] *Ibid*
[158] Dougan, *The Court Helps Those Who Help Themselves,* (n.2)
[159] O'Brien, *Real links, abstract rights and false alarms* (n.134) p648
[160] Somek, *Solidarity decomposed* (n.127), p807
[161] Kochenov and Plender, *'EU Citizenship: from an incipient form to an incipient substance? The discovery of the Treaty text'* (2012) 37(4) EL Rev 369, pp383-3844
[162] Somek, *Solidarity decomposed* (n.127), p807
[163] Barnard, *EU Citizenship and the Principle of Solidarity* (n.127), p166
[164] de Witte, *The End of EU Citizenship* (n.75), p90
[165] Dougan, '*Fees, Grants, Loans, and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?*' (2005) 42 CML Rev 943, p954
[166] Davies, '*The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare',* in Ross and Borgmann-Prebil *Promoting Solidarity in the European Union* (OUP 2010)

This would ensure a better balance between free movement and the Member State interests. The objective that legitimizes jobseeker's equal treatment for access to social benefits is the need to ensure the full efficiency of free movement of workers, by allowing greater cross-border mobility of potential workers.[167]In order to retain this (partly economic-based[168]) legitimacy, the Court should stay focused on the need to ensure a link between a citizen and a Member State's employment market. In doing so, the Court will also retain some normative value when using the concept of solidarity, rather than erroneously relying on the personal circumstances of citizens to determine the sufficiency of the real link. This is not only in the interests of legitimacy at the EU level, it also ensures that Member States are not administratively burdened with overly-personalized tests, and also that citizens themselves are more sure of their rights.[169]

Despite the criticisms that citizenship is devoid of any substantial meaning without generous interpretation from the CJEU, this thesis is of the opinion that the competence of Member States in this highly sensitive area needs to be given sufficient weight. To fail to do so could, as noted by Barnard, give rise to hostility towards free movement[170] (which may be evidenced already, by the UK's decision to leave the EU). A more substantial social order within the Union would need to come from the legislator and not the CJEU.[171] The CRD demonstrates the legislative choices for citizenship rights, its provisions have resulted in much more restrictive case law and national policies on equal treatment and benefits access for EU jobseekers and economically inactive citizens.[172]

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[167] Golynker, *Jobseekers' rights in the European Union* (n.109), p118
[168] Dougan, *The Court Helps Those Who Help Themselves* (n.2) p31; O'Brien, *Real links, abstract rights and false alarms* (n.134), p648
[169] Iliopoulou-Penot, (n.141), pp1011-1012
[170] Barnard, *EU Citizenship and the Principle of Solidarity* (n.127), p175
[171] Domurath, '*The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach'* (2013) 35(4) Journal of European Integration
[172] *Ibid*

## 3.2 Restrictions on access to social assistance for jobseekers in the CRD:

In *Collins* the Court noted that it was derogating from the previous case law such as *Lebon*[173] and *Commission v Belgium*[174], both of which had affirmed that jobseekers had no right to social assistance in Member States other than their home.[175] The CRD post-dates *Collins* and yet codifies free movement law as interpreted in the former judgments of *Lebon* and *Commission v Belgium*.[176]

Article 24(2) of the Directive sets out that Member States are under no obligation to offer social assistance to jobseekers within the first three months of their residence, and within the longer period in which they are entitled to reside in order to seek work.[177] Nic Shuibhne[178] points out that this is contradictory to the objective of the Directive, to enhance free movement rights.[179] The directive 'consolidates' the law of free movement and yet makes a point to ignore part of it developed by the Court in in *Collins*, which interpreted access to some social benefits as a Treaty right.[180] Nic Shuibhne asserts the convincing opinion that *Collins* was deliberately excluded from the wording of the newer free movement provisions.[181] Golynker[182] is in agreement with this and notes that the secondary legislation is proof that the Member States did not wish citizenship to develop in the way that was so generous to the economically inactive; a concern that the previous section of this chapter highlighted.

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[173] Case 316/85 *Lebon* (n.4), paras 35 and 36
[174] C-344/95 *Commission v Belgium* (n.14)
[175] C-138/02 *Collins* (n.24)
[176] CRD, Article 24(2)
[177] CRD, Article 24
[178] Nic Shuibhne, *The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice*, in Syrpis (ed.) *The Judiciary, The Legislature and The EU Internal Market* (Cambridge University Press 2012)
[179] *Ibid,* p331 and 358
[180] *Ibid,* p359
[181] *Ibid,* p360
[182] Golynker, Jobseekers' rights in the European Union (n.109), p119

Both Dougan[183] and Hailbronner[184] predicted litigation arising from the gap between the CRD and the case law on Article 45 TFEU. Neither foresaw the Court challenging the legitimacy of the directly discriminatory measure in Article 24(2), respectively stating that the Court would avoid a conflict between its citizenship case law and the Directive if possible.[185] Hailbronner saw this as a failing of the Court's citizenship methodology, which was not robust enough to withstand any conflict between the case law and the CRD, since the interpretation of Articles 21 and 18 TFEU went beyond their legitimate scope.[186] This chapter has already discussed the rather 'circular' methodology of the Court, described by Barnard.[187] Hailbronner notes that in the current EU legal order, where redistribution of resources is solely within the competence of the Member States, there has been no transferral of power to the EU to legislate and control social security and welfare.[188] Therefore, "*the introduction of Union citizenship is not a sufficient explanation for a fundamental reconstruction of social rights of Union citizens.*"[189] That is not to say that economically inactive EU citizens *should* be excluded from welfare benefits, there may be a plethora of reasons why this should not be the case. However, Hailbronner touches upon an issue that encapsulates the central theme of this thesis: any desire to achieve full recognition of the freedom to move for *all* EU citizens *must* take into consideration the legitimate interests of Member States and balance the two interests.[190] Such a balance may recognise the social inclusion of EU citizens in particular circumstances and instances, but it is impossible to overlook the lack of legitimacy that the EU has in this particularly

[183] Dougan, *The Court Helps Those Who Help Themselves* (n.2), pp22-24
[184] Hailbronner, *Union Citizenship and Access to Social Benefits* (2005) 42 CML Rev 1245, p1264
[185] Dougan, *The Court Helps Those Who Help Themselves* (n.2), p23; Hailbronner, *ibid* p1264
[186] Hailbronner, *ibid* p1266
[187] Barnard, *EU Citizenship and the Principle of Solidarity* (n.127), p175
[188] Hailbronner, *Union Citizenship and Access to Social Benefits* (n.184), p1265
[189] *Ibid*, p1266
[190] *Ibid*, p1265; see also Golynker, *Jobseekers' rights in the European Union* (n.109) p111

sensitive area, so any recognition would need to be sound in terms of the theoretical and normative basis.

When the inevitable litigation arose, the Court took the opportunities provided by ambiguity within the Directive to avoid conflict, as was predicted. In *Vatsouras and Koupatantze*[191]the German social court raised the issue of the conflict between Article 24(2) and the Treaty provisions, as well as the legality of the 'SGB II' benefits legislation, the part of the German social code that sets out that citizens residing as jobseekers are not entitled to social assistance.[192]

The Court noted the express derogation from equal treatment in Article 24(2), but interpreted it in light of Article 45 TFEU (ex. Art 39(2) EC);[193] using *Collins*[194] to re-state that jobseekers have equal treatment for access to benefits intended to facilitate labour market access, subject to the right of the Member States to require a 'real link'.[195] It found that the SGB II benefits could be 'benefits intended', as they referenced the need to be able to work in their prerequisites,[196] and may therefore not be 'social assistance' for the purposes of the CRD.[197] The Court protected the validity of Article 24(2) by finding that the CRD and interpretation of Article 45 TFEU could exist harmoniously. Damjanovic[198] criticises the approach for being overly simplistic and 'cryptical', and based upon the lack of a definition of 'social assistance' in the CRD.

[191] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29)
[192] Paragraph 7(1) of SGB II
[193] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29), para 44
[194] C-138/02 *Collins* (n.24), para 64
[195] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29), para 38
[196] *Ibid,* para 43
[197] *Ibid,* paras 42-45
[198] Damjanovi, *'Case Comment Joined Cases C-22/08 & C-23/08 Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE)'* (2010) 47 CML Rev 847, p853

In the first jobseekers judgment by the CJEU after the implementation of the CRD, not much appeared to have changed on the surface level. However, Fahey[199] argues that a considerable policy choice is evident in this case; the two claimants in the case were at the 'margin' of worker status, and the Court used this alongside the composition of SGB II to cement the right to jobseeking allowances for jobseeker citizens. Fahey believes this is a step back from the Court's line of citizenship case law elsewhere, and focuses too much on free movement of workers rather than the strength of citizenship itself. Particularly, Fahey[200] feels, since *Martinez Sala*[201] was devoid of *any* economic activity, and yet benefits were extended on the rationale of Union citizenship. Although from the above analysis, it is clear that further decisions of this ilk were not expected after the implementation of the CRD.

The Court's decision to hinge the distinction between its earlier case law and the CRD on a semantic difference can be heavily criticised. Particularly due to the lack of definition of 'benefits intended' and 'social assistance', creating normative uncertainty.[202] Fahey[203] criticizes this for being a decision based upon protecting the Member States from financial burdens rather than ensuring a legitimate interpretation of the difference between Article 24(2) and the citizenship case law. While this thesis argues that Member State interests are a vital component for consideration in free movement case law, it also accepts that the uncertainty arising from the rhetorical nuance is unpalatable. Wollenschläger[204]rightfully points out that the position of jobseekers and their access to equal treatment for social

[199] Fahey, *'Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance ": Comment on Cases C-22/08 and C-23/08 Vatsouras and Koupatantze'* (2009) 34(6) EL Rev 933
[200] *Ibid,* page 944
[201] C-85/96 *Martinez Sala* (n.138)
[202] 'Social assistance' gains a definition by the Court in C-140/12 *Pensionsversicherungsanstalt v Peter Brey,* EU:C:2013:565, para 61
[203] Fahey, *Interpretive legitimacy* (n.199), p944
[204] Wollenschläger, *The Evolution of Union Citizenship* in Syrpis (ed.) *The judiciary, the legislature and the evolution of Union Citizenship* (Cambridge University Press 2012), p326

benefits may come to depend on whether their host Member State has included jobseekers within their general social assistance or whether they have created specific allowances for them. This will lead to a divergence in the treatment of jobseekers across Member States, thus perpetuating uncertainty. Legal uncertainty is unpalatable for citizens and Member State authorities alike, as Fahey notes, it is *"bound to generate much litigation, particularly in a Europe of rocketing unemployment coping with global financial challenges."* [205]

There are no perfect solutions to this problem. In order to create more certainty, the Court would need to adopt stringent, clarified definitions of 'benefits intended.' It would either need to decide that all benefits that aid a person's ability to *live* in another Member State ('minimum subsistence benefits') to search for work are 'benefits intended', so that the divergence between Member States welfare systems would not be as large. Alternatively, it would need to decide that all minimum subsistence benefits are 'social assistance', as recommended by Wollenschläger[206]. The former would not be legitimate considering the lack of redistributive power in the EU.[207] The latter is at odds with the primary law as decided in *Collins,*[208] by creating obstacles to ensuring the freedom of movement for workers. Uncertainty therefore may need to be tolerated in this area, which requires a sensitive approach to balancing interests, with subjective considerations about the nature of benefits in the different Member States.

In terms of citizenship focus, this thesis would argue that the Court's focus on the link between jobseekers and workers is legitimate. *Vatsouras* does mention Union citizenship in the context of its decision to follow *Collins.*[209] In this sense, the Court utilizes citizenship in a legitimate way: in order to broaden non-discrimination in the context of a market

[205] Fahey, *Interpretive legitimacy* (n.199)
[206] Wollenschläger, *The Evolution of Union Citizenship* (n.204), pp326-327
[207] Hailbronner, *Union Citizenship and Access to Social Benefits* (n.184), pp1265-1266
[208] Wollenschläger, *The Evolution of Union Citizenship,* (n.204) pp326-327
[209] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29) para 37

freedom. As noted by AG Jacobs[210], cases like *Collins* and *Ioannidis* (and now *Vatsouras*) use citizenship to ensure the efficiency of free movement of workers by entitling jobseekers to equal treatment by referencing the development of Union citizenship. Admitting this is difficult to apply in practice, Jacobs notes that this is a way for the Court to ensure the balance between competing interests.[211] This fits with the view expressed above: the Court should use citizenship cautiously. As de Witte noted, it should mean something, but not everything.[212] Nic Shuibhne also notes that, despite the negative connotations attached to it, *market* citizenship is the prevailing view in free movement law.[213] To push the Union beyond this, according to Nic Shuibhne, would be tantamount to forcing it to run before it could walk.[214] It may therefore be useful that in it's case law regarding jobseeker's access to benefits, the Court has steeped decisions in '*market-making reasons*' by relying upon the free movement of workers to retain its interpretive legitimacy.[215]

Article 24(2) CRD now represents the interests of the Member States, constituting a desire to exclude jobseekers from their social systems. By interpreting around this explicit exclusion the Court has retained its ability the balance those interests with the need to fulfil the objective of ensuring the free movement of workers. Hailbronner[216] notes that the only semi-convincing link between citizenship and the payment of welfare to the economically in active is the fulfilment of free movement. However, secondary community law does not recognise the link between the two, as the CRD (and its predecessors) require citizens to have 'sufficient resources'. The Court appears to have avoided the side-lining of free

[210] Jacobs, '*Citizenship of the European Union – A Legal Analysis'* (2007) 13(5) European Law Journal 591, p595
[211] *Ibid*
[212] de Witte, *The End of EU Citizenship* (n.75), p88
[213] Nic Shuibhne, *The Resilience of EU Market Citizenship* (2010) 47 CML Rev 1597, p1599
[214] *Ibid,* p1628
[215] Damjanovi, *Case Comment* (n.198), p859
[216] Hailbronner, *Union Citizenship and Access to Social Benefits* (n.184), p1250

movement interests, in order to fulfil the vital internal market objective of enhancing free movement of workers. Without doing so, that objective would not have been able to be considered under the CRD. The interests of the Member States are not ignored completely, as they will still have the opportunity to exclude jobseekers from their benefits systems using the 'real link' requirement. In the context of this thesis, the Court has taken a step that preserves its own ability to balance interests, which ought to be regarded a success.

Although *Vatsouras and Koupatantze* does not appear entirely favourable to the citizenship provisions, the judgement still certainly appears to take away a significant proportion of the power that Article 24(2) *would* give to Member States to exclude jobseekers from benefits. The approach provisionally balanced the interests of free movement of Member States, and kept the peace between the CRD and *Collins* case law.[217] However, this success had inherent limitations. The decision in *Vatsouras* leaves unanswered the question of what type of balance will be struck in cases where Article 24(2) CRD cannot be evaded.[218]

The continual success of the decision also depends on the Court's development of the concept of 'benefits intended'. Although Wollenschläger recommended a restrictive definition, problems arose when the Court re-defined their scope in *Alimanovic*[219] and *García-Nieto.*[220]

*Restrictions falling under Article 24(2), ex-workers, and a new definition of 'benefits intended: the Alimanovic and García-Nieto judgments.*

The way the restrictions under Article 24(2) works has been explored in later cases concerning the German benefit. The three month rule is illustrated in the *García-Nieto,*[221]

[217] Wollenschläger, *The Evolution of Union Citizenship* (n.204), p325
[218] Iliopoulou-Penot (n.141), p1011
[219] C-67/14, *Alimanovic* (n.100)
[220] C-299/14 *García-Nieto* (n.101)
[221] *Ibid*

the position of jobseekers claiming social assistance in their longer period of residency is discussed in *Alimanovic*.[222] The decisions follow a pattern of systematic exclusion from welfare benefits for those residing under the CRD,[223] which started with *Dano*.[224] In sum, the Court has accepted highly restrictive applications of the limitations on equal treatment in the CRD, without requiring Member States to justify the proportionality of their use in individual circumstances. The following analysis will demonstrate this and consider the effects of the decisions on the balance between Member State interests and the advancement of the free movement of workers.

The *Alimanovic* and *García-Nieto* cases concerned access to SGB II,[225] akin to *Vatsouras*. In both cases, the allowance was refused based on Article 24(2) CRD[226] transmuted into the German social code, which prohibits claims by citizens residing as jobseekers without retained worker status[227] (*Alimanovic*), or citizens within their first three months of residence[228](*García-Nieto*). For this thesis, the cases explore the development of 'benefits intended', a vital component for the success of the balance struck in *Vatsouras*.

*A new definition of benefits intended:*

Since the decision in *Vatsouras*, the Court in the *Brey*[229] and *Dano* judgments has confirmed a definition of 'social assistance' according to the CRD. In *Alimanovic* and

[222] C-67/14, *Alimanovic* (n.100)
[223] See: Iliopoulou-Penot (n.141), p1015-1022; Nic Shuibhne, '*Limits Rising, Duties Ascending: the Changing Legal Shape of Union Citizenship'* (2015) 52 CML Rev, pp889-938; Nic Shuibhe, '*What I tell you three times is true: lawful residence and equal treatment after Dano'* (2016) 23(6) MJ, pp909-936; Kramer, '*Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed'* (2016) 18 Cambridge Yearbook of European Legal Studies 270, pp290-301
[224] Case C-333/13 *Dano* (n.99), discussed in Chapter 3
[225] Sozialgesetzbuch (SGB), Social Code (SGB II), Second Book: Basic Security for Job Seekers
[226] CRD, Article 24(2)
[227] Paragraph 7 of Book II, point 4(2): exclude beneficiaries are those who's residency arises solely out of their search for work.
[228] See § 7 SGB II, entitled 'beneficiaries', under 'exceptions'.
[229] C-140/12 *Brey* (n.202), para 61

*García-Nieto* the Court determined the relationship between the newly defined 'social assistance' and 'benefits intended'.

The fundamental nature of benefits classification under Article 24(2) becomes obvious when comparing both of the tenable outcomes described by AG Wathelet[230] in the *García-Nieto* opinion. If the benefit *is* social assistance, Article 24(2) is unequivocal that there is no right to equal treatment with regards to access for work-seekers.[231] If the benefit is 'intended to facilitate access to the labour market', the authorities cannot refuse to grant that benefit so long as the claimant can show a genuine link with the host State.[232] The outcomes are almost polar opposites. If the new definition of social assistance is to change the definition of 'benefits intended', it will have direct impact upon the effectiveness of jobseekers' ability to move and reside, and thus will affect the objective of the full realisation of free movement of workers.

The Court in *Brey*[233] determined that 'social assistance' in the CRD, included: "*all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State*."[234]

The Court in *Dano*[235] confirmed this definition. Taking this into consideration, AG Wathelet in *Alimanovic* suggested the Court look at the *predominant* function of the SGB

[230] C-299/14 *García-Nieto* (n.101), Opinion of AG Wathelet
[231] *Ibid,* paras 74 and 75
[232] *Ibid,* para 88
[233] C-140/12 *Brey* (n.202)
[234] *Ibid,* para 61
[235] Case C-333/13 *Dano* (n.99)*,* para 67

II benefits to determine whether they were 'benefits intended', or would fall under the definition of 'social assistance'.[236]

Nic Shuibhne[237] notes that the Court followed this guidance, and found that if the predominant function is to 'cover minimum subsistence costs necessary to lead a life in keeping with human dignity', then the benefit must be 'social assistance'.[238] It later confirmed this in *García-Nieto.*[239]

This is not a perfect distinction. It is in direct conflict with the ruling in *Vatsouras;*[240] as the German social code states that the function of SGB II is to provide a life in keeping with standards of human dignity, by the reduction of need via *integration of the beneficiary into the labour market.*[241] This creates inconsistency, both in terms of the outcomes of the cases and the methodology of interpretation used to reach them. Changing the definition of SGB II naturally restricts the scope of benefits that jobseekers may claim, and broadens the scope of Article 24(2). This may be a logical step to take because of the substantial nature of those benefits. However, the cumulative effects of the Court's methodology in doing so leads O'Brien[242] to (rightly) question whether there are any 'benefits intended' remaining according to EU law.

O'Brien[243] notes how the 'predominant' function test in *Alimanovic* imports an extra condition into the *Vatsouras* ruling, which only looked at whether a benefit facilitates labour market access. A test that investigates whether benefits *predominantly* provide minimum subsistence, shifts the focus of equal treatment towards the need and resources

[236] C-67/14 *Alimanovic* (n.100), Opinion of AG Wathelet
[237] Nic Shuibhne, *What I tell you three times is true* (n.223), p928
[238] C-67/14 *Alimanovic* (n.100), para 46
[239] C-299/14 *García-Nieto* (n.101), para 37
[240] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29)
[241] C-299/14 *García-Nieto* (n.101), paras 14-15
[242] O'Brien, *Civis Capitalist Sum* (n.52), pp947-948
[243] *Ibid,* p947

of the jobseeker, rather than whether the benefit is going to help them gain access to the employment market. The test is paradoxical: "*If they could not maintain dignity without it, then they must actually do without it.*"[244] O'Brien considers whether all means-tested - benefits would fall under the definition of 'social assistance;[245] which seems to the author here to be a natural assumption, as surely investigations into the relative wealth (or poorness) of a citizen to determine their eligibility, is indicative that the benefits are necessary for their subsistence.

*García-Nieto* confirms this, and compounds the 'benefits intended' test even further. In that decision, the Court did not explicitly re-state the 'predominant' function test but instead stated that "*benefits such as the benefits at issue*"[246] must be regarded as social assistance. As noted by O'Brien in relation to this re-enforcement,[247] benefits 'such as' SGB II would be means-tested (benefits are given according to need) or non-contributory benefits, which would include the jobseekers allowance in *Collins.* Davies[248] condones the judgments, as they protect Member States with generous welfare systems; Member States with more traditional social assistance safety nets for the very poor would not be burdened by claims from jobseekers. Davies also suggests it may take an overhaul of certain welfare states, in order to create a fair system that can give benefits access to less dependent citizens, whilst avoiding burdensome EU citizens who need absolute minimum subsistence. Means-testing is currently the only way benefits access can accommodate for a citizen's particular needs; restricting equal treatment therefore punishes work-seekers who are wholly dependent on the Member State, as well as those who only require very little financial help. It is unlikely

[244] *Ibid*
[245] *Ibid*
[246] C-299/14 *García-Nieto* (n.101), para 37
[247] O'Brien, *Civis Capitalist Sum* (n.52), p950
[248] Davies, '*Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency'*, College of Europe Research Paper in Law 02/2016, p2

that any EU Member State will overhaul its welfare system, and it is also unnecessary. This issue arises because jobseekers are viewed in terms of their wealth, or their burden, and not in terms of the reasons why they are in a host Member State in the first place.

O'Brien suggests jobseekers are now only entitled to contributory benefits, which were protected[249] outside of the remit of *Collins* judgment and equal treatment under Article 45 anyway.[250] The new definition of 'social assistance' has an imperative impact upon the rights bestowed under Article 45 and the citizenship provisions. States that have jobseekers allowances generally under their social assistance systems are able to carte-blanche deny them to EU citizens seeking work in their territory. O'Brien and others[251] found a number of Member States that do not offer any financial support to EU citizen jobseekers in their territory.[252]

The UK provides a clear example of how benefits classification affects jobseekers: jobseekers' allowance (the *Collins*[253] benefit) is the only benefit aimed at facilitating labour-market access but will become Universal Credit[254] under UK welfare reform.[255] Since it will no longer be a stand-alone benefit for labour market access, it is likely to be classed as social assistance and EU jobseekers will not be entitled to equal treatment with regards to access to the benefit.[256] It is not impossible to conceive that the benefit may be

[249] Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems, OJ [2004] L166/1, Article 11 and 61 ('Regulation 883/2004')
[250] O'Brien, *Civis Capitalist Sum* (n.52), p948
[251] O'Brien, Spaventa and De Coninck, '*Comparative Report 2015 - The concept of worker under Article 45 TFEU and certain non-standard forms of employment*.' (2016) Project Report. European Commission, Brussels
[252] O'Brien, *Civis Capitalist Sum* (n.52); also O'Brien, Spaventa and De Coninck, *ibid*
[253] C-138/02 *Collins* (n.24), para 64
[254] The Universal Credit Regulations 2013; see guide <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48897/universal-credit-full-document.pdf> accessed on 19/02/19
[255] O'Brien, *Unity in Adversity* (n.57), p148
[256] Regulation 2 Universal Credit (EEA Jobseekers) Amendment Regulations 2015, Statutory Instrument no 546; also Patrick Wintour, The Guardian 6 Nov 2014, *Tories Deny EU Migrants benefits under Universal Credit :* <https://www.theguardian.com/society/2014/nov/06/tories-deny-eu-migrants-benefits-universal-credit> accessed on 18.12.18

split in order to retain the jobseeking element, but in the current climate of CJEU jurisprudence, O'Brien argues that such an interpretation would be unlikely.[257] *Alimanovic* appears to show that this is a correct assumption, as Iliopoulout-Penot asserts that it would have been more balanced to split the SGB II benefits into minimum subsistence costs, and labour-market benefits,[258] in order to retain the interpretation of Article 45 rights and respond to Member State concerns.

This highlights how flawed the idea of separating jobseekers social assistance from 'benefits intended' is. It detriments the free movement of jobseekers, as Member States merely have to construct their jobseeker benefits into something more substantial in order to subvert their obligations under Article 45, Article 18 and 21 TFEU.

This has direct impact on the balance between Member State and Union interests. Mainly, it reduces beneficiaries of 'benefit intended' substantially, so on a very general level the balance is shifted in a way that is more favourable to Member States. If the above conclusions are correct, and if there are very little 'benefits intended' in existence because of the new definition, this will be an excessively fundamental re-balance. So long as there is still an internal market, and Article 45 TFEU is still applicable, the efficiency of free movement for jobseekers needs to be considered; which is not possible if all *Collins* benefits now fall under Article 24(2) CRD. This is especially damaging to the free movement of workers, because those likely to make use of free movement are "*concentrated in lower paid, less secure jobs, with variable hours";* who may not be able to afford to support themselves whilst searching for a job in a host Member State.[259]

[257] O'Brien, *Unity in Adversity* (n.57), p148
[258] Iliopoulou-Penot (n.141), p1019
[259] O'Brien, *Civis Capitalist Sum* (n.52), pp938-939

Another problem with the situation described above is that it shifts the focus of Member State interests. It is no longer an interest of ensuring a link between the claimant and the Member State employment market; Member State interests are purely economic and based upon the wealth of jobseekers. Continually shifting interests make it difficult to judge the balance of policies anyway, and by validating this interest, the balance the Court strikes in the post-*Dano* case law distorts the very objectives of the Union. It is impossible to say that the Court is weighing the objective of ensuring free movement of workers against Member State interests, when it is not ensuring Member States consider citizens' potential to engage in the labour market when restricting equal treatment, and ultimately, free movement rights.

The Court has recognised a Member State interest of preventing poverty tourism,[260] which places qualifications on the post-*Collins* jobseeker rights to equal treatment. The EU objective is not to encourage free movement of the sufficiently wealthy, nor of those who have indefinite security in their employment. The aim is to encourage free movement of *workers*, all of them.[261] As O'Brien puts it: "*national practice is reshaping Article 45 TFEU and shifting the policy positions of the Union."*[262] This is through the demotion of jobseekers in terms of what rights to equal treatment they have, by focusing on their current wealth and not their potential, or even their established link to the employment market.

It is questionable that 'benefits intended' need to share a definition with 'social assistance' under the CRD. Nic Shuibhne notes that it is simply a matter of interpretation.[263] This thesis finds the Court's interpretative choice open to criticism. Article 24(2) of the CRD is intended to ring-fence certain benefits from equal treatment; but that does not automatically

[260] Iliopoulou-Penot (n.141), p1009

[261] While it is outside the scope of this thesis to discuss the changing meaning of 'worker', it is important to note that this is another area where migration is being reduced within the EU; see O'Brien, *Civis Capitalist Sum* (n.52) p953 onwards; for a general discussion on workers as 'burdens' see: Davies, *Migrant Union Citizens and Social Assistance* (n.248)

[262] O'Brien, *Civis Capitalist Sum* (n.52), p949

[263] Nic Shuibhne, *What I tell you three times is true* (n.223),p 928

explain why the new social assistance definition must affect the 'benefits intended' definition. Although it may have been a conscious policy choice of the EU legislature to leave out any reference to 'benefits intended' within the equal treatment provisions of the CRD, the *Collins* judgment is still a valid interpretation of primary EU law and should still be considered. Especially since primary EU law still encourages mobility.[264]

In *Brey*[265] and *Dano*[266] the Court explored the possible overlap of 'social assistance' in the CRD and the provisions on the coordination of social security (Regulation 883/2004[267]). The Court resolved to allow autonomous definitions of benefits in both because of the very different objectives they undertake.[268] The CRD's objective, according to the Court in *Brey*,[269] is to prevent EU citizens becoming an 'unreasonable burden' on Member State finances; therefore requiring it to cover a wider range of benefits, under its restrictions, to secure this objective. This, although perhaps unsubstantiated with empirical evidence, does show a degree of common sense. Regulation 883/2004 covers *all* EU citizens and their potential right to equal treatment regarding access to benefits. If some social assistance benefits fell under the equal treatment provisions of the Regulation, but not the CRD's restrictions, they may present an unreasonable burden on the Member States. But 'benefits intended' are not the same as the benefits in the Regulation, they are curtailed already, applying only to jobseekers, and also specifically centred around benefits which aid a search for work; there is less scope for the CRD's definition of 'social assistance' to take precedence when benefits overlap with 'benefits intended.' This argument gains potency by the fact that the CRD also has an objective of strengthening free movement.[270]

[264] TEU, Article 3(2)
[265] C-140/12 *Brey* (n.202), para 58 (see Ch 3)
[266] C-333/13, *Dano* (n.100) paras 82-84 (See Ch 3)
[267] Regulation 883/2004
[268] C-140/12 *Brey* (n.202) para 24
[269] *Ibid*
[270] CRD, Recital 3 (preamble)

It would be desirable to further clarify the meaning of 'social assistance' and 'benefits intended'. Davies[271] rightfully points out that the welfare state is increasingly expansive, which creates difficulties for defining 'social assistance' or 'basic needs'; it would therefore be simpler to define 'benefits intended' autonomously in light of the objectives of free movement. O'Brien[272] also notes that a clearer explanation of the difference between *Alimanovic* and *Vatsouras* benefits would be beneficial (although factually there is no difference). O'Brien suggests that the difference could revolve around short vs long-term benefits;[273] it is possible that the Court opted to re-consider the classification of SGB II because it is a long-term benefits covering many areas of subsistence.[274] This would be a better way of classifying benefits in terms of balancing interests, it would be less restrictive and therefore less detrimental to the objective of free movement and would present a fairer balance of interests.

Ensuring jobseekers have access to short-term benefits will aid the objective of free movement of workers, by supporting their search for work for a period of time. Furthermore, Member State interests are also considered, as long-term benefifts that are more costly and are more reliant upon solidarity for justification for access would not be available for equal treatment. However, this distinction would require the Court's explicit elucidation that the distinction between social assistance and 'benefits intended' is based upon the length of claims. Considering the change in definition in *Alimanovic* and *García-Nieto,* the balance of Member State interests and the objective of encouraging free movement of workers seems to be unduly weighted towards Member State interests. This may be a logical reduction of jobseeker's rights because of the concerns about public

[271]Davies, (n.248) pp17-18
[272] O'Brien, *Civis Capitalist Sum* (n.52), p948
[273] *Ibid*
[274] Iliopoulou-Penot (n.141), p1028

finances and 'welfare tourism', as Golynker[275] notes the pre-*Collins* refusal of equal treatment for jobseekers was intended as a safeguard against these. The same may be said for the post-*Dano* tightening of rules. This thesis agrees it is logical to expect the CJEU to consider Member State concerns in areas where national sovereignty is so robust, such as the area of social welfare.[276]

However, it is also important to remember the criticism attached to the treatment of jobseekers in the pre-*Antonissen* era, whereby the effectiveness of free movement of workers was threatened by jobseekers being denied fundamental rights and benefits that were necessary for their search for work. Nic Shuibhne[277] clearly highlights that access to minimum subsistence during the search for work will undoubtedly aid that search. Arguments on the extent of the cost do not rid free movement law of this logic. That is not to say that jobseekers could not become an unreasonable burden, Article 45 is not a trump card, but restrictions for jobseekers are best dealt with without curtailing the types of benefits that assist jobseekers too greatly.

This is especially true considering the benefits under consideration have not changed; SGB II did not all of a sudden become a costly benefit that "presuppose the highest degree of solidarity within the national community"[278] as Ms Alimanovic arrived in Germany. It is unlikely that the Court has only just realized that jobseekers may be a cost to Member State finances, yet there is little explanation for the differentiation between *Vatsouras* and *Alimanovic.* Nic Shuibhne notes how something fundamentally changed after *Brey*, but the Court declines to say what exactly changed. It is very difficult not to presume that this is a political choice.[279] This thesis is in full agreement that the political landscape is

[275] Golynker, *Jobseekers' rights in the European Union* (n.109), p122
[276] Minderhoud, *The "Other" EU Security,* (n.68) p363
[277] Nic Shuibhne, *What I tell you three times is true* (n.223), p928
[278] Davies, *Migrant Union Citizens and Social Assistance* (n.248), pp18
[279] O'Brien, *Civis Capitalist Sum* (n.52), p943; Nic Shuibhne, *What I tell you three times is true* (n.223), p923

unwelcoming of expansive equal treatment rights.[280] That is why it is so fundamental to give weight to Member State interests. However, the current legal path the Court is taking does not simply consider Member State interests, it unduly buckles under the pressure of them and stops considering the objectives of the Union regarding free movement of workers.

As the following section shows, the Court not only changed the definition of 'benefits intended', but also softened the Member States' proportionality requirements for restrictions. Arguments for this appear to form largely on economic grounds, which may suggest concerns about levels of benefits access, but which also presents its own fresh set of problems, both for the balance of interests and EU law.

*Automatic exclusion of jobseekers from equal treatment to welfare benefits after Dano:*

In *Alimanovic*, the Court used its re-classification of SBG II benefits as a gateway to systemic application of the CRD. It re-iterated the sentiment of *Dano:* that equal treatment to social assistance is only extended to those who are lawfully resident in a host member State according to the provisions of the Directive.[281] As an ex-worker, Ms Alimanovic had retained her worker status and right to social assistance for 6 months before the benefits were revoked, as per Article 7(3)(c). After this, her residence in Germany fell under the conditions of a jobseeker under Article 14(1)(b) CRD.[282] Although her residence was compliant, the explicit derogation from equal treatment in Article 24(2)[283] applied, so Germany was entitled to refuse her access to social assistance. The same was found in

[280] Davies, *Migrant Union Citizens and Social Assistance* (n.248), pp2-3

[281] C-333/13, *Dano* (n.100), para 69 (see Ch 3)

[282] CRD, Article 14(1)(b): Union citizens seeking work are lawfully resident so long as they are continuing to seek work with a genuine chance of being engaged.

[283] CRD, Article 24(2): Member States are permitted to exclude citizens from social assistance within their first three months, or the longer period allowed to jobseekers.

*García-Nieto*,[284] but the restriction was based upon the shorter period of the claimants being in their first three months of residency.

It has been widely commented that this development creates an automatic exclusion from equal treatment to benefits access for jobseekers,[285] that fails to take into account the specific circumstances of the citizen (the 'individual assessment' requirement),[286] which has been required by the CJEU in previous case law.[287] It was expected[288] that a case concerning Article 24(2) CRD would be decided according to the general principle that restrictions on free movement must be proportionate.[289] Instead, the tenets of the CRD *alone* became the floor and ceiling of jobseekers rights. The reasoning behind the change in methodology has also been criticised,[290] the Court's reasoning is put into three parts by Nic Shuibhne:[291] Firstly, it finds that no individual assessment is necessary, because the CRD itself sets up a 'gradual system' for considering the individual circumstances of potential claimants. It also finds that following the CRD strictly provides certainty and clarity on the right to social assistance under EU law. Finally, it finds that the use of the restriction under the Directive is legitimate because, while one grant of social assistance

[284] Case C-299/14 *Garcia Nieto* (n.101), para 41-42

[285] O'Brien, *Civis Capitalist Sum* (n.52), p948; Iliopoulou-Penot (n.141), pp1013-1024; Kramer, *Had they only worked one month longer! An analysis of the Alimanovic case*, European Law Blog: < https://europeanlawblog.eu/2015/09/29/had-they-only-worked-one-month-longer-an-analysis-of-the-alimanovic-case-2015-c-6714/> accessed on 07/02/19; Kramer, *Earning Social Citizenship in the European Union* (n.223), pp290-301 p295; Nic Shuibhne, *What I tell you three times is true* (n.223), 920-922

[286] Iliopoulou-Penot, *Ibid* pp1022-1024; Nic Shuibhne, *ibid* pp921-923; O'Brien, *ibid* p950; Kramer, *Earning Social Citizenship* (n.223), p294

[287] C-140/12 *Brey* (n.202)

[288] See, to the contrary, Davies, *Migrant Union Citizens and Social Assistance* (n.248), p20

[289] Especially from C-67/14 *Alimanovic* (n.100) Opinion of AG Wathelet, para 90-92 (Referencing Case C-46/12, *N.*, EU:C:2013:97 at para 33; see also C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.29) para 44; C-140/12 *Brey* (n.202), para57); Oxana Golynker, Jobseekers' rights in the European Union (n.109) p120, Dougan, *The Court Helps Those Who Help Themselves* (n.2), p22-24; Davies, *Migrant Union Citizens and Social Assistance* (n.248), p20; O'Brien, *Civis Capitalist Sum* (n.52), p974; Iliopoulou-Penot (n.141) pp1010-1020; Edwards, *EU Citizenship: the CJEU retreats,* Solicitors Journal 159/40 27 October 2015; Peers, *EU citizens' access to benefits: the CJEU clarifies the position of former workers*, EU Law Analysis Blog Tuesday 15th September 2015 < http://eulawanalysis.blogspot.com/2015/09/eu-citizens-access-to-benefits-cjeu.html> accessed 09/02/19

[290] Iliopoulou-Penot (n.141)

[291] Nic Shuibhne, *What I tell you three times is true* (n.223), p922

would not be an 'unreasonable burden' for a Member State to bear, an accumulation of claims would be; an objective of the Directive is to prevent this.

The latter two reasons are heavily criticised, it is settled case law in *Brey*[292](on pensioners) and *Grzelczyck*[293] (student citizen) that a Member State should look at a citizen's personal circumstances, especially the temporary nature of their request for financial help,[294] before deciding they cannot offer social assistance, in order to determine if that citizen would be an *unreasonable* burden. To decide that accumulative claims would be an unreasonable burden, without such assessment, relies heavily on presumptions[295] and may be considered a restriction based upon purely economic reasoning. It is a long-standing principle of EU law that purely economic restrictions are prohibited,[296] which undermines the 'clarifying' objective of the new methodology, as this deviation muddies the law significantly.

The departure from individual assessments, in order to utilize the very clear but very restrictive system under the CRD, is criticized for resulting in the stratification of citizenship;[297] because the restrictions on jobseekers' equal treatment are not considered in the same way as restrictions on those who are economically inactive, or students. Instead, all categories have their right to equal treatment rigidly subject to the different limits laid

[292] C-140/12 *Brey* (n.202)
[293] C-184/99 *Grzelczyk* (n.45)
[294] CRD, recital 16 (preamble)
[295] Nic Shuibhne, *What I tell you three times is true* (n.223), p924
[296] C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-02421 at para 34; C-352/85 *Bond van Adverteerders and Others* [1988] ECR I-2085, para 34; Case C-288/89 *Collecteive Antennevoorziening Gouda* [1991] ECR 1-4007, para 11; Case C-398/95 *SETTG* [1997] ECR 1-3091, para 23; Case C-35/98 *Verkooijen* [2000] ECR 1-4071, para 48; and Case 388/01 *Commission v Italy* [2003] ECR 1-721, para 22; For further analysis on this see Arrowsmith, *Rethinking the approach to economic justifications under the EU's free movement rules* (2015) 68(1) Current Legal Problems, pp307-365; Oliver, *When, if Ever, Can Restrictions on Free Movement be Justified on Economic Grounds?* (2016) 41(2) EL Rev, pp147-175
[297] Iliopoulou-Penot (n.141), pp1013-1025; Kramer, *Earning Social Citizenship in the European Union* (n.223) p299;

out in the CRD, regardless of the circumstances of individual citizens.This thesis finds this stratification problematic because it recognises jobseekers as an independent category without recognising their significance. Categorisation is desirable only so far as it allows the different objectives and Member State interests relating to the categories to be considered in relation to them.

Stratification of rights based on residency is also an issue because jobseekers' residence is not based upon their resources, unlike students or other economically inactive citizens, so rejection of claims for social assistance will not remove jobseeker's right to reside. They are therefore a category of citizen in the most perilous position, as they are unlikely to be physically excluded from the territory of a Member State, but are completely excluded from financial support whilst they reside within it.[298] Kramer notes how this kind of tolerance without support is fundamentally against the idea of the welfare state,[299] which exists to ensure such poverty is not supported.

The CJEU assertion that the gradual system under the CRD looks at the personal circumstances of claimants is also criticized.[300] While it may be sound reason to assume a jobseeker in their first three months of residency ought not to be supported by the Member State;[301] the longer period is more problematic in regard to the lack of individual assessment. Those who have worked have links to the employment market, and therefore show the requisite solidarity for jobseekers assistance.[302] O'Brien notes that Ms Alimanovic had strong links, which could not be taken into consideration by the stringent

[298] Kramer, *ibid*
[299] *Ibid*
[300] Nic Shuibhne, *What I tell you three times is true* (n.223) pp922-923; Kramer, *ibid* p301;
[301] Iliopoulou-Penot, (n.141) pp1013-1014; Golynker, *Jobseekers' rights in the European Union* (n.109), p118; C-67/14 *Alimanovic* (n.100), Opinion of AG Wathelet para 92
[302] de Witte, *The End of EU Citizenship* (n.75)

application of Article 7(3)(c) and Article 24(2) combined. The request for the preliminary ruling in *Alimanovic* shows this, as the applicants "*had been economically active […], had a longstanding link to Germany and began a professional activity directly following the period at issue…they at all times maintained a genuine link with the German labour market.*"[303] The CRD does not take into account any of these 'various factors' in its' gradual system by dictating the retention of worker status in Article 7(3)(c) CRD. Nic Shuibhne[304] rightfully points out that the Court's claim that it does "*just makes no sense*" because it is a generalized, and not individualised, approach to categorizing jobseekers. It does not truly take into consideration the economic activity of the citizen; the very specific lengths of time that are considered under Article 7(3)(c), do not have any great scope to investigate a citizen's link to the employment market and their economic history in a Member State. The Court itself recognised that the provision should not be treated as an absolute in *Saint Prix.*[305]

Nic Shuibhne makes a potent point that the Court may be signalling that the focus on the proportionality of individual cases in citizenship case law is over.[306] She notes, however, that the Court should not end this focus by suggesting that the Directive has the same impact as individual assessments, as this is simply false.

This thesis finds it wholly understandable that the Court wishes to improve the clarity of free movement law, the Member States obviously struggled administratively after the piece-meal approach to social rights utilized personalised tests and 'real links', as noted by Iliopoulou-Penot.[307]It is not in the view of this research that the restrictions under the CRD

[303] Summary of the request for preliminary ruling: O'Brien, *Civis Capitalist Sum* (n.52), p948
[304] Nic Shuibhne, *What I tell you three times is true* (n.223), p922
[305] C-507/12 *Jessy Saint Prix v Secretary of State for Works and Pensions* [2014] EU:C:2014:2007 (discussed below)
[306] Nic Shuibhne, *What I tell you three times is true* (n.223), p923
[307] Iliopoulou-Penot, (n.141), p1011

are insufficient because there are aspects of Ms Alimanovic's residency capable of showing integration worthy of benefits access. Generalized tests, for this research, are not the problem. The problem is that they could be much less restrictive, and the Court has failed to address this. The outcome of Ms Alimanovic's case is not as concerning as the methodology undertaken to reach it, although the case itself evidently lacks social justice and fundamental respect for equality.

As Iliopolou-Penot notes, it is not simply the individual assessment that has been neglected by the Court, but also the need for a proportionality review of the restrictions.[308] Even if it were accepted that the CRD legitimately considers the position of individuals, the Court would still have to determine if automatic exclusions are a proportionate way of achieving the legitimate aim in a more robust way than *assuming* they are because of the 'unreasonable burden' of claims. As the CRD entails restrictions, they should be interpreted narrowly and in light of the right to free movement under Article 45 TFEU.[309] This thesis has found that the strength of proportionality assessments make or break the fine balance the Court has to embark upon in order to ensure that both free movement and Member State interests are correctly considered. The Court should only intervene with restrictions when a Member State's restrictions go too far beyond what is necessary to show a 'real link' with the employment market; but it is arguable that the Court should at least review whether such an intervention is necessary when a measure appears to be exclusionary. The strict application of the CRD provisions on jobseekers are neither appropriate nor necessary for this task, and so the Court arguably should intervene. However, the CJEU seems to have absconded from the role of meaningful judicial review, preferring to accept proportionality

[308] Iliopoulou-Penot, (n.141), p1035
[309] C-67/14 *Alimanovic* (n.100) Opinion of AG Wathelet, para 85, (referencing C-46/12 *N.* EU:C:2013:97, paragraph 33

based upon the black and white text of the secondary legislation, so that it cannot possibly intervene in the application of the CRD. It is therefore impossible to say that a correct balance has been struck between protecting the Member State finances, and ensuring that there is effective free movement for workers.

The Court, in both *Alimanovic* and *García-Nieto,* focuses solely upon the provisions of the CRD, giving full and unequivocal deference to Member State interests. Citizen's rights under Articles 18 and 45 TFEU, are not taken into account. Peers,[310] Nic Shuibhne[311] and Iliopoulou-Penot[312] note that it would have been legitimate for Ms Alimanovic to rely directly on Article 45 TFEU, regardless of the interpretation of Art 7(3)(c) CRD stating that worker status is lost after 6 months. The Court, in *Saint Prix*,[313] had determined that Article 7(3)(c) is non exhaustive, as workers may retain their status, through the later stages of pregnancy, so long as they return to work 'in a reasonable time' after giving birth. *Saint Prix* confirmed that the definition of a worker under Art 45 TFEU is still relevant for jobseekers. The case provides some evidence that the clarity offered by the CRD is not entirely effective, it does not consider the situation of all workers, nor the historical rights given to jobseekers.[314]

More importantly, solely focusing on the CRD precludes all consideration of the objective of ensuring fully effective free movement of workers. The Court in *Saint Prix* used the objective of ensuring free movement of workers,[315] to give considerable weight to the fact that an ongoing employment relationship is not necessary to show a person is a 'worker'

[310] Peers, *EU citizens' access to benefits* (n.289)
[311] Nic Shuibhne, *What I tell you three times is true* (n.223), p931
[312] Iliopoulou-Penot, (n.141), p1018
[313] C-507/12 *Saint Prix* (n.305)
[314] Nic Shuibhne, *What I tell you three times is true* (n.223), p923
[315] C-507/12 *Saint Prix* (n.305), paras 43-44

under the Treaty;[316] and even when such a relationship ends, a jobseeker is *still a worker*.[317] Ms Saint Prix is not considered to have left the employment market even if she is not available to it, for a period of time.[318] Ms Saint Prix was out of work for 5 months, so the Court finds five months too short a period for her to not be regarded as a worker. It is unclear what exact difference in time scales exists between the two cases, but Ms Alimanovic obviously held worker status whilst unemployed for six months, went through a period of being denied financial assistance, and "*began a professional activity directly following the period at issue*."[319] It is self-contradictory to use Art 7(3) CRD to suggest Ms Alimanovic, who *was* available for work for that entire time and has established links to the employment market, is not a worker under the Treaty.

Even if it was possible to argue so, the Court made no reference to the objective of encouraging free movement of workers, and therefore can be criticised for failing to find balance between competing interests. The combination of Articles 7(3) and 14(1)(b) CRD is just as liable to deter workers from moving; especially in the changing worker economy highlighted by O'Brien,[320] filled with little job security, low wages and zero hour contracts.

*Rebalancing interests, or reckless deference?*

There is a general acceptance that the Court's decision in this line of case law is based upon a fundamental reconsideration of Union citizenship.[321] Allowing the limitations of the CRD

[316] *Ibid* para 37
[317] *Ibid* para 35-36
[318] *Ibid* para 41
[319] O'Brien, *Civis Capitalist Sum* (n.52), p948
[320] O'Brien, *Civis Capitalist Sum* (n.52), p954
[321] Iliopoulou-Penot, (n.141); Nic Shuibhne, *What I tell you three times is true* (n.223); Davies, *Migrant Union Citizens and Social Assistance* (n.248); Kramer, *Earning Social Citizenship in the European Union* (n.223)

to be fully realised by Member States is seen as a way to placate growing national concerns about free movement, as well as a way to ensure respect of Member State competence in an increasingly sensitive area.[322] This thesis agrees that the sanctity of the welfare state is unquestionable, the competence of the Member States must be retained, and the Court must step back from re-writing restrictions on social assistance unless it is absolutely imperative to do so. However, it would have been possible for the Court to reduce the burden of proportionality assessments without going so far as to permit the automatic exclusion of all jobseekers from social assistance that aids their search for work.

The Court appears to have accepted the lack of social cohesion across the Union,[323] stepping back from its endeavour to ensure a more social citizenship. Transnational solidarity is a slow process, and it will take a long time for citizenship of the Union to be more fundamental. However, by dropping all reference to the Treaty right to free movement and equal treatment, including the fundamental nature of citizenship, the Court could be criticised as stepping down as a protector of Treaty rights. Without recognition of Article 18 and 21 TFEU, the Treaty right of workers to move in Article 45 TFEU cannot be bolstered to allow jobseekers a fair chance to gain employment in another Member State.[324] It may be desirable to give the Member States more control over citizenship, but allowing the CRD to become the supra-normative framework for rights is problematic. It does not correspond to the differing objectives and interests behind the categories of citizen it provides residency for, most painfully it does not comprehend the modern employment market for jobseekers and ex (or even current[325])-workers. The only way around this is to ensure the Treaty right to equal treatment, as a jobseeking citizen, is still protected.

[322] Iliopoulou-Penot, *ibid*
[323] *Ibid*
[324] Nic Shuibhne, *What I tell you three times is true* (n.223), p927
[325] See, mainly O'Brien, *Civis Capitalist Sum* (n.52), p953 onwards

Nic Shuibhne notes how "*The rights-curbing impulse that dominates recent case law may be understandable. It may be rationally explicable. It may even play a vital part in the preservation of harmonious EU relations overall.*"[326] But without an institutional actor safeguarding the primary rights that have been laid down, through effective and balanced proportionality review, they may disappear altogether. It is one thing to curb rights, and the Court arguably should allow greater curtailing through the proper channels of properly justified restrictions; but it is another thing altogether to deny the existence of rights in the first instance.

Moreover, the institutional deference is a response to problem generated by rhetoric. Iliopoulou-Penot notes the political will to curb citizenship rights *"has constantly been expressed since the letter sent in 2013 to the Council by a number of Member States, stressing the need to control abuses of free movement and declaring war on "benefit tourism";*[327]it is based upon a phenomena that is under-evidenced, a point generally agreed on by O'Brien,[328] Nic Shuibhne[329] and Thym.[330]

Much of the Court's role and legitimacy comes from its institutional position as a counterweight to these nation-centric forces: Iliopoulou-Penot notes that "*the Court should have defended a meaningful reading of the Treaties instead of watering down their scope*

[326] Nic Shuibhne, *Limits Rising, Duties Ascending* (n.223)
[327] Iliopoulou-Penot, (n.141), pp1030-1035
[328] O'Brien, *Civis Capitalist Sum* (n.52), p937
[329] Nic Shuibhne, *Limits Rising, Duties Ascending* (n.223), pp935-936
[330] Thym, The Elusive Limits of Solidarity (n.74), p21; Verschueren, *Free Movement or Benefit Tourism? The Unreasonable Burden of Brey* (2014) 16 European Journal of Migration and Law 147, page 149; Dougan, '*National Welfare Systems, Residency Requirements And EU Law'* (n.74) p102; Study on Active Inclusion of Migrants Institute for the Study of Labor (IZA) and The Economic and Social Research Institute (ESRI), September 2011, p20-21; BBC News 14th October 2013, Benefit tourism claims: European Commission urges UK to provide evidence, <http://www.bbc.co.uk/news/uk-politics-24522653> accessed on 21/11/17; ICF GHK and Milieu, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence,* 14 October 2013 (revised on 16 December 2013)

*through secondary law*."[331] Nic Shuibhne asks *"Who is standing up for Union citizens and for the rights that the Treaty confers on them now?"*[332] The answer may be, undesirably, nobody.

Without CJEU protection of citizenship rights, the unbridled will of the Member States is liable to destroy the foundations of citizenship, withdraw any right to look into the potential of jobseekers, and with it any hope that the objectives relating to free movement can truly be achieved.

[331] Iliopoulou-Penot (n.141), p1031; see also Letter from the Austrian, German, Dutch and British governments, regarding free movement, sent to the Council Presidency in April 2013, < http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed on 11/02/19

[332] Nic Shuibhne, *Limits Rising, Duties Ascending* (n.223), p936; See also Kostakopoulou, '*When EU citizens become foreigners*' (2014) 20 ELJ 447, p463 and Thym, *The elusive limits of solidarity* (n.74), p21

## Chapter Conclusions

This chapter has seen how the case law on jobseekers has shifted largely in favour of Member State interests. The permitted range of restrictions on jobseekers' access to social benefits firstly revolved around the ascertainment of a 'real link' between the citizen and the employment market. Member States appear to have struggled with this concept until the success of the UK in *Collins.* In *Prete* the Court moved to the much more uncertain methodology of requiring Member States to take into account the individual factors of the specific citizen to see if a real link could be proved, rather than having a general determining factors that all citizens had to apply to. This thesis found that to be administratively burdensome and a severe encroachment on Member State competence. After *Alimanovic* and *García-Nieto* it is clear that Member States do not have to justify their discriminatory practices in refusing jobseeking benefits to EU citizens, due to the explicit derogation from equal treatment in the CRD.

Interpretive manipulations on the EU and Member State level have decreased the rights of EU jobseeking citizens. The UK's "Genuine Prospect of Work" test is an example of how EU law is manipulated to restrict the residency of jobseekers, which was intended to be centred on their genuine search for work and chances of engagement rather than the absolute certainty of gainful employment. The shifting definition of 'benefits intended' at the EU level heavily restricted the type of financial support that Member States would have to offer EU jobseeking citizens that fall outside the tenets of the CRD, resulting in many Member States not offering any financial assistance whatsoever.

On top of the rigorous curtailing of jobseekers rights, the Court failed to apply the principle of proportionality to restrictions based solely upon the CRD. Resulting in no credence being given to the concept of equal treatment derived from the hybrid of EU citizenship and Article 45 TFEU. As O'Brien[333] notes, the only application of citizenship in recent case law is the limitations and conditions placed upon it by the CRD. It is clear that a more duty-based[334] citizenship is the objective in the final throes of the case law examined, which is understandable but problematic.

The cumulative effects of these changes have demoted jobseekers to second-class citizens. Consideration has not been given to the fact that they are potential economic actors and therefore vital to the success of the internal market. Although this thesis suggests airing on the side of caution with the extension of equal treatment, the Court has taken two steps forward and three steps back regarding citizenship and equal treatment. Whilst it could have utilized effective proportionality assessments in a way that gave greater protection to Member State interests *and* preserved the aim of the Treaty, the Court has taken its hands off the wheel in the steering of citizenship development. This is not only to the detriment of the objective of free movement of workers via jobseekers rights, but possibly with wider negative effects on those in work.[335] This appears to be to appease migration-sceptic Member State opinions, based on very little evidence[336] of overburdened welfare systems.

In sum, EU law and the CJEU can be criticised as they do not strike a sufficient balance between Member State interests and the objectives of the Union; the ability to do so in

[333] O'Brien, *Civis Capitalist Sum* (n.52), p950
[334] Nic Shuibhne, *Limits Rising, Duties Ascending* (n.223)
[335] This is outside the scope of this thesis, but see: O'Brien, *Civis Capitalist Sum* (n.52), p953-957 Iliopoulou-Penot (n.141) pp1030-1035; Nic Shuibhne, *What I tell you three times is true* (n.223), p931-935
[336] See n.330

future is severely hindered by the new methodology of allowing stringent application of the CRD provisions without proportionality. The CRD has been described as the 'backbone' of Union citizenship,[337] but it has taken a spineless Court of Justice to make it so.

[337] Jacqueson, "*Back to business – the Court in Alimanovic*", BEUCITIZEN Blog (2016), http://beucitizen.eu/back-to-business-the-court-in-alimanovic/ accessed on 19/02/19

# Chapter 2

# Home v Host: Conflicting Ideals about Restrictions on EU Citizens' Access to Student Benefits in Cross-Border Situations.

## Introduction:

Students are one of the most pivotal participants in cross-border movement within the European Union. Free movement introduced education and research opportunities by legislating residency rights for students moving to another Member State.

The CRD enables Students to reside legally in a Member State other than their home for more than three months, under Article 7(1)(c), so long as they are:

*"enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training;*

*and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;"*[1]

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (henceforth 'CRD')

Students are economically inactive and therefore mostly look to the State for financial support to fund their studies and maintenance. EU law therefore provides that in order to move to another Member State a student-Citizen needs to have the resources to provide for themselves, so that they do not unreasonably burden the host Member State.[2] How this is interpreted and applied, will determine how effective EU law is at balancing the need to protect Member States from an unreasonable burden created by student-Citizens and the need to achieve EU objectives that are focused around student mobility and educational attainment.

Firstly and fore mostly, the Chapter will show that there is an EU objective of improving the quality and attainment level of education, and creating and enhancing a European Educational Area, with a high quantity of mobile students.

Secondly, an analysis of the EU free movement framework relating to students will show that Member States have been progressively given a high level of protection against benefit claims from student-Citizens, despite this leading to inconsistencies in interpretation of student residency provisions. The political pressure of 'abuse' of the free movement system or 'benefit tourism' has shaped the legal landscape.

Thirdly, the case law on exportability of benefits will be assessed, which will show that outside the scope of the CRD the CJEU is more willing to rigorously defend free movement rights, leading to a higher attainment of the EU free movement and education goals.

[2] CRD, Article 7(1)(c)

## 1. Education and Student Mobility as an EU Objective:

The competence and interests of the European Union in relation to education are set out in the TFEU;[3] Article 6(e) provides that the Union has competence to "*carry out actions to support, coordinate or supplement the Member States*"[4] in relation to education and vocational training. Article 9 sets out that "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of* […] *a high level of education,* [and] *training.*"[5]

Article 165(1) states the Union should encourage and support co-operation but respect Member State competence over education, particularly in light of it playing a role in their cultural and linguistic diversity."[6] Union action should aim at "*encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study.*"[7] The preamble of the TFEU also dedicates EU determination to increase levels of education attainment.[8]

There is clear deference to the fact that Member States retain a high degree of competence in this area, but the EU Commission has shown intense commitment to the enhancement of the educational goals and removing obstacles to further progression; evidenced by the Erasmus programme[9] and the Bologna Process.[10]

Student mobility in its own right is a policy goal of the EU institutions, due to the positive impact that the mobility of students will have on other objectives of the Union. There is a

[3] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter 'TFEU'),
[4] TFEU, Article 6(e)
[5] TFEU, Article 9
[6] *Ibid*, Article 165
[7] *Ibid*, Article 165(2)
[8] *Ibid,* preamble
[9] European Commission website, <https://ec.europa.eu/info/education/set-projects-education-and-training/find-all-funding-opportunities-education-and-training_en> accessed on 9.11.18
[10] Bologna Process website: <http://www.ehea.info/> accessed on 09.11.18

strong feeling within the European Commission that the ability to study abroad will bring a greater sense of being 'European';[11] the EU Commissioner for Education, Culture, Youth and Sport states that the "*vision for 2025 is of a Europe in which learning, studying and doing research will not be hampered by borders and in which people have a strong sense of their identity as Europeans*."[12]

The desirability of mobile EU student-citizens also stems from the desire for a more competitive labour market,[13] by reducing skills gaps and reducing unemployment whilst increasing European integration.[14]

Despite the commitments to promote student mobility,[15]Dougan notes the substantive lack of free movement emanating from the student communities of the EU.[16] The European bodies have taken steps towards identifying the differing obstacles to this type of free movement and are consistently developing frameworks intended to remove such obstacles as: language barriers, information on educational migration opportunities, issues of

[11] COM(2018) 50 final report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Mid-term evaluation of the Erasmus+ programme (2014-2020) {SWD(2018) 40 final}, p2; COM(2017) 673 *Strengthening European identity through education and culture* — The European Commission's contribution to the leaders' meeting in Gothenburg, 17 November 2017, pp3-9

[12] Tibor Navracsics, Commissioner for Education, Culture, Youth and Sport, in European Commission/EACEA/Eurydice, 2018. The European Higher Education Area in 2018: Bologna Process Implementation Report. Luxembourg: Publications Office of the European Union, p4.

[13] Spaventa, *Citizenship: reallocating welfare responsibilities to the State of origin*, in Koutrakos, Nic Shuibhne and Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016), p50; Lisbon European Council 23 and 24 March 2000 Presidency Conclusions, point 5.

[14] COM(96) 462 *Commission Green Paper: the obstacles to transnational mobility*; Lisbon European Council 23 and 24 March 2000 Presidency Conclusions

[15] Presidency Conclusions – Brussels, 22 and 23 March 2005, Point 35; Socrates website <http://www.firststeps-project.eu/web/content.asp?lng=en&section=SOCRATES> accessed on 09.11.18; European Commission website for Leonardo Da Vinci: <https://eacea.ec.europa.eu/sites/2007-2013/llp/leonardo-da-vinci-programme_en>

[16] Dougan, '*Fees, Grants, Loans, and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?*' (2005) 42 CML Rev 943, pp943-944

regional and minority development in education, the need for lifelong learning and the recognition of certain types of study or vocational training.[17]

However, an obstacle that will definitively affect the mobility of students within the Union (especially those 'deprived' who would benefit most from enhanced opportunities), is the need for funding in order to actually pursue education in another Member State.[18] Plans to reduce this obstacle are absent from the Commission communication, which instead focuses on the ambition to extend the Erasmus+ programme and double the numbers of participation.[19]

That the Commission sees education as a way of ensuring a European identity could link the rights of student-Citizens to the success of EU citizenship.[20] As education can be seen as a way of participating in "active *citizenship*", according to the Commission, and that in order to achieve this, student-Citizen mobility needs to be the rule and not the exception.[21]

An ambitious 2025 agenda proposed aims for "*making learning mobility a reality for all* [and] *preserving cultural heritage and fostering a sense of a European identity and culture*",[22] but there are obvious qualifications on this commitment. The Commission does not fail to mention the principle of subsidiarity,[23] and how national Member States are in control of the content and organization of their own education systems.[24] They focus instead on trying to remove the obstacles created by the non-recognition of certain

[17] COM(96) 462, n.14; Lisbon European Council 23 and 24 March 2000 Presidency Conclusions; Presidency Conclusions – Brussels, 22 and 23 March 2005; COM(2001) 59 *Report From The Commission The Concrete Future Objectives Of Education Systems*, Brussels, 31.01.2001 final; and also Dougan, *Fees, Grants, Loans and Dole Cheques,* (n.16)
[18] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p943-944
[19] COM(2017) 673, n.11, p5
[20] James, *Citizenship, Nation-Building and Identity in the EU* (Routledge/ UACES Publishing 2019) pp32-43
[21] COM(2017) 673, n.11 pp5 -7
[22] *Ibid*, p11
[23] *Ibid,* p2
[24] *Ibid,* p11

qualifications. The CJEU also links citizenship with student mobility in *Bidar*;[25] where it uses the establishment of EU citizenship and the education chapter in the EC Treaty, as the foundation for the decision that the equal treatment provisions in the Treaty also apply to student maintenance grants and loans. Also, in *D'Hoop*[26] the Court mentions that the newfound educational goals of the EU must be interpreted as a desire to advance student mobility.

Education could also be seen as a way of achieving the internal market aims of promoting "*economic, social and territorial cohesion, and solidarity among Member States*" as promised by Article 3 of the TEU.[27] The Commission seems to believe these are products of investing in education, which is "*a shared interest of all Member States and of Europe as a whole as it is a driver for jobs, economic growth and improved welfare."*[28]

The discussion that follows analyses how free movement law has developed to highly restrict the ability of student-Citizens to gain financial support from host Member States where they are studying. There is no mention of these rules in the communication regarding EU educational objectives; yet if these objectives are to be met, and if indeed mobility of students is an imperative part of doing so, there needs to be an addressing of how restrictive free movement law is regarding student Citizens.

## 2. The Right to Move and Reside for the purposes of study:

The historical rights of EU citizens as non-economically active citizens is aptly set out by Dougan,[29] who recalls the Court manufacturing the right to equal treatment in regards to

[25] C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing* [2005] I-02119 para 41
[26] C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-06191, para 32
[27] Consolidated version of the Treaty on European Union [2012] OJ C326/13 ('TEU'), Article 3
[28] COM(2017), n.11 p6
[29] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16)

access to vocational training;[30] the CJEU prohibited discrimination by Member States which would deter mobile EU students from studying at their institutions vis-à-vis fees, quotas and educational requirements.[31] These student rights necessarily implied the right to reside in host Member States so long as the educational purpose continued, i.e. as long as the study period persisted.[32]

Student-Citizen's right to residency, as laid out by the CJEU was enshrined in secondary EU legislation by Directive 93/96/EEC[33] updated more recently by codification into the CRD.

Although high levels of educational attainment are desirable within the EU, student-Citizens' rights are not as imperative to the goal of the single labour market. The wording of the CRD for student-EU Citizens is therefore very similar to the provisions on the completely economically inactive. A hierarchy can be seen: workers and self-employed persons receive the right to residence simply on the basis of their status as such, as according to Article 7(1) of the CRD. In Article 7(1)(b)[34] it is evident that all other citizens must fulfil the sufficient resources and sickness insurance requirements; so that host Member States do not become unreasonably burdened by their residence through claims for social security. Jobseekers, on the other hand, must merely genuinely be seeking employment in order to obtain the right to reside in a Member State.[35]

Students are still an independent category of citizen under the CRD; so will be treated differently and separately from other economically inactive citizens. This was established

[30] Citing C-293/83 *Gravier* [1985] ECR 593; and C-24/86 *Blaizot* [1988] ECR 379
[31] Citing C-152/82 *Forcheri* [1983] ECR 2323; C-309/85 *Barra* [1988] ECR 355; C-24/86 *Blaizot* [1988] ECR 379
[32] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), pp945-949
[33] Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students [1993] OJ L 317 ('Directive 93/96')
[34] CRD, Article 7(1)(b)
[35] See Chapter 1; CRD, Recital 9 (preamble)

in the *Grzelczyk* judgment,[36] which pre-dates the CRD but was decided on the terms of its similar predecessor.[37]

The Court inferred that students are given special considerations regarding the need to have sufficient resources.[38] They are under no obligation to demonstrate, or perhaps even *have*, their self-sufficiency, unlike other economically inactive citizens.[39] They are only required to *declare* to the Member State authorities that they possess sufficient resources not to become an unreasonable burden.[40] The Court accepted that this declaration is likely to change due to the uncertain financial situation that most students will face.[41] For this reason, the Court found that although it is still wholly possible for a Member State's authorities to remove the right to residence for students without the sufficient resources, to stop them applying for social security benefits, those Member States should show '*a certain degree of financial solidarity*' towards such students, as their financial difficulty is likely to be temporary.[42] This case followed the line of reasoning that had been evident in *Commission v Italy*, where the Commission argued that Member States might exclude students from their territory and remove their right of residence if they were to become an unreasonable burden, but it is unlikely that a student should ever become such an unreasonable burden. Students are inherently temporary in their residence within another member state, as they have moved for the purposes of education it is likely that their presence within the Member State and their reliance on Member State resources may only

[36] C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193
[37] Directive 93/96; CRD, Article 7(1)(b) CRD
[38] C-184/99 *Grzelczyk* (n.36), para 40
[39] *Ibid,* para 41; see Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26 ; also Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28
[40] C-184/99 *Grzelczyk* (n.36), para 41
[41] *Ibid,* para 45
[42] *Ibid,* para 44

last the duration of their studies.[43] The CRD reflects this by only requiring students to 'assure' they have sufficient resources, rather than 'have' them.[44]

The reasoning behind such a favourable treatment can be seen from the opinion of the EU Commission in *Commission v Italy*:[45] students are unlikely to be a permanent burden upon a Member State, and furthermore they are likely to supplement what money they do have with part-time work.[46]

In *Bidar*[47] the CJEU stated that student-citizens who use exercise their free movement rights will have a right of residence in the host Member State so long as there is "*no objection that they **have** sufficient resources*"[48] and sufficient sickness insurance. The same was confirmed later in *Förster*,[49]which held that a student-citizen is lawfully resident "*when he or she fulfils the conditions set out in Article 1 of that directive as regards **having sufficient resources.**"*[50] Therefore, there appears to be an onus on the student citizens to *prove* that they have sufficient resources to live in a Member State without becoming an unreasonable burden. The right of residency may be rebutted once there is some doubt that the mobile student has sufficient resources. This seems somewhat at odds with *Grzelczyk* and the *Commission v Italy* decision, whereby some leniency was given to the fact that student declarations may not always ring true because their financial status can change quite rapidly.

This contradiction seems immaterial to the outcome of both *Bidar* and *Förster;* in neither case did the Court look into the sufficiency of any resources or declaration of such. In both

[43] C-424/98 *Commission v Italy* [2000] ECR I-04001, para 40
[44] CRD, Article 7(1)(b) and (c)
[45] C-424/98 *Commission v Italy* (n.43), para 40
[46] *Ibid*
[47] C-209/03 *Bidar* (n.25)
[48] *Ibid,* para 36
[49] C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-08507
[50] *Ibid,* para 40

cases the lawful residency of the individuals was not contested. The cases were more about the national Member States ability to legitimate restrict equal treatment to maintenance assistance that arose as a result of that lawful residency. The ability for EU law to balance the interests of Member States with EU objectives will be discussed in the following section.

## 3. Equal Treatment for Access to Student Maintenance Related Benefits in the Host State:

The codification of the right to residency for students can be seen as a step towards mobilising the educational area in the Union. Certainty of free movement rights and a simple administrative process is bound to encourage free movement of student citizens.[51]

Parallels may be drawn between the history of students and jobseekers that have utilised free movement into other Member States. Earlier, the historical unfavourable treatment of work-seekers regarding access to benefits was discussed. It is clear from the first tenets of case law regarding students, that the position of educational mobility within the EU was much similar. In two judgements, *Lair*[52] and *Brown*,[53] the Court found that at that point in time, considering the state of development of community law, maintenance assistance fell outside the scope of the equal treatment provisions of the Treaty (Article 7, EEC Treaty).[54] Equal treatment under Article 18 (ex. Art 12 EC) may only be relied upon in situations falling under the material scope of the Treaties and therefore EU law, so the lack of educational scope at the EU level was a barrier to equal treatment with regards to maintenance.

[51] COM(2017) 673 (n.11), pp5 and 7
[52] Case 39/86 *Lair,* EU:C:1988:322, para 16
[53] Case 197/86 *Brown* EU:C:1988:323, para 19
[54] Case 39/86 *Lair* (n.52), para 19

The Court revisited the issue in *Grzelczyk*,[55] where the Court found Mr Grzelczyk was entitled to equal treatment with regards to access to the minimex, because of the fundamental status of citizenship of the Union[56] which grants equal treatment in all situations falling under the *ratione materiae* of EU law.[57] The advancement of EU law in the area of education, by legislating for the residency of students[58] and by the EC Treaty including a section on education and vocational training in Article 149,[59] brought it under the *ratione materiae*[60] of EU law, so made equal treatment with regards access to the minimex benefit possible. The Court accepted that the right to free movement is subject to 'limitations and conditions'[61], specifically Article 3 of Directive 93/96 prohibiting access to maintenance assistance for students establishing residency under it; but also found that there were no prohibitions on students using their right to equal treatment to gain equal access to social security.[62]

The *Grzelczyk* judgment is capable of enhancing student mobility within the EU. The Court appears to go out of its way to create an artificial distinction between social assistance and maintenance assistance in order to ensure the equal treatment of a citizen student to financial support.[63] The Court notes the need for financial solidarity between Member States and mobile students, thus suggesting it was not concerned with the burden this would place on host Member States. The Union's educational objectives were therefore given considerable weight. The distinction may be seen as one of practicality; the Court has already held that the financial circumstances of mobile students are likely to fluctuate, and

[55] C-184/99 *Grzelczyk* (n.36)
[56] *Ibid,* para 31
[57] *Ibid,* para 32
[58] Directive 93/96, Article 2; CRD, Article 7(1)(c)
[59] Treaty establishing the European Community [2002] OJ C325/33, Article 149 ('TEC'); TFEU, Article 165
[60] C-184/99 *Grzelczyk* (n.36), para 35
[61] *Ibid,* para 39
[62] C-209/03 *Bidar* (n.25), para 39
[63] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p964

that burdens on the welfare system would not be long-term.[64] The Member States have the authority to remove a student's right of residence if it becomes clear that they are becoming an unreasonable burden,[65] because their financial hardship is not temporary.[66] The distinction between benefits, although at first sight is artificial, is legitimate, in that neither Directive 93/96[67] nor its successor the CRD[68] prohibits access to social assistance.

Moreover, the distinction recognises the potential need for *temporary* financial assistance, which maintenance assistance benefits do not provide, being more long term. Equal treatment rights provided for by Union citizenship are upheld by this distinction, for it will only be when national students would have a right to social assistance that EU citizen students would also have access on the same basis. If national students (more likely to be fully supported with maintenance assistance) could also claim social assistance, this suggests that the latter benefits do have some alternative purpose to maintenance assistance, so granting one does not make futile the restriction of the other.

The later judgment of *Bidar*[69] was also a positive shift towards greater social rights for student-Citizens. Although the residency Directive 93/96 and the CRD both prohibit access to maintenance assistance being claimed on the basis of their residency provisions;[70] the Court found that students could still rely on their Treaty right to equal treatment in order to claim these benefits, if they were legally resident under the aforementioned secondary legislation.[71] The Court found that the reference to maintenance assistance in the CRD (adopted at the time, albeit not implemented), evidenced that those grants were within the

[64] C-184/99 *Grzelczyk* (n.36), para 45
[65] C-184/99 *Grzelczyk* (n.36), para 42
[66] *Ibid,* para 44
[67] Directive 93/96/EEC, Article 1
[68] CRD, Article 7(1)(c)
[69] C-209/03 *Bidar* (n.25)
[70] Directive 93/96; CRD
[71] C-209/03 *Bidar* (n.25), para 46

scope of the Treaty and therefore the equal treatment provisions under Article 18 (ex. Article 12).[72] It also legitimised this extension of equal treatment by referring to the educational goals of the Union.[73] Specifically, the Court referred to the newfound competence of the Council to promote student mobility.[74]

Regardless of the softer approach taken towards sufficient resources and whether student-Citizens can claim equal treatment to access to maintenance benefits, the case law regarding Member State's ability to curtail their equal treatment rights to maintenance assistance is more important to determine how far the educational objectives can be achieved. On the surface it would appear that the Court is committed to increasing educational mobility across the EU. However, as Jørgensen[75] notes, a statement that the principle of equal treatment (Article 18 TFEU) applies to education grants and does not necessarily achieve this. The ability of equal treatment to aid achievement of the educational goals of the EU, depends upon the willingness (or unwillingness) of the Court to accept any objective justifications for the indirect discrimination that undeniably arises when Member States refuse student maintenance to EU citizens.[76] The following analysis shows an inherent willingness to accept such justifications, suggesting that the Member State interests are still balanced heavily against EU educational objectives.

3.1 Restrictions on the right to Equal Treatment - The Real Link Test for Students:

The CJEU in *Bidar* found the UK's requirements for maintenance loans to be discriminatory. They required students to be settled in the UK, and to have resided there for three years prior to the start date of the Course; this would primarily effect non-

[72] *Ibid,* para 43
[73] *Ibid,* paras 40-43
[74] *Ibid,* para 41
[75] Jørgensen, *The Right to cross-Border Education in the European Union* (2009) 46 CML Rev 567
[76] *Ibid* p1574

nationals, so could only be justified *"if based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions."*[77]

The UK court's request for a preliminary ruling in *Bidar*[78] included a request for the Court to clarify the criteria which must be applied in order to determine whether conditions of granting assistance are based on objective considerations independent of nationality. A parallel is evident between work-seekers and students in this regard, as the Court finds that a legitimate objective may be ensuring a 'real link' between EU citizens and the host Member States, to prevent an unreasonable burden on their social assistance system to the point where the overall level of assistance that may be offered is affected.[79] The Court accepted that the UK could require *'a certain degree of integration'*[80] from student citizens, and that requiring of a certain period of residency is an appropriate way of ensuring this.[81] The Court differentiates between student citizens and jobseeking citizens by stating the former cannot be subject to a requirement that they have a link to the employment market; as the knowledge gained in the course of secondary education does not necessarily tie a citizen to a certain geographical job market.[82] In this regard, it becomes clear that the Court may be more concerned with the educational objectives of the EU rather than the internal market relevance of increased educational mobility.

The UK's three-year residency requirement was accepted as legitimate in order to prevent any unreasonable burden on the assistance system. The requirement to be 'settled' in the UK was not; as the UK settled status rules made it impossible for EU students to become

[77] C-209/03 *Bidar* (n.25), paras 53-54
[78] C-209/03 *Bidar* (n.25)
[79] *Ibid,* para 56
[80] *Ibid,* para 57
[81] *Ibid,* paras 59-60
[82] *Ibid,* para 58

settled.[83] That requirement could not take into account the actual integration of the student,[84] unlike the three-year residency period.

The *Bidar* judgment shows the Court embarking upon a legitimate balance of interests. Although a three-year residency requirement is relatively restrictive on the right to equal treatment, it would have been perfectly legitimate for the Court to have followed the *Lair/Brown* line of jurisprudence and simply denied student maintenance a place within the remit of EU law regarding equal treatment. This would have still conformed with the will of the EU legislatures who drafted the student maintenance exceptions into and even later the CRD[85] and its predecessor.[86]. The Court instead strikes a reasonable balance between the need to protect Member States, by allowing fairly robust restrictions, and the need to respect that mobile students are an objective of the EU by upholding the right to equal treatment. By broadening the scope of EU student-citizens' rights, rather than following the narrower wording in the aforementioned Directives, the Court also affirms 'the fundamental status' of EU citizenship. This allows for the possibility of students to claim educational welfare benefits, should a situation arise where it is legitimate and would not pose an unreasonable burden upon Member State finances.

It is clear that EU students are treated less favourably than EU work-seekers. For instance, in *Prete*,[87]a singular requirement to have been educated in the host Member State was treated as being 'beyond what is necessary' to establish a real link; as it could not take into consideration other alternative factors that may show integration.[88] Yet in the *Bidar*[89] case,

[83] *Ibid,* para 61
[84] *Ibid,* paras 61-62
[85] CRD, Article 24(2)
[86] Directive 93/96, Article 1
[87] C-367/11 *Déborah Prete v Office national de l'emploi* EU:C:2012:668, paras 35 to 36
[88] *Ibid,* paras 44-45
[89] C-209/03 *Bidar* (n.25), para 60

the Court appears to accept a single (rather lengthy) residency factor is legitimate to determine genuine integration.

It appears that the period of residency may always be used to determine the existence of a link between the EU citizen and the host Member State, but the type of EU citizen will determine how strict that residency period may be. For instance, in *Bidar* and the *Förster*[90] decision discussed in the following paragraph, three and five years were perfectly reasonable in order to ensure genuine integration. Three years was rejected in *Prinz and Seeberger*[91] (discussed below) because the benefits at issue were claimed from the host Member State. No determinate amount of time was discussed in *Collins*, but the Court found that residency periods required "*must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work;*"[92] which is likely to be less than three years. What is evident, is that EU citizen students resident in a Member State other than their home are seen as a particular risk of burdening the social system; hence the broader approach taken by the Court to the length of residency periods that can be required.

There is further evidence in the *Förster*[93] judgment that the Court gives a wide margin of appreciation to Member States when determining the 'degree of integration' of students, in comparison to determining the 'real link' of a work seeker. *Förster* is factually different to *Bidar*, as the claimant was settled in the Netherlands and worked in various occupations, before becoming a social worker and receiving a maintenance grant to study whilst doing so. The maintenance grant was revoked and there was a request for some repayments when the authorities found that Miss Förster had not been in work for some of the grant duration.

[90] C-158/07 *Förster,* (n.49) para 58
[91] C-423/11 and C-585/11 *Prinz and Seeberger* EU:C:2013:524, para 40
[92] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703, para 72
[93] C-158/07, *Förster,* (n.49)

She could not claim for equal treatment as per *Bidar* because she was not sufficiently integrated into society *prior* to enrolling on her degree course to justify her claim. Ms Förster would have needed a continuous period of five years of prior residence to claim the maintenance grant under Dutch law.[94]

The Court re-iterated that Article 18 TFEU (then Article 12) could be relied upon to claim equal treatment to access to maintenance and social assistance so long as the EU citizen had been resident for a certain period of time in the host Member State.[95] It also confirmed that Article 3 of Directive 93/96 did not preclude this.[96] The Court also affirmed the legitimacy of residency requirements to determine the degree of a student's integration into a host Member State society,[97] and since unlike *Bidar* there was no requirement for the applicant to be 'settled' or any other requirement which would be unobtainable by an EU citizen, the justification and proportionality of the restriction was upheld.[98] Although the residency requirement was considerably longer than the one at issue in *Bidar,* it was still deemed appropriate by the Court, which relied on Article 24(2) CRD (albeit not applicable at the time of the facts of *Förster*) to justify this finding. Article 24(2) stated there was no obligation on the Member States to provide maintenance assistance until a student had the right of permanent residence, which would be after five years continuous residence.[99]

Although there are clearly some similarities between the developments in the student citizen case law and jobseeker citizen case law, the objectives relating to students do not weigh as heavily against the interest of Member States. This is evidenced by the willingness of the Court to allow restrictions on equal treatment with regards to access to maintenance

[94] Article 2.2 Wet studiefinanciering 2000; Article 2(1) Beleidsregel aanpassing aanvraag studiefinanciering voor studenten uit EU, EER en Zwitserland, 'the Policy rule of 9 May 2005'
[95] *Förster,* (n.49) paras 36-39
[96] *Ibid,* paras 41-43
[97] *Ibid,* paras 53-54
[98] *Ibid,* para 47
[99] *Ibid,* paras 54-55

assistance, in the form of lengthy durational residency requirements equaivalent to that which grants permanent residency. The generalised effect of this is that it will almost bar all EU citizens who move solely for the purpose of study from equal treatment to maintenance assistance, as most tertiary education courses will be completed before the period of five years has transpired.[100]

The developments analysed above have attracted considerable academic criticism. The following section of this chapter focuses on these criticisms before addressing whether the increased level of restrictions for student equal treatment has struck a fairer balance between Member State and EU interests.

### 3.2 Abandoning proportionality in the CRD

The Court's decision to permit something as restrictive as a five-year durational requirement was met with disapproval from many angles that appear to overlap. Golynker notes how the CJEU seems to struggle to streamline the 'real link' methodology across jobseekers and students, which creates uncertainty for citizens.

The unexpected outcome of *Förster* is evidenced by the stark differentiation between the judgment and the opinion of AG Mazák on the facts of the case. AG Mazák found a five-year residency requirement to be too general in its scope to be legitimate. The opinion seems more fitting compatible with jobseekers case law in *D'Hoop,*[101] *Ioannidis*[102] and *Prete,*[103] where the Court found that single criteria rules are unsuitable for determining a genuine degree of integration. The settlement requirement in *Bidar* was not justifiable

[100] Golynker, '*Case Comment C-158/07 Förster'* (2009) 46 CML Rev 2021, p2026; O'Leary, '*Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance'* (2009) 34(3) EL Rev 612, p621
[101] C-224/98 *D'Hoop* (n.26), para 39
[102] C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECR I-8275, para 31
[103] C-367/11 *Prete* (n.87) para 41

because it excluded all EU mobile students regardless of how integrated they were.[104] The AG in *Förster* found it perfectly feasible that a student "*may have established a substantial degree of integration into society well before the expiry of that period*."[105] Students may integrate with a Member State during the course of their education; they may undertake part time work, or placements which enable them to become integrated with society, which Ms Förster did.[106]

The first issue that this raises is one of coherence and certainty. O'Leary[107] opines how the *Förster* decision is at odds with the student case law in *Bidar*, as the Court's decision made clear that restrictions should have regard to the actual degree of integration between an EU citizen student and the host Member State. But, as clearly noted by AG Mazák, EU citizen students can be substantially and sufficiently integrated in a host Member State some time before a five year period has elapsed.[108]

The Court's approach also differs from its approach to jobseekers. Golynker[109] and O'Leary both note that the proportionality of residency requirements is not required to be as rigorously assessed by Member States in relation to students. In *Collins* the Court insisted that, as a derogation from the principle of equal treatment, durational periods must be interpreted strictly and be proportionate and must not go beyond what is necessary in order to establish a jobseeker is seeking employment. In *Förster*, the Court finds that a five-year period may be necessary to show the integration of a student because of the wording of the CRD, so the derogation does not appear to be interpreted strictly at all. Golynker[110] found

[104] C-209/03 *Bidar* (n.25), para 61
[105] C-158/07 *Förster* (n.49) Opinion of AG Mazák, para 130
[106] *Ibid*
[107] O'Leary, *Equal treatment and EU citizens* (n.100), p.621
[108] C-158/07 *Förster* (n.49) Opinion of AG Mazák, para 130
[109] Golynker, *Case Comment: Förster* (n.100) p2029
[110] *Ibid*

this difficult to rationalise, because at the time the *Collins*[111] and *Vatsouras and Koupatantze*[112]judgments relied upon the Treaty rights concerning workers, equal treatment and citizenship, which remained and the CRD was interpreted in light of them.[113] *Förster* suggests the opposite and strictly applies the provisions of the CRD, and tends to provide a more general and certain[114] approach; which is also more politically appetising due to giving more weight the concerns of the Member States regarding their student financing.[115] Although the pattern started by *Förster* has since been continued in *García-Nieto*[116] and *Alimanovic*[117], which also show the Court interpreting the provisions of the CRD narrowly to restrict equal treatment to access to social benefits; it does not deter from the fact that the Court at the time could be criticised for having an incoherent stance on the 'real link' between cases involving students and jobseekers.

Golynker[118] notes that the disparity also creates uncertainty regarding the effects of Union citizenship. The establishment of citizenship was an important consideration for the Court in *Collins*.[119] Citizenship is applicable to all nationals of EU Member States, but in this circumstance appears to only benefit those with greater economic potential, as *Förster* lacks the robust proportionality obligation of *Collins*. O'Leary[120] also noted that *Förster* may indicate the end of the citizenship era, as the case does not mention the "*fundamental status*" of EU citizenship that has so often been quoted before[121] including in relation to students

[111] C-138/02 *Collins* (n.92), para 63
[112] C-22/03 and C-23/08 *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE)* [2009] ECR I-04585, paras 36, 37 and 40
[113] C-22/03 and 23/03 *Vatsouras and Koupatantze* (n.112), para 44
[114] Golynker, *Case Comment: Förster* (n.100), p2038
[115] *Ibid,* p2039; O'Leary, *Equal treatment and EU citizens* (n.100), p623
[116] C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* (2016) EU:C:2016:114
[117] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others,* OJ C 142, 12.5.2014
[118] Golynker, *Case Comment: Förster* (n.100)
[119] C-138/02 *Collins* (n.92), para 63
[120] O'Leary, *Equal treatment and EU citizens* (n.100), p626
[121] C-413/99 *Baumbast*, n.6 para 82; C-148/02 *Garcia Avello* [2003] ECR I-11613, para 22; and C-138/02 *Collins* (n.92), para 61

in *Grzelczyk*[122] and *Bidar*.[123] It is the opinion of this thesis that O'Leary and Golynker were correct in their assertions, as in the latest case law on jobseekers, *García-Nieto*[124] and *Alimanovic*,[125] the Court has once again turned to a restrictive interpretation of the CRD in order to create a less ambiguous system than the 'real link' concept, and in neither case is the fundamental status of citizenship discussed.

The *Förster* judgment provided the opportunity for a levelling-down of student citizens rights, which was predicted by Barnard[126] in her analysis of *Bidar*. Barnard opined[127] that the CRD was capable of constituting a regression of EU citizens' rights if it were to be interpreted strictly; if the UK utilized Article 24(2) CRD, their legislation granting EU citizens' access to student maintenance loans would increase the residence period requirement from three to five years. This restriction has occurred in UK law,[128] so the CRD has restricted citizens' rights, despite the educational objectives of the EU. Barnard strongly criticizes[129] the any levelling-down of citizens rights as they exist from the case law of the CJEU, interpreting a Treaty which is primarily aimed at improving the living and working conditions of EU citizens.[130] The aforementioned objective is still essential and prevalent in the TFEU,[131] yet the most recent case law on students and jobseekers shows how the interests of Member States are more important than their Treaty obligations.

[122] C-184/99 *Grzelczyk* (n.36), para 31
[123] C-209/03 *Bidar* (n.25), para 31; C-158/07 *Förster,* (n.49)
[124] C-299/14 *García-Nieto* (n.116)
[125] C-67/14 *Alimanovic* (n.117)
[126] Barnard, '*Case Comment Case C-209/03, R (On the Application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills, Judgment of the Court (Grand Chamber)'* (2005) 42 CML Rev 1465, pp1482-1483
[127] Barnard, *Case Comment: Bidar* (n. 126), pp1481-1483
[128] Education (Student Support) (Amendment) Regulations 2016, Section 6
[129] Barnard, *Case Comment: Bidar* (n.126), p1483
[130] TEC, Recital 3 (Preamble) to the
[131] TFEU, Recital 3 (Preamble)

The above raises questions about the legitimate order of legal instruments within the EU, and the relationship between the legislature and the CJEU. In drafting Article 24(2) CRD, the legislature circumvents the interpretation of Articles 18 and 21 TFEU by the Court in cases under Directive 93/96 such as *Grzelczyk*.[132] In *Förster*, the Court itself abandons its citizenship-centred interpretation of the Treaty in favour of the certain and unambiguous derogation in Article 24(2).[133] Nic Shuibhne[134] states that even though Art. 24(2) "*emits glows of democracy and legitimacy"*from the legislative process, the Court's Treaty-based jurisprudence on citizenship should actually take precedence over the restrictive secondary legislation.[135] The same issue has been noted by Golynker,[136] O'Leary[137] and Barnard.[138] Van der Mei suggests the Court has given in to the pressure of the legislature and the interests of Member States, and taken a step back from its role shaping the legal role of EU citizenship in access to social benefits cases.[139] Dougan[140] also opines that the same reaction was prevalent in relation to Article 3 of Directive 93/96; but also maintains that the Treaty provisions and the CRD can be reconciled by the obligation of the Member States to adhere to the principle of proportionality.[141]

Golynker questions the difference in treatment of jobseekers and students, at the time where the Court circumvented Art.24(2) for jobseekers in *Vatsouras.*[142] She highlights how Ms *Förster* had significant social and economic ties to the host Member State, whereas in

[132] C-184/99 *Grzelczyk* (n.36)
[133] C-158/07 *Förster,* (n.49), para 57; see also C-299/14 *García-Nieto* (n.116), para 49
[134] Nic Shuibhne, *The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice*, in Syrpis (ed.) *The Judiciary, The Legislature and The EU Internal Market* (Cambridge University Press 2012) p.331-62
[135] *Ibid,* p352
[136] Oxana Golynker, *Case Comment: Förster* (n.100), p2029
[137] O'Leary, *Equal treatment and EU citizens* (n.100), p623
[138] Barnard, *Case Comment: Bidar* (n.126), p1483
[139] Van der Mei, '*Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid'* (2009) 16 Maastricht Journal of European & Comparative Law 477, p479
[140] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), pp968-969
[141] *Ibid,* p969
[142] See Chapter 1

*Collins* and *Vatsouras* the claimants had relatively weak links to the host Member State. This thesis agrees that Ms Förster was integrated enough to justify provision of the maintenance grant; but the highly individualistic approach of comparing these specific situations does not aid the overall assessment of the free movement framework from the perspective of balancing interests. A general, restrictive rule against students having equal treatment to access to expensive maintenance assistance should not be deemed unsuitable because of one specific injustice.

Van der Mei[143] analyses students generally, they are a category of citizens which reap the rewards of tax-funded education systems without the promise of paying tax in that host Member State at the end of it, unlike jobseekers who are more likely to become settled tax payers. The concerns of Member States are therefore genuine in seeking to largely restrict them. This thesis holds the opinion that the differentiation between categories of citizens is necessary due to the differing objectives that may be achieved via the free movement of different groups, leading to differing levels of competence and legitimacy of the EU Court and legislator in relation to these categories. The point of this is not to suggest that the social injustice in *Förster* is justifiable or acceptable, but merely to point out that using the injustice to suggest that the framework of differentiating between types of citizens is undesirable is erroneous. If Ms Förster is to have her exceptional integration taken into consideration, it should be because her situation differs from the general populous of student citizens and not because she is more desirable than some jobseekers. Van der Mei opines that there should be differentiation between EU citizens who are just students, and claimants who have relocated to the host Member State and show intention to work there, as Ms Förster had.[144] In the opinion of this thesis, such claimants would possibly have a

[143] Van der Mei, '*Free Movements of Students and the Protection of National Educational Interests: Reflections on Bressol and Chaverot'* (2011) 13 European Journal of Migration and Law 123, p133
[144] Van der Mei, *Union Citizenship* (n.139), pp487-490

strong enough link to Art 45 TFEU to justify equal treatment; or, at least would be exceptional enough to warrant a proportionality review of their claim.

3.3 Balancing competence, EU objectives and Member State interests:

This part of the analysis relating to students will highlightthe difficulty in balancing Member State interests with EU objectives and citizens' interests, in a coherent manner.

Education is a politically sensitive area due to it being highly individualised at the Member State level, increases in cross-border mobility will affect the policy choices that can be made regarding education at the national level.[145] The tension arising between the national and EU level can be seen from the outset: education is expensive, Member States want to ensure the affordability, as well as the quality of their education systems. The obligation to extend equal treatment of educational welfare is perceived as a threat to the affordability, and therefore possibly the quality, of the national education system overall.[146] On the other hand, mobility of students across the EU is desirable for a competitive labour market that is able to fill skills gaps.

This Chapter has already noted the 'free rider' or 'educational tourist' opinion that can be held of students.[147] They are unlikely to be integrated at the start of their studies,[148] and even during the course of their studies are unlikely to integrate to the same depth as if they relocated their centre of interests to the host Member State.[149] Also, EU citizen-students are not economically integrated; their education will be funded by national taxes, which neither the student nor their family has not contributed to, suggesting that they do not

[145] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), pp954-956
[146] Jørgensen, *The Right to cross-Border Education* (n.75), p1568
[147] Van der Mei, *Union Citizenship* (n.139), pp486-487; Van der Mei, *Free Movements of Students* (n.143), p133; Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p954
[148] Dougan, *ibid* p973
[149] A P van der Mei, *Union Citizenship* (n.139), pp487-489; Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p973

inherently 'deserve' to benefit from the education system.[150] Furthermore, they are unlikely to contribute in the future to make up for this fact, as a large proportion of students return to their Member State of origin.[151]

AG Sharpston, in her opinion in the student quotas case *Bressol*[152] finds the 'free rider' argument unconvincing;[153] because students do contribute to the host Member State through indirect taxation on goods and services.[154] She also states that if tax-paying is the only way to become deserving of the benefit of education; then nationals who pay little or no tax will also be excluded from the education system.[155]

This thesis does not wholly agree with the reasoning of AG Sharpston; as noted by Barnard[156] and Dougan,[157] national education systems are funded by tax on the premise of *national* solidarity, a shared identity and a willingness to look after the less fortunate based upon common nationality.[158]

Van der Mei also challenges the arguments of the AG, as although some indirect taxation may be a result of EU citizen students' residence in a host Member State, those students have still not contributed to the education system itself, from which they are reaping a benefit.[159]

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[150] Van der Mei, *Union Citizenship* (n. 139), pp486-487; Van der Mei, *Free Movements of Students* (n.143), p133; Barnard, *Case Comment: Bidar* (n.126), p1476, 1485-1486; Jørgensen, *The Right to cross-Border Education* (n.75), p1569 and 1571

[151] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p985; Van der Mei, *Free Movements of Students* (n.143) p124; Barnard, *Case Comment: Bidar* (n.126) pp1485-1486

[152] C-73/08 *Bressol and Others* [2010] ECR I-02735, Opinion of AG Sharpston

[153] *Ibid,* para 95

[154] *Ibid,* Para 96

[155] *Ibid*, para 96

[156] Barnard, *Case Comment: Bidar* (n.126)

[157] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p954

[158] Barnard, *Case Comment: Bidar* (n.126), p1477

[159] Van der Mei, *Union Citizenship* (n.139), p486

However difficult national welfare solidarity is to rationalise, it undoubtedly exists and cannot be whitewashed in order to attain pure equal treatment between EU citizens and nationals.

The budgetary considerations pointed out by the AG present another issue with balancing the interests in this area. Educational systems are diverse across the Member States, both in terms of funding and accessibility, which naturally affects their attractiveness to migrating students. Therefore, there may be some budgetary impact on Member States with attractive systems; as Dougan notes, Member States have one finite pool of resources from which to fund their education systems, with a possibly considerably larger pool of consumers of those resources.[160]

Budgetary issues may be exacerbated by divergent patterns of student migration.[161] Member States can become 'net importers' of students, with large inflows of EU citizen students studying in their territory without the reciprocity of a large outflow. For instance the UK has an incredibly high proportion of EU citizen-students,[162] as does Belgium,[163] Germany,[164] and Austria.[165] This raises issues of both cost and places for students; as noted by Barnard,[166] the education is paid for through taxes and courses may either be burdened by extra EU citizen-students, or perhaps spaces are taken that would have otherwise gone to a national student.

[160] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p959
[161] *Ibid* p956; Barnard, *Case Comment: Bidar* (n.126), p1483; Van der Mei, *Free Movements of Students* (n.143), pp123-124
[162] Barnard, *ibid*, p1483; Van der Mei, *ibid*, p124; Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p956
[163] Barnard, *ibid*, page 1483; Van der Mei, *ibid,* p124
[164] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p956; Van der Mei, *ibid,* p124
[165] Dougan, *ibid*; Van der Mei, *ibid*
[166] Barnard, *Case Comment: Bidar* (n.126), p1485

Van der Mei,[167] uses Austria and Belgium to show the burden that net imports of students causes. Austria suffers from student mobility, whilst Germany benefits as their student citizens migrate to Austria to enjoy more favourable admission administration for veterinary medicine, returning to Germany to work using the education that has been funded by Austria.[168] Belgium suffers similarly, as it has more favourable admissions policies than France, which restricts the number of places for certain courses.[169]

The above analysis makes it clear that Member State interests are economic and solidarity-centred. It may therefore be argued that, in order to strike a correct balance between free movement objectives and those interests, budgetary considerations and integrational considerations should form part of the restrictions, which should then be applied proportionately. However, there are a few reasons why the economic impact of students should not be the decisive factor in whether reducing funds to, or places for, students is permissible.

Firstly, the CJEU should not be interpreting national budgets and budgetary considerations in an area outside of Union competence.[170] It is legitimate to accept that more students will create more costs, even if it is merely diminutive, and it *could* be significant for some education systems that are not budget-neutral.[171] Although it seems logical that a Member State basing restrictions on an economic burden should prove that burden, this would not create an unambiguous and certain framework of legitimate restrictions on equal treatment for citizen students. The students themselves would not be able to recognise if they had a

[167] Van der Mei, *Free Movements of Students* (n.143), p124
[168] *Ibid*
[169] *Ibid*
[170] Education is an area of supportive competence only: TFEU, Article 6
[171] Van der Mei, *Free Movements of Students* (n.143), p131

right to equal treatment, if they had to understand how the education system was funded, or whether it was likely to be burdened by student migration.

Regardless of the economic nature of these restrictions, budgetary considerations do not account for the fact that students who move purely to study reap a reward that they have not contributed to. As Barnard illustrates, "*the reality is that (poor and usually non-mobile) taxpayers from the host State are supporting the further education of (already well educated, middle class) students from other Member States with whom they share little by way of community of interests.*"[172]

Furthermore, although a more favourable approach to equal treatment, that prohibited restrictions without budgetary evidence, *would* increase student mobility, and therefore the ability to achieve the European educational area and the enhancement of the level of quality and attainment of education in the EU, this may be problematic in its own right. Increases in student mobility could decrease the quality of education in some Member States, if they have to adjust their budgets, lower the quality of their courses, or impose higher admission restrictions. Greater inequalities in the flow of EU citizen-students may also increase the risks of certain Member States relying on being an exporter of students to reduce their own educational costs. Jørgensen notes this could be particularly in order to avoid the high costs of certain subject areas like the sciences and medicine.[173] In such Member States, the quality of education would stagnate or decrease also. Therefore, migrating and non-migrating citizens alike could receive a lower quality education. This directly goes against the objective of improving education across the EU.

The objective of enhancing EU citizenship and solidarity could also be compromised; Barnard notes how the Court has had to be careful when extending the limits of 'financial

[172] Barnard, *Case Comment: Bidar* (n.126), p1485
[173] Jørgensen, *The Right to cross-Border Education* (n.75), p1573

solidarity' Member States are obligated to show to EU citizens because 'enforced equality' could create a hostile tension between non-mobile nationals and mobile students.[174]

It is important to remember that the ultimate aim of the Treaty is to improve the living and working conditions of *all* EU citizens.[175] Threats to the quality of education systems, or forcing Member States to introduce stringent admissions requirements, may well achieve greater mobility without achieving the improvement that is more fundamentally sought.

The balance, in favour of Member State interests, is particularly justifiable because in this particular area the Court has very little competence.[176] Education is a matter of Member State competence, and is politically sensitive as it has impact upon the budget, tax[177] and cultural[178] considerations of the Member States. The EU has only supporting competence,[179] combined with an EU objective aimed at improving education and attainment of education, something that can inherently be achieved on the national level. The *Förster* decision is an unfortunate anomaly, as the citizen concerned had relocated her centre of interests, was taxable in the host Member State and therefore does not suffer from the same arguments that are held against students generally. Golynker notes how the Court may have reached a point where it is simply impossible to ignore the concerns of Member States regarding equal treatment to maintenance aid for students moving from another Member State,[180] and that the Court is trying to find a balance between upholding the ideals of citizenship and social justice in the ever closer union and also the legitimate rights of the

[174] Barnard, *Case Comment: Bidar* (n.126), p1489
[175] TFEU, Recital 3 (preamble)
[176] Barnard, *Case Comment: Bidar* (n.126), p1488
[177] *Ibid*, p1488
[178] Skovgaard-Peterson, *There and back again: portability of student loans, grants and fee support in a free movement perspective* (2013) 38(6) EL Rev 783, p796
[179] TFEU, Article 6(e)
[180] Golynker, *Case Comment: Förster* (n.100), p2039

Member States. This is a balance "*which leads to inevitable compromises and promises no perfect solutions*."[181]

It is therefore impossible to state that the law at present is completely sufficient in creating an adequate balance, it requires some change in order to account for when the unjustifiability of equal treatment to access to benefits may be rebutted by a particularly integrated student. Overall, the genuine Member State interests appear to be balanced against student mobility, the system does not merely safeguard against abuse and unreasonable burdens, but disadvantages those with genuine and justifiable claims on the welfare system.

The next section of this Chapter will show how, whilst the position of students in host Member State has become less favourable, the position of those wishing to export benefits from their home Member State in order to pursue studies elsewhere has been consistently favourable. The case law will be critically analysed, as with the above, before a discussion on whether competing interests are fairly balanced in relation to these students.

## 4. Claims for social benefits from the home Member State: portability of student benefits and EU prohibition of migration discrimination.

This section deals with student-citizens who have used equal treatment and the prohibition of discrimination to access exportable benefits from their home Member State. It is important to recognise that under EU law there is no obligation for Member States to provide exportable benefits so that their nationals can enjoy cross-border educational mobility; Article 165 TFEU clearly provides that the Member States alone are responsible

[181] *Ibid,* p2038

for the composition of their education systems, including any funding for periods of student abroad.[182] However, in cases where Member States elect to have such benefits within their social security structure, the Court has obliged them to ensure that the system for awarding such benefits is compatible with EU law, particularly free movement.[183]

*Morgan and Bucher*[184] concerned the rules governing the award of educational allowances to students moving from Germany to another Member State in order to study. Students had to satisfy the condition of having been studying in Germany for at least a year, and be continuing the same education or training in the Member State they moved to for the benefits to be awarded.[185] Both claimants wanted to study courses not taught at German institutions, so were in a position where they would have to choose to forgo the grant in order to move and study, or would have to study something that was taught in Germany.[186]

As per *D'Hoop,*[187] if a citizen is deterred from exercise their right to freedom of movement, the opportunities to do so offered by the Treaties cannot be fully effective.[188] The twofold test in *Morgan and Bucher*[189] would disadvantage those pursuing higher education outside of Germany, as the process of doing so would involve extra costs, delays and personal inconveniences.[190] For this reason, the Court found the system for awarding the exportable benefits would discourage free movement, and would constitute a restriction on the free movement rights of the citizens involved.[191] Such restrictions can only be justified if they

[182] TFEU, Article 165; see also C-11/06 and C-12/06*Morgan and Bucher* [2007] ECR I-9161, para 24
[183] *Ibid*, paras 24, 28
[184] *Ibid*
[185] *Ibid,* para 4
[186] C-11/06 and C-12/06 *Morgan and Bucher* (n.182), para 19
[187] C-224/98 *D'Hoop* (n.26), para 34
[188] C-11/06 and C-12/06 *Morgan and Bucher* (n.182), para 26
[189] *Ibid,* para 18
[190] *Ibid,*para 29 and 30
[191] *Ibid,* paras 30-39,

are a proportionate measure, taken to pursue a legitimate aim, based on objective factors independent of nationality.[192]

The German authorities failed to successfully argue the justification of the restriction. The legitimate aims pursued were numerous, but could not be achieved by the 1 year continuity rule.[193] Most importantly for this thesis, the German government relied upon the legitimate objective of ensuring that education grants did become an unreasonable burden leading to the reduction of overall grants available, by requiring a sufficient link between the claimant and the host Member State.[194] The CJEU, citing *Bidar*,[195] re-iterated that it is legitimate for a Member State to require such a link, but noted that this had been satisfied by the claimants, as both had been raised and schooled in Germany.[196] As the German requirements did not recognise the established links, the Court found that the continuity requirement was too general and exclusive to proportionately achieve the legitimate aim.

Nic Shuibhne[197] points out that the CJEU was unconvinced of the *necessity* of the continuity requirement, for achieving the otherwise legitimate aims of the German government. The Court utilized to the principle of proportionality to ensure the free movement choices of citizens remained protected. Already a vital difference is seen between *Morgan and Bucher* and *Bidar*[198] and *Förster*.[199] Although the Court in *Bidar* rejected a restriction that would make it impossible for EU student-citizens to gain access

[192] *Ibid,* para 33
[193] *Ibid,* para 36
[194] *Ibid,* para 42
[195] *Ibid,* para 43
[196] *Ibid,* para 45
[197] Nic Shuibhne, *Case C-76/05 Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, Judgment of the Grand Chamber of 11 September 2007, Not Yet Reported; Case C-318/05, Commission v. Germany, Judgment of the Grand Chamber of 11 September 2007, Not Yet Reported; Joined Cases C-11/06 &(and) C-12/06 Morgan v. Bezirksregierung Koln; Bucher v. Landrat des Kreises Duren, Judgment of the Grand Chamber of 23 October 2007* (2008) 45 Common Market Law Review, p775
[198] C-209/03 *Bidar* (n.25)
[199] C-158/07 *Förster,* (n.49)

to maintenance assistance,[200] in both of the cases concerning equal treatment in the host Member States, the Court neglected to assess the *necessity* of the durational residency requirements.

Golynker[201] notes how this decision creates a legal landscape that may be much more fertile for achieving the EU objective of promoting cross-border student mobility. The author also points out that, as the confines of the CRD do not apply to exportable benefits from the home Member State, the "real link" concept is more likely to endure in this line of case law, which could lead to some conceptual issues.[202]

Dougan[203] comments on how the "real link" in this case somewhat radically appears to be established through personal circumstances: the fact that both claimants had been raised and educated in Germany. [204] This is a vastly different to benefits in a host Member State, where benefits access is only justified by by long-term residency.[205]

Not only is this a more social and personal approach to the "real link", Dougan[206] and Golynker[207] also note how the judgment indicates that historical ties to the Member State are capable of justifying an obligation to extend financial solidarity; irrespective of the fact that the student may not have any future relationship with their home Member State.[208] Golynker[209] notes that it would be difficult to impose a requirement for the student to make contributions to the home Member State in future, but there is still an underlying expectation of this in the extension of solidarity beyond the home Member State territory.

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[200] C-209/03 *Bidar* (n.25), para 61-62
[201] Golynker, *Case Comment: Förster* (n.100), p2033
[202] *Ibid*
[203] Dougan, *Cross-border educational mobility and the exportation of student financial assistance* (2008) 33(5) EL Rev, pp723-738
[204] C-11/06 and C-12/06 *Morgan and Bucher* (n.182), para 45
[205] Dougan, *Cross-border educational mobility* (n.203), pp734-735
[206] *Ibid,* pp734-735
[207] Oxana Golynker, *Case Comment: Förster* (n.100), p2033
[208] *Ibid*; Dougan, *Cross-Border educational* (n.203), p735
[209] *Ibid*

There is no guarantee for host, or home Member States, that students they extend financial solidarity to will become contributors to their economies.[210] However, part of the reasoning against extending equal treatment to benefits access in the host Member State is that students are very likely to return to their home Member State,[211] so the more lenient approach to the "real link" in export cases could be justified. Exportability of benefits appears generally more desirable than extending equal treatment in the host Member State, but the sufficiency of their permissible restrictions for promoting the goals of the Union whilst taking into consideration the concerns of the Member States must still be rationalised.

EU educational objectives appear to be at the heart of the *Morgan and Bucher* decision. The CJEU refers student mobility objectives explicitly, when emphasising the need for Member States to refrain from discouraging free movement of students.[212] The Court also touches upon the significance of the restrictions imposed by Germany for those with limited financial resources;[213] therefore appearing to be acting on the Commission's[214] desire to see more citizens from deprived backgrounds enhance their opportunities through education and free movement. The objective of securing higher levels of educational attainment also plays a part in this decision, as both students had sought studies that were not offered at German institutes. Dougan[215] theorises that the decision may positively affect the flow of student mobility; as given the current restrictions on equal treatment regarding access to benefits in the host Member State, only the sufficient wealthy will be mobile. This is compounded by the fact that certain Member States will be burdened with 'net

[210] Dougan, *Fees, Grants, Loans and Dole Cheques* (n.16), p985
[211] Barnard, *Case Comment: Bidar* (n. 126), p1486
[212] C-11/06 and C-12/06 *Morgan and Bucher* (n.185), para 27
[213] *Ibid* para 32
[214] COM(2017) 673 (n.11), pp4-8
[215] Dougan, *Cross-Border educational mobility* (n.203), p737

importing', possibly making it more difficult for their national students to compete for places in education.[216] However, this outcome will depend on how far the Court is willing to extend this line of case law, specifically whether it is willing to to find that all territoriality restrictions on student maintenance assistance constitute a restriction on free movement, and not simply those constructed as explicitly exportable by the Member States.[217] The success of exportability would also depend on the other obstacles that hinder student mobility, such as the recognition of qualifications, or language barriers.[218] Furthermore, even if EU educational objectives can be achieved through exportable grants, to be sufficient for balancing interests, EU law still needs to consider the legitimate interests of Member States.

4.1 Restrictions on claims to home Member State benefits post-Morgan and Bucher.

As the EU has only 'supporting' competence in the area of education under Article 165 TFEU, it is suggested by Dougan,[219] Nic Shuibhne[220] and Barnard[221] that the Court may be exceeding the legitimate limits of EU competence in its student citizen jurisprudence. Nic Shuibhne[222] and Dougan[223] note that the scope of the freedom to move is expanding, and pervading areas of highly sensitive Member State competence to create more expansive citizenship rights under the Treaty. Although this may appear logical in terms of the EU objectives, the political sensitivities in this area are strong and should not be ignored. When assessing the permissibility of restrictions on exportable benefits, the Court should take into

[216] *Ibid*
[217] *Ibid*
[218] *Ibid,* pp737-738
[219] Dougan, *Cross-Border educational mobility* (n.203), pp738
[220] Nic Shuibhne, *Case Law Comment* (n.197), p771
[221] Barnard, *Case Comment: Bidar* (n.126), p1488
[222] Nic Shuibhne, *Case Law Comment* (n.197), p772
[223] Dougan, *Cross-Border educational mobility* (n.203), p738

account genuine Member State interests, and not have overly high standards of necessity that reduce the ability to justify restrictions.

Nic Shuibhne puts forward the argument that Member States should be more open to bringing economic evidence into their justifications for restrictions. Historically, restrictions on EU law are not permitted to serve economic ends.[224] This is enshrined in Article 27(1) of the CRD.[225] Nic Shuibhne argues that the parameters regarding economic justifications should be reconsidered due to the expansion of areas of Member State competence effected by citizenship.[226] The author also states that Member States should use empirical evidence to justify their restrictions[227] rather that assume economic-related justifications would be dismissed.

This thesis is inclined to disagree, in part, with this reasoning. The prohibition of economic objectives may need to be revised, as the justifications for restrictions being economic in nature does not necessarily mean they are protectionist, which is what the Court is more concerned with.[228] However, involving economic evidence in justification for benefits access restrictions will only further perpetuate the involvement of the Court in matters that it should not really concern itself with in the first place. Sánchez and Arcarazo also reject the idea of financial and empirical assessments of economic objectives because of the

[224] See free movement of goods cases: 95/81 *Commission of the European Communities v Italian Republic* [1982] ECR 02187; 238/82 *Duphar BV and others v The Netherlands State* [1984] ECR 00523; C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-2421, para 34; Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, para 34, C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR 1-4007, para 11, C-398/95 *SETTG* [1997] ECR 1-3091, para 23, C-35/98 *Verkooijen* [2000] ECR 1-4071, para 48, and 388/01 Commission v Italy [2003] ECR 1-721, para 22; C-384/08 *Attanasio Group* [2010] ECR I-2055 see also free movement of citizens case (discussed later in this chapter) C-220/12 *Thiele Meneses* [2013] EU:C:2013:683, para 43-44

[225] CRD, Article 27(1)

[226] Nic Shuibhne, *Case Law Comment* (n.197), pp785-786

[227] *Ibid,* pp783-784

[228] *Ibid,* p784

obvious setbacks: the complex nature of budgeting and the actual ability and legitimacy of Courts in assessing economic policy.[229]

Nic Shuibhne[230] does acknowledge that the Court may still be open to refuting economic justifications, even when supported by empirical evidence. It is the opinion of this thesis that it would be rather easy for the Court to do this, as it is difficult for the Member State to prove that there is a real impact on their finances by a certain type of citizen claiming social security. Therefore, it is also difficult to show that their legislation has any real financial necessity.[231] Furthermore, there is evidence[232] to suggest that mobile students have positive impacts on their local economies. The Higher Education Policy Institute report[233] shows that the UK (the largest net importer of EU students[234]) makes a large financial gain from hosting international students, EU students less so, but they are still worth more than they cost.[235] This may not be the case for all Member States, but, as Nic Shuibhne notes,[236] the UK specifically intervened in *Morgan and Bucher* because they had already been 'stung' by the Court's willingness to enhance student-citizen rights in *Bidar*. If, in later litigation, the Court were to use the evidence mentioned above to refute a justification for restriction based upon empirical economic evidence, that would amount to

[229] Sánchez and Arcarazo, *Social Justifications for Restrictions of the Right to Welfare Equality: Students and Beyond* in Koutkrakos, Nic Shuibhne and Syrpis, Exceptions From EU Free Movement Law: Derogation, Justification and Proportionality (Hart 2016), p88
[230] Nic Shuibhne, *Case Law Comment* (n. 197), p784
[231] Sánchez and Arcarazo, *Social Justifications for Restrictions of the Right to Welfare Equality* (n.229), p88
[232] London Economics, *The costs and benefits of international students by parliamentary constituency: report for the Higher Education Policy Institute and Kaplan International Pathways,* January 2018 < https://www.hepi.ac.uk/wp-content/uploads/2018/01/Economic-benefits-of-international-students-by-constituency-Final-11-01-2018.pdf>
[233] *Ibid,* pp38 and 47
[234] Eurostat: Education and training, 'learning mobility' < http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00064> accessed on 01/08/18

[235] A 'typical' EU student brings around £68,000 revenue to the UK and costs £19,000 to host, London Economics, *The costs and benefits of international students by parliamentary constituency,* n. 232, p38
[236] Nic Shuibhne, *Case Law Comment* (n. 197), p786

the Court involving itself directly into budgetary considerations, thus further eroding Member States' competence. Dougan[237] suggests that the economic effects of student mobility will be neutralised by administrative hurdles to mobility, such as qualification recognition, language barriers and admission restrictions. It is therefore not possible to say with certainty that permitting economic justifications would reduce the problem of the Court overstepping its bounds in relation to educational objectives, it is also not possible to say that Member State interests are fundamentally economic in this area.

Purely economic considerations make up only one element of justification for restrictions on exportable benefits. Legitimacy is a major driving factor behind Member States restrictions, for it is up to the Member States to construct these around their ideals of sufficient integration and solidarity. The cases succeeding *Morgan and Bucher* illustrate that the Court continues to struggle to balance the interests of Member States with the educational objectives of the EU, despite the fact that failing to recognise their interests may result in a levelling down of exportable benefits.

*Prinz and Seeberger*[238] concerned the updated requirements of the exportable German benefit. In order to receive the benefit for more than one year, the claimants had to be resident in Germany for a period of three continuous years before claiming.[239] Both claimants fell just short of this three-year period and were unable to access the benefit in order to study outside of Germany, but both had been raised and educated in Germany. The criteria was considered a restriction on the right to freely move as it[240] was likely to dissuade students from pursuing education in another Member State, by treating those who elected to do so less favourably than those who did not. The Court re-iterated the importance of the

[237] Dougan, *Cross-Border educational mobility* (n.203), p738
[238] C-523/11 and C-585/11 *Prinz and Seeberger* (n.91)
[239] *Ibid,* para 5
[240] *Ibid,* para 31

right to freely move within the field of education, and the objective of promoting student mobility.[241]

The Court accepted Germany's legitimate aim of ensuring a sufficient degree of integration between the claimant and Germany, in order to prevent the social security scheme becoming overburdened,[242] which could reduce the overall level of welfare that could be offered.[243] However, both claimants argued that they had sufficient ties to Germany. Prinz had completed education in Germany and was only four months away from completing the three years residence, whereas Seeberger had resided in Germany for the first 10 years of his life, and had also nearly completed the three-year residency required. The Court accepted that continual residence can show a degree of integration with a Member State, but also risks creating situations where claimants had a very obvious history of integration with a State but still end up being excluded from funding.[244] For this reason the Court found that the exclusion was far too narrow and exclusive as a sole condition, so it went beyond what was necessary to ensure integration; especially as factors such as family, work, language and social and economic factors could provide evidence of such a link, but would be unrecognised by the restriction.[245]

Finding a three-year durational residency period too restrictive polarises this case law with *Förster* and *Bidar*. The five-year durational requirement in the CRD/ *Förster* would exclude students who may already be sufficiently integrated in the Member State to warrant equal treatment with regard to access to student benefits.[246] The decision in *Prinz and*

[241] *Ibid,* para 27-30
[242] *Ibid,* para 34
[243] *Ibid,* para 36
[244] *Ibid,* para 38 to 40
[245] *Ibid,* para 38 to 40
[246] C-158/07 *Förster* (n.49) Opinion of AG Mazák, para 130

*Seeberger* applies the principle of proportionality much more rigorously, to protect the interests of EU citizens in ordert to achieve EU educational objectives.

There are a number of reasons why nationals exporting benefits are treated diametrically differently from citizens claiming benefits in the host Member State. Despite the existence of citizenship and the equal treatment that ought to follow, the Court may be accepting and confirming that nationality is the ultimate decider of welfare responsibility. The Court may therefore be recognising that national welfare systems are built upon notions of sharing and taking care of those with a common identity, which can be used to the advantage of citizens in these cases. It is not surprising that in cases of Member State nationals, historical ties are permitted to show sufficient integration, when it is a historical sense of solidarity that legitimizes the welfare state at national levels.

It may also be that the Court differentiates between migration discrimination and nationality discrimination; the latter may be more legitimate because nationality is a boundary of the welfare state, whereas the punishing of individuals for exercising their right to move and reside elsewhere has less legitimacy. This will remain unclear until a case comes before the Court that involves a claimant wishing to export student benefits from a Member State that is not their Member State of origin.

Another possible explanation is that the CRD does not apply within this line of case law, meaning the Court has more freedom to rely on interpretations of Article 21 TFEU. The Court could possibly be as favourable towards student-citizens seeking equal treatment to access to benefits in the host Member State, were it not for the legislators clear policy choice to restrict this in Article 24(2) CRD. What is very clear is that, contrary to the attitude illustrated in *Bidar,* and even more so *Förster,* residency of a minimum duration is not the only legitimate way for students to establish sufficient integration.

Regardless of the Court's reasoning for the divergence, the sufficiency of the case law for establishing the permissibility of restrictions is judged on its ability to balance EU objectives with Member State interests. The above may be able to effectively do so, despite clearly weighing the balance in citizens' favour. Whilst it can be criticised for not respecting the Member State's competence to decide for themselves what constitutes genuine integration, it does allow a reduction in the pool of beneficiaries to only those with deep integrational ties. This reduces the economic burden on the Member State, whilst ensuring student mobility is not unduly hindered.

The legitimacy of this balance will depend upon the level of integration a Member State is expected to acknowledge before it can legitimately restrict exportable benefits. It is logical to accept that most students will generally only have deep ties with the Member State in which they were raised and educated, so the Court's decisions make sense in light of this. AG Geelhoed expresses this in his *Bidar* [247] opinion, by stating that a citizen who comes to a Member State as a minor and is raised and educated there, would have a more thorough integration than an adult who moves to a Member State by choice later in life. Barnard notes how the decision to extend equal treatment in *Bidar* seems fair and logical because the claimant had spent a significant proportion of his life in the host Member State.[248] It would be difficult for any Member State to argue against this, although they may have different opinions of what constitutes genuine integration. It would heavily detriment free movement if the Court were to accept restrictions on exportable benefits for students who only appear integrated into their Member State of origin, as they could not claim benefits in the host Member State. However, a delicate balance is needed in this line of case law;

[247] C-209/03 *Bidar* (n.25), Opinion of AG Geelhoed para 60
[248] Barnard, *Case Comment: Bidar* (n.126), p1479

there will be natural difficulties where students seem to have established thorough integration elsewhere.

*Thiele Meneses*[249] illustrates the extent to which the Court is willing to go in order to promote the objective of student mobility, and constitutes an illegitimate imbalance in favour of that objective. This concerned the exportable German education grants, for German nationals with permanent residence elsewhere. Mr Thiele Meneses held permanent residency in Istanbul, and had never lived in Germany, although he was educated at German schools.[250] His claim for exportable benefits was rejected, because he did not fall under the highly restricted circumstances that would allow him to export. To be eligible he would have to study in his country of residence, a neighbouring country, or would have to be precluded from doing so by some illness, disability or caring obligation. The Court held that, the rules governing exportability constituted a restriction on Mr Thiele Meneses right to free movement,[251] as they would discourage mobility so had to be justified by objective considerations, independent of nationality and be a proportionate means of achieving a legitimate aim.[252]

The German government stated that it was only in a restricted number of cases that exportability for students with permanent residence elsewhere would be granted, there was never intended to be a general scheme for this. The legitimate aims pursued by the restrictions were: to ensure a degree of integration between the student and Germany, to avoid an excessive economic burden from exporting student grants and to promote student mobility from Germany and enhance the German labour market. The Court outright rejected Germany's economic justification.[253] It also found that a restriction based on

[249] C-220/12 *Thiele Meneses,* n.224
[250] *Ibid,* para 41
[251] *Ibid,* para 28
[252] *Ibid,* para 29
[253] *Ibid,* para 44

permanent residence would be too narrow and exclusive to show a sufficient degree of integration; as it would not take into consideration the social factors mentioned in *Prinz and Seeberger,* and would not take into consideration the claimant's education in German schools.[254] The Court also found that the very narrow exceptions granted to some nationals who were permanently resident abroad, would not determine a degree of integration.[255]

*Thiele Meneses* is different to the cases before it, as the claimant in this case had barely been in Germany and the rules were still regarded as being too narrow and exclusive to recognise a possible link with the Member State. A similar situation arose in *Martens,*[256] where the claimant had not lived in the Netherlands since she was age 6; but later moved to Willemstad in Curaçao to study, claiming an exportable grant from the Netherlands. Claimants had to have resided in the Netherlands for three out of the previous six years,[257] which Ms Martens declared she had. When it came to light that she had not, she was asked to repay the grant, and she contested the rules for access to the grant. The Court found the Dutch rule would discourage free movement.[258] The legitimate objective of the rule was to ensure a minimum degree of integration between claimants and the Netherlands, the Dutch government argued it was neither too narrow nor exclusive as the rule could be disregarded in cases where it could create grave injustices, and it did not require a continuous period of three years residency.[259] The Court did not accept the restriction as being proportionate because it would not take into account other factors that show genuine integration between the claimant and Member State.[260]

[254] *Ibid,* paras 38-41
[255] *Ibid,* para 40
[256] C-359/13 *Martens* [2015] EU:C:2015:118
[257] Article 2.14 of the WSF 2000, amended by the Law of 15 December 2010 (Stb. 2010, No 807)
[258] C-359/13 *Martens* (n. 256), para 31
[259] *Ibid,* para 35
[260] *Ibid,* para 39-41

These cases confirm that nationality is a trump card for establishing sufficient integration. In neither of the aforementioned cases had the claimants spent much time in the respective Member States. In both cases[261] the Court makes a point of stating that citizenship is destined to be the "fundamental status" of Member State nationals, entitling them to equal treatment regardless of their nationality. However, it is the claimant's nationality that cements their rights to financial support from their Member States of origin. Both cases were different from *Prinz and Seeberger, Morgan and Bucher* and even *Bidar,* as neither claimant had been educated in the Member State of nationality. The latter mentioned cases have evidence of much deeper ties, yet the restrictions in *Martens* and *Thiele Meneses* have still been held to be disproportionate.

The three out of six-rule was once again challenged in *Commission v Netherlands*[262] in relation to the children of EU workers'. The Court accepted that it was legitimate for the Netherlands the benefit to restrict non-residents access to the benefits, in order to ensure it would encourage mobility of those who would move *back* to the Netherlands.[263] However, the measure was disproportionate for protecting the Netherlands from an unreasonable burden, as children of EU workers' could not be an unreasonable burden, due to the positive economic impact of their parents tax contributions.[264] De Witte[265] criticizes the judgment on the basis that it fails to take into account the need for the student themselves to have a link to the Member State. Student benefits are social benefits, so they would require a more social link. Social links cannot be established by a parent's contributions, but could be established by a period of residency.[266] What is important for this research is to note that

[261] C-220/12 *Thiele Meneses* (n.224), para 19; C-359/13 *Martens* (n.256), para 21
[262] C-542/09 *Commission v the Netherlands* [2012] EU:C:2012:346
[263] *Ibid,* paras 72, 89
[264] *Ibid,* para 69
[265] de Witte, '*Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law: Commission v. Netherlands'* (2013) 50 CML Rev 203, pp214-215
[266] *Ibid,* pp214-215

the Court is suggesting an EU student be given financial solidarity with very little link to the Member State they are claiming it from.

The judgment in *Elrick*[267] further illustrates the Court's willingness to accept the legitimate aims of the home Member States, but also the struggle in achieving this proportionately through restrictions on benefits access. Ms Elrick was permanently resident in Germany, but chose to study in the UK where she lived; she was refused an exportable grant because of the quality of course she had chosen. The qualification she would gain would be equivalent to one gained after one year of vocational study in Germany, when the requirement was that it should equate to at least two years study.[268] Ms Elrick challenged the decision, as had she undertaken studying a comparable course in Germany, a grant would have been made available. It was only unavailable to such courses in other Member States. Therefore, she was in a position where she had to forgo the grant or forgo the freedom to move.[269] The Court once again found that placing a citizen at a disadvantage purely because they have exercised their free movement rights would constitute a restriction on the right to move. The importance of ensuring the efficiency of the right to move was again emphasised, particularly in relation to the field of education.[270] The legitimate objective put forward by the German authorities was the need to ensure that any training subsidised by the German social security system would be a strong qualification that could actually benefit the student and increase their employability.[271] The Court accepted the aim, but questioned how effectively the duration of the course could be for determining the standard of qualification, especially where a comparable course in

[267] C-275/12 *Elrick* [2013] EU:C:2013:684
[268] *Ibid,* paras 6, 10
[269] *Ibid,* para 11
[270] *Ibid,* paras 22-24
[271] *Ibid,* para 31

Germany would have been funded. The justification of the restriction failed, as the criteria went beyond what would be necessary to ensure a strong qualification.[272]

The Court has appeared willing to accept many legitimate non-economic aims for restricting the exportability of student financial assistance, but no Member State so far has managed to proportionately restrict those benefits. The mere fact that such a variety of objectives are accepted as legitimate shows, in the opinion of Sánchez and Arcarazo,[273] an unavoidable and undeniable tension between the fundamental principles of EU law and national welfare policy. The interests of Member States are deemed legitimate in this line of case law, hence the use of the real link concept as a balancing tool; the following section will focus on how well the real link balances those interests with EU objectives.

4.2 Balancing the Interests of Member States with Citizen Interests

This line of case law certainly has more potential to achieve the educational objectives of the Union, than the jurisprudence concerning access to student benefits in the host Member State. The Court itself mentions those objectives explicitly in its citizen-favouring decisions. Neuvonen[274] finds that the Court's explicit assertion that migration discrimination is a prohibited restriction against free movement, is possibly capable of transforming the idea of equality at the EU level, into a more substantial concept, that is separate from and stronger than the general prohibition of discrimination.[275] While this remains to be seen, it is clear that the strength of claims for exportability owing to the rigorous proportionality assessment that restrictions must undergo, creates a system that offers greater equality of opportunity for free movement. Allowing students access to

[272] *Ibid,* paras 32-33
[273] Sánchez and Arcarazo, *Social Justifications for Restrictions of the Right to Welfare Equality* (n.229) pp85-86
[274] Neuvonen, '*In search of (even more) substance for the "real link" test: Comment on Prinz and Seeberger'* (2014) 39(1) EL Rev 125, p134
[275] Neuvonen, *In search of (even more) substance for the "real link" test,* n.274 page 134

exportable benefits so long as they are able to show a link to the home Member State may lead to an increase in a) student mobility and b) working class students being able to enjoy their free movement rights. It can be concluded that the EU objectives of increasing student mobility, especially for those from more deprived backgrounds is more likely to be achieved under the exportability framework.

However, this line of jurisprudence faces similar criticism to the *Prete* decision in relation to jobseekers.[276] The Court seems to insist on all social and economic links being explored, for a "real link" test to be proportionate. There is logic behind requiring Member States to consider personal and social aspects over residency; recalling de Witte's[277] arguments that student grants are social in nature, so sufficient social links should determine eligibility. Temporal residency requirements *can* indicate social integration, as the longer a citizen is in a Member State the more likely they are to integrate.[278] Nevertheless, it is possible for a student to be integrated before the minimum period of residency has elapsed; as was the case in *Förster*,[279] *Morgan and Bucher*[280] and *Prinz and Seeberger*.[281]

It is clear that a very delicate balance is necessary; to account for highly integrated students whilst respecting Member States interests. Applying the principle of proportionality to "real link" requirements may be a legitimate way to create this balance. The real link is capable of ensuring Member States have no financial obligation towards those without a meaningful connection to their society.[282] It constitutes, as noted by O'Brien,[283] a justification for

[276] See Chapter 1
[277] De Witte, *Case Comment Commission v the Netherlands*, Common Market Law Review Vol.50 2013 pp203-216, p212
[278] De Witte, *Case Comment Commission v the Netherlands* n.277 p212
[279] C-158/07 *Förster* (n.49)
[280] C-11/06 and C-12/06 *Morgan and Bucher* n.185
[281] C-523/11 and C-585/11 *Prinz and Seeberger* n.91
[282] O'Brien, '*Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity'* (2008) 33(5) EL Rev 643, p643 p649
[283] *Ibid,* p644

limitations on financial solidarity and a justification for extension of such. According to Neuvonen,[284] it also serves the economic goal of protecting the Member States from an unreasonable burden caused by excessive obligations to extend financial solidarity. AG Sharpston affirms this in her *Prinz and Seeberger* opinion: Member States are permitted to restrict the number of beneficiaries by requiring the real link, therefore decreasing the financial impact of mobile EU citizens. The "real link" provides a way of preserving Member State finances, without a need for the Court to judge and possibly refute economic evidence from the Member States, thus avoiding the political sensitivity that would come with that.

However, the problem with the real link is where to draw the line on the proportionality of them, and that they always requires a case-by-case analysis if they are to provide individualised justice. Skovgaard-Petersen notes[285] this, and Neuvonen highlights[286] that the Court leaves the rather long list of relevant integration factors open-ended, meaning there could be an endless list of considerations before a "real link" is fully proportionate. One of the outcomes of this is that it is administratively cumbersome, and therefore expensive.[287] This is clearly not in the Member State interests in its own right, but the more pressing issue is that extensive proportionality requirements reduce the level of integration necessary before Member States are expected to provide exportable benefits.

O'Brien[288] is of the opinion that the flexibility of the real link gives the Member States discretion to determine for themselves what may establish a "real link";[289] and that so long as they have more than one reasonable avenue of determining a real link,[290] a more

[284] Neuvonen, *In search of (even more) substance for the "real link" test* (n.274), p133
[285] Skovgaard-Peterson, *There and back again* (n.178), p797
[286] Neuvonen, *In search of (even more) substance for the "real link" test* (n.274), p133
[287] O'Brien, *Real links, abstract rights and false alarms* (n.282) p662
[288] O'Brien, *Real links, abstract rights and false alarms* (n.282), p651
[289] *Ibid,* p664
[290] *Ibid,* p662

generalised system of restrictions could be justifiable. She finds that monolithic criteria are problematic, as opposed to restrictive criteria; and that the Court is not concerned with the outcome of welfare cases, but more the procedure.[291] When the real link test is utilized effectively, this would be the case; but it does not seem to have been utilized this way for exportable student benefits. In the line of jurisprudence discussed above, the Court acknowledged circumstances of the specific claimants, which the restrictions on exportability apparently *should* have taken into consideration. This does not give Member States the opportunity to decide for themselves what may establish a genuine link. The Court also reiterated the EU educational objectives repeatedly, so clearly showed some interests in the outcome of welfare cases for students.

It appears that the Member States may be obligated to extend financial solidarity to almost all nationals, regardless of how tenuous their link may be with the territory is. It would appear only those who are completely devoid of any link with the Member State could be restricted; rather than those who cannot prove a 'sufficient link', such a scenario is yet to come before the CJEU. This goes against the logic of membership that underpins the jurisprudence on exportability: membership entails being closely integrated into a national, community of solidarity.[292] In order to be compatible with the principle of solidarity, the framework would have to ensure there were gradations of equal treatment that responded to the different levels of integration and membership with the Member State.[293] Instead, it would appear that nationality is somewhat abused in the case law assessed above. It is clear that the claimants in *Martens* and *Thiele Meneses* had greater ties to other countries, where their membership would justify the extension of financial solidarity. In those cases,

[291] *Ibid,* p662
[292] Skovgaard-Peterson, *There and back again* (n.178), p802
[293] Giubonni, '*Free Movement of Persons and European Solidarity'* (2007) 13(3) European Law Journal 360, p375

Germany and the Netherlands were prohibited from restricting benefits to student citizens that they had very little link with.

It could be concluded that Member State interests are not given a fair balance in exportability cases. Although it could be a case of ensuring the nuances of the "real link" concept are properly implemented, in order to create justifiable restrictions, it is also clear that the Court has not shown much deference in an area where it has very little competence. The case law on exportability seems to be a mirror-image of that on host Member State equal treatment: where the latter fails to recognise sufficient integration, the former fails to recognise the distinct lack of integration. This suggests, for both cases, that the balance between the fundamental right to free movement and equal treatment and the financial concerns of Member States has not been achieved effectively.

The difference is, whilst the imbalance under the CRD appears inevitable for the foreseeable future, the current imbalance experienced by home Member States is not. EU objectives of enhancing student mobility and attainment of education are not wholly prioritized over Member State concerns: it is noted by Skovgaard-Peterson,[294] Dougan[295] and van der Mei[296] that Member States are not **required** to provide portable student maintenance. The Court made this clearest in *Thiele Meneses*[297] and *Elrick.*[298] Therefore, the objectives of the EU do not appear to outweigh the interests of Member States as much as it may appear. Although this could also suggest that EU student mobility objectives are hindered by this case law, as it is restricted to those Member States who explicitly provide

[294] Skovgaard-Peterson, *There and back again* (n.178), p790
[295] Dougan, *Cross-Border educational mobility* (n.203), p731
[296] Van Der Mei, *Overview of Recent Cases before the Court of Justice of the European Union (July-September 2013)*' (2014) 73 European Journal Social Security, p90
[297] C-220/12, *Thiele Meneses* (n.224), para 25
[298] C-275/12 *Elrick* (n.267), para 25

exportable benefits. Dougan[299] opines that an overly-rigorous judicial review of exportable benefits, whilst non-exportable benefits remain in a 'safe haven' based on their territoriality, may actively encourage a levelling down of the benefits granted for cross-border studies.[300]

In order to ensure that the objective of student mobility *can* be effective, Skovgaard-Peterson[301] suggests that EU lawrequires Member States to export even strictly territorial student benefits. Territoriality is arguably a restriction on free movement under Article 21(1) TFEU, thus justifiable only through the use of objective factors independent of nationality, proportionately pursuing a legitimate aim. The aforementioned author is not alone in illustrating how free movement law makes this a real possibility; Dougan[302] and Jørgensen[303] also recognise this. There is case law to back up this claim; *D'Hoop*[304] states that treating Union citizens differently because they have exercised their right to freely move is a restriction that would need to be justified. Dougan[305] highlights *Nerkowska,*[306] where the non-exportability of a civilian war victims' pension benefit unduly discriminated against those exercising their right to free movement and had to be justified. *Schwarz*[307] and *Commission v Germany*[308] demonstrate that different tax deductibility rules that may dissuade parents resident in Germany from sending their children to schools elsewhere in the EU are contrary to the citizenship provisions.

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[299] Dougan, *Cross-Border educational mobility* (n.203), p731
[300] *Ibid*
[301] Skovgaard-Peterson, *There and back again* (n.178), pp790-791
[302] Jørgensen, *The Right to cross-Border Education* (n.75), p1579
[303] Dougan, *Cross-Border educational mobility* (n.203), p730
[304] C-224/98 *D'Hoop* (n.26), paras 34-35
[305] Dougan, *Cross-Border educational mobility and the exportation of student financial assistance,* n. 203 pp731-732
[306] C-499/06 *Nerkowska* [2008] I-03993, paras 32-34

[307] Case C-76/05 *Schwarz* [2007] I-06849, paras 66-67
[308] Case C-318/05 *Commission v Germany* [2007] I-06957, paras 79-81

The deterrent factor, if given the correct weight, could also apply in cases where student assistance is strictly territorial. Skovgaard-Peterson[309] believes the same could be applied to maintenance assistance, as tax advantages and welfare advantages are not differentiated between, for instance, in Article 7 of Regulation 492/2011[310] in relation to EU workers' rights to both. Dougan and Skovgaard-Peterson [311] believe that, although there are fundamental differences in the benefits at issue in the cases mentioned and student maintenance, this is something that should be explored in the justification process for restricting those benefits and should not affect their classification as prima facie restrictions on free movement. It is also noted by Dougan,[312] Skovgaard-Peterson,[313] Jørgensen[314] and Nic Shuibhne[315] that there is a line of case law relating to re-imbursements for healthcare accessed in another Member State, which would suggest that general portability of otherwise territorial student benefits could be possible.

It is not within the scope of this thesis to discuss the legal viability of this. This chapter focuses on whether such a system would create a fair and proper balance between Member State interests and EU objectives that favour citizens' interests. At present, this thesis has found that a relatively fair balance is maintained because the Court applies very rigorous proportionality requirements for Member States wishing to restrict access to benefits they have made portable; but does not require those Member States to make the benefits portable in the first place. If the Court were to interpret territoriality of student assistance as a

[309] Skovgaard-Peterson, *There and back again* (n.178), pp791-792
[310] Regulation 492/2011, Article 7(2)
[311] Dougan, *Cross-Border educational mobility* (n.203), p732; Skovgaard-Peterson, *There and back again* (n.178), p792
[312] Dougan, *ibid,* p732-733
[313] Skovgaard-Peterson, *There and back again* (n.178), pp792-793
[314] Jørgensen, *The Right to cross-Border Education* (n.75), p1579
[315] Nic Shuibhne, *Case Law Comment* (n.197), pp780-781

restriction on free movement, this balance would shift and the interests of Member States would be unduly disregarded.

The Court would, therefore, need to take greater consideration of the Member States' competences when applying the doctrine of proportionality to their restrictions on exportability. It would, at the very least, have to offer some guidance to Member States so that they could avail themselves (as O'Brien[316] illustrates they can) of flexible and fair but strong restrictions under the "real link" concept. It is imperative that the Member States are protected from those wishing to claim who have very little link to their territory (as in *Thiele Meneses* and *Martens*), if they are to have their student welfare systems open to portability; as this effects the balance of interests, and also the Court's legitimacy in imposing the extra-territorial solidarity based upon ideals of membership.

So long as the aforementioned issues are taken into consideration, this thesis agrees with the opinion of Dougan: that the exportability rights could create a framework which genuinely and efficiently achieves the goal of improving student mobility for all classes of EU citizens. It provides them with the means of exercising their free movement rights and financially supporting them for a certain period, that would at least contribute to their ability to form integrative links with another Member State.[317]

## Chapter Conclusions

This chapter has found that there are specific technical problems with the framework of free movement for student-citizens and their access to social welfare. There is significant incoherence within the case law, specifically between host Member States and home

[316] O'Brien, *Real links, abstract rights and false alarms* (n.282), p664
[317] Dougan, *Cross-Border educational mobility* (n. 203), pp725-726

Member States. There are also possible problems with prohibiting economic arguments for restrictions on student benefits, as well as a significantly sensitive interplay between the Court's interpretative role regarding EU citizenship, and the legislator's policy choices in the restriction of students rights. The law is far from sufficient in terms of creating a coherent, clear and unambiguous framework.

Generally, individualised justice is not wholly achieved in the application of the CRD to students migrating to a host Member State, or for Member States exporting benefits for their national students. Where the host State may ignore financial responsibility for those who have thoroughly integrated with it before the CRD residency period requirement is fulfilled, the home Member State may pick up responsibility for those with tenuous, minor links to it.

In both instances, an imbalance of interests is present. The CRD, applying in the host Member State, does very little for achieving the educational goals of the EU. It does not encourage student mobility, especially for working class students, as it offers no financial security for those who elect to do so. The level of permissibility for restrictions on benefits exports from the home Member State is incredibly low, because of the over-rigorous proportionality standards applied to them. This could over-encourage mobility, at the expense of Member States genuine interests to ensure genuine integration of benefits claimants.

However, these imbalances are not entirely concerning. In relation to the host Member State, it is evident that the concerns of Member States are genuine in this area. The strength of Member State interests is compounded by the very limited EU competence regarding education. EU educational objectives are still a major policy driver, but without the requisite competence, there is little scope for the EU institutions to enforce access to student

benefits for EU citizens. It is also clear that other policy developments could increase mobility, such as administrative reductions in the recognition of qualifications.

In relation to home Member State benefits and their portability, the interests of the Member States are not as strongly opposed to increased mobility. Member States are under no obligation to provide exportable benefits, so the more citizen-favourable approach taken when they elect to do so may present a sufficient balance. On balance, the general scheme of law creates a justifiable balance between the restriction of EU citizens' rights to welfare benefits and the objectives of the Union.

# Chapter 3

# Economically Inactive Citizens

## Introduction

This chapter examines the efficiency of EU free movement law for balancing EU free movement interests with Member State interests, vis-à-vis prohibiting economically inactive citizen becoming an unreasonable burden on Member State finances through claims for equal treatment with regard to access to social benefits. It is within this category of citizen that the debate around so-called 'benefit tourism' is most vocal. The term 'social tourism' is coined in the opinion of AG Geelhoed in *Trojani*,[1] as well as the opinion of AG Wathelet in *Dano*[2] and is mentioned in the UK Supreme Court case *Patmalniece.*[3] Therefore, this category is expected to have the highest restrictions placed on equal treatment with regard to benefits access; naturally, this will also constitute the largest degree of appreciation for Member State interests, and also the most manifest imbalance between those interests and EU objectives. Recalling the importance of the citizenship hierarchy, this makes a degree of sense, as economically inactive citizens are also the furthest removed from workers.

However, it is important to establish and keep in mind that there is no longer a prohibition of economically inactive citizens utilizing free movement law to reside in another Member

[1] C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573
[2] C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (2014) EU:C:2014:2358, Opinion of AG Wathelet
[3] *Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions* [2011] UKSC 11, para 38

State. In fact, the Court has extended them "*a certain degree of financial solidarity"*[4] in certain cases, using the right to equal treatment as a legal basis to do so.

Whether an economically inactive citizen may claim social assistance will depend on a large range of factors. These include, but are not limited to: the benefit they are wishing to claim, where their residency right is derived from, whether they have worked in the Member State they are claiming from, how integrated they are, their main reason for being there and possibly the economic effect of their claim on the social assistance system. This chapter will not only explain how these different factors are utilized to determine mobile citizens' rights to social assistance, but will also evaluate their suitability for ensuring a correct balance between the EU free movement objectives, and the interests of the Member States.

## 1. The Possibility of Abuse: Equal Treatment and Free Movement of Union Citizens

Article 21 of the TFEU[5] proscribes that any national of any member state can move and reside in another, regardless of their economic status. The Court, from the very outset of citizenship has deemed it to be the "*fundamental status of nationals of the Member States"* and this status "*has conferred a right, for every citizen, to move and reside freely within the territory of the Member States*."(*Baumbast*)[6]

Article 18 TFEU[7] prohibits discrimination on the grounds of nationality: "*Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality*

[4] C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 44
[5] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ('TFEU'), Article 21
[6] C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-07091, para 81
[7] TFEU, Article 18

*laid down in Article 18 TFEU in all situations falling within the scope ratione materiae of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU"* (*Dano*).[8]

The EU objectives behind this progression in free movement law appear to revolve around the establishment and success of the internal market; Article 3 TEU[9] offers its *citizens* an area where the free movement of persons is ensured. The Article also makes it clear that the Union is combatting social exclusion and discrimination, whilst enhancing solidarity amongst the Member States.[10] Furthermore, the CRD states[11] very clearly that the free movement of persons is a fundamental freedom, constituting part of the internal market; the provisions on residency are intended to simplify and strengthen the right to free movement for all categories of citizens, including inactive persons.

Enhanced free movement rights for all citizens, regardless of economic status, will undoubtedly aid the Union objective of the internal market. However, for this to be a reality there may need to be some extension of equal treatment with regards to social benefits, as losing access to benefits may constitute a restriction on free movement.[12] Since the internal market is an area of EU competence,[13] it may be possible to give citizens the right to equal

[8] Case C-333/13 *Dano* (n.2), para 59
[9] Consolidated version of the Treaty on European Union [2012] OJ C326/13 ('TEU'), Article 3(3)
[10] *Ibid*
[11] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ('CRD'), Recitals 2 and 3 (Preamble)
[12] Verschueren, '*Free movement of EU citizens: including for the poor?*' (2015) 22(1) Maastricht Journal of European and Comparative Law 10, p28; Verschueren, '*Preventing benefit tourism in the EU: a narrow or broad interpretation of the possibilities off ered by the ECJ in Dano?*' (2015) 52 Common Market Law Review, pp 363–390
[13] TFEU, Article 4(1)(a)

treatment in order to enhance their ability to exercise free movement, thus achieving EU objectives to a greater extent.

The progression away from more economically framed objectives, which were aimed at creating a moving labour force and now tip into the area of greater social rights, has sparked fears that generous welfare states are open to abuse by economically inactive citizens that can move in order to gain social welfare that their home Member State would not offer.[14] Due to the lack of harmonization across the EU welfare systems,[15] Member States have placed limits within their national legislation to exclude EU citizens from equal treatment to their social assistance systems. This is particularly true of the most generous Member States with highly developed welfare systems; i.e. the following case law largely flows from Germany and the UK, and Belgium has often been subject to CJEU judgments on social welfare access.

Thym correctly asserts that benefit tourism concerns are not empirically supported; most mobile citizens are employed, many are highly skilled.[16] However, free movement has created consistent and sustained political tension; it is the backbone of the discussions on the UK's decision to leave the EU, with even pro-EU politicians suggesting free movement reform should be considered to ease political tension between Member States and the EU.[17] The EU Commission has persistently requested evidence that benefit tourism is a by-product of EU rules, as can be seen in spokesman Jonathan Todd's statement regarding his requests to the UK for this evidence over the course of three years, which he has not

[14] Verschueren, '*Free Movement or Benefit Tourism: the Unreasonable Burden of Brey*' (2014) 16 European Journal Migration and Law 147, pp148-149

[15] Dougan and Spaventa, "*Wish you weren't here…" New models of social solidarity in the European Union,* in Dougan and Spavanta (Eds.) Social Welfare and EU Law (Hart 2005), p294

[16] Thym, '*The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens'* (2015) 52 CML Rev 17, p21

[17] See Tony Blair's speech to European Policy Centre, 1st March 2018 < https://institute.global/news/tony-blairs-speech-european-policy-centre> accessed on 04/04/18

received.[18] The Commission has also pointed out a 2013 study that stated EU citizens made up less than 5% of the total benefits claimants in most EU countries. The UK's fears regarding jobseekers allowance also seemed flawed as less than 38,000 citizens appeared to be claiming jobseekers allowances and EU citizens were less likely to be unemployed in the UK than nationals.[19] Academics have also regarded the phenomena of such a small quantity of individuals encouraging such a mass of case-law and political attention.[20]

The thesis does not suggest that because 'benefit tourism' cannot be empirically proven, equal treatment with regard to benefits access should be unconditional. The lack of empirical evidence is illuminating in terms of understanding Member State interests in this area. On the one hand, a lack of evidence of welfare burdens may suggest that there is less scope for successful justification for imposing extensive restrictions on free movement to uphold national interests; and more scope for justifying the upholding the interests of the individual citizens and attaining the objective of increasing and enhancing free movement. The latter would be more consistent in the general scheme of free movement law and permissible restrictions. On the other hand, it may be that Member State interests in this instance are not quantifiable with evidence. If Member State interests are seen as purely economic in nature, it is the number of claimants and the economic effect they have that should be restricted by EU and national law. However, if Member State interests were regarding competence boundaries and welfare solidarity in this area, the number of citizens

[18] BBC News 14th October 2013, *Benefit tourism claims: European Commission urges UK to provide evidence,* <http://www.bbc.co.uk/news/uk-politics-24522653> *accessed on 21/11/17*

[19] ICF GHK and Milieu, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence,* 14 October 2013 (revised on 16 December 2013)

[20] Thym, *The Elusive Limits of Solidarity* (n.16), p21; Verschueren, *Free Movement or Benefit Tourism?* (n.14), p149; Dougan, '*National Welfare Systems, Residency Requirements And EU Law: Some Brief Comments'* (2016) 18 European Journal of Social Security, p102

or effects on welfare budgets would not matter; the possibility of equal treatment itself would be an issue, as Member States would lose control over the boundaries of their welfare solidarity. Viewing Member State interests in this light could offer some justification for why the legislation and jurisprudence currently emitting from the EU institutions is tending to be generalised and therefore more restrictive, as will be seen below.

Whether or not the current political tension is warranted, it has created obvious legal results. The monumental wealth of case law regarding benefits access evidences that the political dilemma has led to a legislative and jurisprudential bulwark against free movement rights for the economically inactive. Restrictions do not fit within the general scheme of a fully functioning internal market. The following discussion will therefore determine what level of protection is offered by EU law to Member States to safeguard the welfare system against the economically inactive; as well as analysing how well Member State concerns are balanced against EU objectives relevant to the free movement of citizens. Because of the strong competence of the EU in this area, as well as the sensitive competence of Member States regarding welfare, a delicate balance will need to be struck in order to be fair and legitimate.

## 2. Residency Conditions as a Tool to Restrict Access to Welfare Systems:

The EU legislature accommodates the interests of Member States by requiring mobile citizens to have sufficient enough resources to not burden the social assistance system of a host Member State.[21] Alongside this, the CJEU has long accepted that citizens' rights to move and reside in other Member States are not unqualified. As can be seen from the

[21] CRD, Article 7(1)(a)

repeated 'fundamental status' quote, citizenship is subject to express exceptions.[22] As early as the *Baumbast* judgment, the Court stated that the *"right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.*"[23]

The main measure adopted to give the Treaty rights effect is the CRD.[24] The provisions constrain equal treatment rights for economically inactive citizens that have exercised free movement. Restrictions are express, found in explicit derogations from equal treatment; and also indirect in the form of pre-requisite conditions for equal treatment. The following sections will discuss how those measures operate to restrict benefits access for inactive citizens.

2.1 Express limitations on equal treatment:

There are two express derogations from equal treatment in the CRD.[25] Article 24(2) states that there is no obligation on Member States to offer social assistance to those in their first three months of residency, or those whose residency is derived from their status as a jobseeker.[26] It also states there is no need to grant student maintenance to citizens other than workers, self-employed persons or their families, unless they have gained permanent residence.[27] Both of these express derogations to the principle of equal treatment have been discussed in the previous two chapters relating to jobseekers and students. Neither

[22] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703, para 61; C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-06191, para 28; C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 31
[23] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 85
[24] CRD
[25] *Ibid*
[26] *Ibid* Article 24(2)
[27] *Ibid,* Article 24(2)

addresses the issue of excluding citizens who are purely economically inactive, such as pensioners (*Brey*[28]), or those who are without work and are not seeking work (*Dano*[29]).

The Commission proposed an express derogation[30] during the legislative proposal for the CRD, which would have allowed Member States to exclude all those except the gainfully employed, and those with permanent residence, from social assistance. This was excluded from the final draft. Thym[31] and Meduna[32] highlight that the exclusion was a result of the *Grzelczyk*[33] judgment; which illuminated that express derogations within a Directive do not stop the application of the Treaty right to equal treatment under Article 18 TFEU,[34]and confirmed that inactive citizens lawfully resident had entitlement to social assistance.[35] The Council agreed upon the express derogation in the first three months,[36]as a compromise between protecting Member State social assistance systems from unreasonable burdens and providing inactive citizens with the right to access to social assistance.

After three months of residency, restrictions on the equal treatment rights of economically inactive citizens are based upon the conditions of their residence. Prima facie, the lack of express derogation seems counterproductive to the aim of protecting Member State finances. Jobseekers and students have greater potential to benefit the economy of a Member State, and yet are subject to express derogations from equal treatment. However,

[28] C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] EU:C:2013:565
[29] C-333/13 *Dano* (n.2)
[30] Article 21 Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2001)257 of 23 May 2001
[31] Thym, *The Elusive Limits of Solidarity* (n.16), p23
[32] Meduna, *Institutional Report* in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen *Union Citizenship: Development, Impact and Challenges* pp266-269
[33] C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193
[34] Thym, *The Elusive Limits of Solidarity* (n.16), p23
[35] Meduna, *Institutional Report* (n.32), p267
[36] CRD, Art 24(2)

the balance between the different types of citizens is somewhat rectified by the fact that jobseekers and students have softer residency conditions than inactive citizens. A greater concern is not that the economically inactive may be in a better position to claim benefits than other categories of citizen, but that their position is much more uncertain than those other categories. The following section will show how the interpretation of residency conditions has created a robust, automatic exclusion from equal treatment for citizens needing to claim welfare benefits. Whilst the citizenship hierarchy may legitimise this, the methodology that makes the strict interpretation possible is questionable, as it creates fundamental conflicts within the EU legal framework.

2.2 Conditional restrictions on equal treatment for the economically inactive in the CRD:

The Member States have creatively commandeered residency requirements as a way of protecting their welfare systems. The limitations on citizen's residency rights are found in Article 7(1)(b) CRD; which states that in order to be legally resident, citizens must have comprehensive sickness insurance and sufficient resources not to become an unreasonable burden on the social assistance system.

These requirements existed prior to consolidation of secondary legislation, as per Directives 90/364,[37] 90/365,[38] and 90/366[39] (later repealed by Directive 93/96 EEC[40]). It is the way in which residency requirements have been used and interpreted, including by the CJEU, that has changed and developed them into a rigorous restriction on free movement rights. The trESS report shows how residence as a concept has grown into a way of

[37] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26 ('Directive 90/364')

[38] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28

[39] Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students Official Journal [1990] L180

[40] Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students [1993] OJ L 317 ('Directive 93/96')

determining eligibility for social benefits; whilst previously the concept was "*out of focus, it has increasingly become a sensitive and controversial subject […] by the end of the 1990s, access to several scheme was defined by 'residence.'*"[41]

Without fulfilling the criteria of Article 7(1)(b) CRD, citizens have no legal right to reside in the Member State. Without legal residency, the Court has now made it clear that there is no right to equal treatment under Article 24 of the Directive, which it has deemed a more specific expression of the Treaty right (Article 18 TFEU), in order to prevent citizens seeking to rely directly on their Treaty right to non-discrimination, as was the case in *Grzelczyk*.[42]

Essentially, there is no longer any distinction between burdens that are 'unreasonable', and those that are not when investigating a citizen's welfare claim. The Court is no longer upholding the idea that there should be a '*certain degree of financial solidarity'* between Member States and EU citizens; the idea purported in *Grzelczyk*,[43] that temporary financial hardship should not give rise to exclusion from social assistance, no longer exists.

The reasoning for the affinity between residency and equal treatment to welfare has been addressed by the Court. The citizenship provisions expressly state that they are not unqualified, Article 21 TFEU states: "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States,* ***subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect***"[44] (emphasis added). The CRD and its predecessors are measures adopted to give effect to the Treaty, the conditions they lay down are therefore those which the right to

[41] Coucheir et al, trESS Think Tank Report, '*The Relationship and Interaction between the coordinating Regulations and Directive 2004/38/EC*' (2008) Ghent University, Department of Social Law, Project DG EMPL/E/3 – VC/2007/0188, p17

[42] See Ch 2

[43] C-184/99 *Grzelczyk* (n.4), para 44

[44] TFEU, Article 21

move and reside are subject to. It is citizenship and the utilization of free movement that gives rise to the ratione materiae of EU law, which in turn gives rise to the right to equal treatment. Without legitimate free movement, there is no equal treatment, and without legal residency, there is no legitimate free movement.

EU law has not always been interpreted in such a restrictive way. It is only recently that residency has become both the means and the end to benefits access. It may have always been considered a conduit through which restrictions on free movement and citizenship may be placed, but other residence statuses have mitigated this. This is evidenced by *Trojani.*[45] The Court found that the provisions of the residency Directive (90/364)[46] constituted a limitation on the right to move and reside as per the citizenship provisions. The Member State could therefore require Mr Trojani to have sickness insurance and sufficient resources before his right of residency as a citizen was enforceable. Since he did not possess sufficient resources, he had no legal right of residency derivable from his position as an EU citizen and therefore would not be entitled to equal treatment. Citizenship itself is not a means to equal treatment, as noted even as far back as *Martinez Sala.*[47] However, the habitual residence of the claimant in Belgium led to him being given a residence permit. The Court found this permit to bring Mr Trojani under the ratione materiae of EU law, so that the Treaty right to equal treatment would give him access to social assistance. The Court held that economically inactive citizens who have been lawfully resident for a certain period or who possess a permit will be entitled to equal treatment.[48]

[45] C-456/02 *Trojani* (n.1)
[46] Directive 90/364
[47] C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, para 63; citizens of the Union still have to be lawfully resident before claiming equal treatment.
[48] C-456/02 *Trojani* (n.1), paras 43-44

The Directive rules on residency could still be used to exclude a citizen from equal treatment, in fact the Court laid down in the *Trojani*[49] judgment that a citizen can be excluded from a Member State if they find he does not comply with the formalities of the residency Directives. It is up to the Member State to decide whether applications for social assistance give rise to an issue of legal residence, as it would suggest that the claimant does not have sufficient resources.[50]

The situation after the most recent case, *Dano*[51] is not wholly resolved. Shuibhne[52] notes that Ms Dano did not have a residence permit and so whether or not a *Trojani*-style residence may still give rise to equal treatment is unclear. In *Dano,* Germany was able to conclude that Ms Dano's application for minimum substance evidenced her lack of sufficient resources, so could deny her equal treatment on the basis she had no right to reside in Germany.[53] Nic Shuibhne believes *Trojani* has been overruled,[54] as the right to equal treatment under Article 18 is 'compressed' into Article 24 by the *Dano* judgment;[55] and it is made very clear that social assistance should be extended only to those residing on the basis of the directive.[56] The declaratory nature of residency permits and their inability to grant legal residence has also been noted in *Dias.*[57] In accordance with this shift, Thym is of the opinion that complying with residency criteria in the CRD is now the only vehicle by which economically inactive citizens can claim equal treatment.[58] Verschueren[59] is less sure of the absolute application of the residency requirements, and finds that divergence

[49] *Ibid*
[50] *Ibid,* para 35-36
[51] C-333/13 *Dano* (n.2) discussed below
[52] Nic Shuibhne, '*Limits rising, duties ascending: the changing legal shape of Union citizenship'* (2015) 52 CML Rev 889, p932
[53] C-333/13 *Dano* (n.2)
[54] See Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp932-933
[55] C-333/13 *Dano* (n.2), para 61
[56] C-333/13 *Dano* (n.2), para 61, 69 and 71
[57] C-325/09 *Secretary of State for Work and Pensions v Maria Dias* [2011] ECR I-06387, paras 48 and 54
[58] Thym, *The Elusive Limits of Solidarity* (n.16), p40
[59] Verschueren, *Preventing "benefit tourism" in the EU* (n.12), p379

from the *Trojani*-based view that residence permits give rise to equal treatment does not necessarily mean that a lack of sufficient resources automatically denies EU citizens a right to reside. However, the latter author does accept it is an interpretation of *Dano* that may be followed, and is likely to be followed by certain Member States.[60]

This thesis is inclined to agree with the position taken by Thym and Nic Shuibhne, due to the sustained focus on residency and sufficient resources in cases post-*Dano,* to the neglect of all other considerations available to the Court. One example is principally pertinent to evidence this. In the *Commission v UK*[61] judgment, it becomes evident that no other legal instrument will take precedence over the CRD in terms of residency and access to welfare. The Commission found that UK legislation[62] placed additional, unlawful conditions on access to Child Tax Credit. It did so by imposing a residency requirement that reflected Article 7(1)(b) CRD. The benefits in discussion are social security as classified by Regulation 883/2004,[63] so equal treatment should be extended to all habitually resident citizens, i.e. those who have their centre of interests in the host Member State. Neither the Court nor AG Cruz Villalón agreed with the Commission. For now, it is suffice to say that this case demonstrates sufficiently that *Dano* is a broad-reaching judgment that has placed equal treatment firmly behind the gates of lawful residency.

This section concludes that Article 7(1)(b) of the CRD is now an extremely robust restriction on equal treatment with regard to benefits acess.

[60] *Ibid,* p379
[61] C-308/14 Commission v UK [2016] EU:C:2016:436
[62] Social Security Contributions and Benefits Act 1992, Tax Credits Act 2002, Immigration Act 1971
[63] Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems, OJ [2004] L166/1 ('Regulation 883/2004'); C-308/14 *Commission v UK* (n.61), para 60

The original position was that lawful residency under a Member State's national legislation would preclude exclusion from benefits (*Trojani*), the post-*Commission v UK* position is that the restrictive residence requirements of the CRD apply even when equal treatment should be provided by an entirely different piece of secondary legislation. This does not seem to be the will of the EU legislature, nor does it seem to aid in the attaining of free movement objectives. Such a conclusion is not a confidence-inspiring start to an assessment of the suitability of current free movement restrictions for balancing interests. However, this is just one of the many problems that arise from residency conditions being the main force of restriction on benefits for the economically inactive.

## 3. The Sufficiency of the Current System for balancing interests

The Court has legitimized Member State's utilization of the tenets of the Directive to greatly restrict access to benefits for jobseekers, ex-workers and non-economically inactive citizens. On the one hand, this is obviously beneficial to Member States, which are very concerned with ensuring their welfare systems are not unreasonably burdened by indigent EU citizens. On the other hand, the sheer variety and scale of the problems that arise from restricting benefits access in this manner preclude this thesis from finding that the CRD-based restrictions balance EU interests with Member State interests sufficiently.

The following sections of this chapter will evidence the problems that arise due to the use of residency to restrict equal treatment for benefits access. As noted above in Section 2.1, the problems are rather technical and specific, flowing from the wording of the secondary EU law that implements free movement. There is also a concern that Member State restrictions in relation to free movement of economically inactive citizens go against general principles of EU law, such as the prohibition of direct discrimination and purely economic justifications for restrictions, without any clarification on why this is so from the CJEU.

There are also overarching arguments that permeate these grievances with the law. The consistent further restriction of free movement rights creates issues of inconsistencies in the application of EU law, as it detracts rather heavily from previous, more citizen-favourable methodologies for the interpretation and application of the law.[64] The detraction away from this methodology raises questions regarding the importance and potency of EU citizenship. The restrictive approach also fails to recognise and uphold the plethora of objectives in the Treaties and secondary legislation. The main objective re-iterated in later

[64] See Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp 889-937

case law is that of protecting Member State finances, which is an incredibly important objective in terms of ensuring the Member States retain competence over their welfare systems and also that they are not overburdened with claims from EU citizens, but it should not be pursued to the neglect of all other objectives.

### 3.1 Automatic Exclusions from Equal Treatment

One of the problems with the restriction on access to benefits for economically inactive citizens is that they are based on highly abstract notions in the CRD.[65] Requiring 'sufficient resources' not to become an 'unreasonable burden' on the welfare system creates uncertainty for citizens and Member State authorities. Sufficient resources are an undefined criterion. The provisions of the CRD state that Member States may not lay down a specific amount that will be regarded as sufficient resources, as they are to take into consideration the personal circumstances of the person concerned;[66] they also cannot require citizens to have more than the minimum resources a national would have before they could claim social assistance; or more than the minimum social security pension.[67]

The absence of any formal definition or standard for these requirements opens the door for widespread inconsistency in the application and interpretation of the law. This not only makes it difficult for Member States to construct their social assistance requirements to be EU-compliant whilst ensuring their own objectives are met; it also makes it difficult for citizens to understand how the criteria will apply to them in different Member States, which may deter them from utilizing their free movement rights. There is some merit in the notion of sufficient resources being flexible, as the living costs and financial situation in every Member State will be different, therefore only Member States themselves will know what

[65] CRD, Article 7(1)(b)
[66] *Ibid,* Article 8(4)
[67] *Ibid*

is sufficient. However, the flexibility offers Member States the opportunity to be highly restrictive with their residency conditions. At present, Austria views 'sufficient resources' as basically being 'in work'; as Handlmaier and Blauberger found in their empirical evidence, one interviewee did not understand why EU law differentiates between free movement of workers and free movement of citizens when citizens are required to be in work to gain residence; so the two are synonymous.[68] In the UK, savings may be taken into account[69] whereas they are largely not in Austria unless sufficiently high to cover capital income.[70] Guidelines on the Finnish immigration system state: *"You may also register on the grounds that you have sufficient funds to live in Finland, or, in other words, you will not need to rely on social assistance."*[71] This is not the obvious position of EU law. The Spanish authorities also require citizens' resources to exceed the amount that would generate the right to benefits.[72] This seems to directly contradict Article 8(4) of the CRD which state the amount of sufficient resources should not be higher than the threshold for social assistance.

Davies[73] rightly points out that the EU legislature is to blame for the unsatisfactory state of the law; more comprehensive rules should have been drafted. The current state of drafting has resulted in the national rules on EU rights often being "*an over-simplified parody of*

[68] Heindlmaier and Blauberger, '*Enter at your own risk: free movement of EU citizens in practice'* (2017) 40(6) West European Politics 1198, p1207
[69] UK Visas and Immigration, "*EEA (Qualified Person) Guidance Notes Version 2.0*", December 2015, < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673052/EEA_QP__guide-to-supporting-documents_v1_3_2015-12-04_KP.pdf> accessed on 04/04/18
[70] Heindlmaier and Blauberger, *Enter at your own risk,* (n.68), p1207
[71] Finnish Immigration Service, "Permits and Citizenship – EU registration (free movement)" < http://migri.fi/en/eu-citizen> accessed on 03/04/18
[72] Immigration Portal, Secretaria General De Inmigracion Y Emigracion, < http://extranjeros.empleo.gob.es/es/InformacionInteres/InformacionProcedimientos/CiudadanosComunitarios/hoja102/index.html#requisitos> accessed on 04.04.18
[73] Davies, '*Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency'* (2016) College of Europe Research Paper in Law 02/2016, p26

*the law"* created by pasting "*a few unworkably vague phrases*"[74] into national law, which cannot be regarded as successfully workable.

Davies also notes that the unworkability of the CRD has political and legal consequences.[75] If its unsatisfactory status is neglected by the EU and national legislatures, it is down to the CJEU to lay down more substantial guidance on the CRD's principles. It is not for the Court to re-write insufficient law. The Court's legitimacy lies in its role to give scope and meaning to the Treaties, it should use this role to ensure that unsatisfactory secondary law does not have a negative impact on the objectives of the Union. As Iliopoulou-Penot[76] notes, the Court could (and in the opinion of this thesis *should*) be seen as a counterweight to other actors in European Union governance, which includes national governments and the EU legislature. There is some evidence to suggest that national legislatures are influenced by the rulings of the CJEU when it allows highly restrictive measures to be tsaken against EU citizens' equal treatment,[77] it is an important actor and ought to act with caution because of this. National laws that are based upon abstract and unworkable principles, which do not allow for a balance of interests, should not be legitimized by the CJEU.

The jurisprudential development of 'sufficient resources to not become an unreasonable burden' has been objectionable. The Court starts with a position in *Trojani*[78] and *Brey*[79] that is both administratively cumbersome and uncertain and has ended with automatic

[74] *Ibid,* p2
[75] *Ibid*
[76] Iliopoulou-Penot, '*Deconstructing the former edifice of Union citizenship? The Alimanovic judgment'* (2016) 53(4) CML Rev 1007, p1034
[77] i.e. see UK law discussed in Chapter 2 about the gradual restrictions made to Union citizen access to maintenance; also Jacqueson, '*From Negligence to Resistance: Danish Welfare in the Light of Free-Movement Law*' (2016) 18(2) European Journal of Social Security, p201; Erhag, '*Under Pressure? Swedish Residence-based social security and EU Citizenship'* (2016) 18(2) European Journal of Social Security 207, p210
[78] C-456/02 *Trojani* (n. 1)
[79] C-140/12 *Brey* (n.28)

exclusions from equal treatment being permitted in *Dano*[80], *Alimanovic*[81], *García-Nieto*[82] and *Commission v UK*[83] that clearly do not fit the general scheme of free movement law, or the general scheme of admissibility of restrictions in EU law. In this particular area of law, it appears the Court is consistently failing to ensure a proper balance between the competing interests of free movement law and citizenship, and the protection of Member State welfare systems.

*The original position:*

In *Brey*[84] the Court found that not all burdens would be unreasonable. When assessing whether it would be proportionate to exclude a citizen from social assistance, it would be up to national authorities to determine how many EU citizens already claim that benefit, what the personal circumstances of that specific citizen are and how the social assistance system as a whole may be affected by EU citizens claiming that benefit.[85]

Verschueren,[86] finds the double assessment suggested by *Brey* to be too burdensome for the authorities of Member States to undertake; perhaps even more costly than the saving from contesting a citizen's right to social security.[87] The author also criticizes the Court for creating ambiguity within the law; the CJEU requires Member States to draft restrictions on equal treatment based on clear criteria known in advance, whereas any Union citizen looking at the decision in *Brey* would find it difficult to decipher their legal position.[88]

[80] C-333/13 *Dano* (n.2)
[81] C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (2015) EU:C:2015:597
[82] C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* (2016) EU:C:2016:114
[83] C-308/14 *Commission v UK* (n.61)
[84] C-140/12 *Brey* (n.28)
[85] *Ibid*, paras 64, 78
[86] Verschueren, *Free Movement or Benefit Tourism* (n.14)
[87] *Ibid*, p174
[88] *Ibid,* p177

Furthermore, the requirement to take into consideration the amount of beneficiaries and overall burden a particular type of benefit is suffering, is not a requirement of the CRD.

The *Brey* understanding of 'sufficient resources' is far too technical and costly. This is not to say that proportionality assessments are not fit for the purpose of restricting access to benefits. The problem with proportionality in *Brey* is that it required Member States to look at the financial burden, which will often not be great, less than 1% of the Austrian benefit at issue in *Brey* was claimed by EU citizens.[89] As already noted in this thesis, restrictions based upon how much a Member State can effectively afford would not respect their legitimate concerns about the solidarity-based boundaries of their welfare system. So, even if quantitative analysis would provide a more robust system, it would not provide a correct balance between Member State interests and EU objectives;[90] particularly in an area with little Union competence.

The Court has moved away from requiring Member States to conduct a robust and costly analysis before refusing social assistance. Unfortunately, case law has strayed too far in the opposite direction to another extreme: Member States are now not required to make *any* assessment prior to excluding a citizen from benefits in certain situations.

*Sufficient Resources/ Unreasonable Burden Requirement now automatically unfulfilled after claims of Social Assistance:*

Member States may use recourse to social assistance to justify a finding of insufficient resources, thus stating the citizen will be a burden upon their social assistance. In essence, EU citizens are denied access to welfare benefits simply on the basis they have tried to access welfare benefits. This has serious consequences in human and legal terms. It will

[89] *Ibid*, p 173
[90] *Ibid*

erode the general principle that restrictions on free movement law are to be interpreted narrowly, which is necessary to ensure efficiency of free movement. It also decreases the value of citizenship and the promise of equal treatment that citizenship holds.

In *Dano*[91] the Court permitted exclusion from equal treatment with regard to access to benefits on the basis that the Union citizen had exercised "*their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.*"[92] The only factors taken into consideration were financial, in order to determine that claimants in the position of Ms Dano would not have sufficient resources. There was actually no attempt at determining what kind of burden would be placed upon the social assistance system, thus creating an automatic exclusion.[93]

Later, in the jobseekers decision *Alimanovic*[94] the Court found that there was no need to apply the *Brey*-type criteria because the CRD "*takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity*."[95] This was deemed a sufficient examination enough of a view of the situation of the individual citizen, despite the fact that the CRD only takes into consideration the period worked by a jobseeker before losing their worker status.

The *Alimanovic* judgment was made possible by the decision in *Dano*.[96] The Court's reasoning for finding that no individual assessment is required is weak; it is stated that 'various factors' are considered when worker status is removed, 'in particular' duration of

[91] C-333/13 *Dano* (n.2)
[92] *Ibid*, para 78
[93] *Ibid,* para 80
[94] C-67/14 *Alimanovic* (n.81)
[95] *Ibid*, para 60
[96] *Ibid,* paras 48, 49

economic activity. However, Article 7(3)(c) CRD **only** considers factors dealing with a citizen's economic activity, and those factors are only intended to determine their worker status, they are not intended as a determinant of their eligibility for benefits. AG Wathelet[97] in that case notes that such monolithic criteria cannot possibly ensure that a citizen's situation has been fully examined, as it should be after *Brey*. He also notes that "*If loss of the status of worker seems to be an appropriate, albeit restrictive, transposition of Article 7(3)(c) of Directive 2004/38, its automatic consequences for entitlement to subsistence benefits under SGB II seem to go beyond the general system established by that directive*."[98]

Automatic exclusions were affirmed as legitimate in *García-Nieto*[99], as *Alimanovic* permitted Member States to exclude ex-workers from social assistance without an individual assessment, this rule was taken to include first time jobseekers in the first three months of residence as well.

Automatic exclusions are not in line with the CRD or case law, unduly reduce the use of proportionality and the ability to balance EU and national interests, and negatively affect citizenship.

*Automatic Exclusions are not in line with Case Law or the CRD*

The extreme departure from the position in *Brey* creates inconsistency in the citizenship case law, although it may be understandable. In certain cases, particularly *Dano*, the outcome of the case is legally, politically and logically clear. As Wollenschläger notes, Ms Dano was using free movement to fund her subsistence, no amount of further assessment

[97] C-67/14 *Alimanovic* (n.81), Opinion of AG Wathelet, para 108
[98] *Ibid*, para 103
[99] C-299/14 *García-Nieto* (n.82) para 46

would change the outcome of the case.[100] It is the methodology of the CJEU, rather than the outcome of the case, which is flawed. It makes sense to find that a person who has to have recourse to social assistance cannot possess means to ensure their subsistence. There is an undeniable link between the notion of sufficient resources and access to the social assistance system. The case law in *Trojani*[101] and *Brey*[102] backs this up, as the Court held being eligible for social assistance in the first place could indicate that a citizen is without sufficient resources, and may place an unreasonable burden on the system. However, the CRD does not specifically require citizens to be able to fund their subsistence. Moreover, whether 'sufficient resources' and 'minimum level of subsistence' are one and the same in terms of EU law is debatable.

The CRD provisions support the view that automatic exclusions are impermissible. Article 7(1)(b) provides that citizens should not become a *burden* on the social assistance system, rather than explicitly stating they should not have any recourse to it whatsoever. Wollenschläger is in agreement with this and finds it doubtful that all economically inactive citizens should be excluded from equal treatment to benefits.[103] Also, Article 8(4) clearly states that Member States cannot have a definitive amount that is 'sufficient', suggesting that individual cases should be assessed and citizens should not have their position compared to a flat number. If a Member State is simply using recourse to social assistance as a means of denying the right to reside, that is akin to using a set amount. The actual amount would vary depending on the social benefits claimed, but a very specific threshold is certainly set.

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[100] Wollenschläger, '*Consolidating EU Citizenship: Residency and Solidarity Rights for Jobseekers and the Economically Inactive in a Post-Dano Era'* in Thym, *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017), p171
[101] C-456/02 *Trojani* (n.1), paras 35-36
[102] C-140/12 *Brey* (n.28), para 63
[103] Wollenschläger, *Consolidating EU Citizenship* (n.100), p182

In *Brey*, the Court relied upon recital 16 in the preamble to find that Member States must "*examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him*."[104] This further evidences the argument that automatic exclusions are not an intended consequence of the CRD. Iliopoulou-Penot[105] notes how the CRD has been drafted in order to aid a proportionality assessment, which is counter-productive if automatic exclusions are applied.

Recital 16 of the Preamble to the Directive states *"an expulsion measure should not be the* ***automatic consequence*** *of recourse to the social assistance system;"*[106] this provision is confusing at best. It may *only* relate to expulsion measures, and therefore does not apply when restrictions that deny citizens access to benefits using the right to reside requirements do **not** lead to an expulsion order. In short, it could be the case that denial of benefits and legal residence can be automatic but expulsion cannot. However, since the CRD directs Member States *"to consider whether the beneficiary has become an unreasonable burden on its social assistance system* ***and to proceed to his expulsion****"*[107][emphasis added], this thesis argues that authorities are expected to expel a citizen who has no right to reside. Realistically, if a person is unable to fund their subsistence without social assistance, and is denied support, they simply cannot afford to live in their Member State of choice. Therefore, whether or not an expulsion measure is a guaranteed result of refusal of benefits, leaving the Member State in question should be the result in order to avoid citizens living in financially precarious conditions.

[104] C-140/12 *Brey* (n.28), para 69
[105] Iliopoulou-Penot (n.76), p1024
[106] CRD, Recital 16 (preamble)
[107] *Ibid*

It is submitted here that when a citizen could constitute an unreasonable burden on the public finances of a Member State, there should be a proportionality assessment regarding their request for social benefits. If it would be proportionate to refuse the benefit, they should be excluded from that Member State. Whilst this may appear to be an unduly harsh system, especially considering the fundamental nature of EU citizenship and free movement, this system would be most beneficial as it balances the tenets of EU law, citizens' individual rights and Member State interests.

Two concepts that have been consistently evident in the case law on benefits access are: the notion that those who are dependent upon social assistance will be taken care of in their home Member State,[108] and also the principle that there should be some degree of financial solidarity between Member States.[109] A system that proscribes expulsion in the event of a proportionate exclusion from social welfare and residency would ensure that Member States cannot "*starve them* [EU citizens] *out*";[110] as the AIRE Centre graphically puts it, during their intervention in the *Patmalniece* case in the UK Supreme Court.[111] It would therefore ensure that solidarity is extended where it is not proportionate to exclude a citizen, and would also ensure that the home Member State takes responsibility of its citizens in the event that they become financially vulnerable.

In *Patmalniece,* Lady Hale[112] did not accept that compulsory exclusion is an automatic consequence for those without a right of residence, due to the CJEU ruling in *Trojani,*[113] which states that Member State's "***may***, *within the limits imposed by Community law*, *take*

[108] C-456/02 *Trojani* (n.1), Opinion of AH Geelhoed, para 70
[109] C-140/12 *Brey* (n.28), para 72
[110] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783, discussed below
[111] *Ibid* para 107 (AIRE Centre)
[112] *Ibid* (n.110), para 107 (Lady Hale)
[113] C-456/02 *Trojani* (n.1), para 45

*a measure to remove*[citizens without sufficient resources]*"*[114] (emphasis added). Despite that ruling, it is the opinion of this research that compulsory expulsion is more in line with the provisions of the CRD, and is also more consistent with several EU objectives. Primarily, the objective read into the CRD,[115] aimed at protecting Member State finances, and also (somewhat paradoxically) the objective of reducing social exclusion across the EU.[116] A more thorough examination of how the current application of EU law may lead to an increase in social exclusion will be discussed below.

*Possible reasons for using Automatic Exclusions over Proportionality*

Although the above analysis seems to make clear that proportionality assessments are more consistent with EU law, it is still important to examine why automatic exclusions may have been permitted. The focus of this research now turns to possible justifications for automatic exclusions and how they may be seen as a way to balance the competing interests at hand.

(a) Cases of manifest 'benefit tourism'

This is the main justification for the approach taken in *Dano.*[117] The Court found that Ms Dano failed to establish her legal right of residence because she had moved *solely in order to obtain* social assistance benefits.[118] Therefore, there was no need to further investigate her personal situation. It is clear why the Court made such a bold, concrete statement on excluding citizens in a similar position: Ms Dano had never worked, had no intention of working and had very little in the way of a link to German society as she could not comprehensively speak, read or write in German. A proportionality assessment would have

[114] *Ibid*
[115] C-333/13 *Dano* (n.2), para 74; C-67/14 *Alimanovic* (n.81), para 50; C-299/14 *García-Nieto* (n.82), para 39.
[116] TFEU, Article 9 and Article 153(j)
[117] C-333/13 *Dano* (n.2), para 78
[118] *Ibid*

led to the exact same conclusion as the automatic exclusion, as also noted by Wollenschläger.[119] As already discussed, the facts of *Dano* appear to show the most manifest attempt to claim benefits without the requisite integration or economic contribution to do so, so the *outcome* of the judgment itself appears justifiable.[120]

The methodology that reached the otherwise logical outcome is criticisable.The Court permitted the German authorities to make a decision about Ms Dano's eligibility for benefits based upon her *motive* for being resident in Germany. Verschueren[121] highlights that this goes against the general position that the motive for free movement cannot affect the right of free movement, as noted by the Court and various Advocate Generals in *Levin,*[122] *Akrich,*[123] *Bidar*[124] and *Bressol.*[125] Kramer[126] also criticises the decision for not clarifying what evidenced Ms Dano's intention to move 'solely' in order to claim benefits. He highlights how she was in Germany, supported by her sister, for a couple of years before claiming benefits. Personal facts about her were 'conflated' into the legal provision relating to her sole intention: her lack of German language skills, low education and her sustained unemployment.

This is a dangerous precedent. The German law is unsatisfactory, misleading and unhelpful. Yet, its legitimacy is enshrined in the case law of the CJEU, and therefore in EU law, until it may be revoked or elaborated upon. The wording of the restriction in *Dano* exacerbates

[119] Wollenschläger, *Consolidating EU Citizenship* (n.100), p181
[120] *Ibid*, page 181
[121] Verschueren, *Preventing "benefit tourism" in the EU* (n.12), p 376
[122] Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR I-01035, para 1045
[123] Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-09607, para 55
[124] C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing* [2005] I-02119, Opinion of AG Geelhoed para 19
[125] C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-02735, Opinion of AG Sharpston, para 95
[126] Kramer, '*Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed*' (2016) 18 Cambridge Yearbook of European Legal Studies 270, pp293-294

the idea that Member State interests revolve around protection from 'benefit tourists'; which is an unnecessary and extremely unhelpful idea for free movement law to legitimize. Member State interests can be construed in the protection of their public finances, within the deep-rooted national bonds of solidarity: their interest is (or should be) in the prevention of *unreasonable* burdens. Ms Dano would have undoubtedly been an unreasonable burden, so the outcome of this case strikes a sufficient balance between Member State interests and the objective of effective free movement. However, the methodology by which this was achieved is so deeply flawed that it cannot create a sustainably sufficient balance of interests. The Member State interests are not adequately defined enough to be taken into account, it is evident that constructing Member State interests in terms of presumed, widespread abuse created an artificial legitimacy that suggested a citizen could be a 'burden' without having their particular situation assessed. To fully legitimize this assumption, there would need to be a higher evidentiary standard for Member States. As will be explored below, in relation to economic justifications, this thesis argues that so long as restrictions on free movement constitute a hybrid of economic and solidarity concerns, there is no need to require Member States to prove that there are overwhelming burdens to their social assistance systems. However, if restrictions are based upon the idea of widespread 'abuse' leading to unreasonable burdens, the only way to legitimize this interest is to prove it. Otherwise, it is not possible to show that a sufficient balance has been struck between prevention of an 'unreasonable burden' and the success of EU objectives. Thus, the Court arguably should have necessitated a purposive proportionality requirement, and required Germany to deny Ms Dano the benefit on the grounds that her access to SGB II was not in line with its purpose[127] (to facilitate the reduction of need through aiding

[127] As supported by de Witte, '*The End of EU Citizenship and the Means of Non-discrimination'* (2011) 18 Maastricht Journal of European & Comparative Law 86, p104, O'Leary, '*Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship'* (2008) 27(1) Yearbook of European Law 167, p172; and K

beneficiaries into employment, which her situation suggests it would not have achieved for her).

The lack of mention of jobseekers, ex-workers or other types of economically inactive citizens in the *Dano* judgment may give rise to the belief that it was intended to be narrowly applicable to manifest 'benefit tourists', or (more desirably) those without links to the host Member State. Wollenschläger agrees that *Dano* ought to remain an exception to the general rule that proportionality assessments must occur before exclusion from social assistance.[128]Unfortunately, the neglect of case-by-case assessments of the unreasonable burden did not stop at *Dano*;[129] the judgment was not worded narrowly enough to prevent this, which had severe implications for the development of EU law. Both Nic Shuibhne[130] and Iliopoulou-Penot[131] note how *Dano* was a key turning point in the chain that continued through *Alimanovic, García-Nieto* and *Commission v UK.* Resulting in an incredible U-turn on EU citizenship in terms of methodology and in terms of principle.[132]

It is therefore difficult to suggest that automatic exclusions should even be permitted where there is manifest lack of integration. Without being explicitly and unambiguously confined to the facts which make them justifiable, automatic exclusions are used as a springboard for general exclusion and discrimination. The lack of legitimacy of the concerns of Member States has led to this highly restrictive approach, meaning there cannot be a sufficient

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Lenaerts, '*Union Citizenship and the Principle of Non-discrimination on Grounds of Nationality'*, in Fenger, Hagel-Sørensen and Vesterdorf (eds.) *Festskrift til Claus Gulmann* (Thomson 2006), p 304

[128] Wollenschläger, *Consolidating EU Citizenship* (n.100), pp180-181

[129] C-67/14 *Alimanovic* (n.81), para 61; C-299/14 *García-Nieto* (n.82), para 50

[130] Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp908-910

[131] Iliopoulou-Penot (n.76), p1008

[132] *Ibid*, pp1030-1035; Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp935-937; Nic Shuibhe, '*What I tell you three times is true: lawful residence and equal treatment after Dano'* (2016) 23(6) MJ, pp935-936; Blauberger, Heindlmaier, Kramer, Martinsen, Thierry, Angelika & Werner, '*ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence'* (2018) 25(1) Journal of European Public Policy 1422, pp1424-1426

balance between those interests and EU objectives, as the interests are not backed up and are conflated.

(b) Addressing Member States' Concerns

Directly linked to the phenomena of 'benefit tourism' fears are factors of political and constitutional importance, which warrant consideration about the proper place for institutional actors in the EU and the weight of their concerns and ambitions.

Wollenschläger[133] and Verschueren[134] note that *Dano* was reviewed by the CJEU during a time of political unrest regarding free movement, which explains the Court's desire to take a hard stance against 'benefit tourism'. Iliopoulou-Penot[135] and Dougan[136] both note the continuing deference of the CJEU in this area.

It is generally accepted that the more citizenship-favourable interpretations, which allowed equal treatment with regards access to benefits under certain conditions, was a product of the CJEU's activism.[137] That direction of citizenship was never really the intention of Member States; although the Court was heralded for its pioneering stance on greater social rights,[138] the extension fuelled the fires of debates around 'benefit tourism'[139] and the effects of immigration on public services.

[133] Wollenschläger, *Consolidating EU Citizenship* (n.100), p181
[134] Verschueren, *Preventing "benefit tourism" in the EU* (n.12), p 369
[135] Iliopoulou-Penot (n.76), pp1030-1035
[136] Dougan, *National Welfare Systems* (n.20) , p102
[137] O'Leary, *Developing an Ever Closer Union between the Peoples of Europe?* (n.127), pp172, 177-179, 192
[138] Blauberger et al, *ECJ judges read the morning papers* (n.132) p1423; see Thym, *EU free movement as a legal construction – not as social imagination,* 2014 < https://verfassungsblog.de/en-eu-freizuegigkeit-als-rechtliche-konstruktion-nicht-als-soziale-imagination-2/> accessed on 20/02/2019
[139] Iliopoulou-Penot (n.76), p1031; Blauberger et al, *ECJ judges read the morning papers* (n.132), p1423; Harris, *Demagnetisation of Social Security and Health Care for Migrants to the UK* (2016) 18 (2) European Journal of Social Security, pp130-163; Jacqueson, *From Negligence to Resistance* (n.77), p201; Erhag, *Under Pressure?* (n.77), p210

The CRD appears to have been an attempt to regain competence and control over the development of citizenship.[140] It has constitutional importance because of its mandate to place limits and conditions on the free movement of EU citizens.[141] Therefore, the interpretation and application of the CRD is the playing field between the interests of free movement and Member State concerns.

Craig[142] states that it is vital to take into consideration that the Member States have placed limits on Treaty rights, because of their important concerns. The freedom to move in Article 21 TFEU should not be interpreted in a way which simply evades those concerns.

There are a multitude of issues with the current interpretation of Member State concerns. Nic Shuibhne[143] and O'Leary[144] note that Member States implemented Article 24(2) CRD "*after the Articles 18 and 21 TFEU horse had already bolted."*[145] Therefore, any full recognition of their concerns, as drafted in the CRD, would require retrenchment of rights already given to citizens. If there was a time to broadly interpret restrictions, it was at the very start of the case law on citizenship, or at least directly after the creation of the CRD.[146] But the Court has only very recently turned the law on its head in order to consider Member State concerns this way.[147] Nic Shuibhne[148] notes, the status of citizenship, and the fundamental right to free movement for all citizens, was deployed in the full knowledge of the EU law general principle of equality (and Art 18 TFEU); this general principle

[140] Blauberger et al, *ECJ judges read the morning papers* (n.132), p1433,
[141] Iliopoulou-Penot (n.76), p1030
[142] Craig, '*The ECJ and ultra vires action: A conceptual analysis'* (2011) 48 CML Rev 395, p412; see also Craig, *EU Administrative Law* (OUP 2006), p520
[143] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p909
[144] O'Leary, '*The curious case of frontier workers and study finance: Giersch'* (2014) 51 CML Rev 601, p617
[145] *Ibid*
[146] When Member States were voicing concerns: Blauberger et al, *ECJ judges read the morning papers* (n.132), p1425; which also aligned with EU enlargement in 2004 - see Hailbronner, *'Union Citizenship and Access to Social Benefits*' (2005) 42 CML Rev 1245, p1265; see also Harris, *Demagnetisation of Social Security* (n.139), p139 – suggesting that UK reforms under the CRD were a response to enlargement.
[147] Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp908-910
[148] *Ibid*

precludes comparable situations from being treated differently unless objectively justified. The only way to objectively justify such differences, is through a proportionality requirement.[149] Therefore, the Member States should accept that their interests will have to be considered without the use of automatic exclusions, having known that CRD would not (or, in EU law, *should* not) lead to that.

Secondly, it is difficult to recognise the legitimacy of the Member State concerns in the current case law. The timing of the CRD's creation is one problem, but the latent deference to it compounds this and creates intense normative problems, for the coherence and legitimacy of EU law as well as the balance of interests within it. Blauberger et al note how Member States have continually favoured a more restrictive approach to free movement rights.[150] The Court has generally been independent enough to withstand Member State criticism, but it does not exist in a 'political vacuum' and the more restrictive approach may be a response to wider public opinion aligning with Member State concerns.[151] Iliopoulou-Penot's analysis of recent case law agrees with this, in light of the problems of global recession and general austerity.[152] As a result, the Court is recognising it is not the sole 'owner' of the Treaties, and needs to defer to Member States on the development of EU citizenship. But it is neither legitimate nor necessary to do this by pouring the contents of citizenship into the CRD restrictions.[153]

If the Court is to strike a legitimate and sufficient balance of interests, those individual interests themselves need to be legitimate. Whilst public opinion bolsters the concerns of Member States, it does not legitimize them. If the CJEU did not recognise the need to impose blanket rules to prevent 'benefit tourism' or unreasonable burdens from the very

[149] *Ibid,* p910
[150] Blauberger et al, *ECJ judges read the morning papers* (n.132), p1432
[151] *Ibid*
[152] Iliopoulou-Penot (n.76), pp1030-1035
[153] Blauberger et al, *ECJ judges read the morning papers* (n.132), p1425

start of the citizenship case law, then it is difficult to argue that those concerns are any more real or pressing when aligned with public opinion. It is difficult to argue that the Court has struck a sufficient balance, when the strength of Member State interests are only evidenced by public perceptions.

Decades[154] of citizenship-centred judgments[155] are neglected in order to come to the conclusion that automatic exclusions from social assistance are permissible under EU law. It requires the interpretation and application of Treaty rights to be circumvented, in order to turn the CRD into the floor and ceiling of citizenship rights.[156] Spaventa[157] comments that this is done by neglecting to assess the right to equal treatment under the Treaty as a citizen exercising free movement rights,[158] and instead focusing on equal treatment with regards access to social assistance flowing from Article 24(1) CRD.[159] Equal treatment under Article 24(1) did not apply to Ms Dano because, as discussed above, she had no right of residence under the CRD.

Furthermore, more *human* issues arise from recent interpretations. Kostakopoulou points out that Union citizens have been empowered by their Treaty rights and relevant case law, increasing the exercise of free movement rights. AG Wathelet in *Alimanovic* stated that rulings regarding economically inactive citizens wishing to claim social assistance are sensitive, precisely because they are the cases which define "*the protection offered by EU*

[154] O'Brien, '*Civis Capitalist Sum: Class as the new guiding principle of EU free movement rights'* (2016) 53 CML Rev 937, p937; Craig, *The ECJ and ultra vires action* (n.142), p412
[155] C-224/98 *D'Hoop* (n.22), C-184/99, *Grzelczyk* (n.22), para 44, C-209/03 *Bidar* (n.124) para 62; C-367/11 *Déborah Prete v Office national de l'emploi* EU:C:2012:668, para 33; C-138/02 *Collins* (n.22), para 46; C-413/99 *Baumbast* (n.23)
[156] Spaventa, *Citizenship: Reallocating Welfare Responsibilities to the State of Origin,* in Koutrakos, Nic Shuibhne and Syrpis (eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016), pp34, 42
[157] *Ibid*, p39, p42
[158] *Ibid*, p39-43
[159] *Ibid*, p42

*law to its citizens, as regards their financial situation and their dignity*."[160] It was, arguably, a reckless endeavour to offer free movement to all Union citizens without the requisite welfare safety net to accompany this; especially in a fragile labour market.

EU law cannot guarantee the right to welfare access for its citizens, even those who have exercise free movement and become seemingly integrated. What Union citizenship can do is offer a safety net in terms of claims being *heard.*[161] That may not result in the extension of solidarity, and Union law must be sensitive to the competence of Member States in setting their limits on solidarity; but so long as the law offers Union citizens a chance for their level of solidarity-links to be assessed, it is more legitimate than extending free movement and permitting carte blanche exclusions from welfare access.

Moreover, as Kostakopoulou[162] notes, the current political climate should not dampen ambitions of what EU citizenship *could* be, in time. Full social cohesion may never be reached in the EU, but the CJEU should not strike out the importance of the Treaty-established status entirely; it should instead interpret citizenship and free movement in light of the current development of EU law, to allow for developments in the future. That could take into consideration the lack of EU distributive power, the competence of Member States to protect their nationally entrenched welfare regimes and the need to extend a cautious amount of financial solidarity that is within the realms of advancing EU objectives through necessary free movement. It is less legitimate for the CJEU to re-interpret the Treaty provisions favourably if it does not fully recognise legitimate interests and political climates. A fairer balance of interests, and continued legitimacy for this balance, is only

[160] C-67/14 *Alimanovic* (n.81), Opinion of AG Wathelet, para 2
[161] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p913
[162] Kostakopoulou, *'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens'* (2018) 56(4) JCMS 854, p859

possible if the CJEU is more forthcoming for the reasons behind its decisions and more thorough in its methodology for allowing restrictions on free movement.

The Court's current response to Member State concerns regarding 'benefit tourism',[163] was to negate the requirement to review the proportionality of refusing benefits in circumstances akin to those in *Dano,* as well as *Alimanovic* and *García-Nieto*. The undertone of the judgments suggest that individual assessments do not provide robust enough protection against 'unreasonable burdens', and that the provisions of the CRD are necessary to ensure this protection. This is not necessarily the case.

In terms of the interests of Member States, automatic exclusions seem desirable. If the right to equal treatment is focused upon the need for self-sufficiency *without recourse to the welfare system*, it is unlikely Member States will be paying out a great deal of social assistance to citizens who have exercised their free movement rights. Those who are able to claim residency in a Member State will either be sufficiently wealthy to not have recourse to the social assistance system, or will be in work or self-employed meaning they are unlikely to need such recourse; or they are at least unlikely to claim benefits without contributing to the funding of the system. Spaventa[164] notes the difference in the narratives between economic and non-economic integration, with the former having more substantial aims and benefits (i.e. contributions to the work force and taxation); resulting in the latter being the subject of more legitimate concerns from Member States in restricting their rights, which are devoid of those aims and benefits. She also puts forward the idea that the post-*Dano* chain of case law could be an attempt to correctly apportion welfare responsibilities.[165] Without evidence to suggest the need to fiercely protect the financing of

[163] Verschueren, *Preventing "benefit tourism" in the EU* (n.12), p369
[164] Spaventa, *Citizenship* (n.156), p34
[165] *Ibid*, p45

the welfare state, the restrictive approach may be a legitimacy-based recognition of the national-citizenship borders of welfare responsibility. This thesis would agree that the line of case law certainly makes a strong stance that the nationality and territoriality boundaries of the welfare state are still present, and should do so considering the distributive powers of the EU do not match the generalized freedom of movement it provides.

There are indicators that would support this more restrictive application of EU law. Advocate General Geelhoed in *Trojani* notes how the intention of the EC Treaty was not to permit 'social tourism', or access to greater welfare benefits through free movement, as the legislature "*acted on the assumption that an economic migrant will not claim any subsistence allowance in the host Member State*"[166] when the separation of economic and non-economic citizens first arose in legislation. If economic citizens are given full access to equal treatment for social and tax advantages,[167] by reason of their position as citizens who will not need to utilize them, then the general ideology is that EU citizens should not have any recourse to host Member State social benefits. Therefore, it is unlikely that welfare systems would be opened up for non-economic citizens as a result of EU law. AG Geelhoed also re-instated the general principle that those who depend on social assistance will be looked after in their Member State of origin.[168]

However, this logic is flawed. Firstly, in the current labour market it is no longer possible to say workers will not rely upon social assistance.[169] EU law needs to recognise and address this challenge in order to ensure its objective of a single, internal labour market is

[166] C-456/02 *Trojani* (n.1), Opinion of AG Geelhoed, paras 17 and 70
[167] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ L141/1, Article 7 ('Regulation 492/2011'), Article 7(2)
[168] C-456/02 *Trojani* (n.1), Opinion of AG Geelhoed, para70
[169] Davies, *Migrant Union Citizens and Social Assistance* (n.73), p5

kept. The family and dependents of workers also are entitled to equal treatment;[170] these may well need social assistance as they will not always be in work themselves. Also, there is clearly a link between equal treatment and integration that does not suggest an overly restrictive approach to equal treatment with regards to access to welfare benefits was ever intended. The case law on the 'real link' and 'sufficient degree of integration' shows this;[171] as well as cases where equal treatment has been extended referring to the Member States need to offer '*a certain degree of financial solidarity*'.[172] This thesis has consistently held that the Member State interests are both economic and solidarity-based, they involve the need to reduce economic spending that occurs outside the national boundaries of solidarity. The solidarity[173] element is not catered for by automatic exclusions, leading to the conclusion that they cannot possibly strike a sufficient balance between Member State interests and EU objectives, for they do not truly take into account the legitimate Member State interests.

Also, the blurring of the economic and non-economic boundaries of free movement has already occurred.[174] The role of the Court now is to build upon its Treaty and secondary legislation interpretation to contain the blurring of lines, with a legitimate balance of interests. This is done by allowing Member States to restrict rights legitimately and possibly to a large degree, but also to protect EU objectives by not allowing Member States to restrict welfare access in a way that is utterly detrimental to EU objectives that require free movement.

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[170] CRD, Recital 20 and 21 (Preamble), Article 7(1)(d), 24(1); Including ensuring children have the right to education, Regulation 492/2011, Article 10

[171] C-209/03 *Bidar* (n.124), para 62; C-367/11 *Prete* (n.155), para 33; C-138/02 *Collins* (n.22), para 46

[172] Case C-184/99 *Grzelczyk* (n.4) para 44

[173] O'Leary, *Developing an Ever Closer Union between the Peoples of Europe?* (n.127) p175

[174] Dougan, *Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?* in Barnard and Odudu *The Outer Limits of European Union Law* (Hart 2009); Verschueren, '*European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems'* (2007) 9(3) European Journal of Migration Law 307

Proportionality assessments allow Member States to restrict access to their welfare systems whilst still working towards the aim of an effective internal market. It is clear that individual proportionality assessments can lead to EU citizens being excluded from national welfare benefits, particularly if they would be claimed for a lengthy period such as the pensioner in *Brey;* and also a UK pensioner with a stronger link to the national Member State in the UK Upper Tribunal case *AMS v SSWP (PC).*[175] Mrs AMS had been present in the UK for around 6 years but had not acquired permanent residence due to not consistently having comprehensive sickness insurance; she had UK born children that lived in the UK but was denied state pension credit because a proportionality assessment found she would be claiming a rather large amount for an open-ended period of time, when her circumstances were unlikely to change.[176]

Dougan[177] notes that proportionality assessments have the potential to affect the residency status of individuals, who can still be deemed an unreasonable burden after such an assessment. Thym[178] also points out how individual assessments are not always favourable to citizens, and may result in the denial of their residency or equal treatment.

Therefore, the Member State concerns considered by automatic exclusions are not 'unreasonable burden' citizens. There is no fear about Ms Dano being extended equal treatment, the problem is the administrative process of *hearing* the claim for equal treatment. Arguably, more claims could lead to increased and illegitimate extension of benefits through accidental generosity.[179] But that would be on a very minor scale, and this

[175] *AMS v Secretary of State for Work and Pensions* [2017] UKUT 381
[176] Nath Gbikpi, *Self-sufficiency, health insurance and welfare benefits: the case of AMS,* October 2017 < https://www.freemovement.org.uk/self-sufficiency-health-insurance-welfare-benefits-dutch-widow-case-ams/> accessed on 04/04/18
[177] Dougan, *National Welfare Systems* (n.20), p 103
[178] Thym, *The Elusive Limits of Solidarity* (n.16), p 30
[179] Davies, *Migrant Union Citizens and Social Assistance* (n.73); Heindlmaier and Blauberger, *Enter at your own risk* (n.68)

would be rectified by proper training and explanation of policies to decision makers. The real desire of the Member States appears to be increased administrative efficiency, which makes sense considering the growth of welfare states in the current climate.[180] However, weighing the administrative effectiveness against the different EU objectives at play would indicate that there is an insufficient balance being struck that takes the former into consideration too much. Especially when proportionality can and should be honed into a more general, certain test.[181]

(c) Increasing clarity and consistency

Clarity is expressly stated as a motive for the automatic exclusion in *Alimanovic*. The Court states that EU law needs to provide citizens with certainty regarding their status and rights, in order to create legal certainty and transparency.[182] The same motive for strict interpretation of the CRD is repeated in *García-Nieto.*[183]

A parallel argument is that automatic exclusions create certainty for Member State authorities. AG Wathelet's *Dano* opinion agrees with this, stating that requiring Member State authorities to make individual assessments of every single citizen making claims could be unreasonable.[184] Iliopoulou-Penot notes how the *Alimanovic* judgment itself is a product of Germany's inability to clearly implement the 'real link' decisions of the Court;[185] and the risk of 'over-personalization' of claims and individual assessments lead to high administrative burdens and divergent decisions.[186]

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[180] Davies, *ibid*
[181] O'Brien, '*Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity*' (2008) 33(5) EL Rev 643
[182] C-67/14 *Alimanovic* (n.81), para 61
[183] C-299/14 *García-Nieto* (n.82), para 49
[184] C-333/13 *Dano* (n.2), Opinion of AG Wathelet, para 112; Verschueren, *Free Movement or Benefit Tourism?* (n.14)
[185] Iliopoulou-Penot (n.76), p1011-1012
[186] *Ibid*, p1026

Wollenschläger[187] agrees that rules based upon the notion of proportionality are not as clear or consistent as others. He believes the Court has successfully clarified the position of certain economically inactive citizens,[188] in its recent case law that is devoid of proportionality assessments. However, Wollenschläger also notes that economically inactive citizens not falling into the categories expressly dealt with in the provisions of the CRD will still need a proportionality assessment in line with the prior case law.[189]

It is undesirable to have uncertainty in the law which could affect a citizen's financial subsistence, or their right to residence. The benefit of certain and precise rules on benefits access in terms of low administrative costs, little satellite litigation and lowered welfare costs are obvious. However, the benefit of the clarity achieved at present is artificial in nature.

As Nic Shuibhne notes,[190] 'clarity' is being achieved through the CJEU evading existing case law. It does so by utilizing oversimplified, abstract and unworkable concepts from the CRD.[191] This in turn fails to consider the growing complexity of free movement that has resulted from the empowerment of citizenship, which is covered over rather than dealt with.[192] As O'Brien notes, *"the label of "economic inactivity" masks a* ***wide variety of migrant lives and experiences****"*[193] including those who are integrated into society, may even have extensive work history, or family ties and yet are excluded so long as they fit within the broad scheme of jobseekers, ex-workers and the generally 'economically inactive' at the time their claim is assessed.[194]

[187] Wollenschläger, *Consolidating EU Citizenship* (n.100), p183
[188] *Ibid*
[189] *Ibid*, p181
[190] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p923
[191] Davies, *Migrant Union Citizens and Social Assistance* (n.73), p2
[192] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p923
[193] O'Brien, *The ECJ Sacrifices EU Citizenship in Vain: Commission v UK,* (2017) 54 CML Rev 1 209, p237
[194] *Ibid*

The broader implication of this is discussed by Iliopoulou-Penot,[195] who states that it affects the role of proportionality itself and may leave a 'dangerous imprint' on its function in EU law, as it undermines its inherent presence in areas of constitutional importance. The role of proportionality is imperative if there is to be a balance between Member State interests and EU objectives. The application of the principle has varied in fashion, the contention behind the lack of clarity with proportionality differs depending on how strongly it is applied. For instance, this thesis argues that the requirement for purposive proportionality[196] found in *Collins*[197] and *D'Hoop*[198] is less ambiguous than the need for personalized proportionality in *Prete.*[199] The application of purposive proportionality may settle the issue of ambiguity whilst balancing interests.

AG Wathelet in his *Dano*[200] opinion argues it would be unfair if individual assessments resulted in economically inactive citizens having equal treatment to claim social assistance, as this would put them in a better position than jobseekers, who have no specific right to social assistance or an assessment of their circumstances as per the interpretation of Article 24(2) CRD.[201]

The underlying tension is that jobseekers have a closer tie to the labour market, and therefore a closer link to the Member State, as well as a greater possibility of not burdening the social assistance system. They are therefore more entitled to benefits, if EU objectives are to be balanced with Member State interests. However, the argument that proportionality and individual assessments creates unfairness regarding the hierarchy of citizenship is

[195] Iliopoulou-Penot (n.76), p1022
[196] de Witte, *The End of EU Citizenship* (n.127), p104, O'Leary, *Developing an Ever Closer Union between the Peoples of Europe?* (n.127), p172; and Lenaerts, *Union Citizenship and the Principle of Non-discrimination on Grounds of Nationality* (n.127), p 304
[197] C-138/02 *Collins* (n.22)
[198] C-224/98 *D'Hoop* (n.22)
[199] C-367/11 *Prete* (n.155)
[200] C-333/13 *Dano* (n.2), Opinion of AG Wathelet
[201] *Ibid,* para 116

oxymoronic; it is current EU rules, being applied in an oversimplified manner, which warp the balance of interests, particularly for jobseekers. Although the reasoning behind the judgments in *Dano,*[202] *Alimanovic,*[203] *García-Nieto*[204] and *Commission v UK*[205] are arrived at by different means under the CRD, they have the same outcome. All the types of EU citizens involved were automatically excluded from social assistance without having their personal circumstances taken into consideration; ergo without their deservingness considered, and without having the EU objectives that they relate to considered.

Increasing the use of proportionality, rather than avoiding it, would rectify this. Reducing the requirement to review the proportionality of refusal in *Dano*[206] did not create respect for the citizenship hierarchy in *Alimanovic*.[207] Taking the review mechanism out of one area of free movement law, does not rectify the lack of it in another.

In *Alimanovic*[208]the permissibility of the automatic nature of the restriction was imbued from the *Dano*[209] judgment. AG Wathelet disagreed with the automatic restriction, as it was vital for authorities to be able to assess how long the benefit would be granted for, and how much it would be.[210] The AG repeated the sentiment found in citizenship jurisprudence: a single determinant is too general, narrow and exclusive to consider the link between a citizen and a Member State.[211] The basis of his findings are, that having been employed in a Member State already should show that there is already a certain degree of integration on the part of the citizen, as well as other factors, like Ms Alimanovic's child was receiving

[202] C-333/13 *Dano* (n.2)
[203] C-67/14 *Alimanovic* (n.81)
[204] C-299/14 *García-Nieto* (n.82)
[205] C-308/14 *Commission v UK* (n.61)
[206] C-333/13 *Dano* (n.2)
[207] C-67/14 *Alimanovic* (n.81)
[208] C-67/14 *Alimanovic* (n.81), Opinion of AG Wathelet
[209] C-333/13 *Dano* (n.2)
[210] C-67/14 *Alimanovic* (n.81), Opinion of AG Wathelet, para 103 to 106
[211] *Ibid,* para 108

education in Germany.[212] Kramer[213] notes the circumstances that the CRD could not take into account were Ms Alimanovic's potential connection with Germany as a refugee, fleeing violence in Bosnia and Herzegovina; or the fact her children were born there.

This thesis argues that requiring Member States to take *all* of these factors into consideration would allow for individual social justice,[214] but would detriment clarity and certainty in the law, as well as precluding Member States from exercising their competence in determining sufficient integration for the purposes of benefits access. Differentiation between different types of EU citizen should be considered in the general scheme of EU law, mindful of the Member States need to reduce welfare expenditure that extends outside the national and territorial bounds of that system.

Purposive proportionality determines the solidarity underpinnings of a benefit and its purpose, in order to consider whether an EU citizen should be eligible for it. This would require individual examination, but not over-personalisation. It would not always lead to social justice, and would sometimes unfortunately lead to the exclusion of citizens that may have clear links to the host Member State itself. In the opinion of this research, the act of sufficiently balancing interests in this sensitive area will lead to such instances. For instance, Ms Alimanovic would be extended the German benefit SGB II not because she has very clear integrational links; but because she had a very clear work history, was jobseeking, and would have her need reduced by joining the labour market again; which is the purpose of the German benefit.

Applying purposive proportionality, Ms Alimanovic should not have been excluded from the German benefit. Applying proportionality in the manner advocated by the CJEU in

[212] *Ibid,* para 111
[213] Kramer, *Earning Social Citizenship in the European Union* (n.126), p295
[214] O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017)

*Brey*, Ms Alimanovic would not be considered a long-term claimant, so should not have been excluded. Applying a more personalized test, as was required in *Prete,* she clearly had strong links to Germany and should not have been excluded. Regardless of the intricacies of proportionality assessments, this thesis opposes the overly restrictive interpretation of the CRD, particularly Article 24(2). There is nothing in that Article to suggest that this restriction on equal treatment should not be subject to a proportionality assessment. Recital 16 of the CRD preamble is inclusive of all citizens under the Directive, it states that "*beneficiaries of the right of residence"* should not be expelled until they are an unreasonable burden, and that an expulsion measure should not be the automatic consequence of recourse to social assistance. Proportionality should therefore be applicable to all types of citizens under the provisions of the CRD, regardless of their status as a jobseeker or ex-worker. This would increase certainty by synthesizing the pre and post-CRD case law, whilst still restricting benefits access for the genuinely economically inactive. The above analysis makes it clear that removing the proportionality requirement from applications of the CRD is not necessary to combat benefit tourism, satisfy legitimate concerns of Member States, or increase clarity.

The following sections of this chapter will consider the wider impacts of automatic exclusions in free movement law, and their effect on the balance of interests. Firstly, the liability of automatic exclusions to increase poverty and social exclusion is considered. Then, more technical issues are discussed in relation to the interplay between the CRD and other secondary legislation, as well as the possibility of CRD restrictions to permit direct discrimination and economic justifications for restrictions, both of which are prohibited in EU law.

### 3.2 Increasing Risk of Poverty and Social Exclusion

This issue with the current application of free movement law arises because its provisions, especially after the introduction of EU Citizenship, allow economically inactive citizens to move without restriction but also without guaranteed subsistence. Dougan[215] concisely explains the issue: prior to *Dano,* citizens accessing equal treatment to social assistance may be deemed an 'unreasonable burden' leading to a loss of residency, resulting in their possible expulsion from a Member State. They had a choice between risking their residency or restraining from claiming benefits. Post-*Dano,* no equal treatment is extended without fulfilling the residency requirements in the first place. Therefore, citizens in need face "*the stark choice of either leaving the territory altogether or instead falling into utter destitution*."[216]

This affects jobseekers gravely, as their residency is not dependent upon their means so they are unlikely to be excluded as a result of being refused benefits.[217] However, all citizens are at risk. If citizens do not return to their home Member State after refusal of social assistance, or if they can re-enter the host Member State after exclusion,[218] then they may face living in conditions of poverty. This is the current situation because the CJEU has merely set out that Member States *may* exclude citizens who fail to satisfy the residence requirements.

Unfortunately, in practice, fundamental free movement rights are interpreted generously and inclusively, whereas equal treatment rights to welfare are interpreted incredibly narrowly and exclusively. Heindlmaier and Blauberger[219] note how Member States do not check or enforce restrictions on residence, as this would be costly and cumbersome.

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[215] Dougan, *National Welfare Systems* (n.20), pp103-104
[216] *Ibid,* pp103-104
[217] Kramer, *Earning Social Citizenship in the European Union* (n.126), p299; see also Chapter 1
[218] As permitted by CRD, Article 31
[219] Heindlmaier and Blauberger, *Enter at your own risk* (n.68)

However, their interests are heavily weighted in checking and enforcing welfare benefit eligibility, as they are concerned with protecting their welfare systems from any undue costs. They therefore restrict residence in the way the Court has permitted in the likes of *Dano,*[220] *Alimanovic*[221] and *García-Nieto.*[222]

The aforementioned authors use Germany and Austria as examples of how Member States close welfare systems to EU citizens without restricting free movement.[223] Although they differ in their approach, they both largely tolerate EU citizens *and* do not deport them when they cannot provide evidence of their ability to fund their own subsistence. Free movement therefore remains unrestricted in both Member States.[224] However, welfare benefits are systematically denied to economically inactive EU citizens in both. Those without established legal residency in Austria are not permitted access to the welfare system, and are only told to leave on a voluntary basis. German welfare benefits are denied to those seeking work, or those who reside in Germany 'solely' to claim benefits. Germany has less rigorous free movement legislation, as it only requires citizens to register their presence.[225] EU citizens can be informed that they have lost their residency rights, but this happens very rarely and the authorities do not tend to pursue excluding a citizen; even if they do so, it is not difficult to suspend the process as it can be appealed and the authorities and courts are generally overwhelmed.[226] It is only really in cases where valid grounds of of public order, security, or health exist, that citizens are expelled.[227] The aforementioned authors therefore find EU law has created an 'underclass' of EU citizens, who are not workers but are

[220] C-333/13 *Dano* (n.2)
[221] C-67/14 *Alimanovic* (n.81)
[222] C-299/14 *García-Nieto* (n.82), para 50
[223] Heindlmaier and Blauberger, *Enter at your own risk* (n.68)
[224] *Ibid*, pp1199-1200
[225] *Ibid,* p1206
[226] *Ibid*, p1211
[227] *Ibid*, p1211

economically inactive, who have their presence tolerated but are not extended any financial solidarity.[228]

Nic Shuibhne[229] and Kramer[230] note that forcing Member States towards exclusion after a finding of insufficient resources is a severe course of action. However, the alternative course of action is objectively worse.

Not only is there the problem of an increased *risk* of poverty, it appears that this is an issue that can be physically seen in certain Member States. In Germany, the legislature has responded to the issue of 'tolerated' economically inactive citizens by offering financial support for one month and loan for a ticket to get back to their Member State of origin, on the premise they voluntarily agree to leave Germany.[231] In 2016 the UK Home Office took a more hard-line approach to vulnerable EU citizens and started to administratively remove homeless EU citizens. During a judicial review proceeding in 2017 it was held that this was unlawful action, constituting a discriminatory and systematic breach of free movement law.[232] The policy at issue regarded rough sleeping to be an 'abuse' of EU free movement rights.[233] Three citizens were subject to interviews and told they would be removed from the UK for misusing free movement rights to sleep rough. All three had worked in the UK at some point, although their work could be classed as minimal, and their homeless status suggested it had subsided.[234] Their homelessness was distinguished from cases of actual hardship, where a citizen had intended to work and integrate but had fallen on hard times,

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[228] *Ibid*, p1214
[229] Nic Shuibhne, *Limits rising, duties ascending* (n.52), pp933-934
[230] Kramer, *Earning Social Citizenship in the European Union* (n.126), pp298-299
[231] See German Federal Ministry of Labour and Social Affairs: Clarification of access to social benefits for non-German EU citizens, October 14 2016 <http://www.bmas.de/EN/Services/Press/recent-publications/2016/clarification-of-access-to-social-benefits.html> accessed on 03/04/18
[232] *R (on the application of Gureckis) v Secretary of State for the Home Department,* [2017] EWHC 3298 (Admin)
[233] 'European Economic Area (EEA) administrative removal', version 3.0, published 1 February 2017
[234] *Gureckis* (n.232), para 5-20

and was classified as an abuse of rights under the CRD.[235] However, Justice Lang found that there was a lack of guidance for immigration officers to determine the type of rough sleeping occurring.[236] It has also been reported that citizens were not just removed, but were detained for long periods of time before removal.[237] One citizen reported that they had been detained and told to go home despite being able to show their contract of employment, a zero hours contract with not enough income attached for them to afford housing.[238]

This case further evidences the existence of an expansive reach of free movement and residence tolerance without equal treatment rights sufficient to protect EU citizens. Justice Lang found the Home Office had interpreted the purposes of free movement provisions too narrowly, and found that the purposes of free movement law stretch beyond creating economic advantages for the Member State, but proscribes citizenship rights which do not require an economic benefit to the Member State from the individual.[239] Justice Lang stated that economically inactive citizens have the right to reside in the UK *"**provided that they do not seek social assistance from the host Member State**."*[240]

Justice Lang dismissed the claims that rough sleeping EU citizens did not intend to integrate into the UK, as rough sleepers could still work and therefore integrate.[241] She also dismissed arguments that Member States authorities are burdened by rough sleepers, as the only burden to be taken into account is any burden on the social assistance system.[242] The

[235] *Ibid,* para 56
[236] *Ibid*, para 63, 72
[237] David Jones, *Homeless EU Migrants Have Already Borne the Brunt of Brexit,* The Guardian, Wednesday 20th December 2017, <https://www.theguardian.com/housing-network/2017/dec/20/brexit-bonfire-legal-protection-homeless-eu-migrants> accessed on 11/04/18
[238] *Ibid*
[239] *Gureckis* (n.232), para 90
[240] *Ibid*
[241] *Ibid*, para 91
[242] *Ibid,* para 93

decision makes it very clear that residence rights are extensive, whilst equal treatment rights are non-existent, even in extreme circumstances. So long as citizens refrain from claiming benefits, their presence in a Member State is secured.

The UK's instance contrasts with the treatment of homeless EU citizens in Denmark, but the underlying rational is confirmed as the same by Jacqueson's analysis.[243] The Danish authorities have found homeless EU citizens, who need publicly-funded shelter, do not fulfil the residency conditions of self-sufficiency.[244] Jacqueson argues that this may be in contravention of the CRD, but this is debatable after *Dano* and *Alimanovic*.[245]

It is therefore submitted here that EU nationals living in poverty are a) a reality for Member States, b) are expected to be *tolerated* by Member States and c) are not expected to be supported by Member States. Increased poverty and social exclusion are apparently acceptable in free movement law, but increased claims on the welfare system of the host Member State are not acceptable. This is exacerbated by *Commission v UK*, as all social security is now excluded from equal treatment for all EU citizens without established legal residency under Article 7 of the CRD. This specifically includes child tax credit, which O'Brien notes may lead to an increased risk of child poverty.[246]

It is unacceptable for the fundamental right of free movement to increase the risk of poverty in EU Member States. As Nic Shuibhne notes, it is "*the antithesis of responsibility, and a sad point to have reached in the narrative of Union citizenship."*[247]

[243] Jacqueson, *From Negligence to Resistance* (n.77), p197
[244] *Ibid*
[245] *Ibid*
[246] O'Brien, *The ECJ Sacrifices Citizenship in vain,* (n.193), p239; see also O'Brien, *Unity in Adversity* (n.214), pp68-90, 250-25
[247] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p934

Verschueren[248] notes how the policy objective of reducing social exclusion and poverty has been placed high on the EU agenda, it has found its way into several Articles in the TFEU (namely Article 9, 3(3) and 151)[249] as well as being included in Article 34 of the Charter of Fundamental Rights.[250] Furthermore, Article 1 of the Charter makes provision for the respect of human dignity.[251] This issue therefore has quite a strong human rights dimension. It is outside the scope of this thesis to comprehensively assess whether a human rights claim is likely to arise at some point in the future, as a result of the equal treatment restrictions discussed in this thesis, the human rights dimension offers evidence of the *human* implications free movement law has. It is therefore even more pressing that free movement law addresses the current increased risk of poverty.

Although the decision against the UK Home Office was seen as a win for EU Citizenship,[252] as it detracted from the idea that residency always hinges upon the financial gain a Member State makes from a citizen's presence; this is a dangerous precedent to go by when it is coupled with a re-issued statement that Member States must not be burdened financially by EU citizens.

This research agrees with what the Public Interest Law Unit said during the *Gureckis* case (that homelessness cannot humanely be dealt with by forcibly removing the homeless)[253]; it is submitted that vulnerability of poor EU citizens can also not be humanely addressed by turning a blind eye to their situation so long as they do not seek social assistance. If, for the present time, social assistance cannot be somewhat extended to the vulnerable citizens

[248] Verschueren, *Free Movement of EU Citizens,* (n.12), p14
[249] TFEU, Articles 9, 3(3) and 151
[250] Charter Of Fundamental Rights Of The European Union [2012] OJ C326/391 ('Charter of Fundamental Righs of the EU'), Articles 1 and 34
[251] Charter of Fundamental Righs of the EU, Art 1
[252] Nicholas Webb, *NGO Victory: Home Office policy on EU rough sleepers found unlawful,* Free Movement Blog on Freemovement.org 14th December 2017 < https://www.freemovement.org.uk/ngo-victory-home-office-policy-rough-sleepers-found-unlawful/ > accessed on 03/04/18
[253] *Ibid*

who have utilized free movement, then the expansive rights attached to free movement must be scaled back so that they do not end up in poverty for the sake of their rights.

A problem with the approach suggested is that it would curtail EU free movement as a right that is only available to the sufficiently wealthy. Not only does this reduce the ability to achieve the social policies of the EU, it reduces the effect and strength of EU citizenship. The Maastricht Treaty introduced a step away from economic divisions between free movement rights so that all nationals of all Member States would have the ability to move, work and reside elsewhere in the EU. Excluding and subsequently deporting the poor takes that ability away, and reduces citizens to their economic worth.[254] Citizenship should ensure that free movement is not just for the rich,[255] but in attempting to re-balance the interests of citizenship and the Member States, this aspiration has been lost in the CJEU. At this point in the debate, pushing for exclusion in order to protect citizens from precarious living conditions seems to be the lesser of two evils.

As well as the concerning human effects of automatic exclusions from equal treatment, the strict interpretation of the CRD has important legal consequences that will be discussed in the following sections. These relate to the effect on the relationship between the CRD and other secondary legislation, the justification of direct discrimination in welfare access cases and the permitting of economic justifications in relation to welfare access restrictions.

### 3.3 The relationship between the CRD and Regulation 883/2004

This chapter has already briefly discussed the relationship between Regulation 883/2004[256] (henceforth 'the Regulation') and the CRD[257] in relation to the growing use of residency

[254] See O'Brien, '*I trade, therefore I am: Legal personhood in the European Union*' (2013) 50 Common Market Law Review 1643
[255] David Jones, The Guardian (n.237)
[256] Regulation 883/2004
[257] CRD

requirements to restrict benefits, as per *Commission v UK*.[258] However, an exploration of the complex relationship between the two pieces of legislation aids an assessment of the current balancing act between Member State interests and EU objectives. The following will demonstrate how reliance upon the tenets of the CRD has affected the broad equal treatment rights under the Regulation, creating inconsistencies and imbalances within the law, in order to favour Member State interests.

The Regulation is intended to co-ordinate social security systems across the EU, to avoid any possible negative impacts that may occur when a citizen exercises their right to free movement.[259] The provisions aid the determination of which Member State's social security legislation is relevant to a citizen, so that it is less likely for them to end up claiming from two systems in an abusive manner, or for them to fall between two systems and end up without any financial safety.[260] The CRD's objective is to enhance the right to free movement by clarifying the residency conditions of those who elect to exercise that right.[261] Nothing in the drafting of these two pieces of legislation, which were adopted on the same day, suggests that there is any link between them.[262] However, discussions on where benefits overlap between the CRD and the Regulation have been commonplace in the CJEU's citizenship jurisprudence.[263]

[258] C-308/14 *Commission v UK* (n.61)
[259]C-140/12 *Brey* (n.28), para 51; C-331/06 *Chuck* [2008] ECR I-1957, paragraph 32
[260] C-2/89 *Kits van Heijningen*, ECLI:EU:C:1990:183 para 12 (under Regulation 1408/71); Verschueren, *Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ* (2009) 11 European Journal of Social Security 217, p229; Jorens and Van Overmeiren, *General Principles of Coordination in Regulation 883/2004* (2009) 11 European Journal of Social Security 47, p72; COM(2016) 815 final, *Initiative to partially revise Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and its implementing Regulation (EC) No 987/2009*, p293-294
[261] CRD, Recital 3 (Preamble)
[262] Düsterhaus, '*Timeo Danones et Dona Petentes'* (2015) 11 European Constitutional Law Review 121, pp133-134
[263] Verschueren, *Special Non-Contributory Benefits* (n.260) p217

The legislative overlap occurs mainly in relation to special non-contributory benefits (SNCBs), which have elements of both social assistance and social security.[264] Article 4 of the Regulation prescribes equal treatment to all citizens habitually resident in a host Member State, with regard to access to SNCBs; defined in Article 70[265] and listed in Annex X.[266]The CRD is more protective, it explicitly excludes equal treatment with regard to access to social assistance for those in the first three months of residency and jobseekers.[267] More recently, the conditions of residency have been interpreted restrictively in *Dano*; making it impossible for citizens to have the right to equal treatment, if they attempt to claim social assistance in the form of minimum subsistence.[268]

SNCBs are a controversial issue for certain Member States; they are benefits which ensure a minimum living standard according to the living costs of the Member State and are tax-funded, so they are specific to the territory of the Member State.[269] Their territorial relevance makes them non-exportable,[270] so the Regulation provides for equal treatment with regard to access to them in a host Member State, to combat the effects of a citizen losing their right to SNCBs in their home Member State when they exercise free movement. Member States that offer SNCBs, primarily Germany and the UK, classified those benefits as 'social assistance'[271] under the CRD in order to protect them with the restrictions and conditions on equal treatment in the more protective legislation. There were concerns[272] that the habitual residence gateway to equal treatment in the Regulation was too lenient,

[264] Regulation 883/2004, Art. 70(1)
[265] *Ibid*
[266] *Ibid,* Annex X
[267] CRD, Art 24(2)
[268] Düsterhaus, *Timeo Danones et Dona Petentes*, (n. 262) and analysis of automatic exclusions in 3.1
[269] Verschueren, *Special Non-Contributory Benefits* (n.260) p218
[270] Verschueren, *Special Non-Contributory Benefits* (n.260), p220
[271] See cases: C-308/14 *Commission v UK* (n.61) ; C-333/13 *Dano* (n.2); C-67/14 *Alimanovic* (n.81); C-299/14 *García-Nieto* (n.82)
[272] Düsterhaus, *Timeo Danones et Dona Petentes* (n.262), p125; Council of the European Union meeting, Brussells 13th October 2011, Document 11834/11 ADD 1, p5

and could burden Member States; as it merely required a citizen to have their centre of interests in a Member State before claiming SNCBs. If *Brey* and *Dano* had been decided exclusively under the Regulation, the benefits would have been granted in both instances,[273] which could give some credit to those concerns, considering Ms Dano's lack of integration.

The Court accepted in *Brey*[274] that certain benefits falling into the SNCBs category of the Regulation could fall under, and therefore be protected by, the CRD provisions.[275] However, since *Brey*, the CJEU in *Dano*[276] has permitted the CRD to serve as a robust system of exclusion from equal treatment, which affects the goals of the Regulation more fundamentally, putting citizens at risk of having no welfare system relevant to them. Under *Brey*, only SNCBs that were definitely threatened by a large number of claimants in the host Member State would be excluded from equal treatment.[277] Under *Dano*, all benefits claimants will be denied equal treatment on the basis that they have no sufficient resources, and therefore are not resident under the CRD.[278] Furthermore, the decision in *Commission v UK* suggests that social security can also be restricted based on the CRD residency conditions.[279] In the judgment, the Court does not explicitly state that this extends to social security too, only that there is nothing in *Brey* to suggest that the overlap (between the Regulation and the CRD) does not extend to social security.[280] O'Brien rightly states that this is a shaky foundation on which to build the relationship between the two pieces of EU secondary legislation, particularly since the suggested relationship will heavily affect

[273] COM(2016) 815 final , n.260 P263
[274] C-140/12 *Brey* (n.28)
[275] *Ibid,* para 78
[276] C-333/13 *Dano* (n.2)
[277] C-140/12 *Brey* (n.28), para 78; Verschueren, *Free Movement or Benefit Tourism?* (n.14), p164
[278] Thym, *The Elusive Limits of Solidarity* (n.16), p40; Düsterhaus, *Timeo Danones et Dona Petentes* (n. 262) p131
[279] O'Brien, *The ECJ Sacrifices Citizenship in vain,* (n.193),
[280] C-308/14 *Commission v UK* (n.61), para 38

Article 4 of the Regulation, the equal treatment provision intended to stop citizens losing their right to social protection.[281]

The trESS report by Coucheir et al[282] provides useful insight into what happens, specifically in relation to Article 4, when the tenets of the CRD are transplanted into the Regulation. EU citizens may be habitually resident without being legally resident under the terms of the CRD, and vice versa.[283] Citizens may therefore end up 'falling between two stools' as a result of establishing their centre of interests in another Member State.[284] Citizens lose the right to social security in their home Member State under the Regulation, as they are no longer habitually resident; the Regulation would grant them access to social security in the Member State where they have established their interests instead. However, if the CRD excludes access to social assistance, social security and SNCBs, on the basis of citizens not having 'sufficient resources' to be legally resident because they are trying to claim benefits, citizens will find themselves with no financial support from either Member State. The CRD provisions are undeniably now a restriction of mammoth proportions, to the point where O'Brien[285] criticises the judgment in *Commission v UK* for creating a fundamental principle of exclusion.[286] Both Nic Shuibhne[287] and Spaventa[288] have also commented on this issue, whereby the conditions of the CRD have been treated as a limit on equal treatment rights flowing from a separate Regulation; therefore placing conditions on access to social benefits that were left out of the scope of its provisions.

[281] O'Brien, *The ECJ Sacrifices EU Citizenship in Vain,* n.279
[282] Coucheir et al, trESS report (n.41)
[283] *Ibid*
[284] *Ibid,* pp15-16
[285] O'Brien, *The ECJ Sacrifices EU Citizenship in Vain,* n.279
[286] *Ibid*, p219
[287] Nic Shuibhne, *What I tell you three times is true,* (n.132), pp930-931
[288] Spaventa, *Citizenship* (n.156), p42

This broad culture of exclusion seems at odds with the objectives of enhancing free movement, which both the CRD[289] and the Regulation[290] are aimed at. It must always be considered that these pieces of secondary legislation are ultimately aimed toward the free movement of persons as a fundamental part of the internal market,[291] which makes up both an objective of the EU project and an aim that Member States are Treaty-bound to respect.

The Court's own reasoning for this interpretation on the relationship between these two pieces of EU legislation can be criticised. In *Commission v UK,* the CJEU seemed to accept that the UK could extend residency restrictions to Child Tax Credits because they display some characteristics of social assistance; and it would be 'difficult to conceive' a system which did not require Member States to pay minimum subsistence to EU citizens, but did require it to pay other social benefits.[292]

The premise of this argument rests upon the assumption that there is never an obligation on Member States to provide minimum subsistence to inactive EU citizens. That finding in itself appears profoundly flawed and questionable.[293] The CJEU undermines the entire premise of the Regulation by relying on its own unduly broad interpretation of the CRD, with its newly-found objective of protecting Member States' welfare systems,[294] to the detriment of its free movement objective.

Furthermore, it is evidently clear that economically inactive citizens were intended to be covered by Regulation 883/2004.[295] It cannot be '*difficult to conceive*' economically inactive citizens having equal treatment under the Regulation, when Article 2 of its

[289] CRD, Recital 3 (preamble)
[290] Regulation 883/2004, Recital 3 (preamble)
[291] TEU, Article 3
[292] C-308/14 *Commission v UK* (n.61), para 50
[293] See analysis of *Dano* above*;* COM(2016) 815 final (n.260) p272
[294] C-333/13 *Dano* (n.2)
[295] Jorens and Van Overmeiren, (n.260), p53

provisions makes it clear that legislation protects access to social security for **all** citizens, by stating the Regulation applies to all nationals of a Member State.[296] Recital 42 of the Preamble explicitly refers to economically inactive citizens and states that the Regulation is extended to them.[297] The European Parliament also sets out the objectives of the Regulation on a fact sheet,[298] the aims clearly include equal treatment and the recognition of a single applicable law so that there is no risk of citizen citizens "*obtaining undue advantages from the right to freedom of movement*"[299] by benefitting from two social security schemes at once. The Regulation therefore already foresees and prevents the possibility of abuse; but does not seem to share the Directive's objective to protect Member State finances, as interpreted by the CJEU. The fact that the Regulation intends to find the *single applicable rule* also suggests that at no point should citizens end up in a position of having *no* applicable rules on social security. Protection of citizens' equal treatment, with regards to access to the social security system applicable to them, should therefore be enforced.

The Court also relied upon the purpose of the Regulation being primarily a system of conflict of laws, to decipher which Member State's social security system applies to citizens; [300] it is therefore up to the Member States themselves to legislate the eligibility criteria. O'Brien rightly opines that this is far too simplistic a reading of the legislation. If Member States are permitted to discriminate against non-nationals in their eligibility criteria, which strictly applying the CRD does, then the purpose of the Regulation will be defeated. It would create a Regulation that simply determines which Member State's rule

[296] Regulation 883/2004, Article 2
[297] *Ibid,* Recital 42 (Preamble)
[298] European Parliament, *Fact Sheets on the European Union: Social Security cover in other EU Member States,* 02/2018 < http://www.europarl.europa.eu/factsheets/en/sheet/55/social-security-cover-in-other-eu-member-states> accessed on 27/03/2018
[299] *Ibid*
[300] C-308/14 *Commission v UK* (n.61)

will exclude EU citizen citizens, when the intention is for it to determine which social security system has responsibility for them, hence the inclusion of equal treatment.

The history of the Regulation and SNCBs provides a different view of its intended purposes.[301] Verschueren[302] analyses the *Brey* decision in light of the prior case law and *travaux préparatoires* on the co-ordination of SNCBs.[303] Originally, Member States were required to export these benefits, but the case law became overwhelming as problems arose in their efforts to do so. As a result, the Regulation and its predecessor codified the non-exportability of SNCBs, but would make host Member States responsible for paying them to EU citizens within their territories.[304] This is the price Member States were willing to pay in order to cease the exportability of SNCBs.[305] Verschueren describes *Brey* as a clear derogation from the settlement between the Court and the EU legislature, since host Member States will no longer be required to provide SNCBs under Regulation 883/2004, as provision will rely upon the CRD.[306] The judgments in *Dano* and *Commission v UK* further remove equal treatment from the remit of the Regulation, and therefore constitute even greater derogations from that settled compromise, as well as a move away from the objective of protecting the social rights of citizens.[307]

Overall, nothing in the remit of either legislation points to citizens falling between two stools as a natural outcome of their application. It is difficult to conceive that the residency requirements in the CRD were left out of the Regulation by accident. Not only does the Regulation have a residency requirement already in place, it is clear from the wording of

[301] Van Overmeiren et al, trESS report, *Social security coverage of non-active persons moving to another Member State,* 2011 p14
[302] Verschueren, *Free Movement or Benefit Tourism?* (n.14), p164
[303] *Ibid*
[304] *Ibid*
[305] Düsterhaus, T*imeo Danones et Dona Petentes*, (n.262), pp133-134; Van Overmeiren et al, tress report (n.301), p14; Verschueren, *Free Movement or Benefit Tourism?* (n.14), p164
[306] Verschueren, *ibid*, p164
[307] COM(2016) 815 final (n.260)

Article 4 that equal treatment arising from it is not intended to be influenced by external legislative instruments. The Regulation states "Unless otherwise provided for **by this Regulation**, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof" (emphasis added).[308] It is therefore hard to imagine, in light of the objectives and purposes of the legislation, that the drafters intended the interpretation above to be drawn. The predecessors to the two instruments were never interpreted in this way; Verschueren[309] notes that Regulation 1408/71[310] on the coordination of social security for community workers did not have any restrictions after the establishment of habitual residence, and this was not altered in Regulation 883/2004 when an opportunity arose to update the legislation.

This is further backed up by Verschueren's assertion that reading an extra requirement into the Regulation is not in line with the ultimate objective of the CRD: to enhance free movement law.[311] Reading the arguably over-strict interpretation of requirements of the CRD into another legal instrument, which also gives rights to EU citizens, conflicts with the fundamental principle that restrictions on free movement law ought to be interpreted narrowly.[312]

Düsterhaus[313] opines that it is nothing short of ironic how the Regulation was specifically drafted to include specific social assistance, and to allow for equal treatment for the economically inactive within its tenets, for these citizens to be automatically excluded from those benefits as a result of the application of EU law. The Court's apparent justifications for its findings in *Commission v UK*, which exacerbated the issue of the legislative

[308] Regulation 883/2004, Article 4
[309] Verschueren, *Free Movement or Benefit Tourism?* (n.14), p165
[310] Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2
[311] Verschueren, *Free Movement or Benefit Tourism?* (n.14), p165
[312] C-140/12 *Brey* (n.28), para 70
[313] Düsterhaus, *Timeo Danones et Dona Petentes* (n.262), pp133-134

transplant, can be criticised. The judgment appears logical only when viewed through the lens of Member State interests, as it is based upon the *Dano* reasoning that Member States finances need to be protected. Therefore, an imbalance is plainly present in the application of the law; not only is the Regulation itself hindered, but the objectives that it pursues are also affected.

It is not the imbalance itself which is of the greatest interest to this thesis, but the method by which it arises. This thesis has already found that restricting equal treatment is not always prima facie illegitimate, even when doing so fundamentally undermines the achievement of the internal market goals. In certain instances, Member State interests are legitimate. For instance, the outcome of *Dano* is not disputed[314] even though Ms Dano's right to free movement was impinged by the refusal of equal treatment.

As Düsterhaus notes,[315] it is the far-reaching consequences of the judgment which are concerning. The outcome of the judgment was not arrived at after considering the application of the German rule to Ms Dano's situation; it was arrived at after considering the general application of conditions on residency in the most literal sense possible. This cast the *Dano* net too wide, so that citizens in the same position (i.e. claiming benefits) will be refused equal treatment irrespective of their degree of integration with a host Member State.[316] Because of the link between the CRD and the Regulation formed in *Brey*, any widespread effects of the conditions in the CRD will also affect the effectiveness of the Regulation as regards free movement objectives.

[314] See analysis above under 'manifest benefit tourism'
[315] Düsterhaus, *Timeo Danones et Dona Petentes* (n.262), p133
[316] Thym, *The Elusive Limits of Solidarity* (n.16), p40; Düsterhaus, *Timeo Danones et Dona Petentes*, (n.262) p131

Verschueren[317] argues that this could encourage citizens to try to claim exportability of SNCBs, since there is a bar to them claiming in the host Member State and it would be a restriction on free movement for their home Member State to not grant them.[318] While this is currently only of academic interest, it is not out of the question, particularly in light of the exported benefits granted to certain migrating students.[319] If case law were to shift towards exporting SNCBs again, this would create high levels of inconsistency in the application of EU law. Furthermore, it would exacerbate the artificial reading of the Regulation, as well as creating uncertainty for citizens who have exercised their free movement rights. On the other hand, to not revert back to this system but continue to restrict rights that should be granted by the Regulation is arguably inconsistent with primary law, and would be a backward step for the enhancement of free movement and integration.

If the methodology under the CRD were different, the same degree of imbalance would not exist, the free movement goals would not be as seriously compromised and the two pieces of secondary legislation could be interpreted harmoniously. Düsterhaus[320] considers, in particular, how the two residency conditions could smoothly co-exist if a genuine integration requirement determined access to equal treatment, rather than equal treatment being dependent upon sufficient resources, which could now be taken to mean 'not claiming benefits'. Requiring a degree of integration could easily also show that a person's centre of interests are established in the Member State, thus forming habitual residency for the purposes of the Regulation and integration for the purposes of the CRD. Allowing those with genuine integration to claim equal treatment to SNCBs would increase the scope and therefore success of free movement and equal treatment provisions, but would still retain

[317] Verschueren, *Free Movement or Benefit Tourism?* (n.14), p164
[318] *Ibid,* p164-165
[319] See Chapter 2
[320] Düsterhaus, *Timeo Danones et Dona Petentes*, (n.262), p133

respect for Member States' welfare systems by excluding citizens too who failed to meet this requirement. In the opinion of this thesis, this would be amended to require purposive integration: so those who are claiming in a jobseeking capacity would be required to be intergrated into the employment market, and those claiming subsistence would require more social links etc. This way, the Member States interest in legitimacy and efficacy would be supported by the proportionality requirements.

Another option noted[321] would be to determine both sets of equal treatment under the idea of an unreasonable burden, as per *Brey*, so that Member States can assess sufficient resources under the CRD, and possibly derogate from equal treatment in the Regulation at the same time, by assessing the amount of benefits a citizen would be granted. This would balance interests in favour of Member States which would face definite burdens, and in favour of free movement in situations that would not burden the welfare system.

The entire argument around equal treatment in the Regulation would be different if there was overwhelming evidence of hardship caused by free movement of economically inactive persons within the Member States. As already discussed, such evidence is yet to come to light;[322] even when Member States have raised concerns about the effect of free movement on SNCBs,[323] there has been nothing to suggest to the Commission that there is a real issue; otherwise, the Regulation would have been amended.

It is not submitted that Member States must unconditionally open their social security systems to economically inactive citizens, but that the methodology that is being applied to ensure that they are able to protect those systems is highly problematic, without the justification or backing of a 'constitutional' (Treaty) objective. This simply evidences that

[321] *Ibid*, p133-134
[322] *Ibid,* p138; Thym, *The Elusive Limits of Solidarity* (n.16), p21
[323] Düsterhaus, *ibid,* p125

the current procedure of using residency to restrict benefits access does not work well in the general scheme of EU law, it is too detrimental to the free movement objectives. Also, the consequence of citizens possibly falling between two stools has very dire, human consequences. Such consequences are a heavy factor to weigh against Member State interests. Any balance that puts human lives and dignity at risk, without any acknowledgement or recourse when it does so, has not been struck fairly.

In terms of the relationship at hand, this thesis submits that there should not be a transplant of provisions from the CRD into the Regulation. More specifically, the benefits described in the Regulation should not be restricted on the basis of the provisions of the Directive, as they are currently interpreted. There are far too many indicators that this was not an intended outcome during drafting, and it is not possible to justify this tenuous interpretation in light of the aims and objectives of the two documents or the Treaties. If the use of the CRD provisions had to be proportionate, this would strike a better balance between free movement objectives and Member State interests; it would allow national authorities to assess the specific burden a citizen was placing upon their welfare system, or how integrated they were, and weigh up whether it would be appropriate or necessary to impinge their free movement rights to rectify this.

If the current application does continue, then the issue of expulsion for citizens who fail to establish legal residence under the CRD should be revisited. This possible reform has been a common theme throughout this thesis, it is not submitted that it would satisfactorily resolve the issue of the relationship between the two pieces of EU legislation. However, it would reduce the effects that current uncertainty has on citizens that could end up living in a Member State where they are financially vulnerable, possibly with the result of them living in relative or actual poverty.

### 3.4 The Permitting of Direct Discrimination

The current state of the law and jurisprudence in this area has led to what O'Brien calls "*the mangling and dodging of the discrimination question*."[324] Generally, direct discrimination is only permitted when there is an explicit derogation permitting direct discrimination in EU secondary legislation, or in express derogations in the Treaty for reasons of public health, public security and public policy (Such as Article 45 TFEU[325]). Derogations other than those expressed in primary and secondary legislation can exist under the overriding (or 'mandatory') requirement doctrine, when public interests that are not expressly recognised in explicit derogations can necessitate restrictions nontheless; i.e. effective fiscal supervision was the public interest in the *Cassis De Dijon* case, which created this doctrine.[326] Derogations under overriding requirements are those which must be legitimate and proportionate. As Spaventa[327] notes, direct discrimination is not permitted to be justified by the overriding requirements doctrine. The CJEU therefore faces a problem when public interests could justify direct discrimination, but do not fall under the express derogations. It may either create inconsistencies within its own case law, and throw into question its own legitimacy if it makes judgments that appear to be extending the derogations of the Treaty; or it must use interpretations of measures that are somewhat artificial so that the doctrine remains consistent.[328] The latter situation occurs in the case law regarding free movement of citizens, which prohibits discrimination on the grounds of nationality.[329]

[324] O'Brien, *The ECJ Sacrifices EU Citizenship in Vain* (n.279), p224
[325] TFEU, Article 45 (3)
[326] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR I-00649 para 8
[327] Spaventa, '*On discrimination and the theory of mandatory requirements*' (2002) 3 The Cambridge yearbook of European legal studies 457
[328] *Ibid*, pp458-459
[329] CRD, Article 24; TFEU, Article 18

It appears that discrimination on the basis of nationality is not defined by jurisprudence as well as other types, such as gender discrimination. In the case law regarding free movement and access to social benefits, the CJEU has avoided any thorough exploration of restrictions that may constitute direct discrimination.

This was noted prominently as an issue in the *Patmalniece*[330] case in the UK Supreme Court. The purpose of the Supreme Court judgment was to determine whether UK pension legislation[331] was directly or indirectly discriminatory on the grounds of nationality. Claimants of State Pension Credit had to have a right to reside in the UK; a requirement that UK nationals would satisfy automatically with their nationality, but other Member State nationals would have to satisfy the requirements of the CRD to prove.

Lord Hope found the regulations to be comparable to the policy at issue in the CJEU judgment *Bressol.*[332] In her opinion on *Bressol* AG Sharpston[333] had found the Belgian legislation to be directly discriminatory because it required those claiming a benefit to have a right to permanently remain in Belgium, which all Belgian nationals would automatically satisfy. As other Member State nationals would have to fulfil extra criteria to satisfy this because of their nationality, the measure was directly discriminatory. The CJEU in that instance did not follow the Opinion of AG Sharpston, and regrettably did not elucidate the decision to differ from her opinion. Instead, the Court moved onto the issue of justifying the discriminatory legislation, suggesting it either found it to be obviously indirectly discriminatory in nature or perhaps that it was allowing a justification of direct discrimination[334] – Lord Hope states "*the contrast between her carefully reasoned*

[330] *Patmalniece* (n.110)
[331] The State Pension Credit Regulations 2002, Statutory Instruments 2002 no. 1792 Part II (2)
[332] C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-02735
[333] C-73/08 *Bressol* (n.332), Opinion of AG Sharpston paras 72-74
[334] C-73/08 *Bressol* (n.332), para 62

*approach and that of the Court is so profound it cannot have been overlooked."*[335]The Court looked at the restrictive legislation as a whole and found that in principle it was not directly discriminatory on the basis of nationality, as it set out other criteria such as the need to have Belgium as a place of residence, which is a separate issue from nationality.[336] Due to the similarities between *Bressol* and the situation in *Patmalniece,* Lord Hope found the cumulative restriction in UK law, which also set out other criteria to be satisfied, to constitute indirect discrimination that would therefore have the chance of being justified.[337]

Lord Walker questioned why the CJEU would opt to define the law in question as indirectly discriminatory simply because there is more than one criterion, when the one *necessary* criterion that creates the discrimination should be judged on its own basis.[338] Lord Walker also appears to suggest that it is regrettable how certain legislation can target a specific group, and have a wholly discriminatory purpose, yet still be found to be only indirectly discriminatory and therefore justifiable. He states "*there is an obvious temptation from Governments in the face of understandable popular feeling (in this case, against "benefit tourism") to try and draft their way out of direct into indirect discrimination, with a view to avoiding having to distribute large sums of public funds…to beneficiaries whom their electors would not regard as deserving."*[339] However, Lord Walker still finds the legislation at issue to be indirectly discriminatory due to the decision of the CJEU in *Bressol.*

There is a lack of transparency where discrimination on the basis of nationality is concerned, if the Court had at least voiced reasoning behind the decision to not utilize the definitions given by AG Sharpston, there might be some comprehensive idea of what

[335] *Patmalniece* (n.110), para 33
[336] C-73/08 *Bressol* (n.332), paras 41-43
[337] *Patmalniece* (n.110)
[338] *Ibid,* para 65
[339] *Ibid,* para 72

constitutes direct, and what constitutes indirect, discrimination on the grounds of nationality.

The Court's unwillingness to do so could suggest that political pressure determined the decision to avoid making a finding of direct discrimination, as such discrimination is unjustifiable and the Member State would have had to provide equal treatment until it could pass more compliant legislation. It is understandable for the Court to want to avoid this, particularly in the likes of the *Bressol* case, which concerned educational policies; this thesis has already noted that such policies are considerably sensitive to the Member States.

The tone of the *Patmalniece* judgment suggests that the Supreme Court justices are unwilling but bound to follow the jurisprudence of the CJEU on this particular point. The justices found more reason in the AG Opinion, particularly since it reflected domestic discrimination law to a certain degree.[340] Lord Walker emphasised the need to scrutinize the justification rigorously, because of the undeniably strong link between British nationality and the conditions for accessing State Pension Credit.[341] Should the CJEU be tempted to make decisions based on political pressure from Member State Governments, this puts national courts in the predicament of not being able to interpret and implement the law to a satisfactory degree in their own jurisdictions. Binding national courts to make decisions that are not strictly rational, in order to allow Member States to justify their clearly prohibited restrictions, highlights the imbalance between Member State interests and EU objectives and citizens' rights within this case law.

Discrimination is a naturally ambiguous legal concept. Lady Hale notes in *Patmalniece* that the complexity of this area causes legal issues;[342] as concepts of indirect and direct

[340] *Ibid,* para 69
[341] *Ibid,* para 73
[342] *Ibid,* para 82

discrimination, justification and proportionality become all the more complex and difficult to apply when the types of prohibited discrimination expand and when the situations in which discrimination arises widens.

Nationality discrimination is unique to free movement and EU law,[343] so clear guidance from the CJEU is required. Lady Hale suggests discrimination within this context may have a specific application and be a much more flexible concept. It is possibly a tool to be used for the realisation of EU objectives, more precisely the objective of enhancing the free movement of economically active EU citizens, as these have the most legitimate claim to equal treatment due to their historical rights under the scope of treaty in Article 45 TFEU.

This is a logical and very possible explanation for the confusion surrounding discrimination on the grounds of nationality. However, without such a statement from the CJEU, it will undoubtedly continue to create inconsistency and artificial applications of the concept of indirect discrimination.

Direct discrimination and the possible politicization of the CJEU are inherent in *Commission v UK*.[344] UK child benefits also require beneficiaries to have a right to reside in the UK; non-national EU citizens will have to fulfil the criteria set out in the CRD in order to do so. This is very similar to the rules discussed in *Patmalniece* and *Bressol.* The CJEU found the rule to create indirect discrimination,[345] as did AG Cruz Villalón,[346] despite the fact that the right of residence test does not really apply to UK nationals, as they satisfy it automatically.

[343] *Ibid,* para 83
[344] C-308/14 *Commission v UK* (n.61)
[345] *Ibid*, para 76-77
[346] C-308/14 *Commission v UK* (n.61), Opinion of Ag Cruz Villalón, paras 83-84

The UK argued that the cumulative nature of the test creates indirect, rather than direct, discrimination. The Court seems to focus on the habitual residence requirement in its finding of indirect discrimination, stating UK nationals will only more easily satisfy this condition.[347]

It is the view of this research that the Court deliberately avoids the possibility that the imported CRD provisions create direct discrimination. The Court does not address why the Commission was wrong to complain that the UK was engaging in direct discrimination. No comment is made as to the fact that *all* UK nationals will satisfy the right of residence requirement, making the distinction between nationals and EU citizens a matter of nationality; according to AG Sharpston, such situations differentiate direct discrimination from indirect.[348] O'Brien notes that it is simply unequivocal that the UK rule at issue in this case involved direct discrimination on the grounds of nationality. To use O'Brien's example: "*if a Member State announced that all EU national women were subject to a condition of economic activity for entitlement to benefits, but that EU national men would automatically have a right to reside, we could not characterise that as 'indirect' sex discrimination by arguing that it is a 'residence condition', or because men were 'more likely' to have a right to reside.*"[349]

Discrimination on the grounds of nationality may require different considerations from other types of discrimination, because of its unique nature, having been created at the European level. Member States are more likely to understand, and more importantly agree with, the prohibition of gender discrimination within their domestic laws. They may not hold the same strong sentiments against nationality discrimination, particularly where

[347] C-308/14 *Commission v UK* (n.61), paras 77-79
[348] C-73/08 *Bressol* (n.332), Opinion of AG Sharpston, paras 43-48
[349] O'Brien, *Unity in Adversity* (n.214), page 68

social security and welfare access is concerned. CJEU case law such as *Trojani*[350], *Brey*[351] and *Dano,*[352]as well as the UK Supreme Court cases *Patmalniece*[353] and *Mirga,*[354] illuminate Member States' concerns over benefit tourism. Moreover, nationality is a traditional boundary of the welfare state;[355] regardless of concerns around benefit tourism, Member States will have a culture of nationality discrimination deeply engrained in their welfare systems, and are likely to have a desire to continue this. This concern will make it difficult for them to agree to an overall prohibition of nationality discrimination, thus creating the temptation to avoid having non-justifiable restrictions benefits access, by artificially labelling restrictions as indirectly discriminatory.[356]

Those legitimate concerns then create a tendency for the CJEU to affirm the artificial labelling of restrictions as indirectly discriminatory. Political pressure at the EU level makes this all the more likely; the judgment in *Commission v UK* was handed down just over a week before the UK referendum on withdrawal from the EU. O'Brien suggests that the CJEU's recent case law (mainly *Commission v UK*) highlights its possible politicisation, as the thinly reasoned judgments are hard to rationalise outside of the current political climate.[357] It is difficult to disagree that the Court's unwillingness to retain the clarity and rigor of discrimination law is questionable, save for the possible political backlash that would ensue if Member States were refused the right to protect their welfare systems through restrictions on equal treatment. It is surely only in such extreme circumstances that

[350] C-456/02 *Trojani* (n.1), Opinion of AG Geelhoed, para 18
[351] Case C-140/12 *Brey* (n.28), para 55
[352] Case C-333/13 *Dano* (n.2), para 76
[353] *Patmalniece* (n.110), para 38
[354] *Mirga (Appellant) v Secretary of State for Work and Pensions* [2016] UKSC 1
[355] Dougan, *Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?* in Barnard and Odudu, *The Outer Limits of European Union Law* (Hart 2009); de Búrca, *EU law and the welfare state: in search of solidarity* (OUP 2005)
[356] *Patmalniece* (n.110), para 72
[357] O'Brien, *The ECJ Sacrifices EU Citizenship in Vain* (n.279)

the Court would allow its own judgments to lead to what O'Brien deems "*inadequate characterisation of indirect discrimination"*[358].

The inadequate characterisation also creates confusion about whether direct discrimination *can* ever be justified. Lady Hale noted this in *Patmalniece,* as in the *Martinez Sala*[359] judgment the CJEU held there to be direct discrimination with "*nothing to justify such unequal treatment […] put before the Court*".[360] This implies to Lady Hale that direct discrimination may be justified under certain circumstances, but the CJEU has not made it clear if this is so, or under what circumstances this would be the case.

The above analysis shows that direct discrimination has been permitted, which favours Member State interests over EU objectives (particularly the reduction of discrimination). It is also clear that the Court should explicitly define any exceptional circumstances that can make direct discrimination justifiable, rather than allowing Member States to justify restrictions are are directly discriminatory in all but name. There are clear reasons why the Court has acted the way that it has, but it has done a disservice to itself, national courts, free movement law and the principle of equal treatment by refusing to clarify the law.

It is not submitted that permitting justification of direct discrimination is unacceptable in cases on social welfare access. It may be necessary in this specific area because of the type of tension between EU and Member State interests. The abhorrence of discrimination is not as present in these cases as it is in systematic bias against a certain gender or sexual orientation. In the latter cases, there is a societal and communal view that those factors should not play any part in the delivering of equal treatment. The absolute opposite is true

[358] O'Brien, *Unity in Adversity* (n.214), page 68
[359] C-85/96, *Martinez Sala* (n.47)
[360] *Ibid* para 64

of welfare systems, which are naturally exclusive.[361] However, this thesis is concerned with how well the law balances the interests of EU objectives and Member State interests.

Direct discrimination has been permitted in other areas, which may help to aid an assessment of its viability in balancing the interests between free movement and Member State welfare systems. It is only in highly exceptional circumstances that it has been permitted, and never before within the tenets of free movement of persons. Where it has been apparent is in cases relating to restrictions on free movement of goods, where those restrictions were aimed at securing environmental protection or fiscal balance.

Environmental protection falls under the doctrine of overriding requirements, so direct discrimination is prohibited on restrictions aimed at achieving this aim. Yet the Court has found clearly directly discriminatory measures aimed at environmental protection to be indirect discrimination, and therefore justifiable[362]similarly to the discrimination in welfare access cases. In *PreussenElektra,*[363] the CJEU found that a German rule requiring a percentage of electricity to be purchased in Germany from renewable power sources[364] could hinder intra-community trade.[365] Instead of focusing on the direct nature of this effect on imports, the Court focused on the fact that some obstacles to trade were permitted in the area of energy supply, as the market is not fully liberalised.[366] The Court also found it important that Germany's aim was to increase the use of renewable energy sources, which is also an EU objective that is vital for combatting climate change.[367]

[361] de Witte, *The End of EU Citizenship* (n.127), p89
[362] Dirk Ehlers, *European Fundamental Rights and Freedoms* (De Gruyter Recht Berlin 2007), p243
[363] C-379/98 *PreussenElektra* [2001] EU:C:2001:160
[364] Para 2-3, Stromeinspeisungsgesetz 1990; Paragraph 3(2) Gesetz zur Neuregelung des Energiewirtschaftsrechts 1998
[365] C-379/98 *PreussenElektra* (n.363) para 69
[366] *Ibid,* para 78
[367] *Ibid,* paras 72-74

This could provide some legitimacy to the direct discrimination discussed in relation to welfare cases. The special nature of the restriction may be something to consider. However, it is difficult to see as much legitimacy in welfare restrictions as energy market restrictions. Environmental protection is a long-standing objective and policy concern of the EU itself, recognised by the commission as a ground for exceptions to the four freedoms.[368] It is not merely a protected concern of the individual Member States. By its very nature, the decision in *PreussenElektra* was protecting Member State interests and clear EU objectives, so the imbalance between the two is not as evident.

While there is scope for protection of social assistance systems to be an EU objective, it is only recently that this has been highlighted in cases such as *Dano*,[369] *Alimanovic*[370] and *García-Nieto*.[371] Also, the objective of preserving Member State welfare systems has been noted as an objective of secondary legislation only, in the CRD,[372] and not a matter of Treaty protection, like environmental protection.[373] The Treaty objective, as well as the original objective of the CRD, is the advancement of free movement in the internal market. It is clear that direct discrimination in welfare access cases is not as inherently legitimate as in cases concerning environemtnal protection.

A more closely related example may exist in the free movement of goods case *Decker*[374], whereby a policy directly discriminated against spectacles *purchased* in another Member State. At the point of reimbursement for spectacles, those purchased outside of Luxembourg were required to be pre-authorized whilst the same was not required for spectacles purchased within Luxembourg. It is unclear whether this would be considered

[368] Edwards, *The Exceptions to the Four Freedoms* in Koutrakos, Nic Shuibhne & Syrpis (n.156), pp7-8
[369] C-333/13 *Dano* (n.2), para 74
[370] C-67/14 *Alimanovic* (n.81), para 50
[371] C-299/14 *García-Nieto* (n.82), para 39
[372] CRD, Recital 10, 16 and 21 (Preamble), Article 7(1)(b) and (c), Article 24(2)
[373] TFEU, Article 11 and Article 191
[374] C-120/95 *N Decker v. Caisse de Maladie des Employs Privs* [1998] ECR 1-1831

discriminatory, because glasses produced in Luxembourg but purchased elsewhere in the EU would be subject to the requirement; and vice versa. The Court elected to avoid the discrimination question.[375] Again, in the area of services, the *Safir*[376] case had a similar outcome. This concerned a policy granting tax relief under criterion that distinguished between insurance companies based upon where they were established. AG Tesauro stated the need for clarification on whether this was discriminatory, and the Court failed to answer.[377]

Spaventa notes how it is a tendency for the Court to dodge the issue of discrimination, when the justifications for it are based upon economic objectives.[378] For *Decker* the reasoning behind the policy was the sustainability of the health insurance system. For *Safir* it was tax benefits.[379] Member States cannot use the Treaty derogations to justify objectives with an economic character; whereas the judge-made overriding requirements may be used to justify such derogations so long as they are not *purely* economic. As will be discussed below, the protection of the welfare state is partially an economic objective. It would therefore require overriding requirements to justify it; yet these cannot be used to justify direct discrimination. Spaventa[380] raises the point that for the *Decker* and *Safir* case, the economic issues related are territorial: tax and welfare. They are therefore much more likely to be discriminatory and it would be easy for the Court to find them so; but for the Court to set a precedent of finding them to be discriminatory would severely reduce the avenues of justification available to Member State authorities.

[375] Spaventa, *On Discrimination and the theory of Mandatory Requirements* (n.327), pp459-460
[376] C-118/96 *Safir* [1998] ECR 1-1897
[377] Spaventa, *On Discrimination and the theory of Mandatory Requirements* (n.327), p460
[378] *Ibid*
[379] *bid*
[380] *Ibid*

A factor that may be considered is that the Court has to acknowledge the Member States competence in this area. In both *Decker*[381] and *Commisson v UK*[382] the Court re-iterates the sentiment that the Member States can arrange their social security systems as they see fit. This could also explain why the Court does not opt to narrow down the avenues of justification in this sensitive area.

It has been established *why* the Court has opted to turn a blind eye towards direct discrimination in sensitive areas of Member State competence, the problems occur in the inconsistent way that it does so.

Itis clear from *Decker* that the Court is willing to permit an overriding requirement justification for direct discrimination where it is *necessary*; which the Luxembourg authorities failed to show as the reimbursement was made at a flat rate, there could be no more cost to the social security system incurred by foreign purchase.[383] Despite the sensitivity of the Member State competence over health insurance policy, the CJEU was willing to find the restriction disproportionate because it was not necessary. The same rigorous proportionality test has not been applied in cases of social welfare access for citizens. If proportionality, and the requirement of necessity, were to be applied then a fairer balance could be struck between Member State interests and EU objectives. Furthermore, a deeper analysis of the necessity for welfare restrictions would help to define the specific circumstances under which direct discrimination is justifiable. Lord Walker in *Patmalniece* found that "*the correlation between British nationality and the right to reside in Great Britain is so strong that the issue of justification must in my view be scrutinised with some rigour*".[384] It would be desirable for the CJEU to take the same approach.

[381] C-120/95 *Decker* (n.374) para 21
[382] C-308/14 *Commission v UK* (n.61), para 65-67
[383] Case 120/95 *Decker* (n.374) para 40
[384] *Patmalniece* (n.110), para 73

Furthermore, whether the permissibility of direct discrimination in the overriding requirements doctrine should apply across all of the freedoms is still debatable. There are significant differences between goods and services on the one hand, and citizens on the other. There are a plethora of aims and objectives concerned with free movement of citizens: mobile citizens enhance competition and the single market, but are also imperative to the EU's social objectives that are aimed at social integration and the reduction of poverty and social exclusion.[385]

At present, the law is unsatisfactory because legislation that looks directly discriminatory will still give rise to a claim against Member State authorities, as it is still accepted that direct discrimination cannot be justified by mandatory requirements. The Court has permitted direct discrimination to be read as indirect under the tenets of environmental protection and welfare protection in the field of free movement of goods and services, but this thesis submits that the balance between welfare systems and free movement rights does not necessitate such a step due to the stark differences between the objectives of the two areas and the differences between the two freedoms.

In an area so vital to the enhancement of EU citizenship, which purports to increase equality and integration, direct discrimination ought to have no place unless it is absolutely necessary. It is clearly often necessary to permit effective environmental control, due to wider policy considerations on climate change, something the EU is dedicated to tackling due to overwhelming evidence that it is a global problem.[386] The issue in this area of law is that the CJEU has turned a blind eye and permitted direct discrimination without thorough consideration of the necessity. The current case law interpretations in *Dano*,

[385] TFEU, Articles 151 to 153
[386] EU Directory on Climate Change: < https://eur-lex.europa.eu/summary/chapter/environment.html?root_default=SUM_1_CODED%3D20> accessed on 06/04/18

*Commission v UK* and even *Patmalniece* are built upon the idea that Member States must be able to prevent 'benefit tourism', free movement abuse and overwhelming claims on the welfare system. However, abuse of welfare states is not as pressing, it is not a concern or policy objective of the EU, and if it does exist, it is in a very small number of cases.[387] It is undeniably not justifiable to create inconsistency in discrimination law for this concern. If the Court were more open about the real concerns of Member States, to keep their competence regarding welfare intact, the necessity of direct discrimination might be more legitimising. This would not be a perfect response, as the current application of the laws in a strict manner are far too restrictive to take into consideration important EU objectives. The imbalance caused by the permitting of direct discrimination could and should be softened by a proportionality requirement. This would reduce the use of direct discrimination, take into consideration EU objectives in cases where it is possible to do so, and would strike a fairer balance of interests.

### 3.5 *Permitting Economic Justifications*

As noted above, the CJEU[388] has consistently held that there can be no derogation from the fundamental freedoms on the basis of purely economic considerations.[389] This applies to all derogations from EU law, both explicit in EU legislation and also under the overriding

[387] See: Charlotte O'Brien, *Unity in Adversity* (n.214), page 119; BBC News (n.18)*;* ICF GHK and Milieu, *fact finding analysis* (n.19); Thym, *The Elusive Limits of Solidarity* (n.16), p21; Verschueren, *Free Movement or Benefit Tourism?* (n.14), p149; Dougan, *National Welfare Systems* (n.20), p102

[388] C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-02421, para 34; Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, para 34; C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR 1-4007, para 11; Case C-398/95 *SETTG* [1997] ECR 1-3091, para 23; Case C-35/98 *Verkooijen* [2000] ECR 1-4071, para 48; and Case 388/01 *Commission v Italy* [2003] ECR 1-721, para 22

[389] For further analysis see Arrowsmith, '*Rethinking the approach to economic justifications under the EU's free movement rules',* (2015) 68(1) Current Legal Problems 307; and also Oliver, '*When, if Ever, Can Restrictions on Free Movement be Justified on Economic Grounds?*' (2016) 41(2) EL Rev 147

requirement doctrine. The reasoning behind this prohibition, according to Arrowsmith[390] and Oliver,[391] is that the fundamental freedoms will always trump budgetary interests; public money can often be saved elsewhere, in areas that do not affect the internal market.[392] The general prohibition on budgetary considerations also reduces the risk that the EU institutions will have to engage in difficult impact assessments regarding a Member State's finances.[393] Otherwise, it may fall on the Court to determine whether a Member State could save money elsewhere, or how much of a burden certain EU rules are placing on public funds.[394] This would raise serious concerns about Member State's autonomy to govern their own finances. Moreover, courts (either nationally or at the EU level), are ill-suited to make decisions on budgetary considerations.[395]

There is very good reasoning for prohibiting protectionism when it comes to the free movement of workers, Spaventa notes that workers contribute to the public purse in host Member States, so any protectionism aimed at reducing their financial burden on it should be eradicated.[396] The same reasoning may not be applied for those may draw on the host Member State's resources *without* ever making direct contributions. There may need to be a fundamental difference between how the economic justification rule is applied when it is the citizenship provisions and the objective of enhancing free movement that is directly pitted against the objective of reducing public spending. Spaventa finds that the economic concerns of Member States are legitimate in these cases, and as such, so are the limitations on free movement requiring them to have sufficient resources.[397]

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[390] Arrowsmith, (n.389), p308
[391] Oliver, (n. 389) p176
[392] Arrowsmith, (n.389), p330
[393] *Ibid* pp.307-365
[394] *Ibid,* p347
[395] Nic Shuibhne and Maci, '*Proving Public Interest: the Growing Impact of Evidence in Free Movement Case Law'* (2013) 50 CML Rev 965, pp1003-1004
[396] Spaventa, *Citizenship* (n.156), p34
[397] *Ibid*

Like all general rules, there are exceptions to the prohibition of economic justifications for derogations. Unfortunately, the exceptions to this rule are neither expressed nor fully acknowledged;[398] though some academics have attempted to formulate reasoned responses to divergences from this rule.[399] Member State policy and legislation with clearly economic underpinnings has been permitted by the CJEU turning a blind eye to their true nature,[400] in a similar fashion to the case law permitting direct discrimination. Moreover, where this is done the Court avoids reviewing the proportionality of restrictions, so that it does not engage in the reviewing of Member States budget or revenue decisions.[401] The next part of this research will review the reasoning and methodologies used to permit economic considerations in restrictions on free movement of Union citizens, alongside other areas of free movement; whilst assessing whether this is necessary to strike a fair balance between competing interests.

Snell[402] believes the citizenship case law is unique in the sense that the restrictions flow from EU law itself, as Article 21 TFEU is subject to 'limitations and conditions'.[403] It is for this reason that Oliver[404] does not take account of the economic considerations in citizenship case law, in his overview of economic justifications case law. However, in *Alimanovic*,[405] it is clear that the Court has to disregard the *Antonissen*[406] and *Collins*[407] line of case law, which brought jobseekers under the provisions of free movement of workers, and conferred equal treatment under Art 45 TFEU combined with Arts 18 and 21

[398] Arrowsmith, (n.389); Oliver, (n. 389)
[399] Oliver, (n. 389); Snell, *Economic Justifications and the Role of the State,* in Koutrakos, Nic Shuibhne & Syrpis (n.156) pp12-32 and Arrowsmith, (n.389)
[400] Arrowsmith, (n.389), p309; Snell, (n.399) p16; Oliver, (n. 389) p148
[401] Arrowsmith, (n.389), p309
[402] Snell, (n.399), pp21-22
[403] TFEU, Art 21
[404] Oliver, (n. 389), pp149 and 157
[405] Case C-292/89 *Antonissen* [1991] ECR I-745
[406] C-67/14 *Alimanovic* (n.81)
[407] C-138/02 *Collins* (n.22), para 63

TFEU. The limits and conditions cannot justify this. Even with regards to citizens who do not have a link to the free movement of workers, Nic Shuibhne rebuffs the 'limitations and conditions' line of argumentation that "*induces* [a] *normative migraine*"[408] as it fails to consider the autonomous right to equal treatment under Article 18 TFEU, regardless of the self-depleting constructs of Article 21 TFEU. The author rightfully points out that there is no carte blanche exemption from the obligations laid down in the rest of EU law.[409] Davies[410] highlights that the CRD is a general framework and should be 'actively and responsibly' translated into national laws; restrictions based upon the CRD should still be considered national restrictions. So although the citizenship case law is different because the restrictions are somewhat green-lighted by the EU legislature, the economic nature of them should still be questioned.

Snell[411] examines a plethora of methodologies invoked by the CJEU to avoid engaging with the prohibition on 'purely economic' based restrictions. Healthcare policy restrictions make up the most comprehensive exceptions from the general prohibition of purely economic justifications.[412] The Court has avoided the issue of purely economic restrictions, in cases like *Duphar*[413] and *Dassonville*[414], by stating that the restriction under free movement of goods would have to be found to be discriminatory first, thus avoiding the issue of a Member State 'justifying' their restriction, by avoiding accepting the discriminatory nature of restrictions.[415] This does not occur in the case law on citizenship,

[408] Nic Shuibhne, *Limits rising, duties ascending* (n.52), page 935
[409] *Ibid*
[410] Davies, *Migrant Union Citizens and Social Assistance* (n.73), page 26
[411] Snell, (n.399), pp16-23
[412] Oliver, (n. 389), pp153-156; Arrowsmith, (n.389), p330
[413] Case C-238/82 *Duphar* [1984] EU:C:1984:45
[414] Case C-8/74 *Dassonville* [1974] EU:C:1974:82
[415] Snell, (n.399), p 16

as restrictions on the free movement of citizens and access to welfare is generally accepted as an inevitably discriminatory endeavour, as can be seen from *Dano.*[416]

'Denial' is the methodology of the court in cases such as *Decker*[417] and *Kohll,*[418] where purely economic aims were still rejected, but the Court found that "*the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying* [the restriction]."[419] The Court merely denied the economic nature of a policy relating to 'serious' healthcare budget concerns, and allowed a justification on the restriction via the overriding requirements doctrine.[420] Arrowsmith[421] draws analogies between this case law and *Bidar.*[422] Member States are permitted to ensure that student citizens claiming maintenance assistance do "*not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State*"[423] by requiring students to be sufficiently integrated before they may gain this assistance.[424]

The extent to which economic reasoning is accepted or merely denied in the students' case law is unclear. AG Sharpston asks for clarification on this in her opinion on *Prinz and Seeberger,*[425] where it is not certain that integration objectives are legitimate on their own as a restriction on free movement, whether it is linked to and therefore should be considered with an economic objective, or whether it is merely a means to achieve an economic objective.[426] Arrowsmith finds that if restrictions may exist *because* of the risk of an

[416] C-333/13 *Dano* (n.2), para 77
[417] C-120/95 *Decker* [1998] EU:C:1998:167
[418] C-158/96 *Kohll* [1998] EU:C:1998:171
[419] *Ibid,* para 41
[420] Snell, (n.399), p17
[421] Arrowsmith, (n.389), p345
[422] C-209/03 *Bidar* (n.124),
[423] *Ibid*, para 56
[424] *Ibid*, para 56
[425] C-423/11 and C-585/11 *Prinz and Seeberger* [2014] EU:C:2013:524
[426] C-423/11 and C-585/11 *Prinz and Seeberger* (n.425), Opinion of AG Sharpston, paras 66-72

unreasonable burden on Member State finances, this would be an extensive permitting of economic justification through a general rule of exclusion. If restrictions may exist *when* there is a risk of unreasonable burden, this would be a narrower margin of economic justifications that would be assessed on a case-by-case basis. Either way, the requirement to not become an unreasonable burden is certainly at least partially economic.[427]

The economic nature of restrictions are completely denied in *Brey,*[428] *Dano,*[429] *Alimanovic*[430] and *García-Nieto;*[431] where the Court found it legitimate for a Member State to want to protect its social assistance from the 'unreasonable burden' of EU citizens (respectively, the economically inactive and jobseekers) claiming from the social assistance system. In *Alimanovic*[432] and *García-Nieto,*[433] the Court states the unreasonable burden would come from the cumulative effects of claims that *might* arise, rather than through individual claims; there is still no mention of the effects on the level of assistance available. Therefore, the Court departs from the methodology explained by both Snell[434] and Arrowsmith;[435] it no longer recognises the general prohibition of the economic rule by requiring a sufficiently serious threat to the welfare system before departing from it. It appears to be legitimizing a purely economic objective, because it does not apply the methodology of 'denial' by using severity of the risk.

This seems to have been the case in *Brey,*[436] where the Court stated that excluding the pensioners involved from a supplementary benefit would only be proportionate if the

[427] Arrowsmith, (n.389)
[428] C-140/12 *Brey* (n.28), para 54 and 57
[429] C-333/13 *Dano* (n.2), para 70
[430] C-67/14 *Alimanovic* (n.81)
[431] C-299/14 *García-Nieto* (n.82)
[432] C-67/14 *Alimanovic* (n.81), para 61
[433] C-299/14 *García-Nieto* (n.82), para 50
[434] Snell, (n.399), pp17-19
[435] Arrowsmith, (n.389), p354
[436] C-140/12 *Brey* (n.28)

'unreasonable burden' was sufficiently high. This would need to be determined for both the individual at hand[437] and the collective group of beneficiaries they belong to.[438] However, in *Dano* and the subsequent case law on the CRD, the proportionality of restrictions based upon the unreasonable burden is presumed.

The Court will also permit *partially* economic restrictions, what Snell calls a 'linkage' methodology. In *Hartlauer*[439] the Court found that it was permissible to overlook an aim of protecting the financial balance of the social security system, because in healthcare spending cases came within an overriding objective of protecting public health;[440] it was permitted because the economic objective served only as part of a greater, non-economic, aim.[441] There is no higher and overriding objective in relation to the welfare system.[442] However, it is difficult to tell whether the methodology of the Court in cases of students is more about the linking of the economic objective with the integration requirement, or the severity of the economic objective requiring restrictions based on integration (a more denial based issue); as noted by AG Sharpston above. The case law analysis above shows that the Court is not doing anything unusual by departing from a prohibition of justifications. However, the methodology that it uses to do so is more extreme than in other instances and leads to a much wider scope for restriction; thus affecting the balance between Member State interests and EU objectives more.

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[437] *Ibid*, para 69
[438] *Ibid*, para 61 and 72
[439] C-169/07 *Hartlauer* EU:C:2009:141
[440] Snell, (n.399), p17
[441] *Ibid*
[442] Although, contra to this, Gareth Davies sees political stability, and the financial stability of the welfare state, as overriding public policy concerns able to justify restrictions under the Treaty: <http://europeanlawblog.eu/2016/08/18/could-it-all-have-been-avoided-brexit-and-treaty-permitted-restrictions-on-movement-of-workers/> accessed on 15/02/19; see also Gareth Davies, '*Any Place I Hang My Hat?' or: Residence is the New Nationality'* (2005) 11(1) European Law Journal 43, p47

Snell[443] writes that the line between what is purely economic and what is not is likely to get much harder to determine,[444] because the reach of EU law has expanded into areas that were unforeseen when the rule was established decades ago.[445] EU free movement law now reaches into areas like healthcare, taxation and welfare law, which go to the heart of State legitimacy, as they all offer some kind of State guarantee of protection.[446] By not being able to enact protectionist economic policies, Member States are not as able to ensure the economic protection for their citizens.[447] Oliver suggests the reason for permitted quasi-economic justifications in healthcare could partially stem from an acceptance that healthcare is an area without much scope for Union competence.[448]

This may underpin the reasons why the Court has generally overlooked the truly economic nature of restrictions on equal treatment to welfare benefits. Recognising a rule as purely economic prevents justification for that rule; finding the aim pursued by the Member State to be illegitimate is essentially a signal to cease and desist.[449] Finding restrictions on welfare access to be purely economic would prevent the Court from being able to assess the legitimacy and proportionality of such restrictions, therefore taking away the ability to bring balance between the legitimate interest of the Member States and the fundamental objective of ensuring effective free movement.

Therefore, economic justifications may be necessary in restrictions on benefits. However, the way that semi-economic justifications have been permitted in this area is not ideal. There is incoherence in the students' framework as to whether integration is a separate restriction or forms part of an economic restriction, therefore making it difficult to assess

[443] Snell, (n.399), pp12-32
[444] *Ibid,* p13
[445] *Ibid,* p14
[446] *Ibid,* p15
[447] *Ibid,* p14
[448] Oliver, (n. 389), p176
[449] Snell, (n.399), p14

the proportionality of measures applied to that effect.[450] The denial of the economic nature of justifications in the case law of jobseekers and the economically inactive has led to calls for evidentiary standards to be raised in EU law, so that the proportionality of robust restrictions based upon economic claims can be properly assessed.

This is the point where healthcare and welfare access diverge, Thym[451] shows that in relation to healthcare, Member States have been able to provide detailed data on the level of risk posed to their public services. Therefore the economic justifications have stood.[452] Oliver[453] also notes that the Court looks at length at the necessity for economic planning in healthcare cases,[454] and proscribes that Member States consider the specific circumstances of the healthcare beneficiaries.[455] The Court, in health cases, is a strict but pragmatic actor,[456] Koutrakos[457]illuminates how it interprets free movement broadly, but takes into account the relative issues of healthcare planning after doing so. In the social assistance cases (with *Brey*[458] as an exception, which is much more akin to healthcare case law), EU free movement law has been construed narrowly, and the actual features of the social assistance systems are not looked at. The quality of law in relation to social assistance is not as rich in principle as healthcare access, and therefore may need reformulating.

The 'unreasonable burden' acceptance of economic risk is nothing short of artificial. Both Nic Shuibhne and Iliopoulou-Penot[459] note that *Dano*, *Alimanovic* and *García-Nieto*

[450] C-423/11 and C-585/11 *Prinz and Seeberger* (n.425), Opinion of AG Sharpston, para 66-72; Arrowsmith, (n.389), pp348-358
[451] Thym, *The Elusive Limits of Solidarity* (n.16)
[452] *Ibid,* pp24-50, 28-29
[453] Oliver, (n. 389), pp155-156
[454] C-157/99 *Geraets-Smits* [2001] ECR I-8833 para 34-42
[455] C-385/99 *Müller-Fauré* [2003] ECR I 4509 para 90
[456] Koutrakos, *Healthcare as an Economic Service under EC Law* in Dougan and Spaventa, *Social Welfare and EU Law* (Hart 2005), p116
[457] Koutrakos, *Healthcare as an Economic Service* (n.456) p116
[458] C-140/12 *Brey* (n.28)
[459] Iliopoulou-Penot (n.76), p1027

especially are largely based on presumptions not backed up by evidence. The very definition of 'social assistance' under the CRD is presumptive, including all assistance that could be claimed by those who could "*become a burden on the public finances of the host Member State which* ***could*** *have consequences for the overall level of assistance which may be granted by that State*".[460] Nic Shuibhne[461] finds presumptions in the context of citizenship case law will fuel the culture of exaggeration in discussions on free movement; which she notes[462] even AG Wathelet appears to fall foul of in *García-Nieto*, when determining that entitlement to social assistance could result in '*en masse*' migration into a Member State.[463]

Iliopoulou-Penot[464] points out how the economic justifications permitted in relation to students, inactive citizens, and jobseekers are incredibly divergent and create incoherence. The student case law that deals with the issue more comprehensively, is not even mentioned in the cases of *Dano* or *Alimanovic.* Despite *Dano* concerning Article 7(1)(b) of the CRD, it does not follow the *Brey* reasoning regarding the need to evidence burdens both individually and on the benefit overall. Iliopoulou-Penot notes how the economic burden assumption was carried into the 'New Settlement' deal offered to the UK in February 2016, which allowed an 'emergency break' on in-work benefits for up to four years for newly arrived EU workers; in cases of an exceptional burden being placed upon the social security by them.[465] The 'light touch' approach by the Commission emulates the Court's reasoning,

[460] C-140/12 *Brey* (n.28), para 61
[461] Nic Shuibhne, *What I tell you three times is true,* (n.132), p924
[462] *Ibid*
[463] C-299/14 *García-Nieto* (n.82), para 71
[464] Iliopoulou-Penot (n.76)
[465] Section D point 2(a), European Council, "Conclusions of the European Council meeting",18–19 February EUCO 1/16, Annex I, "Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union",

as the UK was not required to evidence the exceptional economic burden on the social assistance system caused by workers.[466]

There is some confusion as to the standard of proportionality that should be used, with O'Brien[467] rightly pointing out that single claims will never present a burden, but assumption of collective claims does not allow for case-by-case assessment and therefore does not assess the 'deservingness' of the claimant. The idea of forcing Member States to present robust evidence of their financial hardship is tempting, as Nic Shuibhne and Maci note: "*Member States cannot just assert things and do little more to establish an appropriate degree of persuasiveness than show up.*", especially as the Member States are Treaty-bound to ensure free movement.[468]

This thesis agrees that the state of the law regarding economic justifications with restrictions on welfare is unsatisfactory; it heavily weighs in the favour of Member States and does not scrutinise the necessity of restrictions on free movement effectively enough to take into consideration EU objectives. However, requiring an obvious financial burden to justify (quasi-)economic justifications would not create an effective balance between Member State interests and EU free movement objectives. Arrowsmith notes how economic justifications are often '*highly artificial*',[469] this thesis agrees that this is the case in welfare access situations for three reasons: A) economically inactive citizens are a minority. It is difficult to accept that such a minority will have dramatic consequences on the welfare state. B) Even if the number of citizens rose, the risk would be very little. Thym estimates that Germany could afford an extra 2 million economically inactive citizens, this would cost around 2bn EUR per annum, which is less than 1% of their GDP.[470] C) The

[466] Iliopoulou-Penot (n.76), p1029
[467] Charlotte O'Brien, *Civis Capitalist Sum,* (n.154), pp945-946
[468] Nic Shuibhne and Maci, *Proving Public Interest* (n.395), p1004
[469] Arrowsmith, (n.389), p352
[470] Thym, *The Elusive Limits of Solidarity* (n.16), p29

Commission and the OECD have conducted studies that suggest mobile EU citizens positively influences the economies of the host Member State, which outweighs any costs the State incurs due to their residence.[471]

Thym[472] notes that if Member States had to provide data on potential risks to their welfare state, cases would often favour the rights of the citizen seeking to claim welfare benefits. This would create an artificial balance between Member State interests and free movement objectives. As this thesis has noted from the beginning, Member State interests are not simply financial but also concern the protection of the boundaries of national social solidarity underpinning their welfare systems, and their definitive competence over welfare policies. Allowing a Member State to enforce restrictions on free movement only when there is a threat to the social assistance system, would not cover the full range of their legitimate interests. As AG Sharpston noted in *Prinz and Seeberger,*[473] the Member States have not signed up to a fully harmonized social system. It is understandable for them to restrict benefits on the basis of legitimacy and solidarity as well as financial protection.

Furthermore, if the restrictions were seen as purely economic in nature, so that only a certain degree of risk would deem it proportionate, this would also create incoherence and uncertainty. Free movement law would be liable to change with the wind, in line with migratory patterns rather than principled justifications, the latter are more desirable than the former.[474]

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[471] *Ibid;* see also COM(2013) 837 final, Brussels 25.11.2013, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions, page 2-3 and OECD Publishing, International Migration Outlook 2013, Chapter 3 < http://www.oecd-ilibrary.org/docserver/download/8113141ec006.pdf?expires=1521378088&id=id&accname=ocid177243&checksum=53ED6155F8D6CDBA51A1A3DF9B6EDBCD> accessed on 18/03/18

[472] Thym, T*he Elusive Limits of Solidarity* (n.16), p29

[473] C-423/11 and C-585/11 *Prinz and Seeberger* (n.425), Opinion of AG Sharpston, para 70

[474] Arrowsmith, (n.389), p362

This thesis agrees with the approach suggested by Arrowsmith: to allow justifications based upon '*the need to limit expenditure to the scheme's designated purposes'*[475] so restrictions would be proportionate so long as they enforced the purpose of the benefit. De Witte's[476] analysis of jobseekers case law shows how the CJEU may do this (i.e. *Collins*[477] and *Ioannnidis*[478]), by reviewing measures according to how they will ensure a citizen has the type of solidarity requisite for a certain benefit. This protects the finances of the Member State, by curtailing the scope of beneficiaries that can claim, whilst also being based on a more coherent and principled notion than assumed risks; as well as ensuring that a certain degree of citizens are not excluded from free movement .

Requiring Member States to consider the individual circumstances of a claimant before determining the unreasonableness of their burden lessens the economic nature of restrictions, compared to assuming an unjustifiable burden in cases such as *Alimanovic*[479] and *García-Nieto.*[480] For example, if the Court had followed the opinion of AG Wathelet in *Alimanovic* and considered her integration by working, seeking work and having a child in education, this would not be as strictly economic as the Court stating that an accumulation of all individual claims would create a burden on the social assistance system.[481] Yet it would *still* have the outcome of protecting Member State finances and would be a more comprehensive and realistic affirmation of the Member States genuine interests, which are never purely economic, in relation to the welfare state. If purely economic justifications are still to be regarded as generally undesirable,[482] it is surely

[475] Arrowsmith, (n.389), p354
[476] de Witte, *The End of EU Citizenship* (n.127), page 104
[477] C-138/02 *Collins* (n.22),
[478] Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECR I-8275
[479] C-67/14 *Alimanovic* (n.81), para 50
[480] C-299/14 *García-Nieto* (n.82)
[481] C-67/14 *Alimanovic* (n.81), para 62
[482] Oliver, (n. 389), pp155-156, 175

desirable to have a more individual and proportionality-based approach to restrictions than one which assumes a financial burden from consideration of very few factors.

## Chapter Conclusions

This chapter has observed how reliance on residency requirements to protect Member State interests is simply inadequate for purpose. It is unsurprising that this is the case, as the factual and circumstantial divisions between actual (habitual) residency, lawful residency and eligibility for benefits, are vast. What is highly problematic is that the outcome of lawful residency tests have greater impact on a citizen's eligibility for benefits rather than an impact on their ability to reside in a Member State. The idea that citizens may be tolerated but not extended solidarity is an affront to the EU's social and integration aims, as well as an affront to the objective of enhanced free movement.

It is unfortunate for the aforementioned aims that the development of automatic exclusions has arisen in a way that may prevent many citizens becoming fully integrated into a host Member State society. This is particularly true because EU law had already started to develop a more suitable test in the "*real link*" doctrine. Automatic exclusions do not fit with the previous case law and are not fully compatible with the CRD or TFEU. The problems that can be highlighted in relation to the proportionality-based test are not insurmountable, the problems related to the exclusionary and restrictive system under the CRD are much more prevalent. To summarize, they include:

Firstly, automatic residency restrictions on free movement cannot easily be applied on a basis independent of nationality. This has serious consequences for citizenship, intended to be the fundamental status of all citizens, yet their ability to stay in a host Member State will not hinge upon their citizenship rights. Everything will depend on their nationality and their wealth. This does not seem to have been the intended consequence of extending free

movement for those without economic ties; and yet it is the case under the current provisions and jurisprudence.

Secondly, there is the issue that the 'sufficient resources not to become an unreasonable burden' criterion is open to vastly varied interpretations across the Member States *and* constitutes an economic justification on the restriction to free movement of citizens because its primary function appears to be protection of Member State welfare budgets. This was previously heavily qualified by permitting the 'burden' to be assessed in relation to integration, which shifts the focus onto the personal situation of the claimant and their ties with the host State rather than whether they are simply a burden on Member State resources. However, in the post-*Dano* era it is difficult to foresee a situation whereby a citizen will be able to prove that their burden is justified.

The objective of reducing social exclusion is also incredibly pressing and should be addressed at the earliest possible opportunity. As noted above, the real life human effects that free movement of citizens has should be considered when balancing the interests between individuals and the Member States. It is impossible to consider that the EU institutions are striking the correct balance between financial protection and free movement when they are putting citizens in vulnerable and precarious situations.

As noted, there are two overarching issues that engage with all of these problems. The first is the coherence of EU law. The methodology of the Court can and should change according to shifts in attitudes about the hierarchy of objectives of the single market. However, it is difficult to determine that this is justified. The Court has backed away from thorough, proportionality-favouring assessments that tend to aid individual citizens in their search for equal treatment, toward a more systematic interpretation. The new methodology also changed the general scheme of free movement law so that there is a culture of exclusion

and protectionism around Member State welfare benefits. The shift overall seems incoherent and paradigmatic in nature. The CJEU has effectively made a U-turn on citizenship and equal treatment; it could originally be criticized for favouring citizenship too much and enforcing the extending of social solidarity far too quickly, it can now be criticized for taking a backwards leap to the other end of the spectrum. This leaves citizens and academics alike not knowing exactly what *certain degree of financial solidarity* is to be expected from Member States. The Court should at least give greater explanations for its recent shift. It is the sole creator of the substance of citizenship, and as Nic Shuibhne notes, owes a duty to EU citizens to at least be explicit about the departure of that substance.[483]

The second overarching factor is the aims and objectives of free movement that are currently guiding the jurisprudence. The protection of public finances within Member States is but one objective of free movement law, read into recital 10 of the CRD preamble. Other objectives are expressly stated within the Treaties, as well as the CRD. The most primary objectives and therefore the focus of free movement cases should surely be the prior, which include the enhancement of free movement and also the equal treatment of citizens (Articles 20 and18 TFEU). None of these objectives can be fully achieved with an increase in automatic exclusions. While automatic exclusions are a technically and economically sound way of ensuring national finances are not being abused, such abuse is not proven, so this methodology simply precludes other free movement objectives from being considered. The key, as always in this area of law, is a balance of competing interests. Such a balance can only be attained by way of a proportionality review, which takes into consideration the possibility of extending solidarity to EU citizens.

[483] Nic Shuibhne, *Limits rising, duties ascending* (n.52), p935

In *Mirga*,[484] the UKSC states "*it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances.*"[485] The attitude, that only those in 'extreme' circumstances should be extended equal treatment for social assistance, is removed from the aims of the Treaty. It should be noted that the Member States themselves agreed to create the fundamental free movement rights.[486] Furthermore, protection of Member State finances is not the main, nor even an explicitly stated, objective of the CRD. The main objective is to consolidate and enhance free movement provisions.[487] This cannot be achieved when using automatic exclusions from equal treatment on such a broad basis.

This chapter also finds that proportionality can and does ensure Member State finances are still protected, as neither *Dano* nor *García-Nieto* would have had a substantial enough 'real link' to rebut the presumption against their eligibility. However, it would also enhance free movement for those who *were* integrated to a sufficient degree to claim the benefit at issue. The essential balancing act would respect the limits of solidarity from Member State welfare systems, would enhance and strengthen the free movement of those who could demonstrate that their situation fell justifiably within those limits, and would protect the essential citizenship right of having the claim heard and assessed by national authorities. Furthermore, proportionality would reduce the economic nature of restrictions, as well as removing the direct nature of discrimination in restrictions on welfare access.

In sum, it is doubtful that Member State concerns are being legitimately represented, there does not appear to be a need for such robust restrictions on free movement rights.

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[484] *Mirga* (n.354), para 69
[485] *Ibid*
[486] Nic Shuibhne and Maci, *Proving Public Interest* (n.395), p1004
[487] CRD, Recital 3 (preamble): codification of the separate residency Directives was intended to "*simplify and strengthen the right of free movement and residence of all Union citizens*"

Regardless, there is nothing to suggest that proportionality cannot adequately protect Member State concerns. Retaining the necessity of proportionality in restrictions would at least keep the law more coherent in application, whilst ensuring Member State concerns are taken into account and allowing EU objectives to be considered during assessment of restrictions on free movement.

The ultimate conclusion of this chapter is that without proportionality reviews, there is no ability for the Member States or the CJEU to ensure a balance of competing interests in free movement law. It is therefore the methodology of the law, and its effects on that balance, that have been analysed. The focus of this research is now turns to testing the legitimacy of the balance that may be struck when applying the law at present. This will look at the stringency of restrictions on residence and access to welfare benefits, and analyse whether the degree of stringency is necessary in light of the contrasting competences of the EU institutions and Member States relating to the different types of economically inactive citizens.

# Chapter 4

# Legitimizing the Balance of Interests

In the previous three chapters, this thesis has engaged with the history of equal treatment rights to access to social benefits for different types of economically inactive EU citizens. The CJEU jurisprudence relating to restrictions on free movement and equal treatment have been analysed and critiqued, in terms of the ability of permitted restrictions to balance competing interests, and in terms of the methodology used to assess the restrictions.

## Introduction

The final chapter of this thesis will now turn to assessing the sufficiency of the balance that is to be struck between Member State interests and EU objectives, as a result of permitted restrictions. Although the restrictions mainly flow from the CRD, and therefore may be implemented differently across Member States, it seems unlikely that any Member State will impose less restrictive measures than what the Court has previously allowed. Generally, Member States are concerned with protecting themselves from 'welfare shopping' and therefore seek the most restrictive measures to preclude EU citizens' welfare access.[1] There is evidence that Member States utilize the Court's interpretation of the CRD provisions and restrictions, as a way to 'quarantine' mobile EU citizens from their welfare systems.[2] Therefore, it is possible to see a general balance of interests by the restrictions permitted in the case law of the CJEU.

[1] Study on Active Inclusion of Migrants Institute for the Study of Labor (IZA) and The Economic and Social Research Institute (ESRI), September 2011, page 20-21

[2] Kramer, Thierry and van Hooren, '*Responding to free movement: quarantining mobile union citizens in European welfare states*' (2018) 25(1) Journal of European Public Policy 1501; Jacqueson, '*From Negligence to Resistance: Danish Welfare in the Light of Free-Movement Law*' (2016) 18(2) European

Furthermore, the CRD represents the EU legislature's (and therefore Member States') choices about the limits of solidarity and finances that may be extended to EU citizens within their territory. When considering the CRD, Davies notes that the existence of limitations and conditions within it were never controversial, because "*there has never been any serious policy argument about whether such conditions should exist, since there is a broad consensus that entirely removing them could have harmful effects on national institutions and finances, not to mention politics. Debate is about exactly what those conditions should be.*"[3]

Application of the CRD in the robust manner by the CJEU, witnessed in recent case law, clearly represents the political, social and economic will of the Member States. The legal effect of this is that the CRD creates a set of harmonised restrictions on benefits access, applying to a non-harmonised system of benefits provision across the EU. The one-size-fits-all approach of restrictions is likely to produce illegitimate imbalances between the interests of Member States and EU objectives, whilst the use of proportionality as a balancing tool in individual cases is almost always neglected.

The previous three chapters have shown how the case law does create imbalances between the interests of Member States and EU objectives, as well as the individual rights of citizens. It is not in every case that such imbalances will be illegitimate. The legitimacy of the imbalances will depend on the strength of the EU objective, in relation to the strength of the Member State interest, which will vary across Member States depending upon factors such as migratory patterns, the generosity of the welfare system, and their competences.

Journal of Social Security, p201; see also discussion in Chapter 2 regarding UK changes to student maintenance as a result of the CRD.

[3] Davies, *Legislative Control of the European Court of Justice* (2014) 51 CML Rev 1579, p1599

Therefore, the likelihood of imbalances being illegitimate in an area of law, where restrictions are harmonised without the substance of rights being harmonised, is high.

The following sections will illustrate that this is the case. Firstly, by recapping restrictions on equal treatment with regard to benefits access with taxonomy tables for the different categories of economically inactive citizens, and considering the EU objectives relevant to the category. Then, examples of data from Eurostat will demonstrate the highly divergent migratory patterns across the EU, illustrating how a harmonised system of restrictions on welfare access is not necessary and is likely to create different imbalances of interests across the Member States. Finally, for each category of economically inactive citizen, suggestions will be made for how interests could be better balanced.

# 1. Jobseekers

## 1.1 Current framework of restrictions

| Eligible | Unreasonable Burden | |
|---|---|---|
| Jobseekers claiming 'benefits intended to facilitate access to the employment market', who have a sufficient link to the host Member State/ employment market | Jobseekers who have fallen outside of the period of retained worker status, as per Article 7(3)(c)CRD [6 months] | Jobseekers attempting to claim 'benefits intended' before acquiring a link to the Member State |
| Jobseekers who have been in employment and considered a 'worker' under EU law, for more than 12 months, in the host Member State | Jobseekers attempting to claim social assistance or social security | |
| | Jobseekers in their first three months of residence, or before five years permanent residence | |

It is clear that the majority of jobseekers who opt to use their free movement rights to find work in another Member State, will not have the right to be financially supported by the host Member State when they do so. The restrictions on jobseekers access are the most rigorous, especially after the re-interpretation of 'social assistance' and 'benefits intended to facilitate access to the labour market'.[4]

[4] See Chapter 1

As demonstrated earlier,[5] the law at present is systemically exclusionary, so on a general basis it is likely to be too restrictive in comparison to the risk jobseekers actually pose to Member States. The current framework imposes time limits on benefits access in an overly-restrictive manner. There is no time limitation on first-time jobseekers, as the law is aimed at preventing entrance into the welfare system rather than focusing on exit from it. The time limitation of 6 months for jobseekers who have worked seems arbitrary and overly restrictive. Chapter 1 also discussed that potential room for more leniency in the way Art 24(2) CRD is applied, which would also suggest that there is an imbalance as a result of current application of the law. Depending on the level of migration of jobseekers, high restrictions on welfare access will have a detrimental effect on EU free movement goals. The next section of this chapter will use statistical examples to show that migration of jobseekers across the EU is relatively low, suggesting that the high restrictions placed on their equal treatment are unnecessary and that EU free movement objectives may be given more weight without a severe detriment to Member State interests.

[5] See Chapter 1

1.2 Example statistics of migration

| | National | EU Citizen |
|---|---|---|
| TIME / GEO | 2017 | 2017 |
| European Union (current com | 7.2 | 7.9 |
| European Union (before the a | 7.2 | 7.9 |
| European Union (15 countries | 7.7 | 8.0 |
| Euro area (19 countries) | 8.5 | 9.3 |
| Euro area (18 countries) | 8.5 | 9.3 |
| Euro area (17 countries) | 8.5 | 9.3 |
| Belgium | 6.2 (b) | 9.9 (b) |
| Bulgaria | 6.2 | : (u) |
| Czech Republic | 2.9 | 1.9 (u) |
| Denmark | 5.2 (b) | 9.5 (b) |
| Germany (until 1990 former t | 3.2 | 4.9 |
| Estonia | 5.1 | : (u) |
| Ireland | 6.6 (b) | 7.2 (b) |
| Greece | 21.1 | 25.0 |
| Spain | 16.3 | 19.7 |
| France | 8.8 | 8.8 |
| Croatia | 11.2 | : |
| Italy | 10.9 | 13.2 |
| Cyprus | 11.2 | 10.5 |
| Latvia | 8.3 | : (u) |
| Lithuania | 7.1 | : (u) |
| Luxembourg | 3.9 | 5.8 |
| Hungary | 4.2 | : (u) |
| Malta | 3.8 (b) | 4.9 (b) |
| Netherlands | 4.7 | 4.7 |
| Austria | 4.5 | 6.9 |
| Poland | 4.9 | : (u) |
| Portugal | 8.9 | : (u) |
| Romania | 4.9 | : |
| Slovenia | 6.5 | : (u) |
| Slovakia | 8.1 | : (u) |
| Finland | 8.4 | 10.4 |
| Sweden | 5.4 | 8.1 |
| United Kingdom | 4.2 | 4.0 |
| Iceland | 2.7 | : (u) |
| Norway | 3.7 | 6.4 |
| Switzerland | 3.6 | 6.4 |
| Montenegro | 16.3 | : (u) |

Data by Eurostat[6]

Accurate figures combining welfare access *and* residency status are not forthcoming.[7] Eurostat data is used here as a rudimentary tool, it does not show exactly what proportion of unemployed are definitely jobseekers, nor what proportion are claiming jobseeking-related benefits, nor the proportion that are in a working household and therefore may be sufficiently supported, or have rights as a family member of an EU citizen worker. The figures above therefore may be seen as one representation of the 'worst case scenario' for

[6] Labour Force Survey data, for information on quality and collection see: Eurostat reference metadata page <https://ec.europa.eu/eurostat/cache/metadata/EN/employ_esms.htm> accessed on 20/05/19

[7] See Harris, '*Demagnetisation of social security and health care for migrants to the UK*' (2016) 18(2) European Journal of Social Security 130, p133

Member States; the number of total EU unemployed in their territory that would be able to claim social assistance or jobseeking benefits if there were no conditions or restrictions on welfare access. Despite the face value of this needing to be taken very cautiously, some conclusions can be drawn from the table above.

Firstly, a generalised system of restrictions placed on jobseekers' rights to equal treatment with regards to benefits access will not take into account the fact that jobseekers pose different risks to each Member State. Eurostat data shows disparity amongst the Member States, with some having higher percentages of EU unemployed within their respective statistics. The highest concentration of EU jobseekers appear in countries with higher levels of unemployment (Greece) or comparatively lower levels of unemployment (i.e. Denmark, Luxembourg).[8] Those Member States will have a more legitimate imbalance of interests when using Article 24(2) CRD, than the UK (for example), where a) national jobseekers made up 0.2% more than EU citizens-jobseekers in 2017 and b) the percentage of EU jobseekers within the UK unemployed demography is the second lowest of all the Member States' statistics provided to Eurostat.[9]

Furthermore, it is difficult to assign every Member State a particular state of risk from migratory patterns alone, as there are different types of social assistance/security for work-seekers across the EU. This, in itself, provides a problem for having a single-size rule on jobseekers to balance the interests of EU and Member State objectives.

Much of the discussion in the previous chapters showed criticism of generalised systems of restrictions because of their inability to take into consideration the particular circumstances of the individual attempting to claim benefits. However, this thesis finds it

[8] Eurostat Labour Force Survey (LFS) data: Unemployment by sex, age and citizenship (lfsa_urgan) <http://ec.europa.eu/eurostat/web/lfs/data/database > accessed on 07/08/18
[9] *Ibid*

equally criticisable because, in an area where welfare provisions are not harmonised, there will be a need to tailor the restrictions to suit the individual Member States so that an overall appraisal of the balance of interests can be taken for their welfare systems.

The Court's deference to the CRD makes the generalised restrictions problematic. There is nothing in the *Alimanovic*[10] or *Dano*[11] decisions to suggest that the circumstances of the individual should be taken into consideration, nor the circumstances of the Member State's welfare system itself. The reasons given for the broad interpretation of Article 24(2) in *Alimanovic* are increased certainty, the staggered access to rights in the CRD itself, and the issue of an unreasonable burden being placed the host Member State without the restriction. Without assessing Germany's particular need to use that restriction because of the individual circumstances of their welfare system, or Ms Alimanovic's residency, the Court contributes to CRD restrictions becoming harmonised; all Member States will require certainty and so long as 'unreasonable burden' is a presumed outcome of benefits access, all will be at risk of this. However, a cursory glance at Eurostat data shows that not all Member States would suffer an unreasonable burden if the constriction of Article 24(2) were less rigorous.

A second conclusion that may be drawn is that the figures may be varied, but are generally low. This would suggest that high restrictions on jobseekers' access to benefits are not entirely necessary from an economic standpoint. The data may rebut the Court's presumptive interpretation that Art 24(2) is the only line of defence against an 'unreasonable burden' being placed on Member States by jobseekers and ex-workers wishing to claim jobseeking benefits. In terms of balancing the interests of individual citizens, EU objectives and Member State interests, it is clear that Member State interests

[10] C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (2015) EU:C:2015:597
[11] C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (2014) EU:C:2014:2358

are overwhelmingly represented in the law; as a relatively small number of jobseekers can be carte blanche excluded from financial aid to help jobseeking, and are deemed an 'unreasonable burden', despite the fact that the Member States are Treaty-bound to realise the free movement of workers.

### 1.3 Possible problems of imbalances

Imbalances between competing interests are not always illegitimate. In certain circumstances, one interest will be more pressing and require weight to be given to it above all others. In terms of jobseekers' equal treatment with regard to accessing benefits, an imbalance could be legitimised by the Member States' retention of absolute competence in the area of welfare.[12] However, the fact that the EU retains (albeit shared) competence over the internal market[13] as well as social cohesion across the EU[14] may suggest too much weight is attached to the welfare system interests of Member States.

As potential workers, jobseekers were linked to Article 45 TFEU, this formed the basis of the first steps in the extension of jobseekers' rights to residence and equal treatment. In *Antonissen*[15] the Court would not accept a narrow reading of the Treaty that suggested jobseekers only had the right to move if they were taking up employment already offered to them. The crux of the judgment was the need for jobseekers to be able, in reality, to move and actually seek work in another Member State.[16] The pivotal aim was to ensure the efficiency and viability of an enhanced single labour market. The EU objective for

[12] The Union only has competence to ensure coordination of social policies, as per: Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ('TFEU'), Art 5 TFEU
[13] TFEU, Art 4(a)
[14] TFEU, Art 4(c) TFEU
[15] C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-00745
[16] *Ibid*, para 12

jobseekers is therefore the fundamental objective of the effective realisation of the internal market.

The situation at present does not help to achieve the aim of an efficient single labour market, and is therefore detrimental to the internal market objective of the EU. Without any means to support them, citizens without sufficient wealth or without a job already procured (or those in unstable employment) may never have that possibility to search for work in another Member State. If a citizen cannot afford to move and live in a Member State, then they cannot afford to seek work there.

In a Europe with rather high unemployment rates[17] and many job positions being precarious due to the global financial crisis, automatic exclusions from vital financial resources based upon the loss of work (as per *Alimanovic)* will be a bar on free movement for many workers; because of the severe risk of vulnerability. The law at present treats jobseekers as 'unreasonable burdens' unless they have found stable employment, even though this is not a reality for many in Europe.[18] Jobseekers with the potential to find work may not be willing to move to another Member State, with the knowledge that they would have to find *job security* and not just *work* in order to be protected under the social security system. This is not only against the Treaty objective of securing a single labour market, it is also a direct step away from the CRD's objective of promoting free movement. Jobseekers are in a similar position to the pre-*Antonissen* era, whereby the ability to achieve the goal of integrated and enhanced labour markets, is hampered by curtailed rights.

[17] Eurostat statistical findings, 17.632 million are unemployed in 2018 < http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics> accessed on 23/04/18

[18] Fahey, '*Interpretive Legitimacy and Distinction between "Social Assistance" and "Work Seekers Allowance": Comment on Vatsouras'* (2009) 36 European Law Review 7

The Court's interpretation of the Treaty (under Article 45 and 18 TFEU and the citizenship provisions in Article 21 TFEU), which makes free movement an achievable reality, does not seem compatible with the interpretation of the CRD, which makes the reality inaccessible for many EU citizens. For an area so strongly linked to workers, the Treaty and the single labour market, the EU institutions are leaving far too much up to the discretion of Member States in how they extend social solidarity; particularly in an area where the EU competence is far more manifest due to the link to the single market.

The law at present appears to be interpreted in a way that will only influence and enhance the most desirable form of free movement possible: that being, free movement of the already employed, or the highly skilled or sufficiently wealthy. The automatic and exclusionary culture of equal treatment at present is a form of protection against poverty migration. It is not possible for free movement law to achieve an effective single labour market whilst ensuring only a small percentage of individuals gain the rights necessary to facilitate their employment in another Member State.

Therefore, there is a severe imbalance between the EU objective of the internal market success and the Member State interests, which cannot be legitimised through arguments about competencies. The interests of the Member States are seemingly overstated, as there is a clear gap between the risk they face and the restrictions they impose. Compounding this is the issue that restrictions on jobseekers' access to benefits encroaches upon an area with strong EU competence and fundamental objectives. This results in the conclusion that the current law is insufficient for the task of effectively balancing these competing interests in a legitimate manner.

Were there no EU competence over the internal market, or were jobseekers not considered a component of the single market via Article 45 TFEU, the stringent and exclusive Member

State competence over welfare access would legitimise the imbalance of interests that arises because of the blanket application of Art 24(2) CRD.

### 1.4 Possible tools for re-balancing or legitimising

The above analysis shows, firstly, that an illegitimate imbalance is struck between EU objectives relating to free movement and Member State interests in curtailing access to the welfare system. Secondly, the current EU law framework is incapable of striking a balance that is fitting because it applies a one-size-fits-all rule to highly divergent welfare systems in Member States with differing migratory patterns. The next part of this research will consider how EU law may re-balance interests, or how the current imbalance may be legitimized.

*Using proportionality to re-balance interests under the current framework*

One option is the possibility of the CJEU attaching greater weight to the EU objectives underpinning Art 45 TFEU, by requiring Member States to abide by the principle of proportionality. This could be done in two principal ways. Firstly, by re-defining or clarifying the scope of the difference between 'social assistance' and 'benefits intended'; secondly, by requiring the restriction in Art. 24(2) CRD to be applied narrowly and proportionally in and of itself.

Both of these are within the limits of the CJEU's capacity. There is room for re-evaluation of the scope of 'benefits intended' after *Alimanovic.* As noted earlier, the distinction between those benefits and social assistance could be made clearer by the CJEU, for example depending on the length of time attached to benefits; or means-tested benefits could be split so that EU jobseekers may claim the part that intends to aid access to the employment market.[19] This would not create excessive inconsistency in the law, as the

[19] See Chapter 1

Court in *Alimanovic*[20] gave little reasoning to why the minimum subsistence benefits at hand could not be characterised as 'benefits intended'.

Re-interpretation of the definition of 'benefits intended' would re-balance Member State interests with EU objectives and ensure the use of proportionality. If more jobseeking benefits were to be classified as 'benefits intended', restrictions would have to be placed by means of the overriding requirements doctrine as in cases like *Collins*[21] and *D'Hoop,*[22] meaning they would have to be objective, serve a legitimate aim and be proportionate. This would make restrictions on equal treatment for access to benefits less severe for jobseekers, thus allowing more room for EU objectives to be achieved. Furthermore, the overriding requirements doctrine would not create the issue of a harmonised system of restrictions the way Art. 24(2) does, as it would require Member States to exercise their own discretion when imposing restrictions on welfare access. Restrictions would therefore be more tailored to the welfare system and the specific interests of the Member State.

A possible problem with using the definition of 'benefits intended' to create a more proportionate balance between EU objectives and Member State interests is that it may be seen as an artificial methodology for subverting the will of the EU legislator and Art. 24(2), but this could be softened by the extent of the definition. To give proper weight to EU objectives, minimum subsistence jobseeking benefits would be 'benefits intended', to promote greater security for mobile EU jobseekers. However, to avoid a fundamental clash with Art. 24(2) and Member State interests, a slightly less generous reading of 'benefits intended' (such as split benefits or short-term benefits) would create compromise between the current restrictive system and a system that would undermine the CRD.

[20] C-67/14 *Alimanovic* (n.10) para 45-46
[21] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703
[22] C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-06191

The legal scope for requiring Art. 24(2) CRD to be applied proportionately is found in *Brey,*[23]where the CJEU expressly stated that freedom of movement is the general rule, so conditions in the CRD must be construed narrowly and in compliance with limits imposed by EU law and the principle of proportionality, as per *Baumbast*.[24] AG Wathelet in *Alimanovic* also re-iterates the need for proportionality.[25] The Directive itself has scope for requiring proportionality.[26] Recital 16[27] of the Preamble refers to 'beneficiaries of the right of residence', which jobseekers are. Beneficiaries should not be expelled as long as they do not become an unreasonable burden on the social assistance system, and expulsion measures should not be an automatic consequence of recourse to the system. Finally, 'in no case' should jobseekers be expelled except on the grounds of public policy or public security.

A narrow reading could be given to this, particularly in the light of Recital 21 and Art. 24(2); it may be suggested that jobseekers cannot be expelled in most circumstances because they do not pose a threat to the social assistance system, having no right to access it. However, the CRD was drafted in light of *Collins*, which gave jobseekers access to specific financial benefits and not necessarily social assistance. Furthermore, there is a clear special hierarchical status awarded to jobseekers as they are grouped with workers and self-employed citizens in regards to expulsion. This is a clear reproduction of the sentiment held in *Collins,* that jobseekers have a quasi-worker status, which is one of the foundations of their right to 'benefits intended'. Moreover, since jobseekers are awarded a special residency with less stringent conditions around their resources, it could be suggested that

[23] C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565, para 70
[24] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091para 91
[25] C-67/14 *Alimanovic* (n.10), Opinion of AG Wathelet, para 87
[26] See also discussion in Chapters 1 and 3
[27] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ('CRD'), Recital 16 (Preamble)

they are expected to be somewhat supported when exercising their free movement rights. The alternative is an irresponsibly open-ended right to reside with no welfare safety net.[28] This thesis is of the opinion that the EU legislator did not intend this result from the CRD, which was drafted to enhance the right to free movement. Without any specific reference to 'benefits intended', the CRD should be interpreted in line with the case law as it still stands. Regardless of the distinction between the types of benefits available to jobseekers, Art. 24(2) CRD is a restriction and ought to be applied narrowly and in line with proportionality. Therefore, there is legal space to soften the effects of Art.24(2), apply it only when necessary, and re-balance the interests of Member States with EU objectives that require lower restrictions on the right to free movement for jobseekers.

The problem with using that legal space to ensure the objectives of the EU are met is that it would require a U-turn on the interpretation of the CRD from the CJEU. From a legal point of view, this would create inconsistency in the case law, which is undesirable. However, it is always open to the Court to shift the focus (or depart from an established line) of case law, especially with a new set of circumstances presented.

In terms of both options available for re-balancing at the CJEU level, there are challenges. Re-balancing would only be possible in the event of a reference to the CJEU that concerns 'benefits intended' or Art. 24(2). With recent case law applying the CRD so rigorously, national courts may not feel the need to refer to the Court in cases concerning CRD provisions, and may be unwilling to do so if it jeopardizes the status quo.[29] While it may be a possible and necessary evil for the Court to divert from previous case law (in *Alimanovic* or *Garcia-Nieto),* this may still be an unlikely outcome even in the event of a

[28] See Chapter 1 and 3

[29] For instance, see *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, para 48 where considerations of *Brey* (n.23) were rejected *acte éclaré* because of *Dano* (n.11) and *Alimanovic* (n.11)

new case. The possibility of political backlash may prevent the Court from re-balancing the interests, particularly after the decision in *Dano* was politically welcomed.[30]

Furthermore, a possible issue of re-balancing with proportionality would be the consistent difficulty that has plagued this area of law, regarding what is proportional, and how proportionality should be assessed.[31] Individual assessments relating to the citizen's length of residency and financial position are administratively burdensome and uncertain, and are unlikely to take into account Member State interests; when individual rights are pitted against quasi-economic interests, the economic interest will usually be fulfilled by money saving elsewhere to protect the individual right, so proportionality may completely detriment Member State interests.[32] Generalised proportionality, i.e. looking at the actual budgetary impact of EU migration, also comes with a set of issues. It is overly economic in nature and cannot take into consideration the solidarity and competency aspect of Member State interests, it may not aid Member States at all if statistically their systems are not at risk; moreover, generalised proportionality may require Member States to make budgetary considerations about what they can afford and are willing to offer to EU citizens. A strong criticism of this is that Member States have already made that choice when debating and voting upon the final version of the CRD.

If proportionality were to be used to re-balance interests at the EU level, this thesis would suggest an individualised approach whereby Member States consider the proportionality of restrictions based upon the circumstances of the individual benefit claimant. Firstly, this is more in line with the provisions of the CRD, particularly Recital 16. More importantly, the general burden shouldered by Member States and the general achievement of EU free

[30] See discussion on politicization of the Court in Chapters 1 and 3

[31] Discussed in Chapters 1-3.

[32] Although see Arrowsmith, who suggests it is highly unlikely that the CJEU would undertake this kind of assessment: Arrowsmith, '*Rethinking the approach to economic justifications under the EU's free movement rules',* (2015) 68(1) Current Legal Problems 307

movement goals are made up from the sum of individual claims. Nuances in individual claims are the tool that can balance these competing interests in the delicate manner that is required. However, this thesis also recognises that in the current political landscape it is unlikely that proportionality will be used by the CJEU to re-balance interests away from Member States.

*Codifying Collins into the CRD: legislative change to re-balance interests*

Another possibility for rebalancing is the codifying of *Collins* or a proportionality requirement into the CRD by the EU legislature. This would re-balance interests without the Court having to hear a case, or create inconsistency in case law. This faces the same problem as the tools noted above, that there might be an absence of political will to do so. If the EU legislature accepted *Collins* or the principle of equal treatment as interpreted by the CJEU, it would likely have already been written into the CRD. Whilst political landscapes may change, and may shift after the UK's withdrawal from the EU, with Member States committing to integrate more deeply, it is unlikely that the current political landscape will shift enough for a legislative change that opens up the social system. In that case, the next step would be to consider changes that would at least legitimize the current imbalance. These would need to change the course of direction of the EU, and scale back the goals and the importance placed upon free movement.

*Reforming the CRD and jobseekers' rights to free movement*

Another reform, that could legitimize the imbalance rather than rectify it, is reforming the CRD to reflect the reality of the application of EU law at present. Firstly, Recital 16 presents conflict with Recital 21 and Art. 24(2). It is very clear that individual circumstances will not be systematically checked in relation to jobseekers, who come under 'all beneficiaries of the right of residence'.

Secondly, Art 14(4)(b) should be amended somewhat. At present, jobseekers are awarded special status because of their historical ties to the free movement of workers.[33] The formalities for jobseekers' residence are much less restrictive than for economically inactive citizens or even students. However, this is as far as the special status aids jobseekers. They have no right to be financially supported by the Member State, which puts them at risk of having the right to reside with no welfare safety net.[34] Essentially, jobseekers[35] need to have sufficient resources to safely reside within the Member State. For that reason, their residency status should also depend on this, akin to economically inactive citizens, so that EU jobseekers are not at risk of living in financially precarious conditions after exercising their fundamental right to free movement.

In addition to this, reforming Art 14(4)(b) and Recital 16 will legally disassociate jobseekers from workers, thus creating a legislative shift away from the reasoning of the CJEU in *Antonissen* and *Collins*, which led to jobseekers being given equal treatment to certain benefits in the first place. Such a reform would make it clear that the Member States reject the special status awarded to jobseekers in previous interpretations of EU law, rather than the current system of half-accepting this in terms of residency and rejecting it in terms of equal treatment.

A underlying issue with this idea is that it does not get rid of the EU's internal market competence, nor does it get rid of the objectives for free movement of workers and citizens. The real issue with the restrictions at present is not that they are genuinely incomprehensible or illogical, but that they appear so in light of the current objectives enshrined in the EU legal framework. So long as Art 3(2) and (3) of the TEU[36] recognises

[33] See Chapter 1
[34] See Chapter 1
[35] Who are not ex-workers with worker status
[36] Consolidated version of the Treaty on European Union [2012] OJ C326/13 ('TEU'), Article 3

that the Union 'ensures' free movement of people and the functioning internal market, obstacles to this, such as a lack of equal treatment, will raise questions about their legitimacy. This is particularly true when Art 4(a) of the TFEU[37] provides for shared EU competence over the internal market, and Art 26(1) and (2) also 'ensures' the internal market's functioning including free movement of persons. The fundamental conflict between permitted restrictions and EU competences suggests that a more drastic legislative shift is needed, in order to legitimize the imbalances that have occurred at the EU level.

*Enshrining the political shift in primary EU law*

Since EU citizenship and the provisions of free movement do provide a right to a certain demographic of citizens,[38] this thesis would not suggest any fundamental changes to the rubric of EU citizenship in Arts 20-25 TFEU. However, if the Treaties were to reflect the current application of EU law, they would ensure primarily the free movement of *workers* rather than persons.

One way to soften the illegitimacy that arises from the clash between EU objectives and free movement reality is the inclusion of Member State protection within the EU objectives. If a Treaty change could create a clear objective to protect the national, sovereign welfare systems of Member States, this would raise the interests currently protected by national implementation of the CRD and within the CJEU's recent case law, to the EU constitutional level and therefore legitimize their focus in free movement law.

Considering the incoherence of EU law that has resulted from the shift in jurisprudence of the CRD, it is important for the Member States to make their position clear by agreeing to a Treaty amendment in the European Council and ratifying this at the national level in their

[37] TFEU, Article 4

[38] For instance, those who *do* have sufficient resources, workers and self-employed persons.

respective Member States. A declaration of the direction of EU citizenship and the main goals of the EU project itself may be necessary to clarify citizens' rights, but it is important to keep open the option of developing EU citizenship into something greater than it currently is, or previously was. The EU institutions should be able to respond to any developments that occur in relation to EU solidarity and integration.

For the above reasons, this thesis suggests the Member States acting within the European Council make it unequivocally clear that there are legitimate limits on the commitment to EU free movement, by way of Treaty amendment making protection of Member State national welfare systems a constitutional principle of EU law. The Treaties should explicitly state the EU's commitment to preserving the national boundaries of Member States' welfare systems. This could be applied in a similar fashion to deference to national security. Art 4(2) TEU[39] considers the EU's obligations to respect the national integrity of its Member States, and particularly references national security. It should also particularly reference the protection of national welfare systems and the exclusive responsibility of the Member States to make decisions regarding welfare. Furthermore, Article 3 TEU,[40] specifically subsection 3, should make reference to giving respect to the protection of Member States' welfare systems. This would place that protection directly alongside the establishment of the internal market and the combatting of social exclusion and discrimination. Whilst these factors may be at odds, so long as they are on equal footing, any weighting either way will be more legitimate than imbalances that ignore the fundamental status of the internal market.

Whilst this thesis does not suggest any changes should be made to the actual rubric of Articles 20-25 TFEU, or the current framework for EU citizenship, Articles 20 and 21 could

[39] TEU, Art 4(2)
[40] TEU, Art 3(3)

also specifically reference the Union's commitment to protecting welfare systems of the Member States. Similarly, some secondary legislative changes could be made to the preamble of the CRD in order to reflect its apparent objective of protecting Member States welfare systems. Recital 10[41] should be more explicit than requiring citizens to not become an 'unreasonable burden' within their initial residency, and should recognise the CRD's objectives of ensuring the protection of Member States' competence over the welfare system.

By constitutionalising the protection of the welfare systems, both free movement and Member States' welfare interests would be an EU objective on equal footing; if the political climate were to change in favour of enhancing EU citizenship with greater social rights, the CJEU or the EU legislature could easily re-balance the interests to reflect this. Treaty amendment would have to be done under the ordinary revision procedure in Art. 48 TEU.[42] Ratification by all Member States' national constitutional requirements should not be difficult in order to give greater protection to national welfare sovereignty.

Secondary legislation amendment is, for reasons noted in the previous section, not enough to reduce genuine questions on the legitimacy of restrictions to equal treatment so long as the latter is given primary status, alongside the principle of free movement. An example of the problem facing secondary legislation amendments is the proposal to amend Regulation 492/2011 during UK renegotiations of EU membership.[43] The proposal would introduce a 'safeguarding mechanism' to restrict access to non-contributory in-work benefits for newly arrived EU citizens. It is not within the scope of this thesis to give a detailed analysis on

[41] CRD, Recital 10 (Preamble)
[42] TEU, Article 48
[43] European Council, Conclusions 18 and 19 February 2016, EUCO 1/16, Annex I, "*Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union*",Section D, "Social benefits and free movement", para.2(a) – *"Changes to EU secondary legislation"*.

the mechanism, but it has been criticised for allowing Member States to refuse non-contributory benefits to workers for up to four years, seemingly without providing detailed evidenced on the necessity of doing so.[44] The general issue with this is that, despite the legislative change Member States will still be Treaty-bound committed to ensuring free movement and non-discrimination.[45]

The commitment to protecting the boundaries of welfare systems needs the same legal status as free movement and equal treatment if it is to be a legitimate force for balancing interests heavily in favour of Member States in cases of welfare access. This would legitimise the strict application of the CRD, along with the CJEU's assertion that the objective of the CRD is to protect Member States' social assistance systems. Treaty amendment will also expressly clarify the current political position of the EU Member States on the direction of the EU and citizenship within it, whilst providing the legal landscape to ensure the goals and direction of the EU can be achieved when (or if) a more suitable time arises.

To conclude this section, the imbalances that exist at present can be rectified by the CJEU or EU legislature using the available legal space that is ensured by Union competence over the internal market and free movement of persons. If, as this thesis opines, this would not be politically desirable, the legal space can be reduced in order to legitimize the imbalances by making the protection of Member States' welfare systems a matter of priority within the EU legal framework.

[44] Iliopoulou-Penot, '*Deconstructing the former edifice of Union citizenship? The Alimanovic judgment*' (2016) 53(4) CML Rev 1007, pp1028-1029
[45] Iliopoulou-Penot (n.44), p1029

## 2. Students

### 2.1 Current framework of restrictions

| Eligible | Not Eligible | Unclear |
|---|---|---|
| **Host Member State** | | |
| Student citizens claiming maintenance assistance who have acquired the right to permanent residency | Student citizens claiming maintenace assistance before 5 years/ permanent residence | Student citizens claiming minimum subsistence (dependent upon integration) |
| **Home Member State** | | |
| Nationals of the home Member State claiming exportable educational benefits | | |

At present, whether students have equal treatment with regard to access to educational benefits will largely depend on whether they are trying to claim the benefit from their *host* Member State or *home* Member State. Access will also depend on exactly what benefits they are trying to claim.

Host Member States are well protected from the possible burden of student citizens. The CRD contains an express derogation from equal treatment, which gives Member States ultimate discretion on whether to provide EU student Citizens with maintenance grants or subsidised loans. There is no obligation to do so for students who do not hold the right to permanent residence.[46] In both *Bidar* and *Förster* [47] the CJEU permitted serious limitations on student maintenance access for EU citizens, by allowing Member States to require them to have been resident in the Member State for a number of years before being eligible. *Förster* in particular replicates the Directive; student maintenance grants in the Netherlands were not available to mobile EU student Citizens, unless they had resided in the

[46] CRD, Article 24(2)
[47] C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-08507

Netherlands for at least five years. The severity of this restriction evidences the perceived importance of the restrictions on educational grants. Student maintenance benefits appear to only be accessible to those who have fully integrated with a Member State.

In regards to social assistance, rather than maintenance assistance, Member State protection is less clear. *Commission v Italy*[48] and *Grzelcyzyk*[49] discussed the possibility of a burden created by EU student citizens on the social assistance system. Particularly in *Grzelczyk*, the Court found that a Member State could not exclude a mobile EU citizen from access to minimum subsistence, as a certain degree of financial solidarity should be extended when the burden on the host Member State would not be *unreasonable*.[50] In *Grzelczyk*[51]the Court mentions a degree of financial solidarity should particularly be extended where there is a temporal nature to the beneficiaries' hardship; and previously in *Commission v Italy*[52] it was found that students will naturally pose a lesser burden on social assistance because their residence is inherently temporary and fixed to the duration of their studies. It may be argued that if a student has resided for the majority of their course (or if they are only claiming very short-term benefits) they can make legitimate claims to social assistance. However, considering the general shift of attitude from the CJEU regarding restrictions on equal treatment based upon lack of sufficient resources,[53] it may be unlikely that the same decision would be made were *Grzelczyk* to come before the Court now. Since it has not been explicitly departed from, it cannot be ruled out that Member States may have to provide some temporary social assistance to students.

[48] C-424/98 *Commission of the European Communities v Italian Republic* [2000] ECR I-04001
[49] C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193
[50] *Ibid,* paras 39, 45
[51] *Ibid*, paras 44, 45
[52] C-424/98 *Commission v Italy* (n.48), para 40
[53] See Chapter 3, section on automatic exclusions

Home Member States can place restrictions on benefits, so that only those with a sufficient degree of integration can access them, for courses that would benefit the home Member State's economy.[54] Member States are under no obligation to construct benefits within their education systems that would financially support the free movement of students to pursue education in another Member State.[55] However, if a Member State elects to do so, it must do so in line with EU law, and the objectives and principles that accompany it.[56] Germany has particularly struggled in constructing an exportable student benefit that is compatible with free movement law.[57] What can be determined from the case law is that the level of integration is vastly less demanding than for claiming student maintenance from a host Member State; as even requiring a three-year residency period,[58] or a one-year study period,[59] in Germany was deemed too narrow and exclusive to show a necessary degree of integration.

The overall principles that are evident from the case law are that in terms of home Member State restrictions, nationality is everything until it is nothing; in terms of host Member State restrictions, residency is nothing until it is everything. This reinforces the idea that nationality and residency are not comparable, and the former is a trump card for benefits access whereas the latter is a highly restricted gateway to possible equal treatment. The next part of this section will compare the approaches taken to migratory patterns, to determine if there is an inherent imbalance between EU citizens' rights and Member State interests.

[54] See Chapter 2
[55] C-11/06 and C-12/06*Morgan and Bucher* [2007] ECR I-9161, para 24; C-275/12 *Elrick* [2013] EU:C:2013:684, para 25
[56] C-11/06 and C-12/06 *Morgan and Bucher,* (n.55) para 24 and 28
[57] See C-11/06 and C-12/06 *Morgan and Bucher,* at (n.55); C-220/12 *Thiele Meneses* [2013] EU:C:2013:683; C-423/11 and C-585/11 *Prinz and Seeberger* [2014] EU:C:2013:524*;* C-275/12 *Elrick* (n.55)
[58] C-423/11 and C-585/11 *Prinz and Seeberger* (n.57), paras 37-38
[59] C-11/06 and C-12/06 *Morgan and Bucher* (n.55) para 46

## 2.2 Example statistics of migration

Data by Eurostat[60]

**INDIC_ED:** Students (ISCED 5-6) studying in another EU-27, EEA or Candidate country - as % of all students **UNIT:** Percentage

| TIME | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| GEO | | | | | | | | | | |
| Belgium | 2.6 | 2.6 | 2.6 | 2.5 | 2.6 | 2.9 | 2.7 | 2.6 | 2.6 | 2.9 |
| Bulgaria | 7.4 | 8.6 | 8.7 | 8.9 | 8.3 | 7.9 | 8.0 | 8.1 | 6.2 | 9.0 |
| Czechia | 1.8 | 1.8 | 1.8 | 2.0 | 2.1 | 2.6 | 2.7 | 2.9 | 2.5 | 3.1 |
| Denmark | 2.7 | 2.5 | 2.3 | 2.6 | 2.5 | 2.4 | 2.5 | 2.5 | 2.4 | 2.4 |
| Germany (until 1990 former territory of the FRG) | 1.9 | 1.9 | 2.2 | 2.8 | 3.1 | 3.5 | 3.6 | 3.9 | 3.9 | 3.9 |
| Estonia | 3.2 | 3.5 | 3.6 | 4.1 | 4.5 | 4.9 | 5.2 | 5.6 | 5.2 | 6.8 |
| Ireland | 7.5 | 8.5 | 9.3 | 13.8 | 14.2 | 17.7 | 14.8 | 12.8 | 12.6 | 13.3 |
| Greece | 7.9 | 7.3 | 6.0(d) | 5.5 | 5.8 | 5.2 | : | 5.3 | 4.6 | 5.9 |
| Spain | 1.2 | 1.2 | 1.1 | 1.3 | 1.4 | 1.2 | 1.3 | 1.3 | 1.1 | 1.6 |
| France | 1.9 | 2.0 | 2.1 | 2.4 | 2.5 | 2.3 | 2.4 | 2.5 | 2.3 | 2.6 |
| Croatia | 6.8 | 6.9 | 6.3 | 6.4 | 6.2 | 6.0 | 6.4 | 6.2 | 3.3 | 6.0 |
| Italy | 1.6 | 1.6 | 1.5 | 1.7 | 1.8 | 1.8 | 2.1 | 2.4 | 2.1 | 2.9 |
| Cyprus | 53.6 | 54.8 | 56.5 | 53.2 | 56.9 | 58.4 | 56.2(d) | 54.9 | 53.8 | 52.3 |
| Latvia | 1.7 | 1.6 | 1.7 | 2.2 | 2.5 | 2.9 | 3.3 | 4.5 | 5.1 | 7.2 |
| Lithuania | 2.3 | 2.3 | 2.6 | 3.0 | 3.3 | 3.6 | 4.0 | 5.0 | 5.8 | 8.3 |
| Luxembourg | 66.7 | :(u) | :(u) | 80.8 | :(u) | : | : | : | 64.1 | 72.5 |
| Hungary | 1.7 | 1.5 | 1.5 | 1.7 | 1.8 | 1.8 | 2.1 | 2.4 | 1.9 | 2.6 |
| Malta | 5.9 | 8.4 | 7.8 | 10.0 | 9.9 | 10.9 | 11.4 | : | 11.0 | 11.1 |
| Netherlands | 1.8 | 1.8 | 1.8 | 2.1 | 2.1 | 2.2 | 2.5 | 2.6 | 2.4(d) | 3.0 |
| Austria | 4.7 | 4.7 | 4.4 | 4.6 | 4.7 | 4.3 | 4.5 | 4.3 | 1.7 | 4.8 |
| Poland | 1.1 | 1.2 | 1.3 | 1.6 | 1.8 | 1.8 | 2.0 | 2.0 | 1.5 | 2.1 |
| Portugal | 2.5 | 2.7 | 2.9 | 3.7 | 4.0 | 3.9 | 4.4 | 4.7 | 4.3 | 5.0 |
| Romania | 2.2 | 2.4 | 2.3 | 2.2 | 2.2 | 2.0 | 2.3 | 2.9 | 3.3 | 5.2 |
| Slovenia | 2.4(d) | 2.1(d) | 2.0 | 2.1 | 2.1 | 2.1 | 2.2 | 2.3 | 2.0 | 2.6 |
| Slovakia | 7.9 | 8.2 | 8.6 | 10.2 | 10.2 | 10.7 | 11.4 | 12.5 | 13.4 | 14.3 |
| Finland | 3.0 | 2.9 | 2.7 | 3.0 | 2.9 | 2.7 | 2.8 | 2.9 | 2.6 | 3.0 |
| Sweden | 2.3 | 2.2 | 2.3 | 2.7 | 3.0 | 3.0 | 3.2 | 3.2 | 3.2 | 3.6 |
| United Kingdom | 0.5 | 0.6 | 0.5 | 0.5 | 0.6 | 0.6 | 0.6 | 0.7 | 0.7 | 0.9 |
| Iceland | 15.7 | 15.5 | 17.0 | 17.4 | 17.8 | 18.2 | 19.5 | 17.6 | 16.6 | 16.8 |
| Liechtenstein | :(u) | :(u) | 77.1 | 73.6 | 51.0 | 67.7 | 71.8 | 71.7 | 62.4 | 65.4 |
| Norway | 4.5 | 4.7 | 4.8 | 4.9 | 5.0 | 5.1 | 5.3 | 5.5 | 5.7 | 6.2 |
| Switzerland | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) |
| North Macedonia | 9.2 | 10.4 | 11.9 | 11.9 | 10.5 | 8.4 | 8.0 | 7.8 | 5.4 | 6.7 |
| Turkey | 1.8 | 1.8 | 1.6 | 1.6 | 1.5 | 1.5 | 1.5 | 1.4 | 0.6 | 1.3 |

[60] Eurostat: Education and training, 'learning mobility' <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00064> accessed on 01/08/18; Student mobility (educ_thmob) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=educ_thmob&lang=en> accessed on 28.05.19

**INDIC_ED:** Inflow of students (ISCED 5-6) from EU-27, EEA and Candidate countries - as % of all students in the country **UNIT:** Percentage

| TIME | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| GEO | | | | | | | | | | |
| Belgium | 6.2 | 7.1 | 7.5 | 8.1 | 8.1 | 8.4 | 7.9 | 7.9 | 8.0 | 8.4 |
| Bulgaria | 2.5 | 2.7 | 2.7 | 2.8 | 2.8 | 2.7 | 2.7 | 2.7 | 2.7 | 3.0 |
| Czechia | 2.8 | 2.8 | 3.6 | 5.0 | 5.3 | 5.4 | 5.6 | 5.9 | 6.3 | 6.5 |
| Denmark | 3.5 | 3.5 | 3.9 | 4.5 | 4.9 | 5.3 | 6.5 | 7.3 | 8.1 | 8.6 |
| Germany (until 1990 former territory of the FRG) | 5.6(d) | 5.7(d) | 5.7(d) | 5.6(d) | 5.4(d) | 4.8(d) | 4.7(d) | 4.6(d) | :(d) | 4.1 |
| Estonia | 1.3 | 0.9 | 1.0 | 1.1 | 1.2 | 1.3 | 1.3 | 1.2 | 1.4 | 1.7 |
| Ireland | 2.4(d) | 2.6(d) | 2.3(d) | 2.5(d) | 3.2(d) | 2.6(d) | 3.3(d) | 5.3(d) | 5.0 | 6.6 |
| Greece | 1.9 | 2.0 | 2.0(d) | 1.6 | 2.2 | 2.7 | : | 2.5 | 2.4 | 2.4 |
| Spain | 0.5 | 0.6 | 0.7 | 0.8 | 0.9 | 1.0 | 1.3 | 1.5 | 1.6 | 1.6 |
| France | 2.4 | 2.4 | 2.2 | 2.3 | 2.3 | 2.1 | 2.1 | 2.1 | 2.2 | 2.2 |
| Croatia | 0.2 | 0.2 | 0.1 | 0.1 | 0.1 | 0.1 | 0.2 | 0.1 | 0.2 | 0.2 |
| Italy | 0.8 | 0.8 | 0.8 | 0.8 | 0.9 | 0.9 | 0.9 | 0.8 | 1.0 | 1.0 |
| Cyprus | 3.7 | 3.7 | 3.9 | 4.6 | 5.1 | 4.4 | 5.2 | 5.8 | 7.7 | 9.8 |
| Latvia | 0.6 | 0.6 | 0.8 | 0.6 | 0.5 | 0.5 | 0.6 | 0.6 | 0.9 | 1.5 |
| Lithuania | 0.1 | 0.1 | 0.2 | 0.3 | 0.5 | 0.5 | 0.2 | 0.2 | 0.2 | 0.2 |
| Luxembourg | : | : | : | 38.5 | : | : | : | : | 43.3 | 41.9 |
| Hungary | 2.0 | 2.0 | 2.0 | 2.1 | 2.2 | 2.3 | 2.7 | 2.8 | 2.9 | 3.2 |
| Malta | 1.4 | 1.7 | 2.0 | 2.2 | 2.1 | 2.0 | 2.1 | : | 2.0 | 2.3 |
| Netherlands | 2.3 | 2.3 | 3.4 | 3.9 | 4.3 | 4.7 | 5.2 | 5.5 | 5.4(d) | 5.6 |
| Austria | 10.8 | 11.1 | 10.9 | 12.1 | 13.0 | 13.9 | 14.4 | 14.9 | 15.0 | 15.7 |
| Poland | 0.1 | 0.1 | 0.1 | 0.1 | 0.2 | 0.2 | 0.3 | 0.3 | 0.4 | 0.4 |
| Portugal | 0.7 | 0.7 | 0.8 | 0.8 | 0.8 | 0.7 | 0.8 | 1.0 | 1.2 | 2.4 |
| Romania | 0.3 | 0.3 | 0.3 | 0.2 | 0.2 | 0.2 | 0.3 | 0.4 | 0.6 | 0.8 |
| Slovenia | 0.6(d) | 0.7(d) | 0.7 | 0.8 | 0.9 | 1.0 | 1.1 | 1.2 | 1.3 | 1.6 |
| Slovakia | 0.4 | 0.5 | 0.5 | 0.5 | 0.5 | 1.8(d) | 2.2 | 3.0 | 3.4 | 3.7 |
| Finland | 1.0 | 1.0 | 1.0 | 1.1 | 1.2 | 1.2 | 1.2 | 1.3 | 1.3 | 1.4 |
| Sweden | 4.3(d) | 4.5(d) | 4.6(d) | 4.8(d) | 5.0(d) | 2.7 | 2.8 | 2.8 | 2.8 | 2.9 |
| United Kingdom | 4.8(d) | 5.1(d) | 5.1(d) | 7.0(d) | 7.8 | 7.1 | 7.2 | 7.5 | 7.8 | 8.2 |
| Iceland | 3.3 | 2.2 | 2.2 | 3.3 | 3.7 | 3.6 | 4.1 | 4.3 | 4.6 | 4.5 |
| Liechtenstein | : | : | 79.3 | 86.7 | 64.2 | 64.1 | 63.4 | 62.0 | 59.2 | 61.3 |
| Norway | 2.2 | 2.4 | 2.5 | 2.6 | 2.7 | 2.7 | 2.7 | 2.7 | 2.8 | 3.0 |
| Switzerland | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) | :(z) |
| North Macedonia | 0.0 | 0.2 | 0.2 | 0.2 | 0.2 | 0.2 | 0.2 | 0.4 | 0.4(d) | 0.3 |
| Turkey | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 |

| INDIC_ED / GEO | Students (ISCED 5-6 | Inflow of students (I |
|---|---|---|
| Belgium | 11.6 | 37.8 |
| French Community in Belgiun | : | : |
| Flemish Community in Belgiu | : | : |
| Bulgaria | 25.8 | 8.4 |
| Czechia | 12.9 | 28.5 |
| Denmark | 4.9 | 23.5 |
| Germany (until 1990 former t | 104.5 | 121.0 |
| Estonia | 4.6 | 1.1 |
| Ireland | 25.3 | 12.7 |
| Greece | 36.8 | 15.1 |
| Spain | 29.4 | 30.5 |
| France | 54.7 | 50.3 |
| Croatia | : (z) | 0.3 |
| Italy | 54.2 | 19.8 |
| Cyprus | 25.5 | 3.1 |
| Latvia | 7.1 | 1.5 |
| Lithuania | 15.2 | 0.4 |
| Luxembourg | 7.8 | 2.5 |
| Hungary | 9.6 | 12.1 |
| Malta | 1.4 | 0.3 |
| Netherlands | 18.5 | 44.4 |
| Austria | 14.7 | 59.2 |
| Poland | 43.0 | 8.6 |
| Portugal | 18.9 | 9.2 |
| Romania | 37.2 | 5.5 |
| Slovenia | 2.6 | 1.7 |
| Slovakia | 35.2 | 8.2 |
| Finland | 8.7 | 4.5 |
| Sweden | 13.4 | 13.2 |
| United Kingdom | 16.8 | 205.6 |

Data by Eurostat (respectively exported students, then imported)[61]

Once again, Eurostat data is a rudimentary tool to illustrate the pressure that would be placed on Member States' maintenance assistance schemes, if equal treatment restrictions were removed. The data above does not differentiate between students moving purely within the EU (as other candidate countries are included), do not differentiate between students who are self-sufficient or gain maintenance assistance from their home Member State etc.[62]

[61] Eurostat, *Tertiary Education Participation* (INDIC_ED)

[62] See Eurostat metadata: table 1: < https://ec.europa.eu/eurostat/cache/metadata/en/educ_uoe_enr_esms.htm> table 2: <https://ec.europa.eu/eurostat/cache/metadata/en/educ_uoe_h_esms.htm> - note also figures collated for outflow do not come from Member States themselves but are estimated based on the number of that nationality enrolled in host Member States

However, two important factors can be identified. Firstly, student migration is on the rise: in 2002 there were 354,200 EU students studying in an EU Member State that was not their home State.[63] In 2012 (when the most recent data refers to, and so the year chosen for assessment), the figure rose to 663,700.[64] It is natural and desirable for this figure to rise, in terms of the Union's objectives and aspirations. The tables above are taken from Eurostat's 'thematic indicators' on the achievement of Lisbon objectives,[65] so student mobility is still at the heart of EU objectives, despite the broader margin of appreciation given to restriction mobile student's rights to assistance. The Union is in need of highly-skilled workers to create a more competitive labour market, and is aiming to increase the skills and continued learning of its citizens. However, a rise in student mobility also increases the risks to Member State financial equilibriums and welfare boundaries, in the event that they have to extend equal treatment with regard to access to maintenance assistance.

Secondly, the Eurostat data also shows that student mobility varies greatly across the Member States. The UK is a particularly stark example of a Member State being a 'net importer': in 2012 the UK had an inflow of around 205,600 students whereas only around 17,400 left to study elsewhere in the EU.[66] In the same year, the Netherlands imported around 44,400 students and exported around 19,000 students.[67] There are also issues of 'net exporters' such as Cyprus, which exported 25,500 students and only imported 3,100. Greece is in a similar position, exporting around 38,200 students and importing 15,100.

[63] Eurostat: Education and training, 'learning mobility' < http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00064> accessed on 01/08/18 (figures discontinued after 2012– *Tertiary education participation* (INDIC_ED) for figures)
[64] Eurostat, (n.63)
[65] Eurostat, above at (n.63) Student mobility (educ_thmob) found in "*Thematic indicators – progress towards the Lisbon objectives in education and training (educ_them_ind)"*
[66] *Ibid*
[67] *Ibid*

France, on the other hand, imported around 50,300 students and exported around 55,100 so has a greater equilibrium than the former two Member States.[68] Much like the data on jobseekers, the student mobility data suggests that the risk to the finances of the Member States is too varied to have a single rule applicable to all, whilst retaining a legitimate commitment to educational objectives of the EU. Disparity seems to be more extreme in relation to student mobility, so a harmonized restriction on maintenance assistance will be even less desirable.

Unlike jobseekers and access to social assistance, the benefits that may be claimed will be generally expensive. Statistically speaking, the risk for host Member States is very clear. Maintenance assistance is expensive, and a large (and increasing) number of students may affect budgets of Member States if equal treatment was open to all. Restrictions should therefore be different to jobseeker restrictions, in that they ought to focus more on curtailing entrance to (rather than promoting exit from) the welfare system.

At present, host and home Member State restrictions are polarised extremes. Most students progressing to tertiary education in another Member State will not have access to maintenance assistance there under Art 24(2) CRD.[69] Most students wishing to claim exportable benefits from their home Member State will be able to do so, so long as they have a tenuous link to that Member State, and the Member State provides exportable benefits.[70] The extent to which the former is necessary, and the latter becomes a real financial problem, will depend on whether individual Member States are net importers, net exporters or neutral in terms of student mobility. This suggests there are Member States which do require the rigorous application of Art 24(2) (i.e. the UK or the Netherlands), but

[68] *Ibid*
[69] See Chapter 2
[70] See Chapter 2

also that there are Member States which do not; vice versa, there are Member States which require more rigorous restrictions on exportable benefits, and those which would not. Therefore, a carte blanche application of restrictions (or equal treatment, in terms of home Member States) may be insufficient for creating a delicate balance between EU objectives and Member State interests, and may lead to imbalances that weigh heavily in favour or against Member States.

### 2.3 Possible problems of imbalances

Like jobseekers, mobile EU students will also contribute to the success of the internal market and therefore, there is some EU competence on their ability to exercise free movement. However, this is a shared competence and unlike jobseekers, students have not been linked to the free movement of workers. Although highly skilled graduates are desirable for a more competitive labour market, the case law on student mobility within the EU has not interpreted student mobility as imperative for the success of Art 45 TFEU (as in *Antonissen* and *Collins*). Instead, *Grzelczyk*[71] and *Bidar*[72] interpreted students' equal treatment as a product of EU citizenship and the EU's supporting competence in the area of education.

All EU citizens contribute to the functioning of the internal market, which ensures the free movement of *people*, but there is an undeniable hierarchy of citizens within the EU legal order.[73] Workers are the apex citizen of the EU, and are the most protected by the CJEU and EU legislature. The further away a citizen gets from a worker, the less protection that can be legitimately afforded to them by the EU legal framework. Therefore, the EU competency in relation to students is likely to be more limited than in relation to jobseekers.

[71] C-184/99 *Grzelczyk* (n.49), para 39
[72] *Ibid* para 35
[73] See Introduction and Chapter 1

The Court emphasised the importance of the training and educational objectives in *Grzelczyk*,[74] *D'Hoop*[75] and *Bidar*[76] as well as in *Morgan and Bucher*,[77] *Prinz and Seeberger*[78] and *Thiele Meneses*.[79] In *D'Hoop* especially the Court pointed out that the educational goals of the Union will not be met if citizens are deterred from moving elsewhere to study.[80]

There is greater scope to protect Member State interests in relation to educational welfare, as it involves two sensitive areas of Member State competence. Despite having educational objectives,[81] the EU has only supporting competence in relation to education.[82] Whereas welfare provision has always been solely within the remit of Member State competence.[83]

The distance between students and the single labour market, alongside the strong Member State competence and lower EU competence with regard to education, mean that imbalances caused by rigorous exceptions to equal treatment for students appear more legitimate than for jobseekers. As the CRD restrictions are polarised from the case law on exportable benefits, which enforce student mobility interests, questions must be raised about the approach taken in the latter cases; education and welfare access are still within the competency of the Member State when applied to their own nationals. The imbalance in favour of EU goals may need addressing in regards to exportable benefits. In *Thiele Meneses* and in *Martens*, exportable benefits were expected to be granted to students with

[74] C-184/99 *Grzelczyk* (n.49) para 35
[75] C-224/98, *D'Hoop* (n.22), para 32
[76] C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing* [2005] I-02119, para 39-42
[77] C-11/06 and C-12/06 *Morgan and Bucher* (n.55), para 27
[78] C-423/11 and C-585/11 *Prinz and Seeberger* (n.57), para 29
[79] C-220/12 *Thiele Meneses* (n.57), para 24
[80] C-224/98, *D'Hoop* (n.22), para 32
[81] TFEU, Articles 165-166
[82] TFEU Article 6
[83] TEU, Article 5(2)

little to no link with the home Member State.[84] Whilst this thesis has consistently held that non-nationals should be required to show a real link in order to be eligible for welfare benefits, due to their lack of nationality-based solidarity and social ties; this is due to the comparison of relocated non-nationals with nationals who are resident and present in their home Member State. It is clear that in the two aforementioned cases, the individuals had stronger connections with other territories. If integration, of the type that can give rise to educational benefits eligibility, can be forged in a host Member State,[85] then the same level of integration cannot simultaneously exist in the home Member State merely on the basis of nationality. Similarly, if the line of *Grzelczyk* still applies and mobile students in certain circumstances may claim social assistance, this will also need to be addressed.

Overall, the larger margin of appreciation granted to Member States, in relation to students' rights to equal treatment makes sense. The EU objectives and competencies in this area do not go far enough to support rights that are more robust at this time. Furthermore, the Treaty educational objectives relate to enhancing *quality* and *scope* of education. This does not rely as heavily on cross-border movement as enhancing the single labour market, which creates a further distinction between students and jobseekers. There is *a* relationship with the labour market, as quality and degree of educational attainment does impact the success of that market. However, unlike jobseekers, who need to be able to move in order to fulfil the objective of the single labour market, students may be educated to a high quality in their home Member States. The quality and degree of education can be attained by national policies, supported by greater competence and legitimacy. The EU can also support student mobility in ways that do not interfere with welfare provision.[86] Therefore, although there

[84] See Chapter 2
[85] See Chapter 2
[86] See Chapter 2

may be imbalances between the EU educational objectives and Member State interests, this may be justified in cases of students.

2.4 Possible tools for re-balancing or legitimising

In relation to students, there is less of a need for re-balancing, or even legitimising any potential imbalances, than in relation to jobseekers. The main cause for concern is with exportable benefits and the possibility of social assistance being claimed by students relying on *Grzelczyk*. The following section will suggest possible ways of re-balancing interests in relation to those two issues. There are also some changes that could be made to make the CRD restriction in Art. 24(2) more balanced, but the favourable treatment towards Member States in those cases is more legitimate, so changes would be more desirable than necessary for legitimacy.

*Using proportionality as a re-balancing tool*

Once again, it is possible to re-balance interests by the CJEU's use of proportionality. In relation to exportable benefits, the Court has accepted a wide variety of possible justifications for limiting exportable student finance;[87] it is down to the Member States to create a framework that ensures restrictions are necessary based upon those justifications. However, it is also the Court's responsibility to soften its current proportionality requirements to relinquish some competence back to Member States in relation to educational benefits. The Court in cases such as *Thiele Meneses*[88] and *Martens*[89] took into consideration specific circumstances of the claimants in order to show that the restrictions were too exclusive and therefore unjustifiable.[90] This is similar to the decision in *Prete,*[91]

[87] See Chapter 2
[88] C-220/12 *Thiele Meneses* (n.57), paras 38-41
[89] C-359/13 *Martens* [2015] EU:C:2015:118
[90] See Chapter 2
[91] C-367/11 *Déborah Prete v Office national de l'emploi* EU:C:2012:668

which also seemed to suggest that Member States should take into consideration all of the factors relating to the personal circumstances of claimants which could show a degree of integration with the Member State.[92]

If the opportunity arises, the Court should be more willing to accept residency requirements as a proportional way of restricting exportable benefits. If the Court finds that Member States can refuse equal treatment because there is insufficient integration before permanent residency under the CRD,[93] then it should be possible for Member States to also recognise insufficient integration when there is a lack of residency from nationals. Especially as the former suggests that after 5 years there is an ensured degree of integration with a Member State, enough to justify claims for student benefits, which require a high degree of solidarity with the host Member State. That solidarity will, in the reverse scenario, be lacking for those who have been outside of their home Member State for long enough to establish that level of integration elsewhere. Not only is it legitimate to find residency requirements proportional, in light of the case law on host Member State benefits, it is desirable. It allows the Member States to decide for themselves what level of integration is necessary before student benefits can be claimed, which is legitimate because of their ultimate competence in this area.

Possible problems may arise if this approach were to be taken, which would mirror the problems with the strict application of Art 24(2). Strict residency periods do not create individualised justice; circumstances may arise where a citizen has obviously strong ties to a Member State but does not fall within the residency period.[94] In terms of viewing the law's legitimacy through a balance of interests, individual justice will not always be

[92] See Chapter 1
[93] C-158/07 *Förster* (n.47)
[94] See Chapter 2

possible, especially when retaining some degree of certainty and Member State competence over integration.[95] Reliance on proportionality would not create the same issue as it would with jobseekers, as restrictions are already framed to be individual and relating to the tie between individual citizens and the Member State, despite the fact that they are generalised. However, changing the proportionality standard would still require a case to come before the CJEU on exportable benefits; it is more likely that this will occur than a case on jobseekers allowances, as the Member States themselves will be more willing to question the status quo of the law on benefits restrictions.

If proportionality is not used to re-balance interests in relation to exportable benefits, it is always possible for Member States to not offer exportable student loans and maintenance grants in the first place. It would be undesirable to encourage the practice of removing benefits, as this would detriment student mobility within the EU. For this reason, it would be in the Court's interest to be more accepting of restrictions.

Although this thesis finds the literal application of Article 24(2) in relation to students could be prima facie legitimate, the framework may be criticized for being overly restrictive, as citizens may be integrated before a five-year period. [96] The five-year limit, although it may appear severe, is at least an indication that the CRD has imposed a restriction based upon the Member States' red lines on solidarity and integration. It is more adequate, in this respect, than the restrictions applied to jobseekers, which do not entail any consideration of integration beyond actual economic activity or the degree of need of the citizen, and

[95] See Chapter 2

[96] de Witte, '*Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law: Commission v. Netherlands'* (2013) 50 CML Rev 203, p214; Van der Mei, '*Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid'* (2009) 16 Maastricht Journal of European & Comparative Law 477, p487; C-158/07 *Förster* (n.47),Opinion of AG Mazák, paras 130 - 133

severely undermine the EU's competence in relation to the labour market and free movement.

There is scope for the Court to soften Art. 24(2) CRD, should the right circumstances arise. A potential grey area could still arise in cases which fall between the *Bidar*[97] and *Förster*[98] scenarios. Prior integration, before embarking upon education, may give rise to equal treatment with regard to access to maintenance even when a Member State makes use of the five-year permanent residence requisite. Ms Förster had worked in the sector where she had been educated; she had contributed to the Member State and had integrated herself into the society both during and after her studies. This was not taken into account because the integration did not occur to a sufficient degree *before* the study grant was given. In *Bidar* integration occurred before the grant, and also before the three-year residency requirement period. It was held by the Dutch authorities in *Förster* that if she had been integrated at the same level *before* studying, she would have been integrated enough to claim equal treatment under the *Bidar* case law.[99] The Court did not state whether this was the case, instead differentiating the two cases based upon *Bidar*[100] making it impossible for EU citizens to gain equal treatment regardless of their integration. It is therefore open for the Court, in future, to find a citizen integrated enough to warrant equal treatment so long as that integration occurs before they attempt to access benefits. This would create a more ambiguous approach to equal treatment, and would require Member States to look more into personal circumstances, but it would create a more delicate balance between Member State interests and the EU educational goals. Furthermore, if this interpretation were to be taken, a correlating approach would need to be taken concerning residency restrictions on

[97] C-209/03 *Bidar* (n.76)
[98] C-158/07 *Förster* (n.47)
[99] *Ibid* para 22
[100] *Ibid* para 47

exportable benefits. Overall, proportionality could create a more desirable and delicate balance of interests, but it is an unlikely approach to be taken because of the CJEU's newfound focus on certainty in the application of EU law.[101]

*Changes to secondary legislation*

As the competencies involved in education weigh heavily in favour of Member States, there is little need to change EU change primary legislation to legitimise imbalances created by the law. Focus should therefore be on the changes to secondary legislation that may re-balance interests to reflect competencies in this area.

It is unlikely that the CRD would be amended to include restrictions on exportable benefits, as equal treatment under the CRD applies only where the residency of the individual is based upon the tenets of the CRD, and to their treatment in relation to nationals of a host Member State. Considering not all, in fact very few, Member States offer exportable benefits, it appears logical to leave for them to construct their own restrictions under the overriding requirements doctrine, and leave it open to the CJEU to consider the compatibility of them with EU law.

Some amendment to the CRD could be necessary in order to either codify or reject the ruling in *Grzelczyk*. Codifying that students can access social assistance if they are integrated into the host Member State would support the educational objectives of the EU, by ensuring that students can finish their studies in the host Member State if they run into temporary financial difficultly. Any codification would need to be explicit about the temporary nature of benefits access that students could acquire equal treatment to, the temporality of financial difficulties lay at the heart of both *Grzelczyk* and *Commission v*

[101]See Chapter 3

*Belgium.*[102] However, it is highly unlikely that this would be codified in the first place, considering the position on maintenance assistance, and would conflict with the CRD position regarding social assistance for jobseekers. If the category of citizens that enjoy greater protection by EU competencies cannot claim social assistance, it would appear illegitimate if the category that is less protected by EU competencies could.

It is more likely that the conditions under Art 7(1)(c) of the CRD would be re-drafted to clarify that a student's sufficient resources and their ability to become 'unreasonable burden' are determined by their access to social assistance, in order to prevent any further *Grzelczyk* judgments. Not only would such a reform explicitly give Member States a greater margin of appreciation when it comes to citizen students and equal treatment, thus fitting their ultimate competence. A reform akin to this would also fit with the recent pattern of case law,[103] which suggests claims for social assistance have the automatic consequence of a lack of legal residency within a host Member State.

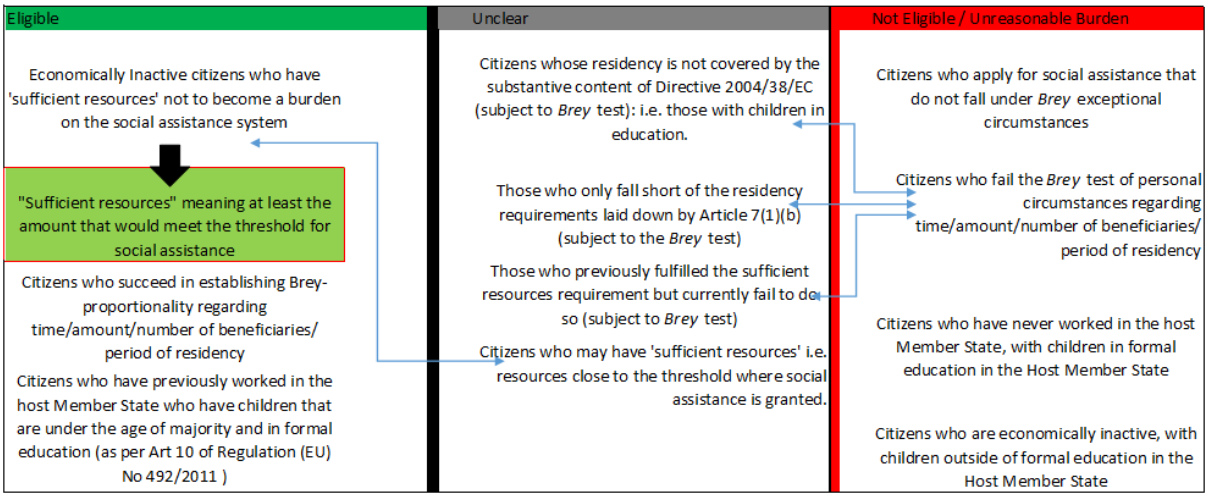
To soften the current favouring of Member State interests, and give some consideration to EU educational objectives, Art 24(2) of the CRD could also be reformed to include a less restrictive time limit. Three years was considered sufficient by the CJEU in *Bidar,*[104] and would slightly alter the balance of interests so that EU educational objectives were more likely to be achieved. However, a two-year difference in the residency restriction is unlikely to affect mobile students on a large scale; it would not create a system whereby a student could move specifically for educational reasons and immediately access financial assistance in order to support this. It is even unlikely that financial assistance would be open to most students who move abroad to study a tertiary degree. It could aid a very limited

[102] See Chapter 2
[103] See Chapter 3
[104] C-209/03 *Bidar* (n.76), para 60

number of citizens who move for work, or some other reason, and then opt to study in their Member State of residence. Even this limited number could be seen as an advancement on EU student mobility objectives. As noted above, individuals will enhance the achievement of mobility objectives, as they make up the parts of its sum. Reforming the CRD in this respect could cost Member States very little in terms of student maintenance, and have a corresponding (albeit small) impact on EU objectives in order to create a more delicate balance. The possible problem with this is much like the above issues with jobseekers; it is unlikely for the Member States acting as the EU legislature to want to change the status quo when it is so heavily favoured for their interests.

## 3. Economically Inactive

### 3.1 Current framework of restrictions




The above table highlights the highly varied situations of economically inactive citizens who fall under Article 7(1)(b) CRD. The table includes an expansive ‘unclear’ section and is much more convoluted than the tables regarding explicit derogations.

The actual number of citizens who would fall into the eligibility category is highly restricted. Firstly, those who actually have 'sufficient resources' are unlikely to claim social benefits.

Secondly, the case law has flipped the position from an absolute bar on automatic exclusion from social benefits, to one that presumes the justifiability and proportionality of exclusion.[105] After the *Dano*[106] judgment, the definition of who may be an 'unreasonable burden' became extremely broad.[107] It would appear that for those who are economically inactive to claim equal treatment for access to welfare benefits, they would have to successfully establish legal residency under Article 7(1)(b) of the Directive; meaning that anybody who does not have sufficient resources not to burden the social assistance system with comprehensive sickness insurance would be ineligible for any social benefits. *Dano* effectively cancelled out earlier case law that gave a less restrictive interpretation of Article 7(1)(b), by shifting the focus from Member States having to prove a burden upon the welfare system (as in *Brey*) to citizens having to prove their sufficient resources in the first instance, by not claiming benefits. The Court took a literal interpretation of Article 24 CRD, which extends equal treatment to those 'residing on the basis of this territory', to find that *only* those who had proven that residence could be eligible for equal treatment in the first place.[108]

After *Dano*, those establishing a *Brey* right to equal treatment with regard to access to social assistance will be few and far between, if the UK's interpretation of when proportionality is required to assess an 'unreasonable burden' is an accurate interpretation. In *Mirga*,[109] it was hinted by Lord Neuberger that proportionality may be used in exceptional cases to

[105] See Chapter 3
[106] C-333/13 *Dano* (n.11)
[107] See Chapter 3
[108] C-333/13 *Dano* (n.11), para 69
[109] *Mirga* (no.29) para 66, 70.

determine that a mobile citizen should not be excluded from equal treatment under the Directive and should instead be able to rely directly upon their rights as a citizen under Articles 20 -21 and 18 TFEU. The Upper Immigration Tribunal judgment in *LO v SSWP*[110] gives some insight into what may be considered 'exceptional circumstances'. Most prominently, specific circumstances of claimants will be taken into consideration when there is a *lacuna*[111] in the CRD. The judge in *LO* found that although the CRD is intended to cover the situations of most citizens, it cannot possibly conceive every type of residence. For example, as noted in the *Teixeira*[112] judgment of the CJEU, there is no mention in the CRD of economically inactive parents of Union citizen children who are considered minors. The tribunal judge in *LO* claimed *Brey* is not a generalised approach, stating that *Brey*-style examinations are confined to the previously self-sufficient EU citizens, including sickness insurance; since the claimant in *LO* had never been self-sufficient there was no need to look into personal circumstances.[113]

The tribunal decision in *AMS*[114] confirms that *Brey* is still relevant where a claimant was previously self-sufficient. However, this in turn depends upon the *Brey*-style proportionality being successful. In *AMS*, it was very unfortunately confirmed that proportionality assessments may still deem EU citizens ineligible for welfare benefits where: national legislation would result in them gaining substantially more benefits than they would need (the pensioner in *AMS* required around £200 per month but would have ended up with around £1100),[115] where there would be a large number of claimants in the

[110] *LO v Secretary of State for Work and Pensions* [2017] UKUT 440 (AAC)
[111] *Ibid,* paras 49-51
[112] C/480-08 *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department* [2010] I-01107, paras 48-50
[113] *LO* (n.110), para 48
[114] *AMS v SSWP* [2017] UKUT 381 (AAC)
[115] *Ibid*, paras 12, 14-15, 18 and 22

same situation as the case at hand,[116] and where the entitlement to benefits would be largely open-ended.[117] Personal ties to the State were not to be taken into consideration as this creates ambiguity and widens the demography of citizens who could begin claims for equal treatment with regard to access to social assistance.[118] In reality, *Brey* will advance the position of these EU citizens only when they are previously self-sufficient *and* where they are in a situation that is so highly unusual that not many other claimants in their factual situation would be present in the host Member State.

It is also important to note that it is not the CRD that allows parents of EU citizen children to claim equal treatment with regard to access to social assistance; it is a result of their derivative right to residency as per *Teixeira*.[119] Therefore, most cases falling under the CRD will result in no access to benefits for economically inactive citizens.

The following section will look at examples of migration statistics to determine if there is a possible imbalance between EU free movement objectives and Member State interests.

[116] *Ibid*, para 25
[117] *Ibid*, para 25
[118] *Ibid*, para 24
[119] C/480-08 *Teixeira,* (n. 112)

3.2 Example statistics of migration

| TIME / GEO | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|
| European Union - 28 countrie | 2,269.5 | 2,354.0 | 2,482.1 | 2,524.9 | 2,490.8 |
| European Union - 15 countrie | 2,223.2 | 2,304.7 | 2,435.7 | 2,474.5 | 2,441.3 |
| Euro area (19 countries) | 1,808.6 | 1,847.0 | 1,911.3 | 1,963.8 | 1,997.3 |
| Belgium | 153.6 | 158.1 | 153.6 | 161.8 (b) | 163.7 |
| Bulgaria | : (u) | : (u) | : (u) | : (u) | : (u) |
| Czechia | 13.4 | 13.1 | 9.0 | 11.3 | 11.1 |
| Denmark | 20.1 | 22.8 | 22.6 (b) | 25.8 (b) | 27.0 |
| Germany (until 1990 former t | 535.3 | 576.3 | 614.1 | 620.7 | 643.9 |
| Estonia | : (u) | 1.7 (u) | 1.3 (u) | 1.4 (u) | 1.7 (u) |
| Ireland | 73.5 | 77.3 | 73.2 | 72.4 (b) | 70.3 |
| Greece | 28.4 | 23.6 | 23.5 | 19.7 | 21.9 |
| Spain | 275.0 | 253.6 | 253.5 | 268.4 | 284.0 |
| France | 230.5 (b) | 219.2 | 228.9 | 244.9 | 218.2 |
| Croatia | : (c) | : (c) | 1.2 (u) | 1.2 (u) | 1.0 (u) |
| Italy | 303.7 | 310.9 | 328.7 | 327.0 | 332.5 |
| Cyprus | 13.4 | 13.7 | 14.7 | 15.1 | 15.9 |
| Latvia | : (u) | : (u) | : (u) | : (u) | : (u) |
| Lithuania | : (u) | : (u) | : (u) | : (c) | : (c) |
| Luxembourg | 37.4 | 40.4 (b) | 44.4 | 44.4 | 42.1 |
| Hungary | 6.3 | 7.6 | 6.9 | 7.7 | 7.6 |
| Malta | 1.9 | 3.4 | 3.1 | 5.0 | 4.9 |
| Netherlands | 51.1 | 52.9 | 51.2 | 59.2 | 62.9 |
| Austria | 83.0 | 92.9 | 97.8 | 101.5 | 113.0 |
| Poland | : (u) | : (u) | 5.6 (u) | : (u) | : (u) |
| Portugal | 8.0 | 7.9 | 7.7 | 7.9 | 8.0 |
| Romania | : (u) | : (u) | : (u) | : (u) | : (u) |
| Slovenia | 2.1 (u) | 2.2 (u) | 1.8 (u) | 1.9 (u) | 1.2 (u) |
| Slovakia | : (u) | : (u) | : (u) | : (u) | : (u) |
| Finland | 9.1 | 10.6 | 11.6 | 10.3 | 10.4 |
| Sweden | 32.1 | 30.3 | 32.4 | 28.0 | 29.1 |
| United Kingdom | 382.4 | 428.1 | 492.4 | 482.4 | 414.1 |

Data by Eurostat – Inactive EU citizen population aged 15-64 (thousands)[120]

There is difficulty in viewing the imbalance between EU objectives and Member State interests because Eurostat data does not provide information that is broken down to both *reasons* for inactivity and *citizenship* of the persons who are inactive. It is clear that across the EU around 2.5 million inactive citizens are resident in a Member State that is not their own.[121] This is not reason enough to assume that citizens who fall into the Article 7(1)(b) category are statistically creating a large risk to the social assistance system. Inactive citizens are still a very small portion of the entire EU population and many may have worked in the host Member State before.[122] In addition to this, not all the economically

[120] Eurostat (lfsa_igan), Inactive Population by sex, age and citizenship <appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_igan&lang=en> accessed on 25/09/18
[121] Eurostat (lfsa_igan), n.(120)
[122] ICF GHK and Milieu, *A fact finding analysis,* (n. *on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and*

inactive included in this figure will be trying to claim social assistance and many will be excluded from doing so. It is therefore important to look more deeply into what kind of inactive citizens are making up this complex demography.

More Eurostat data[123] gives information on the percentage of the 'inactive' population by reason for inactivity. This can include retirement, studying, family or caring obligations, disability, waiting recall to work or even thinking no work is available.[124] The CRD already deals with students as a separate category of citizens, who are rather rigorously excluded from access to welfare benefits. If the largest portion of the inactive population are those in education, this will indicate that the economically inactive are a minority and there may be an imbalance between EU objectives and Member State interests created by Article 7(1)(b) CRD.

The Member States with the highest number of inactive mobile citizens are: Spain, France, Italy and the United Kingdom.[125] This is likely to be the case because these are Member States with a high proportion of intra-EU migrating pensioners and students.[126] The largest percentages of economically inactive give the reason of being retired, or being in education.[127]

*healthcare granted on the basis of residence,* 14 October 2013 (revised on 16 December 2013), Page 20 and 24

[123] Eurostat lfsa_igar reasons for not working: 'Inactive population not seeking employment by sex, age and main reason' < http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_igar&lang=en > accessed on 25/09/18

[124] Eurostat lfsa_igar (n.123)

[125] Eurostat (lfsa_igan), n. (120)

[126] ICF GHK and Milieu report, (n.122), p22

[127] Eurostat lfsa_igar (n.123)

| 2017 Data for Economically Inactive by Reason | | | | |
|---|---|---|---|---|
| Place | % of Inactive Population | Trend | % of Total Population | Trend |
| Retired | | | | |
| EU (28) | 14.40% | ↓ | 3.80% | ↓ |
| Spain | 6.40% | ↓ | 1.70% | ↑ |
| France | 20.20% | ↓ | 5.80% | ↓ |
| Italy | 8.80% | ↓ | 3% | ↓ |
| UK | 13.50% | ↓ | 3% | ↓ |
| In Education or Training | | | | |
| EU (28) | 34.70% | ↑ | 9.20% | ↑ |
| Spain | 37.50% | ↑ | 9.70% | ↑ |
| France | 38.80% | ↑ | 11.10% | ↑ |
| Italy | 32.30% | ↑ | 11.20% | ↑ |
| UK | 30.50% | ↑ | 6.80% | ↑ |
| Looking After Children or Incapacitated Adults | | | | |
| EU (28) | 9.80% | ↑ | 2.60% | ↑ |
| Spain | 6.80% | ↓ | 1.80% | ↓ |
| France | 8.30% | ↓ | 2.40% | ↑ |
| Italy | 10.30% | ↓ | 3.60% | ↓ |
| UK | 18.30% | ↓ | 4.10% | ↓ |

As with the above two sections, Eurostat data can only provide a rudimentary view of migratory patterns and the reasons for inactivity. For instance, the table showing the percentages of the inactive population by reason relates to the entire population of Member States, it does not show the percentage of EU citizens giving that reason for inactivity. The percentage of inactive mobile citizens will therefore be much lower. However, it is possible to draw some conclusions from the data shown.

Firstly, the varied nature of inactive citizens distorts how the balance of interests is viewed. To give examples of variances: pensioners are not going to work again, it is unlikely they will fall into a position where they do not rely on social assistance once they start to claim, so Member State interests in curtailing these will be relatively high, as noted by the AG in *Brey*[128] and the tribunal judge in *AMS*[129]. Ms Dano was considered entirely unwilling to

[128] C-140/12 *Brey* (n.23), Opinion of AG Wahl, para 84
[129] *AMS* (n.114) para 25

work and therefore would be relying on Germany's expensive social assistance for the foreseeable future.[130] Mr Trojani was part of a reintegration programme, and therefore may have been willing and able to work once the programme was concluded; meaning he may not claim minimum subsistence indefinitely. It is difficult to treat these categories accordingly when they are subject to the same automatic exclusion from equal treatment under the CRD.

Secondly, there is once again great disparity in inactive citizens between the Member States, suggesting a highly exclusionary harmonised system of restrictions will produce imbalances. The disparity is in terms of the benefits that may be accessed, as well as the amount of inactive. The actual cost of inactive citizens in the event of equal treatment restrictions being lowered will differ greatly, depending on the construction of social assistance in the host Member State.[131] Social assistance is generally not generous when compared to contributory benefits, as it is a safety net against poverty in most EU Member States, although there are exceptions.[132] The amount and duration of benefits is also highly divergent amongst the Member States.[133] Furthermore, not all of the types of inactive will need social assistance in its truest form (i.e. minimum subsistence), the retired may require certain pension benefits and single parents may require child benefits. Again, the cost and duration will differ vastly between the Member States; their interests will therefore be different, the more generous Member States may require automatic exclusion whereas the less generous may not.

Finally, it is evident from the statistics is that the economically inactive are a minority group in populations. It is mainly students who make up the composition, with the retired making

[130] C-333/13 *Dano* (n.11), paras 39, 78
[131] IZA and ESRI, 2011 Report (n.1) p81-82
[132] i.e. the German SGB II benefit at issue in *Dano, Alimanovic* and *Garcia-Nieto*
[133] IZA and ESRI, 2011 Report (n.1), p80

up the second largest group for most Member States, and those with families trailing behind. What also should be taken into account is that not all of the citizens included in these figures will be reliant upon social assistance; they may live in working households, or have their own sufficient resources. The actual amount of beneficiaries that would be claiming welfare benefits is low, concluding that there is an imbalance between free movement objectives and Member State welfare interests. This also suggests there is an imbalance in the law, and that the current interpretation of residency conditions in the CRD is too restrictive to create a legitimate balance of interests.

### 3.3 Possible problems of imbalances

What is evident is that general exclusions from access to welfare cannot possibly respond to the actual risk posed by the plethora of types of citizens under the CRD. Although a carte-blanche denial of eligibility does remove the issue of nuancing this area of law to these situations, such a course of action cannot be said to be capable of responding to the actual risks created by mobile citizens. Therefore, it is highly likely that there will be imbalances between free movement objectives and Member State interests. Economically, the law presumes that a burden is placed upon the social welfare system by a multitude of claimants who may not exist, or may not claim benefits for long enough to create a burden; there is space for greater achievement of free movement objectives where highly exclusionary restrictions are not necessary.

Furthermore, a plethora of EU objectives and principles are important to the rights attached to this category of citizens. At the Treaty level, there is the commitment to the reduction of poverty and social exclusion, as well as the principle of non-discrimination on the basis of nationality and, above all, the fundamental and constitutional status afforded to the

enhancement of free movement. From the case law, and some analogy in the CRD, there is evidently also an objective of protecting Member State social assistance systems.[134]

The reduction of social exclusion, and the commitment to lifting citizens out of poverty, has been accorded Treaty status by its inclusion in Article 9 TFEU.[135] It is rather easy to determine that this objective lacks presence in the case law on social assistance and equal treatment with regards to their access. This is where the economically inactive differ from jobseekers and students; the latter two have the support of Treaty-based objectives relating to the free movement of workers and the need for a competitive educational area, which are expressed firmly as reasons for the decisions of the Court. Strict interpretations and applications of the CRD and a broad interpretation of *Dano*-esque restrictions, may place citizens who have moved out of their home Member State in a position of poverty, or at least financial hardship.[136] Despite this, the objective of reducing poverty has never been cited within this case law, even when it was more generous towards equal treatment for this category.

The reasons for this are obvious, free movement of students and jobseekers is necessary for a competitive education and labour market. The reduction of poverty and social exclusion can be achieved through Member States' national policies; regulation of free movement and equal treatment regarding access to social benefits are not an imperative means of achieving that goal. However, free movement should not actively hamper the achievement of an EU objective, such as the reduction of poverty and social exclusion. It is therefore concluded that a fairer balance needs to be struck between poverty and social exclusion goals, and the reduction of burdens on Member State welfare systems.

[134] See Chapter 3
[135] TFEU
[136] See Chapter 3

Although the exclusionary nature of restrictions under the CRD are questionable and likely to create imbalances, it is also clear that there is not as much EU competence in relation to these citizens as there is for jobseekers, or even students. Mobility of the inactive is not *per se* an EU objective, so it would not be legitimate to pursue and facilitate this and make it more possible by having broad rights to equal treatment. Although the objective of the internal market is to ensure free movement of *persons,*[137] this has to be weighed against the Member States' ultimate competence regarding their welfare systems. In terms of the hierarchy of citizenship, this category is the furthest removed from workers; therefore, it is the furthest removed from the EU-level ability to offer greater protection. Whilst the current balance in favour of Member States may seem prima facie legitimate, it would be possible to have a more delicate balance that would aid the achievement of EU objectives, it would also be possible to concretise the current legitimacy further. The following section will look at the scope for change in both respects.

### 3.4 Possible tools for re-balancing or legitimisation

*Using proportionality as a re-balancing tool*

It is generally open for the CJEU to make use of proportionality as a re-balancing tool, particularly in relation to conditions on economically inactive residency, as it is subject to undefined concepts such as "sufficient resources" and "unreasonable burden."[138] These concepts invite further assessment from national authorities and Courts in relation to individual claimants, which is supported by the wording of recital 16 of the CRD preamble.[139] Furthermore, these conditions constitute restrictions on free movement and therefore ought to be construed narrowly and in line with the principle of proportionality,

[137] TEU, Article 3(2)
[138] See Chapter 3; CRD, Article 7(1)(b)
[139] See Chapter 3

as per *Brey*.[140] This will always be the case so long as free movement is still the general, and fundamental, principle involved in welfare access cases.

It is therefore open for the CJEU to insist that the conditions in Art 7(1)(b) CRD are applied in light of recital 16, so after considering how lengthy the claim for benefits would be, the amount it would cost and the citizen's residency in a Member State. This would allow enough flexibility in the CRD to take into consideration disparities between welfare states and the circumstances of economically inactive citizens. Member States with long-term, expensive benefits (akin to those at issue in *Dano*) would be able to curtail access to these, but Member States offering short-term benefits may not; this would present a more effective way of balancing interests. Akin to the suggested reforms above, it would not change the legal landscape of free movement greatly, but would create a more nuanced and sensitive balance between otherwise competing interests.

The issues that may arise in relation to such a decision would be the same as in relation to jobseekers. Interpreting Art 7(1)(b) CRD narrowly would appear to be a U-turn by the CJEU on equal treatment, although the *Dano* judgment itself could be interpreted narrowly or broadly.[141] Furthermore, the vast array of possible scenarios that could fall under this provision would likely give the CJEU scope to depart from *Dano*. Uncertainty and administrative burdens may arise out of assessing claims on an individual basis. However, in order to create the fairest balance of interests, flexibility and therefore less certainty will be required. A more pressing issue for this re-balance is the willingness of national courts and administrations to challenge the status quo, which is favourable to Member States; also, the willingness of the CJEU to backtrack on *Dano, which* was widely commented on as a

[140] C-140/12 *Brey* (n.23), para 70; C-413/99 Baumbast (n.24), para 91; C/408-03 *Commission v Belgium* [2006] ECR I-02647, para 39
[141] See Chapter 3

positive development in EU law.[142] Although this would create a more genuine balance of interests, it may be an unlikely development.

*Reforming secondary legislation*

Aspects of the CRD are in need of clarification, and could be re-drafted in order to soften the current restrictions and produce a fairer balance, or explicitly codify current restrictions and create greater legitimacy for those restrictions.

A fairer balance could be struck by creating more categories of citizen, to take into account the different needs of those citizens particularly in relation to welfare. This would reduce the imbalances that are caused by a generalised exclusion from the welfare system, regardless of personal circumstances. The purpose and scope of the benefits that such a varied range of citizens may try to claim cannot be generalised. Generalisations are difficult enough for student and jobseeking benefits, as Member States construct their benefits differently. However, those who are expected to be 'self-sufficient' may require access to a varied range of benefits with different purposes, which are also construed very differently. However, this may simply create uncertainty where a citizen could fall under two possible categories. A more palatable reform could be codifying *Brey* to some extent, in Art 7(1)(b) CRD, to make it explicitly clear that the personal circumstances of the claimant need to be assessed before exclusion from welfare is permitted. This would fit with the pre-*Dano* case law, as well as supporting and enhancing the strength of recital 16 of the CRD preamble. It would also tailor the CRD to respond to the risks to specific welfare systems by specific individuals. However, much like the suggestions for reforming the CRD to be more favourable to jobseekers, this is an unlikely change to be made by the EU legislature when the CRD has been interpreted to represent the Member State interests so heavily.

[142] See Chapter 3

Another option would be to codify and clarify the *Dano* decision, by specifically linking the unreasonable burden with the social assistance system in Art 7(1)(b), in a manner that makes clear that claims for welfare benefits equate to a lack of legal residency. This is the only way that citizens will know for certain that they will not have their particular circumstances assessed under *Brey* proportionality, or the provisions of the CRD. Were this change to occur, Art 8(4) would also need to explicitly link sufficient resources to social assistance, which would shift its current position.[143] Recital 16 would also require re-drafting to implement the interpretation suggested by this thesis.[144] This would remove the duty on Member States to consider personal circumstances and to place a duty on them to exclude from their territory citizens who are not lawfully resident there. Whilst this appears an extreme step to take, the alternative is leaving citizens without a welfare safety net, and without specific residency rights.[145]

Although this would be a less desirable way of dealing with the possible imbalances created by the current application of EU law, it would reflect current case law trends and respect the competency dynamic between the EU and Member States, and would therefore be legitimate. At present, the CRD respects Member State interests in some aspects (i.e. Art 7(1)(b), Art 24(2)) but in other aspects appears geared towards upholding the fundamental right to free movement (Art 24(1), recital 16, Art 8(4)). Codifying the recent decisions of the CJEU would make it clear that Member State interests place legitimate limits on the right to equal treatment. Ensuring that this is coupled with corresponding restrictions on the actual freedom to move, through expulsion measures, will prevent citizens from being

[143] See Chapter 3
[144] See Chapter 3
[145] See Chapter 3

'tolerated' in Member States where they have no financial security. If the prevention of social exclusion is an objective of the EU, this is necessary.

*Enshrining changes in primary EU law*

It may not be entirely necessary, in relation to the economically inactive, to change primary law to reflect the current political and legal status of free movement. The Member States have ultimate competence regarding welfare access, and as already noted the economically inactive are the furthest away from the EU competence on the free movement of workers.

However, questions may still be raised about how this impedes the internal market objective of the EU, as well as the realisation of citizenship; both of which Member States are committed to whilst still bound by the Treaties. To reduce any lingering questions about legitimacy, as already noted above, the protection of Member States welfare boundaries should be constitutionalised at the European level.[146] This would legitimise the current imbalances that exist in favour of Member States across the entire range of economically inactive citizens, and also retain enough flexibility for the CJEU and the EU legislature in future to accommodate advancements in citizenship, should the political appetite change.

## Chapter Conclusions

This chapter has shown that there is an overall culture of imbalance created by the literal application of the CRD. The creation of harmonized restrictions on welfare access appear ineffective for balancing EU objectives with Member State interests, because they cannot possibly take into account the differences between welfare systems and migratory patterns within the individual territories of Member States. Furthermore, highly exclusionary restrictions on equal treatment do not appear to be legitimate as migratory statistics suggest

[146] See Section 1 on Jobseekers

low-levels of risk for Member States should the restrictions on equal treatment be lifted entirely.

The legitimacy of those high restrictions depends ultimately on where competence is strongest, as it is noted that Member States do not (and should not) need to show an actual financial risk in order to place restrictions on access to their welfare system. For jobseekers, there is strong EU competency because of the ties to free movement of workers. To legitimise the severe imbalance between EU objectives and Member State interests created by the CRD, the Member State interests would need to be constitutionalised at the EU level to put them on an equal footing with the EU objective of free movement. This would aid legitimacy across the board, in relation to the imbalances seen for all types of economically inactive citizen.

For students and other economically inactive citizens, the stratification of rights and corresponding duties appear more legitimate because of the Member States competence over their welfare systems and education. If stratification is to be legitimate, it should at least respect the hierarchy of citizens as it currently stands and afford jobseekers more extensive equal treatment to correspond to the EU competence in this area, or at least challenge that competence by making protection of the national welfare systems a fundamental part of EU law.

Across the board, there are issues with creating inconsistency and unfairness for EU citizens that have been extended rights and to have them later retracted, which is why only a political declaration will really suffice to stop the claims based upon older case law or notions of integration and proportionality.

Overall, issues of legitimacy and criticism of current approaches arise because of legal space, such as the current EU competence in relation to free movement, which Member

States are Treaty-bound to respect. In an area necessitating a very sensitive and complex balance of interests, legal space that is not used or removed will raise questions about the legitimacy of the decisions that are being made. Creating the best balance of interests will involve the CJEU taking up legal space, or it will involve the legislature and Member States reducing legal space through being more specific in case law, secondary legislation or preferably at the constitutional level.

# Thesis Conclusions

This thesis has engaged with the history of equal treatment rights for economically inactive categories of EU citizens. It has witnessed the widening and subsequent narrowing of citizenship rights, and analysed this progression from the point of view of the need to attain a balance of interests in EU law. The contents of this thesis provide an original contribution to the citizenship literature by focusing on the general scheme of EU law, as it stands after recent developments, and assessing its viability for balancing the interests of EU objectives and Member State interests. This thesis has sought to demonstrate the legitimacy, or illegitimacy, of the stratification of citizenship rights to their limits and conditions; it does so by establishing what EU objectives relate to the three types of inactive citizens considered, and whether those objectives are considered to a sufficient extent in the legislation and CJEU case law that has developed recently in this area.

The first chapter of this thesis presents a taxonomy of the previous and current rights of jobseekers to equal treatment with regard to access to welfare benefits. The chapter found that post-citizenship, the CJEU provided equal treatment to benefits intended to aid integration into the labour market for citizen jobseekers. Case law analysis found that the development of equal treatment was cautious, and Member State interests were taken into account by the 'real link' jurisprudence, which would prevent benefits access for those who did not have a genuine link to the employment market. The real link requirement was a success in terms of precluding restrictions that would not determine a link with the labour market, and allowing those that would in *D'Hoop, Collins* and *Ioannidis.* This took into account the genuine Member State interests in promoting the legitimacy and efficacy of benefit provision, whilst ensuring that free movement was not unduly prohibited. Academic commentary supported this view, and found that the proportionality requirement and 'real

link' methodology was an imperative tool for reducing the tension between Member State and EU interests.

The CJEU also initially succeeded in the post-CRD case law, by ensuring that jobseekers rights were not hampered by the inclusion of Article 24(2) and the express derogation from provision of social assistance. The current application of the law, as per *Alimanovic* and *Garcia-Nieto,* allows Member States to broadly define jobseeking benefits as 'social assistance' and therefore automatically exclude citizens from those benefits. All first time jobseekers, and workers who fall out of work and remain unemployed for 6 months, are excluded from claiming jobseekers allowances that are 'social assistance'. The chapter concluded that this was an insufficient mechanism for balancing free movement rights with Member State interests. Article 24(2) allows a severe imbalance, as it restricts the rights of workers already integrated into the employment market (*Alimanovic*), which evidences how little consideration is given to free movement objectives in relation to workers.

Furthermore, this imbalance will be sustained, as automatic exclusions cannot be tempered to respond to the needs of the two contrasting interests. Although the chapter found that the CJEU struggled with imposing the proportionality requirement of the overriding requirements doctrine in a precise manner, it was the best methodology for creating a sensitive and nuanced requisite balance. Proportionality can be softened or hardened to consider the ongoing development of social cohesion and solidarity within the EU. Automatic exclusions do not, and cannot, consider developments. This thesis found that it would be more legitimate for Article 24(2) to apply only to jobseekers who cannot demonstrate a link to the employment market, which would still reduce the amount of beneficiaries to its strictly intended purpose and therefore recognise Member State interests, but would also promote free movement of labour across the EU.

Chapter 2 established that the EU has very clear objectives regarding the attainment level and quality of education in the Union. This has a relationship with the internal market, and free movement of workers, as student mobility is seen as a desirable policy for attaining greater education. This, in turn, allows for more highly skilled workers who can fill labour shortages in the single labour market.

Member State interests, however, were incredibly strong in this area because of the retention of competence over their education systems as well as their welfare systems. Educational benefits require strong solidarity underpinnings to justify the provision and funding of education to beneficiaries. The chapter analysed case law and found that post-citizenship, students were extended financial solidarity when moving for the purposes of study (*Grzelczyk, Bidar*). The CJEU itself referenced the educational objectives of the EU as a reason for this extension. Unlike the shift in jobseekers jurisprudence, a strong right to equal treatment still exists in relation to students. However, the Court has balanced this by accepting robust restrictions on equal treatment, supported by the CRD in Article 24(2), in *Förster* as well as *Bidar*. Akin to the jobseekers developments, the CJEU abandons the principle of proportionality when interpreting the Member States' implementation of the CRD. The specific integrational links in *Förster* could have provided the Court with the ability to reject the long residency requirement, but it opted not to do so and as such weighted its decision in favour of Member State concerns around the financing of their education systems. In sum, Member States are permitted to exclude students from their welfare systems until they are permanently resident in the host territory. This thesis found this to be legitimate, because of the aforementioned conclusion that Member State interests are legitimised by the particular sensitivity of their competence in relation to education.

Chapter 2 also saw a strong reaction to migration discrimination, whereby the Court polarised the situation of host Member States with home Member States. Case law analysis

showed that Member States have difficulty in justifying restrictions on exportable benefits granted to nationals as proportionate, even for those with permanent residency elsewhere (*Thiele Meneses*, *Martens*). The CJEU also confirmed the fundamental objective of attaining education mobility within the EU to justify its strong application of the principle of proportionality, which required Member States to take into account innumerable factors to determine the level of integration with the claimant. This thesis found this approach to be unnecessarily insensitive to Member State concerns, but also agreed with academic commentary that suggests this may be legitimate, because there is no obligation under EU law to export student benefits, so it is open for Member States to secure their interests by reducing the amount of exportable benefits. Paradoxically, this would detriment the student mobility objectives of the EU; for this reason, the chapter finds that the CJEU should soften its approach to proportionality, and recognise the legitimacy of Member State concerns and restrictions on exportable benefits, particularly those that require a period of residency.

Chaper 3 considered the balance between Member State interests and internal market objectives regarding free movement of inactive citizens. The chapter found that the internal market objectives of the EU do include economically inactive citizens, as the internal market ensures the free movement of *persons* regardless of economic activity. However, the chapter also considered important Member State interests in this area relating to their exclusive competence over their welfare systems, and the overall lack of requisite social cohesion in the EU making welfare responsibility in host Member States unlikely.

The chapter established that residency conditions are the method of restricting claims by inactive citizens on the welfare sytem of host Member States. Citizens are required to have sufficient resources not to be an unreasonable burden on the social assistance system, in order to establish residency under EU law. This is open to vast interpretation, so the lack of express derogation from equal treatment regarding the economically inactive highlighted

the need for EU law, particularly interpreted by the CJEU, to promote a balance between these two contrasting factors.

The chapter analysed post-citizenship case law and found a drastic swing in methodology from the CJEU. The CJEU in *Brey* could be criticised for requiring Member States to consider too many factors before they could proportionately exclude a citizen from welfare access. Member States would have to look at the personal circumstances of a claimant, as well as the amount of financial support they required, and the impact on the particular benefits by EU citizens claiming it. Academic commentary criticised this for lacking any normative certainty, and creating a high administrative burden for Member State authorities. In *Dano,* only two years later, the opposite approach was taken and the CJEU now allows Member States to determine that citizens who claim social assistance are not legally resident if they make claims for social assistance. This completely removes the ability to use the CRD provisions on equal treatment and leaves citizens without recourse to the social assistance system. This thesis found that this interpretation was heavily weighted in favour of the Member States, and was unnecessary for the task of balancing EU objectives with Member State interests. Automatic exclusions are administratively efficient and politically desirable in the current Eurosceptic climate. However, they do not take into account the Member States commitment to the internal market, and have the propensity to place citizens in financially vulnerable position. Furthermore, automatic exclusions permit direct discrimination and frame Member State interests in a purely economic manner, both of which are prohibited under EU law.

Overall, the CJEU goes from balancing interests in an arguably over-sensitive and burdensome manner, to setting aside longstanding principles of EU law in order to allow Member States to carte blanche exclude citizens. This is unnecessary for the task of recognising the Member States' competence and concerns around their welfare systems, as

Chapter 3 found that the proportionality requirement in *Brey* could have been tailored to respond more effectively to Member State concerns. Member States could still shrink the pool of beneficiaries with assesments of individual circumstances and proportionality requirements, which would also reduce the economic focus of limitations on equal treatment and make restrictions indirectly discriminatory rather than directly so. The fact that the CJEU could, but opts not to, use a legitimate constitutional tool to create a more effective balance shows a clear deference to Member State interests, which will be sustained if there is no amendment.

The first three chapters have overarching in themes. In all three, strong objectives at the EU level are highlighted which legitimise the enhancement of free movement. In all three scenarios, a fundamental shift occurred in the case law, which weighted EU law in favour of Member State interests. *Förster* is to students, as *Dano* is to inactive citizens and *Alimanovic* is to jobseekers. Furthermore, in all three scenarios the CJEU shifts the focus of restrictions away from the proportionality of them, towards systematic and general exclusions, which apparently create more certainty. This thesis criticises this because the fundamental shift neglects previously important objectives, and gives the impression that powerful Member State interests negate these objectives and require automatic exclusions. Such an absolutist approach to the curtailing of citizenship rights is seldom necessary, as in cases where Member State interests are strong (i.e. *Dano*), proportionality will provide the same legal outcome. However, in some instances, the favouring of Member State interests can be seen as legitimate, which the final chapter seeks to establish.

The final chapter of this thesis re-highlighted the culture of imbalance that EU law currently presents. It also highlighted that automatic exclusions and literal interpretations of the CRD create a harmonised system of restrictions on benefits access, which does not take into account the diversity of welfare systems across the Member States, or varied migratory

patterns. Eurostat data confirmed that non-economic migration is low within the EU, which throws into question the need for the robust restrictions placed upon all categories of inactive citizens.

The chapter considered the hierarchy of citizenship and the relevant competencies surrounding each category of citizen reviewed in this thesis. As jobseekers are closest to the free movement of workers, the chapter found that the imbalance caused by high levels of exclusion is illegitimate. The CJEU or EU legislature could legitimately extend more equal treatment to jobseekers, in order to re-balance the interests of Member States with EU objectives. However, in the current political climate, this thesis suggests it may be wiser for the Member States to make a political declaration regarding the protection of their welfare systems at the EU constitutional level. This would stop the fundamental right to free movement from undermining the legitimacy of restrictions based around concerns for welfare responsibility.

The chapter re-established Member States valid concerns regarding educational mobility in the EU and found that some re-balancing would be more desirable than necessary for legitimising the current favouring of Member State interests. Since the balance could be struck more fairly, this would be desirable. This thesis recommends softening the application of the CRD with proportionality, and allowing greater recognition for Member State interests in regard to exportable benefits by lowering the proportionality standard for restrictions.

The valid concerns and exclusive competence of Member States in relation to welfare for the inactive is similar, so Member States may have their interests legitimately favoured in case law on inactive citizens. However, the manner in which this imbalance occurs is deeply unsatisfactory, despite the fact that the imbalance itself is prima facie legitimate.

Finding that a citizen does not have legal residency merely prohibits their access to welfare benefits, it does not prohibit their ability to stay in the Member State. Therefore, in order to fully take into account the EU objective of reducing social exclusion, and to ensure that free movement is adequately tailored to reflect the need for financial support, expulsion should be a legal result of refusal for benefit claims.

The thesis also considers that constitutionalising the protection of Member State welfare systems will legitimise most imbalances in this area of law; as it is the historically fundamental status accorded to citizenship and free movement that throws into question the sudden concern for Member State interests. That is not to suggest that further developments in citizenship should not be made, or that a balancing act would not be required, but that if this matter is of vital importance it should be constitutionalised to reflect this.

Overall, this thesis has analysed the current interpretation and application of free movement for economically inactive citizens, and found a general culture of imbalance in the law. This has resulted from the CJEU's shift in methodology, which previously required a sensitive balance to be struck between Member State interests and free movement rigths but now permits automatic exclusion from equal treatment for inactive citizens. The EU objectives which bolstered citizen's claims to equal treatment in the first instance, are detrimented by this shift and are not taken into consideration by the current application of the law. Furthermore, the method of permitting automatic exclusions is flawed, as it does not represent the interests of Member States in a legitimate manner. Instead of recognising the competence of Member States regarding welfare access and the historical boundaries fof the welfare state, the Court has based its more restrictive decisions upon highly abstract notions drafted into the CRD.

This research has found that in light of the development of EU law and social cohesion in the EU at present, an imbalance that favours Member State interests in this area may be legitimate. However, without this being explicitly recognised by the CJEU, secondary legislation or the Treaties, there will always be a fundamental clash between free movement as an EU objective and foundational pillar, and restrictions on access to social welfare.

The main findings of this thesis relate to the current application of free movement law and the balance it strikes between competing interests, the necessity of any imbalances, and the ability of the law to strike a better balance.

There are severe imbalances in the application of free movement law, EU objectives are placed at a detriment by rigorous application of derogations from free movement and equal treatment, which are heavily weighted towards protecting the interests of Member States wishing to curtail access to their welfare systems. Specifically, the objective of creating a single labour market[1] and securing the free movement of workers[2] is hindered by jobseekers' inability to claim any financial support whilst looking for work in another Member State. The educational objectives of enhancing student mobility[3] and increasing the quality and attainment levels of education[4] is impacted by the lack of financial support offered to EU mobile students outside the Erasmus[5] programme, unless they come from a member State with exportable student benefits.[6] The current application of residency conditions on other economically inactive citizens also impacts the success of the internal

[1] TEU, Article 3
[2] TFEU, Article 45
[3] TFEU, Article 165(1)
[4] TFEU, Article 9
[5] See Chapter 2
[6] See Chapter 2

market, free movement of persons and the application of fundamental rights and equal treatment.[7]

The current methodology for assessing restrictions taken by the CJEU allows Member State interests to be framed in a way that does not represent their concerns in a legitimate or fully founded manner. The lack of requirement to apply restrictions proportionately presents a view that Member States are at risk of 'benefit tourism', or an overburdening of their welfare systems. This is not the legitimate interests of the Member States, as there is little risk of any such abuse or burden. The legitimate interests of Member States lie in their ability to protect their competency regarding the redistribution of resources through the welfare system, the ability to safeguard their public finances, and to ensure that citizens are integrated enough with their territories in relation to the desired goal of the benefits claimed.

The law in this area has consistently struggled to maintain a balance between EU objectives and Member State interests, although the actual mechanics of the legal framework would provide a sufficient balance. Particularly, the use of proportionality in the derogation process and the ability for the CJEU to soften or harden evaluations of necessity, promote the recognition of all interests and a careful approach to restrictions in order to legitimately balance them. The abandoning of the use of proportionality in the case law has led to the imbalances described above. This thesis has concluded that imbalances are not always illegitimate, and may be legitimised by evidence of little Union competence in relation to certain citizens, or very strong Member State competence relating to the welfare system.

Mobility data has been used to show that robust restrictions on equal treatment are not necessary in order to protect the legitimate interests of the Member States. Mobility of

[7] See Chapter 3

welfare-reliant citizens across the EU is very low, and varies across Member States. Combining this with variances in the approach to social security and social assistance, this thesis finds that the CRD restrictions need to be applied in a flexible manner in order to sufficiently accommodate for the specific risks that arise within the Member States. There is no need for carte blanche application of restrictive rules, and such an application fails to consider divergent mobility patterns and the approach of individual Member States to welfare provision. A more nuanced approach to the application of restrictions on equal treatment is therefore necessary.

This thesis has presented an original contribution to the literature on citizenship and welfare access. Firstly, by providing a comparative analysis of approaches to the different categories economically inactive citizens, which highlights how a legitimate stratification of citizenship rights could exist. By examining the different EU objectives and competencies relating to the different categories of citizens, as well as the contrasting Member State interests, this thesis has shown how a different approach may need to be taken in the application of the citizenship rights to different categories. Such stratification is only legitimate if it allows the effective co-governance of citizenship, in order to allow greater protection where there is strong enough EU competency and objectives to justify doing so. So long as citizenship rules are more protective of citizens at the top of the EU hierarchy (those closer to workers, i.e. work-seekers), stratification of citizenship rights may be legitimate. Secondly, this research also presents a historical and current snapshot of the struggle to strike a balance in this sensitive area of law, and the imbalance that carte blanche restrictions create when important EU objectives are denied a presence in the case law.

Moreover, this thesis has utilised mobility data to rebuff the idea that a stringent, literal approach to restrictions is necessary to protect the economic interest of Member States.

Whereas the thesis does not suggest using mobility statistics as part of the justification process for legitimate restrictions on equal treatment, the very low mobility of economically inactive citizens provides evidence that the law is imbalanced. The current application of the free movement framework, particularly the CRD, is based upon a presumption of risk to welfare systems which remains unfounded. The suggestion is therefore to apply free movement law in a way that does not accommodate such a presumed risk, but accepts a degree of welfare responsibility for certain citizens.

Finally, this work has contributed concrete suggestions for where legal space exists to re-interpret certain principles ('social assistance', 'sufficient resources', 'unreasonable burden' and the principle of equal treatment) in light of proportionality, in order to give greater credence to EU objectives and re-balance the competing interests in this area. The ability, and desirability, of applying the CRD in a more proportionate manner has been recommended.

Recommendations have also been made that would legitimise the current imbalance, if the present approach to the law is deemed to be the correct approach. To legitimise the current imbalances, changes will be necessary at the Treaty level, and the secondary legislation level. Due to the focus of the Treaties on the attainment of the internal market, and the fundamental status awarded to freedom of movement and equal treatment, deference to Member State interests that detract from these factors will raise questions of legitimacy. This thesis has suggested constitutionalising the commitment to protect the integrity and boundaries of national welfare systems, to put that protection on an even level with free movement. This thesis has also suggested changes to the CRD regarding jobseekers, students and other economically inactive citizens is necessary. Currently, the CRD is worded in a manner which supports the use of proportionality. Recital 16 of the preamble,

and Article 8(4)[8] in particular cite the need to consider a citizen's circumstances before any decision can be made regarding the 'burden' the place on the host Member State. The fact that these provisions would need to be reformed to support the current application of the CRD, would suggest that the current imbalance created by the law was not an intended outcome.

This research opens up further questions, which lie outside the scope of this thesis but nonetheless warrant exploration. These questions mainly revolve around the future of EU citizenship. With Brexit looming, and the UK struggling to leave the Union in an agreeable manner, a future that involves more (rather than less) European influence may be more agreeable and therefore achievable for the remaining Member States. Already, the Union has committed to the recognition of a European Pillar of Social Rights,[9] which purports to guarantee support for free movement, welfare, education and equality. If this is to be the future, a keen eye should be kept on the case law from the CJEU regarding welfare equality and free movement. As this thesis highlights, failing to recognise *any* welfare responsibility for cross-border citizens leads to a detriment for EU objectives and goals.

This opens up a broader question on the future of the EU as a whole, whether more steps will be taken towards a federal Union, and how welfare responsibility will be allocated in such a Union. The Member State interests recognised in this thesis, regarding competency, solidarity and economics are deeply entrenched in their histories as individual nation states. This will only be changed in the event of a serious change in the power balance between the Member States and the Union bodies. Until a federal future is categorically accepted,

[8] CRD, (preamble) and Article 8(4)

[9] European Pillar of Social Rights booklet, 2019: < https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 07.11.19

or completely revoked as a concept, the role of free movement law will be to create a sensitive balance between territorial Member State interests and Union goals.

Further empirical research is also important and desirable, as this thesis could only use Eurostat data. Data should be collected that is able to show the degree of EU citizens claiming (or attempting to claim) the types of benefits relevant to them, and how the law has been applied for them to do so (or be restricted from doing so). This is particularly valuable for the acknowledgement of the inflated rhetoric regarding free movement abuse and benefit tourism. As already stated, this does not equate to necessitating the use of empirical evidence in the justification process, when derogating from equal treatment. The issue at hand is challenging the current wording of restrictions. Terms like 'unreasonable burden' and 'social tourism' are unhelpful for the navigation of co-governance in EU citizenship. The future must focus more on defined, non-loaded principles that determine where welfare responsibility exists, which will bring clarity and legitimacy to the law. The current interpretation and language of the law gives the impression of it being a bulwark against the utilization of free movement for nefarious purposes, or against the excessive burdening of welfare systems. This is not the case, the law's purpose is to draw a line that demarks where financial solidarity exists.

The fragility of the solidarity that had apparently built up to allow equal treatment in the earlier case law, which is non-existent the recent judgments, highlights that citizenship needs to have robust foundations. More research should therefore be conducted regarding how citizenship should operate, what exactly it should provide and how it can be hardened against influence from external factions. In the future, citizenship rights should not so easily be undermined by things such as economic crises, media perceptions or the rise of nation-centric politics.

Two prevalent issues require further research in the near future. The first is the creation of a road map or telos for EU citizenship. This thesis has highlighted the problem with having free movement at the heart of EU citizenship: it cannot be egalitarian without the agreement of much more EU influence. Whilst the issue is to be co-governed by the Member States and EU bodies, restrictions will be necessary and an economic hierarchy of citizens will exist. This leads to divergent enjoyment of citizenship rights, and ultimately divergent understanding of the European identity. The identity will be positive for those with the socio-economic background to enjoy the opportunities provided by EU citizenship, and negative for those who fall short of doing so. EU citizenship may benefit from being centred around democratic rights that can be shared equally amongst the peoples of the Union.

The use of language and rhetoric in the Union is also of pivotal academic importance. This thesis, as already mentioned, has highlighted how the current language of the law is unhelpful and somewhat arbitrary. Requiring *integration* or permanent residency is more likely to cause imbalances in the law, than requiring a 'link' between citizen and Member State. The latter were generally realised through personal circumstances and attempts to engage with the Member State labour market. The former seem to be more focused around the economic contributions a citizen has made, and their permanence within the territory. Research into how more sensitive language could be used to construct the borders of welfare and residency is therefore important, for the language of the law should reflect its true purposes, goals and ideals. This may come from the untangling of welfare responsibility and residency status, as the law currently applies crude requirements of 'sufficient resources' not to become a 'burden' or be 'permanently resident' in order to allocate welfare responsibility to the host Member State. All of these terms are loaded, they view citizens as a problem whilst unhelpfully enforcing the idea that a few may be tolerated if they are of sufficient economic worth, or share a long history with the host Member State.

This is not in line with the ideal of free movement, of ensuring high levels of mobility, or of creating a *European Union* Citizenship rather than a citizenship that allows individuals to forge solidarity link with one Member State over time.

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