Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2024, n. 2

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies" www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Indice-Sommario
2024, n. 2

Editoriale

FOCUS
La proposta di regolamento europeo in materia di filiazione (COM (2022) 695 final, del 7 dicembre 2022)

Il Focus contiene saggi e contributi elaborati a seguito della riflessione realizzata nel Convegno organizzato presso l'Università di Macerata (22 novembre 2023)

Articoli, Commenti e Note

FREE MOVEMENT OF STUDENTS AND ACCESS TO SOCIAL ADVANTAGES: THE 'EU STUDENT' AS A HOLDER OF INDIVIDUAL RIGHTS

Lorenzo Dello Iacovo*

1. Introduction

Student mobility has become a crucial component of the promise of social mobility that higher education bears, as evidence shows that a study abroad experience contributes significantly to career opportunities. Ever since the landmark case *Gravier*, the right to study abroad within the territory of the Union has been constitutionally enshrined in the supranational domain, as the CJEU held that nationals of the Member States enjoy such freedom in their capacity of European citizens[1]. Nonetheless, almost 40 years later, the EU institutions have not developed a coherent set of rules coordinating student financial aid systems and, as of today, many learners are still discouraged from exercising their freedom to move due to financial obstacles[2]. If the main purpose of free movement should be that of enabling students to attend abroad courses or training that are not available at home, it also holds true that this opportunity is stripped of its substance if it is not backed up by an effective right to cross-border education.

Double-blind peer reviewed article.
* Ph.D Candidate in Law and Institutions, Università degli Studi di Torino. E-mail: lorenzo.delloiacovo@unito.it.
[1] Court of Justice, Judgment of 13 February 1985, *Françoise Gravier v City of Liège*, case 293/83.
[2] Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions, *Achieving the European Education Area by 2025*, of 30 September 2020, COM(2020) 625 final, p. 7.

Although commitment to the Bologna project requires public institutions to "actively address obstacles to mobility for vulnerable, disadvantaged or underrepresented groups of students and staff"[3], with a view to ensuring equal access for all to the learning opportunities offered by international programmes, the issue of student finance of free movers still remains unsolved. Numerous Member States have established financial support schemes, the features of which can vary significantly due to highly diverse cultural traditions, higher education policies and economic development[4]. However, due to the national dimension of these systems, student benefits such as grants and loans are not always available for those who wish to pursue university studies in another EU country. This is among the reasons why several recent publications have underlined that higher education in Europe still fails to reduce socio-economic inequalities[5].

Despite the emphasis that the most recent EU policy documents have placed on the need to encourage student mobility, little has been done to ensure that EU mobile students can base their claims on a solid legal basis. Students do not enjoy an individual right to access financial aid in the host Member State unless one of their parents (or, more rarely, they themselves) perform a genuine and effective economic activity. If that's not the case, they may have to comply with the stringent requirements imposed on EU citizens or ultimately resort to their home Member State. However, this dual understanding of student finance as an individual right of the student and as a right that is derived from the economic activity performed by the parent-worker creates tensions within free movement law that need to be addressed.

Firstly, on a *systemic* level, the principle whereby a worker may export student finance from his state of employment to his children residing abroad is perceived as unfair and increasingly contested at the level of the Member States. The growing discontent has led several countries to try and restrict the scope of this right, through the adoption of policies in clear breach of the principle of non-discrimination enshrined in Article 45 TFEU. These lingering tensions contribute to the enduring of a hostile climate, which diverts the attention of the public debate from the need to grant more robust rights to mobile students to the need to protect national welfare systems.

Secondly, on an *individual* level, differential treatment can occur if student benefits are both understood as social advantages for the student and for the parent-worker, depending on whom the exercise of free movement is attributable to. The recent case

[3] EHEA, *Principles and Guidelines to Strengthen the Social Dimension of Higher Education in the EHEA*, Rome Ministerial Communiqué 2020 - Annex II, available at https://www.ehea.info/Upload/Rome_Ministerial_Communique_Annex_II.pdf), p. 7.

[4] Aid can be paid directly to students in the form of a grant, which does not have to be paid back, or as a loan, which does have to be repaid; it can be granted directly to students or to their families indirectly in the form of family allowances or tax relief, and so on. For a comprehensive comparative analysis of different national student fee and support systems that can be found in the European Union, see: EUROPEAN COMMISSION/EACEA/EURYDICE, *National Student Fee and Support Systems in European Higher Education - 2020/21*, Luxembourg, 2020.

[5] See, *inter alia*: M. SAVAGE, *The Return of Inequality*, Harvard, 2021; T. PIKETTY, *Une Brève Histoire de l'Égalité*, Paris, 2021; C. LAVAL, F. VERGNEL, *Éducation Démocratique*, Paris, 2021; M. S. MERRY, *Educational Justice*, New York, 2021.

MCM v Centrala studiestödsnämnden has brought attention to this issue, as it again showed that vesting the CJEU with the task of sorting out the breadth of students' mobility rights may produce inequalities and create further dilemmas. Due to the persistent absence of a European instrument regulating the funding of student mobility, the Court of Justice plays a crucial role in concretely defining the legal expectations that students might have as regards the possibility to access funding for their studies abroad. However, since the Court does not follow a coherent strategy concerning social policy, such decisions might lead to unpredictable effects.

In addition to that, the case offers an opportunity to revisit the everlasting question of how financial responsibility for mobile students should be distributed. Students end up being linked to the funding scheme of their host State or of their Member State of nationality along parallel lines, depending on whether the exercise of free movement is attributable to they themselves or to their parents. This dual scenario is a source of uncertainty, as it leaves the question unanswered: who ultimately bears the brunt of paying for student finance? The lack of clarity contributes to the existing problem of uneven burden sharing and points out to the limitations of redistributive policy at the EU level.

The contribution will first attempt to provide suggestions within the free movement legal framework, by formulating considerations on the case-law concerning the export of student finance respectively from the host State (para. II) and from the home State (para. III), with a view to identifying the main obstacles and outlining the criteria elaborated by the Court to assess the degree of connection that students need to demonstrate in order to benefit from social entitlements in the respective States. The findings suggest rethinking established principles in EU free movement law in such a way that student mobility rights can not only be recognized and upheld, but also reconciled with the need to respect Member State autonomy in the organisation of their higher education systems. However, to provide mobile students with a truly effective right to financial support for their studies abroad, legislative action might prove necessary at this stage.

2. Access to student finance in the host State

Albeit the right to have access to higher education studies represents a shared constitutional tradition across the EU[6], the right to education guaranteed by the EU

[6] According to the shared constitutional traditions of most Member States, access to higher education must not be made universal, but only available depending on an individual's abilities. See, as examples: Article 34, Constitution of the Italian Republic: "Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations"; Article 16(4) Constitution of the Hellenic Republic: "All Greeks are entitled to free education on all levels at State educational institutions. The State shall provide financial assistance to those who distinguish themselves, as well as to students in need of assistance or special protection, in accordance with their abilities"; Article 74(4) Portuguese Constitution: "In implementing the education policy, the State is charged with: […] (d) In accordance with his capabilities, guaranteeing every citizen

Charter of Fundamental Rights holds a purely programmatic character[7]. That is in line with the division of competences provided for by the Treaty, according to which the legislative competence of the EU in the field of higher education is subject to a two-fold constraint[8]: recourse to the ordinary legislative procedure is only allowed for the adoption of "incentive measures" and any harmonisation is excluded[9]. Accordingly, Member States retain full responsibility with respect to the organization and the financing of their education and vocational training system[10], meaning that they are not subject to any obligation to provide a funding system for higher education studies pursued in another Member State[11].

Even in the absence of an obligation in this regard, if a Member State decides to provide for educational benefits of any sort, it must ensure that their conditions of eligibility are compliant with European Union law. National policies granting social advantages can be struck down if they hinder the internal market freedoms[12] or result discriminatory in nature[13]. That is because the principles of free movement and non-discrimination on grounds of nationality demand Member States to allow intra-EU migrants to access their welfare systems on an equal footing with their own nationals, provided that specific conditions are met. To this end, the legal category under which EU students exercise their right to free movement plays a fundamental role in determining

access to the highest levels of education, scientific research and artistic creation"; Article 33(2) Charter of Fundamental Rights and Freedoms of the Czech Republic: "Citizens have the right to free elementary and secondary school education, and, depending on particular citizens' ability and the capability of society, also to university-level education"; Article 41 Constitution of the Republic of Lithuania: "Higher education shall be accessible to everyone according to individual abilities. Citizens who are good at their studies shall be guaranteed education at State schools of higher education free of charge".

[7] Merely requiring the Member States to implement it through the adoption of national policies. See, to this effect: art. 51 of the Charter of Fundamental Rights of the European Union. See also: L. PASQUALI, *L'accesso all'insegnamento superiore nello spazio giuridico europeo: Considerazioni su un diritto sociale internazionalmente garantito*, in E. CATELANI, R. TARCHI (a cura di), *I diritti sociali nella pluralità degli ordinamenti*, 2015, Napoli, p. 89.

[8] For an overview of the EU competences in the field of higher education, see: B. GAGLIARDI, *Le competenze dell'Unione Europea in materia di istruzione superiore: un confronto con lo "Spending Power" degli Stati Uniti d'America*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2021, n. 3, pp. 675-721.

[9] Article 165(4) TFEU: "In order to contribute to the achievement of the objectives referred to in this Article: - the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, - the Council, on a proposal from the Commission, shall adopt recommendations".

[10] Article 165(1) TFEU: "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity".

[11] Court of Justice, Judgment of 24 October 2013, *Andreas Ingemar Thiele Meneses v Region Hannover*, case C-220/12, para. 25.

[12] Court of Justice, Grand Chamber, Judgment of 23 October 2007, *Rhiannon Morgan v Bezirksregierung Köln* and *Iris Bucher v Landrat des Kreises Düren*, joined cases C-11/06 and C-12/06, para. 28; Court of Justice, Judgment of 18 July 2013, *Laurence Prinz v Region Hannover* and *Philipp Seeberger v Studentenwerk Heidelberg*, joined cases C-523/11 and C-585/11, para. 30.

[13] Court of Justice, Grand Chamber, Judgment of 13 April 2010, *Nicolas Bressol and Others, Céline Chaverot and Others v Gouvernement de la Communauté française*, case C-73/08, para. 40.

access to social rights in the host State and deeply affects the extent of their inclusion in the welfare state[14].

The strongest protection is indubitably awarded to economically *active* citizens ('EU workers'[15]) and their dependent family members under the free movement of workers provisions. Secondary legislation reproduces the principle of equal treatment in the field of social advantages,[16] by stating that a national of a Member State shall enjoy, in the territory of another Member State, the same social and tax advantages as national workers (Article 7(2) of Regulation 492/2011). The protection awarded to economically active migrants is particularly strong, as they derive an *absolute* right to equal treatment in their Member State of employment. Hence, an EU student can in principle claim maintenance grants if she performs some kind of employment in the host country, or more often, if she's a dependent family member of an EU migrant worker.

The position of economically *inactive* students is rather different. In their capacity of EU citizens, they are not granted automatic access to the welfare system of the host country, but merely a right to move and reside freely in the territory of the Member States[17]. The expectation that mobile EU citizens shall enjoy 'social solidarity'[18] has been judicially constructed[19]: beginning with *Martinez Sala*[20], which first allowed non-economically active citizens to rely upon the principle of non-discrimination to get access to social assistance, and then in *Grzelczyk*[21], where the CJEU called for the acceptance of "a certain degree of financial solidarity" between nationals of a host Member State and nationals of other Member States[22]. However, the dissatisfaction that started brewing with regard to the 'judicial creativity' of the Court led the EU legislator to codify the conditions for the exercise of the right to free movement for EU citizens, including the rules

[14] S. MANTU, P. MINDERHOUD, *Struggles over social rights: Restricting access to social assistance for EU citizens*, in *European Journal of Social Security*, 2023, no. 1, p. 3.
[15] For a definition of this concept, see: S. GIUBBONI, *Being a worker in EU law*, in *European Labour Law Journal*, 2018, no. 3, pp. 223 ff.; N. KOUNTOURIS, *The Concept of Worker*, in *European Labour Law: Fragmentation, Autonomy and Scope*, 2018, no. 2, pp. 192 ff.; A. SAGAN, *The classification as worker under EU law*, in *European Labour Law Journal*, 2019, no. 4, pp. 353 ff.
[16] Court of Justice, Judgment of 2 April 2020, *Landkreis Südliche Weinstraße v PF and Others*, case C-830/18, para. 29.
[17] Article 21(1) TFEU.
[18] On the meaning of this term, see: S. MANTU, P. MINDERHOUD, *Exploring the limits of social solidarity: welfare tourism and EU citizenship*, in *UNIO - EU Law Journal*, 2016, no. 2, p. 4; M. FERRARA, *The European Union in search of solidarity*, in *Annals of the Fondazione Luigi Einaudi*, 2017, no. 51, pp. 227 ff.
[19] For a recent theoretical reconstruction of the development of the CJEU case law as regards EU citizens' access to the welfare state, see: F. COSTAMAGNA, S. GIUBBONI, *EU citizenship and the welfare state*, in D. KOSTAKOPOULOU, D. THYM (eds.), *Research Handbook on European Union Citizenship Law and Policy* Konstanz, 2022, p. 225 ff.
[20] Court of Justice, Judgment of 12 May 1998, *María Martínez Sala v Freistaat Bayern*, case C-85/96.
[21] Court of Justice, Judgment of 20 September 2001, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, case C-184/99. Equally, the CJEU clarified that the right of the host Member State to terminate the right of residence of an EU citizen should not be the automatic consequence of relying on the social assistance system. For an overview of the case, see: A. ILIOPOULOU, H. TONER, *Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, in *Common Market Law Review*, 2002, no. 39, p. 619 ff.
[22] *Ibid.* paras. 29-46.

regarding access to social assistance, through the adoption of Directive 2004/38/EC. As a result, equal treatment in the enjoyment of social advantages is now conditional on the requirement of legal residence in the host country, which is in turn subject to the possession of sufficient financial resources not to become a burden on the social assistance system of the host Member State[23]. In addition to that, with specific regard to student finance, Member States are exempted from awarding "study grants and study loans" to persons *other than workers* prior to the acquisition of permanent residence[24], which is obtained after legally residing in the host Member State for at least 5 continuous years[25].

Ever since the adoption of Directive 2004/38, the Court also proved more attentive to the Member States' concerns regarding potential interference in their competence in the social sphere. In the landmark case *Bidar*[26], it held that, with a view to preserving the financial sustainability of their welfare systems, Member States are allowed to grant social assistance only to those applicants who have also demonstrated "a certain degree of integration" into their society[27]. As a result, national welfare policies may lawfully link the enjoyment of social benefits to additional integration requirements, such as length of residence, which is considered the most relevant indicator for the purpose of this assessment[28]: the CJEU has clarified that in *Förster*[29], by holding that a five-years continuous residence condition is an appropriate measure to ensure that applicants have a sufficient degree of attachment to the Member State granting the aid.

The stringent conditions imposed on economically inactive members of the polity who wish to access welfare benefits in the territory of the Union illustrate why EU citizenship is often referred to as 'market citizenship'[30], indicating a notion that relies heavily on a "functional concept of the individual […] as a holder of economic

[23] Article 24(1) Directive 2004/38/EC. The right to legal residence in the host Member State is also conditional on the requirement of possessing comprehensive sickness insurance. See: Article 7(1) of Directive 2004/38/EC.
[24] Article 24(2) Directive 2004/38/EC.
[25] Article 16(1) Directive 2004/38/EC.
[26] Court of Justice, Grand Chamber, Judgment of 15 March 2005, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, case C-209/03.
[27] *Ibid.* paras 57-63. However, national authorities could not limit access to student financial aid by solely relying on formal criteria, such as the duration of residence in the awarding Member State, instead having to take into considerations the existence of "a genuine link with the society" as a whole. For a critical appraisal of the case see: C. BARNARD, *Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*, in *Common Market Law Review*, 2005, n. 42(5), pp. 1465-1589. See, also: N. RENNUY, *The Trilemma of EU Social Benefits Law: Seeing the Wood and the Trees*, in *Common Market Law Review*, 2019, no. 6, pp. 1549-1590, 1557, where the author refers to the "integration-protection" nexus which permeates EU social benefits law.
[28] C. BRUZELIUS, *Freedom of movement, social rights and residence-based conditionality in the European Union*, in *Journal of European Social Policy*, 2019, n. 29(1), p. 70; S. MANTU, P. MINDERHOUD, *Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens*, in *European Journal of Migration and Law*, 2019, n. 21, p. 313 ff.
[29] Court of Justice, Grand Chamber, Judgment of 18 November 2008, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, case C-158/07.
[30] M. EVERSON, *The Legacy of the Market Citizen*, in J. SHAW, G. MORE (eds.), *New Legal Dynamics of European Union*, Oxford, 1995, p. 73. See also: N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, no. 6, pp. 1597-1628.

freedoms"[31]. Access to student finance in the host Member State is normally precluded to students who are economically inactive, as this benefit can only be claimed pursuant the obtainment of permanent residence, clearly showing how the Citizens Directive is "mostly imbued with an 'integration through work' philosophy"[32]. A similar understanding of the EU citizen may prove difficult to reconcile with the need to ensure the effective mobility of students, which are by definition economically inactive citizens wishing to gain valuable knowledge and training before they can become productive members of the labour market. Hence, it is to EU workers that the next section will turn, with a view to identifying the extent to which engaging in an economic activity can justify access to benefits for their dependent children.

2.1. Export of student finance to dependent children: signs of 'erosion' of the free movement of workers

The position of economically active migrants (and their dependent family members) was traditionally understood as granting them access to social advantages on an equal footing with the nationals of the host Member State, as no significance was attached to other factors, such as the duration of their residence or employment. The 'sufficient link' case-law developed with regard to economically inactive citizens in principle does not affect economically productive members of the labour market, whose link of integration can be presumed as a result of their contribution to the financing of social policies through payment of taxes by virtue of their employment[33]. As a consequence, integration requirements are normally admissible only outside the scope of Article 45 TFEU. Nonetheless, the absolute nature of this right has been questioned in the last two decades, as the CJEU has gradually but consistently extended the application of the 'genuine link' test to a specific category of EU workers, namely frontier workers. As they retain residence in their State of origin, the latter are sometimes perceived as second-class migrants and their entitlement to full equal treatment has been disputed in several occasions[34].

Originally, the Court made no distinction between migrant and cross-border workers as regards the application of the non-discrimination clause, by relying on the principle according to which freedom of movement shall be enjoyed "without discrimination by permanent, seasonal and frontier workers"[35]. Hence, it had initially clarified that access to social advantages in the State of employment should extend without discrimination to

[31] S. KALDENBACH, *Union Citizenship*, *Jean Monnet Working Paper* 9/03, 2003, p. 5 ff.
[32] D. KRAMER, *From worker to self-entrepreneur: The transformation of homo economicus and the freedom of movement in the European Union*, in *European Law Journal*, 2017, n. 23, pp. 172-188, 185.
[33] Court of Justice, *Martinez Sala*, cit., para. 25; Court of Justice, Judgment of 14 June 2012, *European Commission v Kingdom of the Netherlands*, case C-542/09, paras. 65-66. As regards workers' equal access to social entitlements in their capacity of economic agents, see: C. O'BRIEN, *I Trade, Therefore I Am: Legal Personhood in the European Union*, in *Common Market Law Review*, 2013, pp. 1643-1684.
[34] A. ILIOPOULOU-PENOT, *Le rattachement à l'Etat comme critère de l'intégration sociale*, in *Revue des affaires européennes*, 2013, no. 4, pp. 651-655, 655.
[35] See: recital 5 of Regulation EU 492/2011.

frontier workers[36], the dependent children of which could claim student benefits under the same conditions as the children of national workers[37].

However, less than ten years later, the first signals of a paradigm shift were starting to become visible. The first overt application of integration tests to frontier workers occurred in the rulings in *Hartmann*[38] and *Geven*[39], where the CJEU clarified that a Member State could lawfully refuse to grant social entitlements (in particular a child-care benefit) to non-resident workers who only had a 'minor' occupation in their State of employment[40]. According to the Court, a "substantial contribution to the national labour market" had to be considered as a valid factor of integration in the host State[41]: as a result, frontier workers who were employed for less than 15 hours per week were considered not sufficiently integrated therein and could be legitimately excluded from the enjoyment of welfare benefits.

Although relating to a different type of social advantage, these judgments would later serve as precedents to justify a line of case law concerning student finance for higher education studies: a few years later, in fact, *Commission v Netherlands*[42] confirmed that the Member States power to require a certain degree of integration before providing study grants is not limited to situations in which the applicants are economically inactive citizens[43]. This reading was then confirmed in *Giersch*[44], where the Court blatantly allowed for differential treatment between migrant and frontier workers depending on their level of integration[45], as it stated that "the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State[46]", thus clearly confirming the applicability of the 'genuine link' test to the former. Here the CJEU took it a step further: whereas in the ruling in *Commission v Netherlands* participation in the host State's employment market *per se*, regardless of its duration,

[36] Court of Justice, Judgment of 27 November 1997, *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij*, case C-57/96, paras. 50-51.
[37] Court of Justice, Judgment of 8 June 1999, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, case C-337/97, para. 21.
[38] Court of Justice, Grand Chamber, Judgment of 18 July 2007, *Gertraud Hartmann v Freistaat Bayern*, case C-212/05.
[39] Court of Justice, Grand Chamber, Judgment of 18 July 2007, *Wendy Geven v Land Nordrhein-Westfalen*, case C-213/05.
[40] *Ibid.* para. 26. For a critical appraisal of these judgments see: M. COUSINS, *Free Movement of Workers, EU Citizenship and Access to Social Advantages*, in *Maastricht Journal of European and Comparative Law*, 2007, no. 4, p. 343 ff.; S. 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*, in *Yearbook of European Law*, 2008, no. 27, p. 167 ff.
[41] *Ibid.* para. 25.
[42] Court of Justice, *Commission v the Netherlands*, cit.
[43] *Ibid*. para. 57.
[44] Court of Justice, Judgment of 20 June 2013, *Elodie Giersch v Etat du Grand-Duché de Luxembourg*, case C-20/12.
[45] S. O'LEARY, *The curious case of frontier workers and study finance:* Giersch, in *Common Law Market Review*, 2014, no. 51, pp. 601-622.
[46] Court of Justice, *Giersch*, cit., paras. 64-65.

seemed to establish a strong presumption of integration[47], in *Giersch* the court upheld a provision which made study grants accessible to non-resident workers only insofar as they had worked at least five continuous years in the host State. Although the measure at issue was struck down at the proportionality stage, the validity of such an additional requirement was then confirmed in two following judgments, *Bragança Linares Verruga*[48] and *Aubriet*[49], albeit with some clarifications[50].

It is worth underlying that, whilst it recognised the indirectly discriminatory nature of the national legislation at issue, the Court accepted that it could be justified by the Member State's ambition to increase the proportion of its residents with a higher education degree, which it classified as a legitimate objective in the public interest[51]. In doing so, for the first time in a case involving student finance, it welcomed an unequivocally protectionist justification[52], relating to a Member State's desire to invest in its own economy.

These judgments epitomise an important turnaround in the Court's jurisprudence, which had previously established that, at least with regard to economic free movement law, "aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the

[47] A. HOOGENBOOM, *Export of Study Grants and the Lawfulness of Durational Residency Requirements: Comments on Case C-542/09, Commission v the Netherlands*, in *European Journal of Migration and Law*, 2012, no. 14, p. 425. In *Commission v Netherlands* sole reliance on a predetermined residency requirement was considered an inappropriate means to assess the strength of frontier workers' connection to the host State, as it ignored the link arising from their employment and contributions: Case C-542/09 *Commission v the Netherlands*, cit. paras. 65-66. See also: S. MONTALDO, *Frontier Workers and Access to Welfare Benefits in the Member State of Employment: Too Much of a Strain?*, in *Politiche Sociali*, 2017, no. 3, p. 499, where the author underlines how participation in the employment market required a restrictive interpretation of the 'genuine link' test.

[48] Court of Justice, Judgment of 14 December 2016, *Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la recherche*, case C-238/15.

[49] Court of Justice, Judgment of 10 July 2019, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, case C-410/18.

[50] The Court expressed the need to allow for consideration of breaks in the working period that, due to their limited duration, are "not liable to sever the connection" between the applicant and the awarding Member State. See: Court of Justice, *Bragança Linares Verruga*, cit., paras. 29-30. Moreover, it held that other significant periods of employment performed before the application should be considered for the purpose of calculating the effective duration of work. See: Court of Justice, *Aubriet*, cit., para. 45. For further analysis, see: C. JACQUESON, *Any news from Luxembourg? On student aid, frontier workers and stepchildren: Bragança Linares Verruga and Depesme*, in *Common Market Law Review*, 2018, no. 55, p. 901 ff.; J. SILGA, *Luxembourg Financial Aid for Higher Studies and Children of Frontier Workers: Evolution and Challenges in Light of the Case-Law of the Court of Justice*, in *European Public Law*, 2019, no. 1, p. 13 ff.

[51] Court of Justice, *Giersch*, cit., para. 48. A similar objective, which was presented as a 'social' aim, appears clearly economic in nature: its pursuit was indeed justified in light of the urgent need for Luxembourg to make the transition to a knowledge-based economy. See: Opinion of Advocate General MENGOZZI, delivered on 7 February 2013, in the case C-20/12, *Elodie Giersch and Others v Etat du Grand-Duché de Luxembourg*, paras. 42-45; Court of Justice, *Giersch*, cit., paras. 53-55.

[52] A. TURMO, *The Pernicious Influence of Citizenship Rights on Workers' Rights in the EU: The Case of Student Finance*, in N. CAMBIEN, D. KOCHENOV, E. MUIR (eds.), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges*, Leiden, 2020, pp. 305-334, 315.

Treaty"[53]. Moreover, whereas the CJEU had traditionally refrained from formulating predictions as to the students' future career choices, by holding that the knowledge acquired in the course of higher education does not "assign a student to a particular geographical market"[54], here, instead, it seems to imply that the student's level of integration in the host Member State may contribute to determine her future behaviour[55]. According to this logic, students who detain their residence in the funding Member State are considered more deserving of financial support, as they are more likely to return to its labour market upon completion of their studies, even if those studies were undertaken abroad[56]. Conversely, frontier workers and their dependent children, who retain their residence in their State of origin, may be required to fulfil additional conditions to demonstrate a sufficient level of integration in the host State, attaining, for instance, to the length of their employment relationship.

This line of case-law ultimately marked the acceptance of a new form of prospective reciprocity, labelled as the "investor's"[57] or the "human capital" approach[58], according to which Member States should reasonably expect students whose studies they have funded to return after graduation in order to enrich their employment market[59]. After almost thirty years, the CJEU seemed to finally distance itself from the conclusion reached in its seminal case *Gravier*[60], where free movement was firstly construed as an instrument enabling students to obtain a degree in the Member State where they wished to work and to complete their education according to their desires and expectations[61]. The cases concerning the Luxembourg student finance policy show that the Court's priority has now shifted from allowing the individual student to choose to move where she can thrive, to ensuring that the student returns to the Member State which has financed her studies in order to contribute to the development of its economy (rather than the economic

[53] Court of Justice, Judgment of 6 June 2000, *Staatssecretaris van Financiën v B.G.M Verkooijen*, case C-35/98, para. 48.
[54] Court of Justice, Judgment of 25 October 2012, *Déborah Prete v Office national de l'emploi*, case C-367/11, para. 45.
[55] S. O'LEARY, *The curious case of frontier workers and study finance:* Giersch, cit., p. 601.
[56] Court of Justice, *Giersch*, cit., para. 67; Court of Justice, *Commission v Netherlands*, cit., paras. 76-77. However, requirements based on past residency do not seem to convincingly ensure the students' return upon graduation. Indeed, a similar objective could be achieved by making the grant of portable funding conditional upon the student's returning to the funding State's to work there for a minimum period of time. To this effect, see: Opinion of Advocate General SHARPSTON, delivered on 16 february 2012, in the case C-542/09, *Commission v the Netherlands*, para. 147: "it is not self-evident that past residence is a good way of predicting where students will reside and work in the future".
[57] A. TURMO, *The Pernicious Influence of Citizenship Rights on Workers' Rights in the EU*, cit., p. 316.
[58] H. SKOVGAARD-PETERSEN, *Market Citizenship and Union Citizenship: An Integrated Approach? The Martens Judgment*, in *Legal Issues of Economic Integration*, 2015, no. 3, pp. 281-300, 296.
[59] H. SKOVGAARD-PETERSEN, *There and Back Again: Portability of Student Loans, Grants and Fee Support in a Free Movement Perspective*, in *European Law Review*, 2013, no. 6, pp. 783-804, 798. This approach has been criticized as it seems contradictory on a conceptual level to frame portable student benefits both as a means to increase student mobility, which is linked to the general EU objective of promoting the free movement of persons, and as an investment in the State's own economy, which is a purely national and protectionist aim.
[60] Court of Justice, *Gravier*, cit.
[61] *Ibid.* paras. 23-24.

development of the internal market)[62]. Although the Court's interpretation of the relevant provisions arguably constitutes a distortion of the supposed aims of freedom of movement[63], these judgments suggest that understanding financial aid as a social advantage to be enjoyed by the students' parents raises issues of reciprocity that need to be addressed.

2.2. Problematizing free movement of workers: understanding student finance as a benefit for the parent-worker

The progressive turnaround in the Court's case law has mainly been analysed in the literature from the perspective of frontier workers, who witnessed a significant weakening of their right to equal treatment in the access to social advantages[64]. However, less attention has been devoted to the peculiar circumstances that these judgments have been adopted in, with regard to the specific nature of the benefits involved and the broader implications arising from the application of economic free movement law to benefits that are ultimately intended to be enjoyed by economically inactive citizens.

Indeed, as regards the field of student finance, the principle of free movement of workers has been increasingly perceived as posing a threat to what is considered a fundamental prerogative of the States: ensuring a fair allocation of their educational resources[65]. The dissatisfaction that has emerged vis-à-vis the supra-national rules regarding access to social advantages should come as little surprise given that the current conceptualization of the principle of non-discrimination still dates back to the Treaty of Rome in 1957, at a time where the European Union only comprised its founding members. It is even less surprising considering that the CJEU, from that moment onwards, has progressively extended the breadth of Member States' obligation to treat workers equally, through an expansive interpretation of Article 45 TFEU. Not only it broadened the category of welfare benefits that shall be enjoyed by migrant workers in the host State well beyond the context of work, by including "all social and tax advantages, whether or not attached to the contract of employment"[66]. Few years later, in the well-known *Lebon*[67] case, the scope of the non-discrimination clause enshrined in article 7(2) of Regulation 1612/68 (now Regulation 492/2011) was interpreted as to include not only the worker, but her dependent family members as well.

---

[62] S. O'LEARY, *The curious case of frontier workers and study finance:* Giersch, cit., p. 614.
[63] A.P. VAN DER MEI, *EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems*, in M. DOUGAN, E. SPAVENTA (eds.), *Social Welfare and EU Law – Essays in European Law*, Oxford, 2005, pp. 219-240, 228.
[64] A. TURMO, *The Pernicious Influence of Citizenship Rights on Workers' Rights in the EU*, cit.; S. MONTALDO, *Frontier Workers and Access to Welfare Benefits in the Member State of Employment*, cit.
[65] S. JORGENSEN, *The Right to Cross-Border Education in the European Union*, in *Common Market Law Review*, 2009, no. 5, pp. 1567-1590, 1573.
[66] Court of Justice, Judgment of 30 September 1975, *Anita Cristini v. Société nationale des chemins de fer français*, case 32/75, para. 13.
[67] Court of Justice, Judgment of 18 June 1987, *Centre public d'aide sociale di Courcelles contro Marie-Christine Lebon*, case 316/85.

As a result, the right to enjoy social advantages in the host State has become reliant on the employment of the parent-worker regardless of where her child or spouse lives and resides, thus allowing migrant and frontier workers to export welfare benefits to their dependent family members residing in their home State. Whereas a similar principle might seem fit for those social entitlements that are meant to compensate costs that the bread-winner has actually sustained, it proves harder to justify when it concerns benefits, such as student finance, "whose social function is primarily to serve as a trampoline for individual empowerment" of the beneficiary[68]. Indeed, it is not as obvious that frontier workers' children not residing in the parent's State of employment should receive portable financial aid: several Member States offer such support to students in their capacity of independent young adults with a view to facilitating access to education regardless of their parents' intention (or possibility) to support them financially[69].

Notwithstanding this, for many years to come the principle remained largely unchallenged. However, in today's profoundly changed socio-economic landscape[70], the criteria underpinning exportability of social advantages have begun to create tension at a political and institutional level[71]. This mechanism has increasingly raised concerns among Member States, which claim that such a broad interpretation of the prohibition of discrimination could lead to "study grant forum shopping" that their national finances could not bear[72]. In other words, they fear that allowing for the exportability of social benefits to the workers' children residing abroad could overburden their welfare systems with responsibilities of redistribution that they believe should be addressed at the EU level[73]. As a consequence, feelings of "welfare chauvinism" have grown stronger[74], causing national governments to ensure that access to social entitlements remains

[68] F. DE WITTE, *Who funds the mobile student?*, cit., p. 212.
[69] *Ibid*.
[70] C. ROOS, *The (de-) Politicization of EU Freedom of Movement: Political Parties, Opportunities, and Policy Framing in Germany and the UK*, in *Comparative European Politics*, 2019, no. 5, pp. 631-650. The author explicitly links the growing contestation of intra-EU mobility with the Eastern enlargement which took place in 2004.
[71] This tension was first explicitly acknowledged by the European Commission in the 'Impact Assessment' accompanying the EC's 2016 proposal for reforming Social Security Coordination, where it stated, with reference to family benefits: "Such perceptions of unfairness are sustained (reinforced) both by the non-contributory nature of family benefits that are predominantly financed wholly or partially through general taxation and the fact that in the majority of Member States entitlement to family benefits is on the basis of legal residence whereas under the EU social security rules priority is awarded to the State of economic activity. This results in a tension between the EU social security rules and principles of national legislation […]". See: EUROPEAN COMMISSION, *Impact Assessment on the 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*, (E) No 987/2009, SWD(2016) 460 final/2, p. 126.
[72] Court of Justice, *Giersch*, cit., para. 21.
[73] S. SEUBERT, *Shifting Boundaries of Membership: The politicization of free movement as a challenge for EU citizenship*, in *European Law Journal*, 2020, no. 26(1-2), pp. 48-60, 59.
[74] R. CAREJA, E. HARRIS, *Thirty years of welfare chauvinism research: Findings and challenges*, in *Journal of European Social Policy*, 2022, no. 2, pp. 212 ff.; D. MARTINSEN, G. ROTGER, J. THIERRY, *Free movement of people and cross-border welfare in the European Union: Dynamic rules, limited outcomes*, in *Journal of European Social Policy*, 2019, no. 1, pp. 84 ff.; F HJORTH, *Who Benefits? Welfare Chauvinism and National Stereotypes*, in *European Union Politics*, 2016, no. 17, p. 3 ff.

primarily determined by a direct relation between individuals and Member States, rather than the EU[75].

In the last few years, the issue of exportability of welfare benefits to dependent family members has been a politically salient one, as a result of the debate that surrounded the Austrian policy concerning the indexation of family benefits. Indexation is a mechanism according to which, when benefits are exported to children residing abroad, Member States can adjust the amount of the benefit to the cost of living in the children's country of residence: as a result, they pay a lower amount for children living in Member States with lower costs of living (but also a higher amount for children living in Member States with higher costs of living)[76]. Through the adoption of such policy the Austrian government tried to relieve political pressure over the increasingly contested free movement rules by restricting, not the pool of beneficiaries, but the amount of benefit exportable[77]. Although the indexation policy was struck down in the recent judgment *Commission v Austria*[78] as a result of the infringement procedure brought by the Commission, it could be argued that the current understanding of student finance as a benefit to be enjoyed by the parent-worker, in a way comparable to family benefits, may attract further contestations from the Member States capable of undermining the democratic legitimacy of student mobility rights[79].

As free movement is so soundly enshrined in the Treaties, political decisions destined to have significant repercussions on national budgets are stripped from the hands of democratically elected institutions, thus remaining exempt from political amendment[80]. As a result, Member State governments wishing to preserve autonomous domestic regulation over highly sensitive policy domains are pushed to "explore legal grey areas

[75] D. SAINSBURY, *Welfare States and Immigrant Rights: The Politics of Inclusion and Exclusion*, Oxford, 2012; M. FERRERA, *The Boundaries of Welfare: European Integration and the New Social Politics of Social Protection*, Oxford, 2005.

[76] Indexation was first introduced in the public arena as part of the British renegotiation deal preceding the Brexit referendum: although ultimately rejected, the agreement reached by the EU and the UK fostered lively discussions between Member States regarding a potential reform of the rules regulating EU workers' access to social security.

[77] M. BLAUBERGER, A. HEINDLMAIER, C. KOBLER, *Free movement of workers under challenge: the indexation of family benefits*, in *Comparative European Politics*, 2020, no. 18, pp. 925-943, 935.

[78] Court of Justice, Judgment of 16 June 2022, *Commission v Austria (Indexation des prestations familiales)*, case C-328/20. As family benefits are considered social security benefits, they fall within the coordination system established by Regulation 883/2004. The Court had no doubt in stating that the adjustment of family benefits based on the State of residence of the children constituted an infringement of said Regulation, which at art. 7(2) explicitly provides that such benefits shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary resides in a Member state other than that in which the granting institution is situated.

[79] Increasing politicisation of EU migrants' right to social assistance can partly be attributed to the democratic deficit that is associated to rights that are advanced through judicial decisions. See: L. BEAUDONNET, *A Threatening Horizon: The Impact of the Welfare State on Support for Europe*, in *Journal of Common Market Studies*, 2015, no. 53, p. 457 ff.

[80] D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, no. 4, p. 460 ff. See also: S. K. SCHMIDT, *Extending citizenship rights and losing it all: Brexit and the perils of 'Over-constitutionalisation'*, in D. THYM (ed.), *Questioning EU Citizenship. Judges and the limits of free movement and solidarity in the EU*, Oxford, 2017, pp. 17-36.

and test the limits of what can be considered compatible with EU law"[81]. The same situation occurred in the field of student finance, where national policies have increasingly imposed integration requirements on frontier workers wishing to export student benefits to their children residing abroad, notwithstanding the equal treatment obligations arising from EU law. In doing so, Member States (successfully) attempted to push back the boundaries of free movement of workers, to "promote, in dialogue with the Court, a change of jurisprudence that reflects their agendas and preferences"[82]. This situation illustrates that governments may threaten to infringe EU rules if the domestic costs of compliance are perceived as disproportionate.

Ultimately, the non-contributory nature of social assistance benefits, which are predominantly financed through general taxation, reinforces perceptions of unfairness as regards their exportability to dependent relatives residing abroad. However, this perception of unfairness "is grounded in principles […] rather than financial concerns"[83]. These conclusions beg for further reflection on the essence of the EU system of social solidarity, thus raising the question whether eligibility conditions for social entitlements for workers should be linked to the nature of the benefit involved, rather than to the individual position of the applicant[84]. This would allow to distinguish between benefits that flow from the status of an economically active person or form part of her salary, which are largely uncontested, from those which are granted to the worker but are ultimately destined to benefit a person dependent upon her. If applied to the field of social assistance, a similar solution could help easing the tension that surrounds the right to export student finance to dependent family members residing abroad, by acknowledging that, from a fundamental rights perspective, the recipient of the benefit, namely the parent, can only serve as a trustee, while the real addressee of the social policy measure remains the student[85].

The analysis conducted showed that understanding student mobility rights as derived rights that flow from the economic activity of the parents has created political tensions that need to be addressed[86]. To ensure the sustainability of unrestricted EU labour mobility and to support a balanced process of European integration, the regulation of

---

[81] M. BLAUBERGER, A. HEINDLMAIER, C. KOBLER, *Free movement of workers under challenge: the indexation of family benefits*, cit., p. 934; See also: M. BLAUBERGER, *With Luxembourg in mind…the remaking of national policies in the face of ECJ jurisprudence*, in *Journal of European Public Policy*, 2012, no. 1, pp. 109 ff.

[82] A. GAGO, F. MAIANI, *'Pushing the boundaries': a dialogical account of the evolution of European case-law on access to welfare*, in *Journal of European Integration*, 2022, no. 2, pp. 261-275, 271.

[83] M. RUHS, J. PALME, *Free Movement and European Welfare States: Why Child Benefits for EU Workers Should Not Be Exportable*, cit., p. 139.

[84] F. DE WITTE, *Who funds the mobile student?*, cit., p. 203.

[85] See the reflection carried out with regard to the parent-carer as the recipient of family benefits intended for the child in: A. BALTHASAR, *The current discussion on Austrian family benefits indicating major dissensus on the interpretation of EU law*, in *Central European Public Administration Review*, 2020, no. 2, pp. 73-100.

[86] On the need to reconcile the prohibition of discrimination in the free movement of workers provisions with the rapidly changing reality of work and society, see: N. NIC SHUIBHNE, *Reconnecting free movement of workers and equal treatment in an unequal Europe*, in *European Law Review*, 2018, no. 4, p. 477 ff.

student benefits should be regulated in such a way to reconcile the ideal of promoting student mobility with the perceived negative consequences for some of the Member States. Hence, alternative ways of ensuring fair access to study benefits must be envisioned: to this end, the focus will now turn to the student as a holder of individual rights.

3. Export of student finance from the *home State*

Accessing student finance in the host Member State can prove extremely challenging for students who are economically inactive, as this benefit can only be claimed pursuant the obtainment of permanent residence (see *supra* para. II). As a result, mobile students may ultimately be required to turn to their home State with a view to exporting abroad the benefits provided therein. Nevertheless, this task is not always easily accomplished: not all Member States offering educational benefits for higher education studies also provide for their portability, and even when they do, the establishment of integration requirements may cause them to be unavailable for national citizens whose 'genuine link' is perceived as weaker. Nonetheless, in their capacity of EU citizens, students enjoy a degree of protection vis-à-vis their home State's policies aiming at restricting their right to export student finance[87].

As a general rule, a breach of free movement occurs in cases where differential treatment amounts to a form of *discrimination* that is expressly prohibited by the relevant provisions[88]. However, EU citizens cannot rely on the non-discrimination clause enshrined in Article 18(1) TFEU to challenge measures enacted by their Member State of origin: for this purpose, in addition to the 'orthodox' discrimination approach, the CJEU has gradually interpreted the Treaty provisions as to catch within their scope other forms of differential treatment that, although non-discriminatory in nature, are capable of creating a *restriction* on inter-State movement[89]. Consequently, 'mobile' EU citizens are allowed to challenge national measures which treat them less favourably than 'static' citizens, to establish whether they have been put at a disadvantage simply because they

[87] Citizens of the Union under Article 20(1) TFEU may rely on the rights conferred on that status against their Member State of origin. See: Court of Justice, Judgment of 26 October 2006, *Tas-Hagen and Tas*, case C-192/05, para. 19.
[88] C. BARNARD, *The substantive law of the EU: The Four Freedoms*, cit., p. 213.
[89] A. TRYFONIDOU, *Free Movement of Persons Through the Lenses of 'Discrimination' and 'Restriction'*, in M. ANDENAS, T. BEKKEDAL, L. PANTALEO (eds.), *The Reach of Free Movement*, The Hague, 2017, p. 57; A TRYFONIDOU, *The Notions of 'Restriction' and 'Discrimination' in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to one of (Almost Complete) Independence* in *Yearbook of European Law*, 2014, no. 1, p. 385 ff. See also: Court of Justice, Judgment of 17 March 2005, *Karl Robert Kranemann v Land Nordrhein-Westfalen*, case C-109/04, para. 26; Court of Justice, Grand Chamber, Judgment of 16 March 2010, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle* UFC, case C-325/08, para. 34; Court of Justice, Judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, case C-514/12, para. 30.

have exercised their freedom to move and to reside in another Member State[90]. To this end, citizens who do not fulfil integration requirements established by their own country of origin may rely on Article 21(1) TFEU to claim that they have been subject to a "discrimination against the exercise of free movement"[91].

In the specific context of student finance, the restriction approach has played a significant role in situations where the traditional discrimination perspective proved difficult to apply, allowing for the creation of a set of criteria which can be used to repeal national policies that unlawfully deny (or limit) the exportability of welfare benefits. In fact, although Member States enjoy wide discretion in deciding which criteria to use for the assessment of the 'genuine link'[92], they shall not establish conditions that are "too exclusive in nature" or which unduly favour elements which are not representative of the effective degree of connection between the claimant and the Member State concerned[93]. Several times the CJEU has considered conditions imposed by the home State inappropriate to assess the existence of a sufficient degree of connection, as they required, for the purpose of exporting student finance: the study program to be pursued abroad to be a continuation of a previous study period in the funding Member State[94]; the university to be attended to be situated in the country of residence of the applicant (or in a neighbouring State)[95]; the course to be pursued abroad to have a minimum duration[96]; or to have obtained a diploma or professional qualification within the territory of a given State[97].

If compared to the case-law regarding requirements imposed by the host State, the jurisprudence on the integration conditions imposed by the home State appears far less tolerant. Whereas a 5-year residence condition is deemed an appropriate measure to ensure that the applicant is sufficiently connected to the host State[98], all kinds of predetermined residence requirements have been found disproportionate to assess the degree of attachment to the State of nationality[99]. This illustrates that, whereas in cases regarding application for student finance in the host State the Court is more likely to

[90] Court of Justice, Judgment of 11 July 2002, *D'Hoop v Office national de l'emploi*, case C-224/98, paras. 30-31; Court of Justice, *Morgan and Bucher*, cit., para. 25.
[91] Opinion of Advocate General POIARES MADURO, delivered on 30 March 2006, in the joined cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi loanninon*, para. 46. See also: N. NIC SHUIBHNE, *The Coherence of EU Free Movement Law*, Oxford, 2013, pp. 143-155, whereby the author refers to a 'migration penalty'; A. ILIOPOULOU-PENOT, H. TONER, *A New Approach to Discrimination against Free Movers?*, in *European Law Review*, 2003, p. 398 ff.
[92] Court of Justice, *Tas-Hagen and Tas*, cit., para. 36.
[93] Court of Justice, *D'Hoop*, cit., para. 39; Court of Justice, Judgment of 21 July 2011, *Lucy Stewart v Secretary of State for Work and Pensions*, case C-503/09, para. 95; Court of Justice, Grand Chamber, Judgment of 16 October 2012, *European Commission v Republic of Austria*, case C-75/11, para. 62.
[94] Court of Justice, *Morgan* and *Bucher*, cit.
[95] Court of Justice, *Thiele Meneses*, cit.
[96] Court of Justice, Judgment of 24 october 2013, *Samantha Elrick v Bezirksregierung Köln*, case C-275/12.
[97] Court of Justice, *D'Hoop*, cit.
[98] Court of Justice, *Förster*, cit.
[99] Court of Justice, *Prinz and Seeberger*, cit.; Court of Justice, Judgment of 21 February 2015, *B. Martens v Minister van Onderwis, Cultuur en Wetenschap*, case C-359/13.

uphold the *quantitative* criterion based on duration of residence[100], when it comes to exporting educational benefits from the home State different benchmarks come into play. In *Prinz and Seeberger*[101], the CJEU sought to further define the content of the notion of integration, by clarifying what degree of connection the Member States are allowed to require before granting their own nationals financial support for their studies abroad. A condition based on sole residence was struck down for it did not take into account other factors which connected the student to her home Member State, relating to the fact that she "is a *national* of the State concerned and was educated there for a significant period" or to other elements such as, in particular, "family, employment, language skills or the existence of other social and economic factors"[102].

The Court thus clarified the need to adopt a more 'holistic approach' when assessing the strength of a student's affiliation with her home State[103], as it laid down a list of criteria that can be taken into account for such purpose[104]. In such cases, priority is assigned to the *qualitative* criterion of the individual circumstances of the applicant, which values the social and personal connections established in the Member State concerned[105]. As an example, having been raised and having completed schooling in the home State is considered a sufficient indicator of the degree of integration required to access financial aid therein, even in the absence of continuous residence[106], and the existence of a connection is not to be excluded even where a student has never resided in his Member State of nationality[107]. Hence, it can be concluded that students are granted the right to export student finance from their home State when they can demonstrate that their affiliation hinges on more intangible socio-cultural factors[108].

[100] Court of Justice, *Bidar*, cit., para. 59: "the existence of a certain degree of integration may be regarded as established by a finding that the [claimant] has resided in the host Member State for a certain length of time".
[101] Court of Justice, *Prinz and Seeberger*, cit. See also: P. J. NEUVONEN, *In Search of (Even) More Substance for the 'Real Link' Test: Comment on Prinz and Seeberger* in *European Law Review*, 2014, no. 39, p. 125 ff.
[102] *Ibid.* para. 38.
[103] A. HOOGENBOOM, *Mobility of students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?*, in *Croatian Yearbook of European Law and Policy*, 2013, no. 9, pp. 15-60, 36.
[104] Previous case law had affirmed the justifiability of integration conditions both on economic and social grounds. However, it was still unclear precisely what elements were to be taken into account in examining whether a particular restriction can be justified. See: Opinion of Advocate General SHARPSTON, delivered on 21 February 2013, in the joined cases C-523/11 and C-585/11, *Prinz and Seeberger*, para. 32.
[105] P. DE SANTA MARIA, *Movilidad de Estudiantes y Ciudadanía de la Unión: Un Análisis a través de la Jurisprudencia del TJEU*, in *Revista de Derecho de la Unión Europea*, 2015, no. 28, pp. 231-258, 247; M. DOUGAN, *Cross-border educational mobility and the exportation of student financial assistance*, in *European Law Review*, 2008, no. 33, pp. 723-738, 735.
[106] Court of Justice, *Morgan and Bucher*, cit., para. 45.
[107] Court of Justice, *Thiele Meneses*, cit., para. 41.
[108] F. DE WITTE, *Justice in the EU: The Emergence of Transnational solidarity*, Oxford, 2015, p. 163.

4. A free movement of worker 'spill-over' in the home State case-law: *MCM*

With its judgment in the recent case *MCM v. Centrala studiestödsnämnden*[109], the CJEU has delivered yet another chapter in the saga of the exportability of student benefits from the home State. Although it might not have sparked the interest of many, as the outcome of the case might have appeared quite unsurprising[110], it is instead argued that this ruling provides valuable insights on the complex interplay between the free movement of workers and the EU citizenship principles, resulting from the understanding of student finance as a benefit that can be claimed by the parent-worker of the student.

The applicant in the main proceeding (hereinafter, 'MCM') is a Swedish national who had applied to the Swedish Board of Student Finance (CSN) to obtain financial assistance for his higher education studies in Spain. However, his application was rejected as he did not fulfil the requirement of residence in Sweden[111] nor did he fulfil the alternative requirement of a sufficient connection with Swedish society[112]: MCM not only was born in Spain, but he had also resided there from birth. In his capacity of a Union citizen, he could have challenged the Swedish legislation at issue by referring to Article 21 TFEU, with a view to assessing whether such integration requirements could have deterred him from leaving his country of origin, thus constituting a restriction of his free movement rights. However, here lies the peculiarity of this case: instead of relying on his citizenship rights, MCM challenged the refusal by relying on his father's migrant worker status.

MCM's father, a Swedish national residing in Sweden, had worked in Spain for 20 years before returning to his home country. The integration requirement at issue could indeed also be captured by Article 45 TFEU, which grants workers the right to be protected from national measures which might render less attractive the exercise of their fundamental freedom to pursue an economic activity in a different Member State[113]. The future unavailability of the benefit for his son could have ultimately deterred MCM's father from emigrating to Spain. In conclusion, nonetheless, the CSN confirmed the original refusal, as it maintained that the free movement of worker provisions were not applicable in those circumstances, for MCM's father ceased to be a migrant worker when he returned to Sweden in 2011.

---

[109] Court of Justice, Judgment of 24 November 2022, *MCM v Centrala studiestödsnämnden*, case C-638/20.
[110] P. MELIN, *Financial assistance for family members of migrant workers to study abroad (C-638/20)*, 2022, available at: https://eulawlive.com/analysis-financial-assistance-for-family-members-of-migrant-workers-to-study-abroad-c-638-20-by-pauline-melin/.
[111] Studiestödslag (1999:1395) chapter 3, para. 23(1). The right to receive economic support for higher education studies to be pursued abroad is subject to a residence requirement in Sweden for a continuous period of at least two in the five years preceding the application.
[112] Centrala studiestödsnämndens rättsliga ställningstaganden dnr 2013-1 13-9290 samt dr 2014-112-8426 (CSN internal instructions, No 2013-113-9290 and No 2014-112-8426). The residence requirement does not apply, on account of Article 7(2) of Regulation 492/2011, to those whom the CSN recognizes as migrant workers or as members of their family. In such cases, however, student aid may still be granted, but only insofar as the applicant satisfies the alternative requirement of having a "sufficient connection" with Swedish society.
[113] Court of Justice, *MCM*, cit., para. 46. See in particular: Court of Justice, Judgment of 10 October 2019, *Adelheid Krah v Universität Wien*, case C-703/17, para. 41.

Hearing the appeal, the Swedish National Board of Appeal for Student Aid decided to refer a preliminary question to the Court of Justice demanding whether Article 45 TFEU and Article 7(2) of Regulation 492/2011 preclude legislation of a Member State requiring family members of migrant workers to have a genuine connection with their Member State of origin in order to benefit from social advantages. In the field of student finance, Article 45 TFEU (in combination with Article 7(2) of Regulation 492/2011) is normally invoked by frontier or migrant workers seeking financial assistance for their children from the host State, namely their State of employment (see *supra* para. II). However, this case has created a break with this general rule: the Court for the first time has applied Article 45 TFEU to assess a refusal to export student finance from the Member State of origin of the student[114], as the restriction analysis was performed under the free movement of worker lens, instead of under Article 21 TFEU.

4.1. Student finance for an unborn? Issues of causality and the 'remoteness test'

As previously mentioned (*supra* para. III), the imposition of integration requirements on a Member State's own nationals is generally deemed to constitute a restriction on their right to move and reside freely in the territory of the Union[115]. However, the restrictive nature of national legislation does not automatically entail its unlawfulness: it is for the CJEU to determine whether a restriction on free movement can be justified, by assessing whether it pursues a legitimate objective in the public interest and, furthermore, it is appropriate and proportionate for that purpose. In *MCM*, however, the Court left no room for ambiguity: the integration requirement at issue posed *no restriction* to begin with.

In its view, the causal connection between the choice of the worker to exercise his free movement rights and the availability of the grant for his son appeared too 'remote' to cause an appreciable disadvantage. When performing the restriction analysis, the Court recalled that Article 45 TFEU can be relied upon to challenge measures liable to prevent or deter EU workers from leaving their country of origin. Hence, the reference point of the analysis had to be the moment when MCM's father actually exercised his right to free movement to take up employment in Spain. At that time, however, his son had not yet been born, leading to the obvious conclusion that the 'sufficient link' condition set by Swedish law could only constitute a restriction on "the future behaviour of another person who does not yet exist"[116].

As pointed out by the CJEU, at the time MCM's father moved to Spain to take up employment, the availability of the benefit at issue did not depend solely on his choice to

[114] P. MELIN, S. SIVONEN, *Overview of recent cases before the Court of Justice of the European Union (September-December 2022)*, in *European Journal of Social Security*, 2023, p. 7.
[115] Court of Justice, *Thiele Meneses*, cit.; Court of Justice, *Elrick*, cit.; Court of Justice, *D'Hoop*, cit.; Court of Justice, *Prinz and Seeberger*, cit.; Court of Justice, *Martens*, cit.; Court of Justice, *Morgan and Bucher*, cit.
[116] Opinion of Advocate General MEDINA, delivered on 7 April 2022, in the case C-638/20, *MCM v. Centrala studiestödsnamnden*, para. 52.

move, but instead rested on "a succession of hypothetical and uncertain future factors"[117]. Only in the event that a number of conditions had come into place the measure at stake could have had a deterrent effect on his decision to move. Indeed, the disadvantage would have materialised only insofar as: he proceeded to have a child; that child decided to remain in the host State even when his parent returned to their Member State of origin; the child was not integrated into the society of the State of origin; finally, he/she decided to pursue higher education studies[118]. As a result, the factual circumstances of the case were deemed "too uncertain and indirect" to influence the choice of the worker to exercise his freedom of movement[119] and therefore the national provision was not found to constitute a restriction of article 45 TFEU[120].

As it considered the relevant circumstances "too uncertain and indirect", the CJEU, for the first time in a case involving student benefits, framed the issue as one of 'remoteness'. The remoteness test is one of the judicial restraints placed by the CJEU on the material scope of the internal market freedoms with a view to limiting their applicability to only those situations involving a significant hindrance to free movement[121]. Consisting of two different criteria, one based on causality ('directness') and one based on probability ('certainty')[122], the test is understood as a *qualitative* threshold, by which the Court seeks to assess whether the alleged restriction of EU rights is sufficiently connected to the national measure being challenged[123]. This principle had been raised in previous student finance cases such as *Morgan and Bucher*[124] and *Elrick*[125], but both times it had been promptly dismissed. However, this was not the case in *MCM*:

---

[117] Court of Justice, *MCM*, cit., para. 34.
[118] *Ibid.*
[119] *Ibid.* para. 35. To this end the Court also recalls its previous case law in: Court of Justice, Judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach*, case C-437/17, para. 40.
[120] Court of Justice, *MCM*, cit., para. 36.
[121] A. TRYFONIDOU, *Article 45 [Free Movement of Workers] (ex-Article 39 TEC)*, in H. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union - A Commentary*, Heidelberg, 2021, p. 959.
[122] However, it is unclear how much relevance should be given to each criteria or whether they could even be considered as synonyms. In this regard, see: M. JANSSON, H. KALIMO, *De minimis meets "market access". Transformations in the substance - and the syntax - of EU free movement law?*, in *Common Market Law Review*, 2014, no. 51, pp. 523-558, 541.
[123] As opposed to the "de minimis" test, which sets a *quantitative* threshold as regards the appreciability of the restriction imposed: it applies when a situation that would normally trigger the application of EU law is too insignificant to be actually taken into account. On the other hand, the remoteness test applies to those factual circumstances that are not sufficiently linked with EU law in the first place. See: N. NIC SHUIBHNE, *Between Negative and Positive Scope? The Principles of De Minimis and Remoteness*, in N. NIC SHUIBHNE (ed.) *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford, 2013, p. 157. However, different opinions can be found among legal scholars as to whether the 'remoteness' test is based on an autonomous principle, or rather it is in itself a form of the de minimis rule. Conforming to the former point of view, see: N. NIC SHUIBHNE, *Between Negative and Positive Scope? The Principles of De Minimis and Remoteness*, cit.; A. TRYFONIDOU, *Article 45 [Free Movement of Workers] (ex-Article 39 TEC)*, cit., pp. 992-993. Adopting the latter view, see: J. HOJNIK, *De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?*, in *European Journal of Legal Studies*, 2013, no. 6, pp. 25-45, 36-37; M. JANSSON, H. KALIMO, *De minimis meets "market access"*, cit., p. 541.
[124] Court of Justice, *Morgan and Bucher*, cit., para. 32.
[125] Court of Justice, *Elrick*, cit., para. 29.

as the focus of the restriction analysis shifted to the student's parent, the Court could not conclude that decision to move and the disadvantage occurred could be framed within a causal relationship.

4.2. Risk of inequalities at the individual level: the flip-side of *Martens*

The ruling in *MCM* showed that the situation where a student is required to have a connection with his home State before benefitting from a study grant does not deter his parent from exercising his freedom of movement under Article 45 TFEU. However, one might wonder what the outcome of the case would have been if the study grant at issue had been understood as a social advantage for the student, rather than for the parent, and the question referred had been framed as a matter under Article 21 TFEU. In other words, the question arises whether the Court's decision would have been different if the students' citizenship rights, instead of the parents' rights as a migrant worker, had been the fulcrum of the analysis.

Given the cooperative nature of the preliminary reference procedure, the CJEU has been largely recognized the power to rephrase the questions referred if it considered this would help the national court in settling the case[126]. Therefore, it would often indicate if it decides to apply a provision of EU law different from the one(s) identified by the national judge[127]. Within the context of student finance, a similar process had taken place in *Martens*[128]: although the principal question referred by the national court concerned a potential restriction of free movement of workers, the CJEU instead opted for an interpretation based on Articles 20 and 21 TFEU, thus shifting the attention on Ms. Martens' situation as a Union citizen rather than as the child of a (former) frontier worker[129].

The factual circumstances were almost identical: Ms. Marten's father, a Dutch national, moved to Belgium to take up employment and only returned to the Netherlands after a long period of occupation in the host State. His daughter, as a Dutch national, would have been entitled to student finance within the Netherlands: however, Ms. Martens, who had grown up in Belgium, never moved back with him, thus falling short of fulfilling the residence requirement set by Dutch law for the attainment of such grant. Just like MCM's father, who had returned to Sweden after a long period of employment in Spain, Ms. Marten's father had already returned to his home State at the time the

[126] M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford, 2010, p. 403; T. TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, in *Common Market Law Review*, 2003, no. 50, p. 9 ff. See also: Court of Justice, Judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, case C-140/09, para. 24.
[127] See e.g.: Court of Justice, Judgment of 12 June 2003, *Arnoud Gerritse V Finanzamt Neukölln*-Nord, case C-234/01, paras. 23-24, where the Court held that the question referred should have been understood "as concerning the freedom to provide services rather than the freedom of establishment".
[128] Court of Justice, *Martens*, cit.
[129] H. SKOVGAARD-PETERSEN, *Market Citizenship and Union Citizenship: An "Integrated" Approach?*, cit., p. 284.

disadvantage occurred: as a consequence he had already given up his EU worker status[130], whereas applicability of Article 45 TFEU generally requires an uninterrupted performance of genuine and effective work[131]. In light of this, the facts in the main proceedings were deemed to fall outside the scope of applicability of the free movement of workers provisions and the Court looked for a possible restriction of Mr. Marten's daughter's rights as a Union citizen. Although *MCM* featured a situation comparable to that of *Martens*, the CJEU did not apply the citizenship provisions and examined the facts of the case under the free movement of workers' lens.

The application of the remoteness test ended up showing that the causal relationship between the integration requirement and MCM's father decision to move was too weak to entail a breach of EU law. However, when considering the same factual circumstances from the student's perspective, the issues of causality raised by the Court seem to disappear. As stated by the Advocate General, the same integration requirements, if scrutinized under Article 21 TFEU, would have dissuaded the applicant *himself* from exercising his free movement rights, in light of "the impact that exercising that freedom was likely to have on the right to the education or training grant at issue"[132]. The application of the free movement of workers legal framework shifted the focus of the analysis away from the restrictive nature of the rule onto the evaluation of its dissuasive impact on his father's decision to move: as a result, the actual connections that linked MCM to his home State were disregarded.

The judgment thus seems to support the argument that understanding educational benefits as social advantages to be enjoyed by the students' parents fails to properly take into account the bonds that students create with the Member States granting the aid. MCM claimed that the connection to his Member State of origin was sufficient to enable him to receive financial aid for his studies, by referring to the fact that he is a Swedish national, has a Swedish parent, that other members of his family are Swedish and that he regularly spends time in Sweden[133]. All these factors should be taken into account when assessing the degree of connection between a student and his home State, as the CJEU expressed the need for a thorough assessment of the individual circumstances of the applicant, with particular attention to her social and personal ties.

Although it might have been doubtful whether nationality, as the only connecting factor, would have been sufficient to prove the existence of a genuine link[134], two

[130] The general rule that can be drawn from the CJEU case-law is that worker status is lost upon cessation of the employment activity: Court of Justice, *Martínez Sala*, cit. paras. 32-36. However, several exceptions can be found where the Court accepts that the status of former migrant or frontier worker may produce effects after the employment relationship has ended. See, for example: Court of Justice, Judgment of 19 June 2014, *Jessy Saint Prix v Secretary of State for Work and Pensions*, case C-507/12, para. 35; Court of Justice, Judgment of 13 December 2012, *Caves Krier Frères Särl v Directeur de l'Administration de l'emploi*, case C-379/11, para. 26.

[131] See, *inter alia*: Court of Justice, Judgment of 23 March 1982, *Levin v. Staatssecretaris van Justitie*, case C-53/81, para. 17; Court of Justice, Judgment of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, case C-66/85, para. 21.

[132] *Ibid.*

[133] Opinion of Advocate General MEDINA, *MCM v. Centrala studiestödsnamnden*, cit., note 7.

[134] P. MELIN, *Financial assistance for family members of migrant workers to study abroad (C-638/20)*, cit.

arguments may attempt to prove the contrary. Firstly, MCM's connection could be based on other parameters among those identified by the *Prinz and Seeberger* case law, such as family ties with other Swedish nationals and social ties resulting from the periods of time he spent in Sweden every year. Secondly, under the Article 21 TFEU restriction analysis nationality is considered a significant proxy in proving the degree of attachment[135]: indeed, there is a strong presumption that Member States' rules requiring their own nationals to satisfy integration requirements before exporting welfare benefits are inherently restrictive of their right to move and reside freely in the territory of the Union[136]. This conclusion is indeed supported by the specular decision that the Court reached in *Martens*: the residence condition established by the student's home State was found to put Ms. Martens in a disadvantaged position simply because she had moved to Belgium with her family and continued to exercise her rights as a Union citizen while residing there. From the EU citizenship perspective, the rule at issue was deemed to restrict her free movement rights, the persistent exercise of which depended solely on her nationality[137]. Although the Swedish legislation at issue might have allowed the flexibility requested by the Court's case law as regards the assessment of the 'genuine link', given that the right to student financial aid was not based exclusively on a minimum period of residence in Sweden but could also be based on a sufficient connection to Swedish society[138], this judgment shows that the dual understanding of the right to student finance, both as an individual right of the student and as a right derived from the economic activity of the parents, might ultimately create inequalities at the individual level depending on the specific EU law provisions that the CJEU relies upon.

The claim that advancing welfare rights via case-law may result in unequal treatment is not unprecedented[139] and holds particular significance in the case of student mobility rights[140]. The application of different sets of rules, such as those elaborated in the free movement of workers and the EU citizenship domains, increases the number of possible eligibility criteria, thus facing the Court with significant difficulties in adjudicating on individual legal claims[141]. The complexity of this task is further exacerbated by the great diversity of national support schemes. On the other hand, the overlap of multiple sets of

[135] F. STRUMIA, C. BROWN, *The asymmetry in the right to free movement of European Union citizens: the case of students*, 2015, available at: http://eulawanalysis.blogspot.com/2015/07/the-asymmetry-in-right-to-free-movement.html.
[136] E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, in *Common Market Law Review*, 2008, no. 1, pp. 13-45, 25. See also: Opinion of Advocate General SHARPSTON, delivered on 28 June 2007, in the case C-212/06, *Gouvernement wallon*, para. 65.
[137] H. SKOVGAARD-PETERSEN, *Market Citizenship and Union Citizenship: An "Integrated" Approach?*, cit., p. 294.
[138] Opinion of Advocate General MEDINA, *MCM v. Centrala studiestödsnamnden*, cit., para. 52.
[139] S. K. SCHMIDT, *The limits of judicialising transnational welfare: progression and retrogression of the ECJ case law on access to social benefits*, in D. KOSTAKOPOULOU, D. THYM (eds.), *Research Handbook on European Union Citizenship Law and Policy*, cit., pp. 265-281, 276.
[140] A. SCHENK AND S. K. SCHMIDT, *Failing on the social dimension: judicial law-making and student mobility in the EU*, in *Journal of European Public Policy*, 2018, no. 10, p. 1522 ff.
[141] S. K. SCHMIDT, *The limits of judicialising transnational welfare*, cit., p. 276.

rights implies a critical degree of legal uncertainty for the individuals[142], as applicants might find it difficult to understand the conditions of case law-based eligibility, with the consequence that "chance has more of a say in whether or not EU citizens are granted certain rights derived from ECJ case law in their local courts"[143]. This problem clearly emerges from the comparison of the two cases examined: despite the near-total similarity of the factual circumstances, the application of the EU citizenship provisions led to the identification of an unlawful restriction of the student's free movement rights, whereas the application of free movement of workers led the Court to conclude that a restriction was not even conceivable.

5. The mobile student as a *Union citizen*: reallocating the burden between the home and the host State

The tensions surrounding the export of student finance to dependent children residing abroad (see *supra* para. ii.2) and the risk of unequal treatment linked to the spill-over of economic free movement principles in the EU citizenship domain (see *supra* para. iv.2), both seem to suggest that the right to benefit from student finance in cross-border situations may be negatively affected by the existence of this dual status. Both the Advocate General and the Commission in *MCM* shared the same view, claiming that the benefit at issue "constitutes, above all, a social advantage for the student himself" for "it is [the student] who is requesting that aid and it is [the student] who would receive that aid"[144]. However, the order for reference did not clarify whether MCM was still economically dependent on his father[145], thus leaving the decision to the Court whether he should have been treated as an autonomous student or as a dependent family member. The legal uncertainty that might derive from the exercise of this margin of appreciation suggests that students might be "better off with certain, even if more restrictive, rules"[146]: in light of this, it is argued that the right to financial support in cross-border situations should ultimately be understood as an *individual right* of the student, albeit subject to the limitations that are associated to the citizenship of the Union in the social sphere. Hence, it is to this legal framework that the investigation will turn, in order to determine to what extent the citizenship provisions may constitute a source of mobility rights for EU students.

The concept of Union citizenship, and in particular the breadth of the rights and obligations attached to it, has been at the heart of vigorous debates ever since its introduction by the Treaty of Maastricht. The original 'expansive' approach of the

[142] J. HOEVENAARS, *The Preliminary Reference Procedure: Challenge or Opportunity?*, in *Recht der Werkelijkheid*, 2015, no. 36, p. 83 ff.
[143] S. K. SCHMIDT, *The limits of judicialising transnational welfare*, cit., p. 277.
[144] Opinion of Advocate General MEDINA, *MCM v. Centrala studiestödsnamnden*, cit., para. 34.
[145] *Ibid*. para. 39.
[146] S. K. SCHMIDT, *The limits of judicialising transnational welfare*, cit., p. 274.

CJEU[147], which envisioned the citizenship of the Union as destined to become "the fundamental status for nationals of the Member States"[148], seemed to lay the foundations for the creation of a solid social dimension. In doing so, this judicial trend promoted an understanding of EU citizenship as an independent source of rights, ultimately meant to replace national citizenship[149].

However, in the past decade the case-law on social benefits clearly showed the Court's intention to promote a 'thinner' version of this supranational status, by reconsidering the scope of the rights associated to it[150]. This turnaround can be partly explained as a consequence of the adoption of Directive 2004/38, which embodied the more restrictive political choices made by the EU legislature, forcing the CJEU to set stricter boundaries on its interpretative discretion in the definition of citizens' social rights[151]. However, it can also be tied to the profound changes that have contributed to shape the socio-economic context of the European Union during the past twenty years: the Eastern enlargement, which strongly increased Member State's fear of 'welfare shopping', the Eurozone crisis and (last but not least) Brexit, have deeply affected the political climate, exposing the limited scope of the trans-national solidarity obligations that most EU countries are willing to accept.

Although it arguably betrays the original vision of EU citizenship as a self-standing transnational status[152], the Court's restrictive reading of Union citizenship seems at current stage "pragmatic and understandable"[153]. In times where the general condition of the polity does not seem to allow Union citizenship to fully deliver its promises, it is indeed paramount to reconcile this concept with an ideal of reciprocity and restore a perception of fairness in the social contract that binds the Union and its citizens. If EU citizenship ought to be at the cornerstone of the process of European integration and truly fulfill its role as the shaper of an "ever closer union", this process will be crucial.

However, it is argued that the analysis of the Court's case-law on the duties that Member States must assume in respect of economically inactive citizens has been mostly carried out from a one-sided perspective, focusing on the mitigation of the responsibility

---

147 F. COSTAMAGNA, S. GIUBBONI, *EU citizenship and the welfare state*, cit.: the authors refer to an "ascending phase" of EU social citizenship, where the Court of Justice adopted an "expansive logic".
148 Court of Justice, *Grzelczyck*, cit.
149 D. KOCHENOV, *The Citizenship Paradigm*, in *Cambridge Yearbook of European Legal Studies*, 2013, no. 15, pp. 197 ff.
150 Court of Justice, Judgment of 19 September 2013, *Pensionsversicherungsanstalt v Peter Brey*, case C-140/12; Court of Justice, Grand Chamber, Judgment of 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, case C-333/13; Court of Justice, Grand Chamber, Judgment of 15 September 2015, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, case C-67/14; Court of Justice, Judgment of 25 February 2016, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, case C-299/14.
151 D. CARTER, M. JESSE, *The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens*, in *European Papers*, 2018, n. 3, p. 1179 ff.
152 C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, no. 53, p. 937, where the author argues that "welfare nationalism is washing away the traces of EU citizenship".
153 A. ILIOPOULOU-PENOT, *Deconstructing the Former Edifice of Union Citizenship? The* Alimanovic *Judgment*, in *Common Market Law Review*, 2016, no. 53, p. 1035.

that the host State carries in this regard. Conversely, the home State's role as a free movement *facilitator* has been largely overlooked: as it gradually watered down the obligations of solidarity incumbent on the host State, the CJEU increasingly obliged the State of nationality to truly enable free movement for its own citizens, by removing financial obstacles to its exercise. This tendency is particularly visible in the case-law on the free movement of students, where the Court has stretched the scope of the right to student finance well beyond the boundaries of the national community[154]. As pointed out by Strumia, "the judicial trend has been towards a lightening of the burden that host Member States, as opposed to home ones, bear in this respect"[155]. The imposition of heavier duties on the home State vis-à-vis the export of student finance can indeed be read as a counterweight to *Förster*, which discharged to a large extent the host State from the same obligation[156].

Although this judicial trend has been largely construed as a shortfall of supranational citizenship, as the involvement of home Member States is generally perceived as undermining the strength of the EU citizen status[157], part of the literature has challenged this view and attempted to offer a different perspective on this phenomenon, by placing emphasis on the need to reassess the relationship between the sovereign State and the citizen. The EU citizen has turned into a 'transnational stakeholder': although she retains her primary affiliation to a nation State, the interconnectedness of the domestic and the supranational levels has made her claims increasingly dependent on decisions that transcend the national dimension[158]. These circumstances prompt the need to embrace a cosmopolitan perspective of the State, to be understood as a bearer of duties to its own citizens not only as members of the national polity, but also as part of a broader supranational community[159]. A similar view supports the idea that it is a duty of the nation State to facilitate free movement in the interest of the members of its polity, through a commitment to "protect migration 'ex ante' as a viable option for its citizens", by "build[ing] and support[ing] clear pathways to international mobility"[160].

This perspective suggests that EU citizenship shall be construed as an *enhancement* of national citizenship, rather than a complement to it, as the home Member State has

---

[154] H. SKOVGAARD-PETERSEN, *Market Citizenship and Union Citizenship: An "Integrated" Approach?*, cit., p. 293.
[155] F. STRUMIA, *Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States*, in *European Law Review*, 2020, no. 4, p. 517.
[156] D. THYM, *The elusive limits of solidarity: residence rights of and social benefits for economically inactive union citizens*, in *Common Market Law Review*, 2015, no. 1, p. 17.
[157] E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: the Role of Rights*, Cambridge, 2017, p. 215; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What are the Implications for the Citizen When the Polity Bargain is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 158.
[158] F. STRUMIA, *The citizen as other: The case from within for cosmopolitan state duties and freedom to migrate*, in *The Modern Law Review*, 2024, no. 3, p. 682.
[159] See, *inter alia*: L. CABRERA (ed.), *Institutional Cosmopolitanism*, Oxford, 2018; R. BEARDSWORTH, G. WALLACE BROWN, R. SHAPCOTT (eds.), *The State and Cosmopolitan Responsibility*, Oxford, 2019; L. YPI, *Statist Cosmopolitanism*, in *Journal of Political Philosophy*, 2008, no. 16, p. 48.
[160] F. STRUMIA, *The citizen as other*, cit., p. 696.

become the true "enabler" of the rights guaranteed by the supranational status[161]. As demonstrated in the CJEU's case-law on student finance, by favouring the exportability of rights that Member States grant to their own nationals, Union citizenship extends the reach of national citizenship across borders.

Union citizenship is considerably different from national citizenship, and so is the nature of the social obligations that derive from it. The latter are not being backed by an EU-wide taxation system, let alone coordinated within a supranational welfare system or distributive scheme, as social policy remains fully dependent on national arrangements. Thereby, whereas the principle of distributive justice may serve as a foundation for social rights in the domestic realm, it has proven unsuitable to justify the recognition of the same rights at the supranational level[162], especially as regards economically inactive migrants' access to the welfare of other Member States. Ultimately, the traditional perspective on the relation between Union citizenship and free movement rights, focusing on access to the *host* Member State's welfare, has highlighted the weaknesses of European social citizenship, showing "the Court's deference to the Member States' autonomy to define (and thus confine) the circle of individuals enjoying the solidarity embodied by social benefits (especially non-contributory ones)"[163].

These findings seem to suggest that, at current stage, the responsibility for the welfare of mobile citizens rests primarily with the home Member State[164]. In light of this, the relationship between EU and national citizenship can be reconstructed as follows: whereas Union citizenship serves the purpose of granting EU economically inactive citizens the right to move and reside freely in the territory of the Member States, thus enabling the individual to choose the community she wishes to become a member of, it is now the function of national citizenship to provide the necessary support for the exercise of such freedom to move, in particular as regards the allocation of financial resources of a Member State which are primarily intended to be used to the benefit of its nationals[165].

It follows that the *home State* (Member State of nationality) should be designated as the competent Member State for providing such support, regardless of the fact that the studies are pursued domestically or abroad. Only in case a student is sufficiently integrated in the host State the presumption shall be rebut that the responsibility to provide maintenance for her studies lays with the home State. Given the unpredictability of where and when limitations to free movement may apply in the recent jurisprudence of the Court, students should always be reassured about the possibility to rely on their home country as the last resort for their claims. However, the ruling in *MCM* demonstrated that

[161] F. STRUMIA, *Supranational Citizenship's Enablers*, cit. 507.
[162] P. ELEFTHERIADIS, *The Content of European Citizenship*, in *German Law Journal*, 2014, no. 15, p. 787.
[163] A. ILIOPOULOU-PENOT, *Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment*, cit., p. 1031.
[164] C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford, 2017, p. 35.
[165] A BALTHASAR, *The current discussion on Austrian family benefits indicating major dissensus on the interpretation of EU law*, cit., pp. 85-86.

this is not always the case. If in *Martens* the Court compensated the inapplicability of Article 45 TFEU with the recognition of a "wider reach" to Article 21 TFEU[166], the judgement in *MCM* leaves the question open as to whether the growing trend to challenge the 'market citizenship' paradigm will be counterbalanced by the reinforcement of other rights, or whether it will only result in a loss of protection for EU mobile workers.

6. Conclusion

The understanding of student finance as a right that is derived from the economic activity of the parent raises multiple issues.

The Court has accepted limitations on the free movement of workers to ease political tensions that have arisen among the Member States as a consequence of the export of student benefits to children residing abroad. As the domestic costs of compliance with the supranational rules are perceived as unreasonable, national governments have explored legal grey areas, by imposing integration requirements on economically active migrants. Hence, the CJEU has moved beyond the presumption that frontier workers are integrated into the Member States in which they work and pay taxes, as it has made them subject to the application of additional integration tests, thus showing that the "economic link" no longer shields them from requirements that do not apply to residents. In other words, the EU workers' right to equal treatment in accessing social benefits appears to have lost its absolute nature.

Moreover, the ruling in *MCM* confirms that the 'market citizenship' approach, which may be appropriate for certain types of social entitlements, does not grasp the social function of study grants and its underlying idea of reciprocity, as it fails to take into account the effective ties that students create with the Member States granting the aid. The judgment showed that integration requirements imposed by the home Member State may fall outside the scope of the free movement of workers' provisions, as it might be difficult to establish that a restrictive effect on cross-border economic activity has occurred. Shifting the focus of the analysis on the economic activity performed by the parent, rather than on the *social* connections that the students create with a given State, may be problematic when seeking to export student finance from the home State, in light of the specific integration factors that the Court deems relevant in that regard. This may foster inequalities at the individual level, thus leaving EU students with a significant degree of legal uncertainty vis-à-vis their condition of eligibility in the different Member States.

It follows from these considerations that the right to access student benefits in cross-border situations should be understood as an *individual right* of the student, to be enjoyed in her capacity of a Union citizen. This solution could be beneficial in respect to both of the issues raised. On one hand, eliminating the possibility for mobile workers to export

[166] H. SKOVGAARD-PETERSEN, *Market Citizenship and Union Citizenship: An "Integrated" Approach?*, cit., p. 296.

student benefits to their dependent children residing abroad may remove much of this political tension, thus possibly leaving room for a public debate about the recognition of an EU right to export student finance. On the other, as the CJEU wavers between treating students as dependent family members and as individuals with their own rights, mobile students could find it beneficial to be recognised a narrower but more clearly defined set of rights, since the overlap of conditions of eligibility may lead to undesired consequences, as highlighted by the judgment in *MCM*.

The question should finally be addressed of which Member State should in principle bear the responsibility for providing maintenance for higher education studies in cross-border situations under the EU citizenship legal framework. Against the backdrop of theories of state cosmopolitanism, it is argued that the home State should be presumed to bear a duty to allow its students to engage in trans-national studies. This conclusion seems more in line with the evolution of the Court's case law on social rights stemming from the status of Union citizens, which has progressively shifted the burden from the host State to the home State as regards the allocation of non-contributory benefits. A similar approach would allow for a fairer and clearer distribution of responsibilities between the home and the host State, with the latter being only in charge of fulfilling those duties of reciprocity that result from being an economic stakeholder (e.g. by taking up employment and paying taxes in the host state)[167], or that derive from the existence of a continuous link through residence. Other contributions have suggested that the State of last residence should be identified as the competent Member State in this regard[168]: however, in cases where the State of last residence does not correspond with the State of nationality, students would still be exposed to integration requirements in particular as regards their length of residence, and a significant risk would persist for students to fall between the cracks, thus resulting ineligible in the State where they reside. The analysis conducted showed that the 'genuine link' arising from the possession of national citizenship seems to be more strongly emphasized by the Court: in fact "not only *can* Member States privilege their own nationals in study grant and loan matters, but they *must* in fact privilege them, as nationality is to be held as an independent connecting factor by which a Union citizen can establish a genuine link with a Member State of the EU"[169].

Nonetheless, the lingering state of uncertainty regarding the extent to which students enjoy supranational protection for their claims ultimately begs the question whether, in

[167] P. ELEFTHERIADIS, *The Content of European Citizenship*, cit., p. 790. According to the author: "Employers or employees, clients, financial intermediaries, or regulators are cooperative agents because they are engaged in cooperative relationships with others under a common scheme of contract, property, and tort law and are enmeshed in a complex web of relations of benefit, loss, and risk. They are, in this sense, cooperative agents connected by ties of cooperative justice. It is obvious that all economic stakeholders are cooperative agents".

[168] A. P. VAN DER MEI, *Coordination of student financial aid systems: Free movement of students or free movement of workers?*, in F. PENNING, G. VONK (eds.), *Research Handbook on European Social Security Law*, Cheltenham/Northampton, 2015, p. 468.

[169] A. HOOGENBOOM, *I study here, and thus I belong? Mobile Students in the European Union*, in H. VERSCHUEREN (ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Cambridge, 2016, p. 170.

the persistent absence of a coordinated system of maintenance support on a European level, it is desirable to equate students to all other categories of EU citizens exercising free movement. After *Martinez Sala* opened the gate for economically inactive citizens to enjoy social assistance in the EU, there has been a strong need to guarantee respect for national interests and protection of welfare systems. The introduction of stricter requirements imposed on EU citizens, such as integration tests, has been accepted by the CJEU to mitigate the impact of the recognition of the right to equal treatment to all EU citizens lawfully residing in other Member States, regardless of their economic activity. By doing that, the Court of Justice sought to employ safeguards to prevent situations where the decision of moving was grounded in the sole reason of seeking welfare benefits. However, this situation hardly applies to students: it is thus argued that assimilating the circulation of students to the free movement of all other categories of citizens is detrimental for the EU, in light of the importance of cross-border student mobility with regard, on one hand, to its contribution to the economic growth, on the other, to its role as a catalyst for the promotion of a European identity[170].

The free movement of students holds an economic value in itself, that, although clearly mentioned in policy documents, still ought to be acknowledge by EU law: student mobility remains promoted at the level of the intentions, but little has been made to concretely allow students to truly benefit from their free movement rights. The more recent EU initiatives in the field of higher education have brought to the fore that, as of today, "the internal market is a reality for goods but not for education and culture"[171] and "Europe could still do better in stimulating mobility […] to maximise Europe's global influence when it comes to values, education, research, industry and societal impact"[172]. Furthermore, in his newly published Report on the Future of the Single Market, Letta has highlighted that "still too few Europeans have the opportunity to study in other EU countries"[173]. These findings suggest that, although transnational learning mobility can benefit from initiatives aiming at fostering collaboration between higher education

[170] K. MITCHELL, *Rethinking the "Erasmus Effect" on European Identity*, in *Journal of Common Market Studies*, 2014, no. 2, p. 330 ff.; C. VAN MOL, *Intra-European Student Mobility and European Identity: A Successful Marriage?*, in *Population, Space and Place*, 2012, no. 19, p. 209 ff.; K. MITCHELL, *Student Mobility and European Identity: Erasmus Study as a civic experience?*, in *Journal of Contemporary European Research*, 2012, no. 8, p. 490; B. STREITWEISER, *Erasmus Mobility Students and Conceptions of National, Regional and Global Citizenship Identity*, Buffet Center Working Paper No. 11/01, 2011.

[171] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening European Identity through Education and Culture - The European Commission's contribution to the Leaders' meeting in Gothenburg*, 17 November 2017, COM/2017/0673 final, p. 4.

[172] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Strategy for Universities, SWD(2022) 6 final, p. 3.

[173] E. LETTA, *Much more than a Single Market. Speed, Security, Solidarity: Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, April 2024, p. 23, at: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf.

institutions, such as the creation of a "European Degree"[174] or the European Universities Initiative, emphasis shall also be placed on the reinforcement of student mobility rights. Indeed, despite the considerable success of initiatives such the Erasmus+ programme, the Union has to this day failed to grant students a bundle of rights that is effective and clearly delimited in its scope.

To create an independent status for student wishing to exercise their free movement rights would mark a significant step forward: hence, the goal should be to act through the legislative procedure with a view to recognizing an autonomous *right to export* student maintenance grant from the State of nationality, thus abandoning not only the soft policy approach that denotes EU educational policy[175], but also the judicial law-making technique that has traditionally characterized the field of student mobility rights. As pointed out, nothing in the nature of student finance should discourage the recognition of a right to export, neither as regards the financial sustainability of welfare systems, nor as regards the potential risk of attracting 'welfare tourism'[176]. Conversely, granting students such a right would, on one hand, provide for a clearer division of competences on who should bear the cost of financing higher education studies between the host and the home State, and on the other, avoid situations where the students risk falling between two stools, as they might result ineligible for funding in both Member States.

ABSTRACT: EU law does not create a uniform status for those who seek financial support to pursue higher education studies in a different Member State: students may do so in their capacity of EU citizens, or, whether possible, they may rely on their parents' rights as EU migrant workers. However, understanding educational benefits as social advantages to be enjoyed by the students' parents creates tensions within free movement law, both on a systemic and on an individual level. Creating an autonomous status for students exercising their right to free movement not only would clarify who should bear the costs of financing their studies between the home and the host State, but would also avoid risks of differential treatment, as occurred in the recent case *MCM v Centrala studiestödsnämnden*.

KEYWORDS: EU free movement law – social advantages – student mobility – higher education – EU citizenship.

[174] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Blueprint for a European Degree*, of 27 march 2024, {SWD(2024) 74 final}.
[175] L. LÁNCOS PETRA, *Soft Structure vs. Soft Measure: Fleshing Out the Tension in EU Education Policy* in *Legal Issues of Economic Integration*, 2018, no. 3, p. 253 ff.
[176] A HOOGENBOOM, *I study here, and thus I belong?*, cit., p. 184.