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US AND THEM: RESTRICTING EU CITIZENSHIP RIGHTS THROUGH THE NOTION OF SOCIAL INTEGRATION

Stefano Montaldo*

SUMMARY: 1. Integration: A new paradigm for Union citizenship. – 2. Integration conditionality and access to welfare: The genuine link test and the downward trend of economically (in)active EU citizens. – 2.1. Economically inactive EU citizens and integration conditionality: The genuine link test. – 2.2. Blurring the line between economically active and inactive EU citizens: The genuine link test and frontier worker. – 2.3. From the genuine link to the residence test: An additional substantive condition for granting welfare benefits. – 3. Failed integration? The impact of criminal behaviour on EU citizenship rights. – 4. Policing integration complexity: Concluding remarks.

1. Integration: A new paradigm for Union citizenship

The integration of foreign nationals has always been of concern for sovereign States¹. Caught between narratives imbued with “political messianism”² and the centrifugal driving forces intrinsic to “liquid” modern societies³, integration mirrors a community’s degree of internal and external openness. On the one hand, this concept governs the sliding doors of inclusion and otherness within a given group, as it measures the level of

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¹ The concept of integration and its impact on individuals and societies are traditional fields of study for sociologists and political scientists. Several theories have been proposed in order to describe the rationale underpinning this concept and its effects on individuals and societies. For an overview, as far as the EU is concerned, see H.J. TRENTZ, *Narrating European society. Toward a sociology of European integration*, New York, 2016.

² J.H.H. WEILER, *Deciphering the Political and Legal DNA of European Integration*, in J. DICKSON, P. ELEFThERIADIS (eds.), *Philosophical Foundations of European Union Law*, Oxford, 2012, p. 137.

³ Z. BAUMAN, *Liquid modernity*, Cambridge, 2000.

assimilation of (and compliance with) societal values and rules⁴. On the other, it reflects the “managerial effects”⁵ of migration policies on incoming migration flows⁶.

European legal order is not immune to the compelling rise of the concept at issue. Despite the absence of a clear legal definition, integration is gradually becoming a key cross-cutting category of EU law: its vocabulary has penetrated the internal market and the various branches of the areas of freedom security and justice⁷. It has a significant impact on the legal status of individuals, whether EU citizens or foreign nationals. The influence on EU citizenship status is the focal point of the present analysis⁸.

Within the European legal order, the ‘us/them’ hiatus smooths over the complexity of the challenges confronting the EU and its Member States. In principle, the European legal order has promoted a positive attitude toward integration issues over the years, given the establishment of “an ever-closer union among the peoples of Europe”⁹. From this point of view, the concept at stake reveals significant ‘integrative’ potential, as it identifies a general objective of European law. In light of it, rights are conferred as a means for enhancing individual emancipation and fostering inclusiveness in national societies¹⁰. Integration could therefore be described as a two-way process of accommodation whereby both nationals of other Member States and host societies face the challenge of social and economic inclusion of incomers. Within the framework of the internal market, the teleology of integration is coupled with the principle of equality and requires the removal of material and immaterial barriers to access to the labour market, essential public services and welfare benefits in the host State¹¹. These are all necessary pre-conditions for the full enjoyment of fundamental individual rights and for a gradual increase of – personal and collective – quality of life: integration and rights mutually reinforce each other.

⁴ In general, see J. SCHNEIDER, M. CRUL, *Theorising integration and assimilation*, Oxford, 2012.

⁵ D. KOSTAKOPOULOU, S. CARRERA, M. JESSE, *Doing and Deserving: Competing Frames of Integration in the EU*, in E. GUILD, K. GROENENDIJK, S. CARRERA (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Burlington, 2009, p. 167.

⁶ The identitarian and defensive use of citizenship status and integration policies has been widely discussed. From a legal perspective, see S. RODOTÀ, *Il diritto di avere diritti*, Roma-Bari, 2012, p. 4.

⁷ The importance that EU law attaches to the individual does not lead to “pure individualism”. “EU law strives to convert European individuals into members of social spheres external to the political system of the country of origin”: L. AZOULAI, *The European individual and collective entities*, in L. AZOULAI, S. BARBOU DS PLACES, E. PATAUT (eds.), *Constructing the person in EU law*, Oxford, 2016, pp. 203-223.

⁸ Integration of third country nationals is a key-aspect of the common EU migration policy, but it will not be considered for the purposes of the present contribution. See G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2014; S. MONTALDO, *Integration examinations for regular migrants: the difficult search for a balance between national competencies and full effectiveness of EU law*, in *UNIO EU Law Journal*, 2016, n. 2, pp. 39-53.

⁹ See the Preambles of the TEU and the TFEU.

¹⁰ Integration has also been construed from an institutional perspective, as a complex framework of policies and tools to foster equality and inclusion: D. SCHIECK, *Economic and social integration. The challenge for EU constitutional law*, Cheltenham, 2012.

¹¹ P. CARO DE SOUSA, *Catch me if you can. The market freedoms ever-expanding outer limits*, in *European Journal of Legal Studies*, 2011, n. 2, pp. 162-191.

Over the years, the goal of integration has led to a profound reconsideration of the traditional legal categories in the internal market. Integration has contributed to the advancement of the European integration process by boosting the extension of rights to new groups of individuals, regardless of whether they participate actively in the market. The original market preference has been replaced by a more complex and mature legal scenario where students, job seekers, retirees, economically inactive citizens, offenders and minors can, in principle, enjoy the rights that were once reserved for workers¹².

However, the progressive relationship between these two poles reveals the dark side of the integration discourse; integration combines all of the factors determining the centre of gravity of a person, the State and the social environment to which he/she is principally connected. The European integration process has blurred the ways in which personal bonds affect an individual's legal status. Due to the exercise of the freedom of movement, EU citizens can be related to different Member States through citizenship and social integration bonds. In this framework, it has been underlined that, in principle, "the importance of the State of origin is noticeably waning in favour of the responsibilities and obligations of the host States"¹³. However, this major paradigm shift is not all encompassing, just as the principle of equality is not absolute. Here, the "defensive" essence of the concept of integration strikes back, as the degree of inclusion in the host society ends up playing a decisive role in conferring rights to EU citizens. The normative implications of integration include an exclusionary effect to the detriment of those who fail to demonstrate sufficient attachment to the host society. The elements demonstrating the level of proximity to the host Member State can be subject to judicial review to determine whether the EU citizen deserves the full-enjoyment of the rights related to his/her status and to the exercise of a fundamental freedom of the internal market. Of course, Member States are keen to benefit from remaining leeway and often rely on the negative soul of the concept at issue, using forms of integration conditionality as a way of protecting national interests.

This reversed perspective reveals a certain degree of incoherence within the EU legal order, where social integration performs both an integrative and a defensive function. The conceptual vagueness of the notion inflates further flexibility - if not uncertainty - in the system and could allow for major deviations from the EU citizenship regime and internal market law. Some systemic factors are currently exacerbating this risk. In times of "existential crisis"¹⁴ of the European integration process, the detrimental effects of global

¹² Curiously enough, as pointed out by Ségolène Barbou des Places, such an evolution is also reflected by the clash between the internal market traditional approach and the factors underpinning integration goals. On the one hand, the internal market has developed through the very essential element of mobility; on the other hand, integration entails a certain degree of stability and settlement. Internal market has to do with instantaneity, whereas social inclusion is a question of the passing of time. This is another factor blurring traditional EU law categories and leading the EU legal order a step forward, in terms of complexity and maturation. See S. BARBOU DES PLACES, *The integrated person in EU law*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds.), *Constructing the person in EU law*, Oxford, 2016, pp. 186-202.

¹³ Opinion of Advocate General D. RUIZ-JARABO COLOMER, delivered on 15 May 2008, in the case C-228/07, *Petersen*, par. 30.

¹⁴ See Jean-Claude Juncker's speech to the European parliament on the State of the Union 2016, *Towards a*

economic turbulence and the massive migration flows from third countries are distorting the public debate on the advantages and burdens of intra-EU mobility¹⁵. Furthermore, public budget constraints favour defensive national policy choices, where integration conditionality measures represent just one brick in the solid wall of a general trend towards a watered-down approach to the principle of non-discrimination on grounds of nationality.

The Court of Justice plays a key role in this context. As the ultimate interpreter of EU law, the Court is best positioned to clarify what the elusive concept of integration actually means for the purposes of European legal order and the extent to which it can justify national measures restricting the scope of application of the rights conferred to EU citizens. The central question here is whether the Court can be expected to urge Member States to maintain the advances the EU integration process has achieved over the years. The Court does not exist in a vacuum and the debate on its ‘political’ role is lively¹⁶: the interpretation of an elusive concept imbued with political connotations may well mirror the rise of the negative side of the ‘integration coin’.

As reliance on quantitative and qualitative factors of integration increases, its impact on traditional categories of EU law also intensifies accordingly. In this context, the present contribution addresses some of the legal implications of the integration discourse, with a specific focus on select aspects of the EU citizenship regime through the lens of the interpretative role played by the Court of Justice. Firstly, the article considers the evolution of case law concerning the balance between solidarity and the need to preserve national budgets from unreasonable burdens. The recent trend in access to social benefits in the host Member State highlights the Court’s inclination to uphold national budgetary concerns in relation to both economically active and inactive EU citizens. Secondly, the analysis examines the case law on permanent residence and protection from deportation. In particular, the Court acknowledges that a period of imprisonment for a serious crime entails a negative diagnosis on the degree of compliance with societal values and interrupts the continuity of residence in the host Member State. Such a failure to achieve a proper level of integration is deemed sufficient to preclude the acquisition of the right to permanent residence and weakens protection against deportation.

The article analyses this controversial case law and the importance it attaches to the elusive concept of social integration. It discusses the extent to which non-compliance with moral/societal values, in a legal order “united in diversity”, can affect the “fundamental status of nationals of Member States”¹⁷ and the rights stemming from it.

better Europe - A Europe that protects, empowers and defends, available at http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm

¹⁵ M. FERRERA, *The contentious politics of hospitality: Intra-EU mobility and social rights*, in *European Law Journal*, 2016, n. 6, pp. 791-805.

¹⁶ See for instance M. DAWSON, B. DE WITTE, E. MUIR (eds.), *Judicial activism at the European Court of Justice*, Cheltenham, 2013.

¹⁷ Court of Justice, judgment of 20 September 2001, *Grzelczyk*, case C-184/99, par. 31.

2. Integration conditionality and access to welfare: The genuine link test and the downward trend of economically (in)active EU citizens

2.1. Economically inactive EU citizens and integration conditionality: The genuine link test

The Court of Justice has acknowledged that Member States are required to show a certain degree of financial solidarity to foreign EU citizens and their family members¹⁸. However, financial solidarity duties are far from absolute and their actual incidence on national policies varies along with evolving general contingencies, as confirmed by the reactions to the recent global economic crisis¹⁹.

This means that, in principle, “it is permissible” for national authorities to ensure that welfare support granted to foreigners “does not become an unreasonable burden” hampering overall levels of assistance²⁰. The “unreasonable burden” threshold is *per se* a pre-condition for the lawful enjoyment of the freedom of movement of persons in the EU and it has been codified by relevant secondary legislation²¹. However, it has little to do with the scope of application of EU citizenship-related fundamental rights, as its primary purpose is to protect national finances from potential side effects of the internal market²². As such, it should be interpreted as an exceptional restriction to EU fundamental freedoms, a deviation from the Treaties to be invoked as a last resort.

From a Member State perspective, however, this condition may not suffice to avoid excessive burdens on domestic budgets. In particular, national governments are often concerned about the implications of economically inactive EU citizens’ free movement. The absence of an economic link between the individual and the host Member State - and the subsequent lack of contribution to the national welfare system - may urge a selection of the potential recipients of benefits. This is why, in order to govern welfare assistance demand and to meet national budgetary concerns, the Member States have traditionally resorted to integration requirements, the fulfilment of which is a mandatory condition for economically inactive EU citizens to benefit from national welfare systems.

This is in principle perfectly understandable and the Court itself has clarified that national authorities can render the exportability and granting of benefits to this wide

¹⁸ Court of Justice, *Grzelczyk*, cit., par. 44.

¹⁹ R. PALLADINO, *Protezione delle finanze degli Stati membri e ridefinizione delle condizioni di esercizio delle libertà fondamentali*, in *Studi sull’integrazione europea*, 2016, nn. 2-3, pp. 533-556. On the intersection between policy choices, EU law and individual claims of solidarity, see, *inter alia*, the in-depth cross-cut analysis developed by F. DE WITTE, *Justice in the EU. The emergence of transnational solidarity*, Oxford, 2015.

²⁰ Court of Justice, Grand Chamber, judgment of 15 March 2005, *Bidar*, case C-209/03, par. 56.

²¹ See recitals 10 and 16, as well as Articles 7, 12, 13 and 14 of Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, of 29 April 2004, in OJ L 158, 30 April 2004, pp. 77-123.

²² E. GUILD, S. PEERS, J. TOMKIN, *The EU citizenship Directive. A commentary*, Oxford, 2014, pp. 123-131.

category of individuals conditional upon a tangible connection with the State concerned²³. Support can be legitimately reserved to inactive EU citizens who are able to demonstrate they achieved a certain level of integration in the host society, so to reconcile concerns regarding unbridled access to social benefits by those who do not contribute to economic welfare²⁴.

The key questions then become: what is the content of the notion of integration, and what degree of connection with the host society has to be established? So to avoid wide leeway on the part of national authorities, the Court of Justice brought back national integration requirements to a common framework, the so called genuine link test.

In the premises, it has to be underlined that as long as the welfare benefit at issue is not governed by EU law, the Member States enjoy wide discretion in deciding which criteria to use for such an assessment²⁵. This is further amplified by the fact that social policy is a domain reserved to the Member States²⁶, while EU legislation only encourages coordination among national welfare systems as a means to neutralize potential obstacles to freedom of movement²⁷. Nonetheless, discretion in matters of social policy may neither unduly restrict the general principles of the European legal order²⁸, nor undermine the rights granted to individuals by the Treaty provisions regarding their fundamental freedoms²⁹.

The Court of Justice has consistently held that the criteria identified to demonstrate a genuine link “must not be too exclusive in nature”. They must not unduly select elements that “are not representative of the real and effective degree of connection”, to the exclusion of all other relevant factors³⁰. Therefore, the requirements on which the genuine link is based must be flexible enough to address the challenge of diversity and complexity, inherent to the fuzzy concept of personal integration³¹.

From this point of view it has been suggested that, in principle, even in the absence of an economic link with the host State, a sufficient level of integration is to be inherently presumed in case of a legal residence³². However, the Court does not uphold the automatic

²³ For a general overview see S. AMADEO, *Il principio di eguaglianza e la cittadinanza dell’Unione: il trattamento del cittadino europeo ‘inattivo’*, in *Il diritto dell’Unione europea*, 2011, n. 1, pp. 59-94.

²⁴ Court of Justice, Grand Chamber, *Bidar*, cit., par. 57.

²⁵ Court of Justice, judgment of 26 October 2006, *Tas-Hagen and Tas*, case C-192/05, par. 36; Court of Justice, judgment of 1 October 2009, *Gottwald*, case C-103/08, par. 34.

²⁶ Court of Justice, Grand Chamber, judgment of 18 July 2007, *Geven*, case C-213/05, par. 27.

²⁷ F.J.L. PENNING, *European Social Security Law*, Cambridge, 2012.

²⁸ Court of Justice, judgment of 26 January 1999, *Terhoeven*, case C-18/95, par. 44.

²⁹ Court of Justice, judgment of 11 January 2007, *ITC*, case C-208/05, par. 40. In relation to frontier workers, see Court of Justice, judgment of 13 December 2012, *Caves Krier*, case C-379/11, par. 52.

³⁰ Court of Justice, judgment of 11 July 2002, *D’Hoop*, case C-224/98, par. 39; Court of Justice, judgment of 21 July 2011, *Stewart*, case C-503/09, par. 95; judgment of 18 July 2013, *Prinz*, joined cases C-523/11 and C-585/11, par. 37.

³¹ T. PAPADOPOULOS, *Immigration and the variety of integration regimes in the European Union*, in E. CARMEL, A. CERAMI, T. PAPADOPOULOS (eds.), *Migration and welfare in the new Europe. Social protection and the challenges of integration*, Bristol, 2012, pp. 23-48.

³² L. AZOULAI, *La citoyenneté européenne: un statut d’intégration sociale*, in G. COHEN-JONATHAN (ed.) *Chemins d’Europe. Mélanges en l’honneur de Jean-Paul Jacqué*, Paris, 2010, pp. 1-28. In relation to long-term residents who are third-country nationals: Court of Justice, Grand Chamber, judgment of 22 April

correlation between residence and level of integration and tries to avoid a formalistic approach. As a rule, substantive factors such as duration and continuity of residence are considered prototypical and all-encompassing conditions for demonstrating one's degree of integration, since they likely entail the establishment of stable personal links with the host society³³. Close personal and family ties likewise contribute to the appearance of a lasting connection³⁴, as well as the demonstration of genuine attempts to seek employment for a reasonable time³⁵. On the contrary, obligations to have completed a certain number of years of study³⁶ or to have obtained a diploma or professional qualification within the territory of a given State³⁷ have been labelled as overly exclusive in nature.

The Court has also repeatedly underscored that integration requirements must be carefully handled. Caught between the integrative function of the principle of non-discrimination on the grounds of nationality and the interests of the Member States, integration conditionality narrows down the scope of individual rights in the internal market. As a means of addressing fears of unbearable welfare tourism, it influences eligibility for a social benefit and warrants exclusion for many potential recipients. Accordingly, major deviations from the general principles of the European legal order must be avoided. The relevant national measures must pursue a legitimate objective in the public interest, and be scrutinized in light of their appropriateness and proportionality to it. Discriminatory measures can be justified only insofar as they adequately and necessarily meet such an objective, given the absence or non-feasibility of alternative and less restrictive solutions³⁸.

The “unreasonable burden” threshold and the genuine link test can be considered settled key-features governing the dynamics of solidarity and rights across the EU. However, the Court has recently further enhanced the impact of integration conditionality, by extending the test on the degree of attachment also to job seekers and certain categories of migrant workers, such as frontier workers. Moreover, it has elaborated the right-to-reside test, which provides the Member States with further room for exclusion of potential recipients of welfare benefits.

2.2. Blurring the line between economically active and inactive EU citizens: The genuine link test and frontier workers

2012, *Kamberaj*, case C-571/10, par. 90-92.

³³ Court of Justice, Grand Chamber, judgment of 18 November 2008, *Förster*, case C-158/07.

³⁴ Court of Justice, judgment of 22 September 1988, *Bergmann*, case 236/87, par. 20-22; Court of Justice, *Stewart*, cit., par. 100.

³⁵ Court of Justice, Full Court, judgment of 19 December 2013, *Collins*, case C-138/02, par. 69-70.

³⁶ Court of Justice, judgment of 17 January 2013, *Prete*, case C-367/11, par. 50-51.

³⁷ Court of Justice, *D'Hoop*, cit., par. 39.

³⁸ B. NASCIBENE, F. ROSSI DAL POZZO, *Diritti di cittadinanza e libertà di circolazione nell'Unione europea*, Padova, 2012.

Surprisingly enough, the slow emergence of integration conditionality requirements has crossed the dividing line between economically inactive and active citizens. The Luxembourg case law on frontier workers' rights is particularly suggestive in this regard³⁹.

This category of workers is characterized by a distinctive feature. On the one hand, cross-border commuters have an economic link with the State where they work and contribute to its welfare system accordingly. On the other, they preserve residence as well as their core interests and personal connections in the State of origin, where they pay residence-related taxes⁴⁰. This twofold link places frontier workers on the frontline of the debate concerning the limits of financial solidarity among the Member States. In fact, the rising scale of cross-border commuting⁴¹ is a convenient scapegoat for veiled protectionist reactions to the lack of job opportunities and to tight national budgetary constraints⁴².

Frontier workers have traditionally shared the same status as "ordinary" migrant workers under EU law. As long as they pursue a genuine and real activity for remuneration under the direction of another person, they fall under the broad concept of worker pursuant to Art. 45 TFEU, as interpreted by the Court of Justice⁴³. In fact, settled case law consistently remarks that EU citizens who, regardless of their place of residence and their nationality, are employed in another Member State fall within the scope of the Treaty provisions on the free movement of workers⁴⁴.

Therefore, cross-border commuters are entitled to demand non-discrimination on grounds of nationality and the other prerogatives accorded pursuant to primary law to workers who exercise or have exercised the freedom of movement⁴⁵. Likewise, they are

³⁹ Under EU law, 'frontier worker' means any individual pursuing an activity as an employed or self-employed person in a Member State but residing in another Member State, to which he/she returns daily or at least once a week as a rule. The definition is provided by Art. 1 let. f) of Regulation 883/2004 of 29 April 2004 of the European Parliament and the Council on the coordination of social security systems.

⁴⁰ M. FALCONE, *Previdenza e vantaggi sociali per i familiari dei lavoratori comunitari migranti e frontalieri secondo la Corte di giustizia*, in *Studi sull'integrazione europea*, 2009, n. 3, pp. 681-715.

⁴¹ Worker cross-border commuting has grown steadily in the European Union over the past twenty years. A survey conducted in 2006 and published in 2009 revealed some 780 000 frontier workers: G. NERB, F. HITZELSBERGER, A. WOIDICH, S. POMMER, S. HEMMER, P. HECZKO, *Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries*, 2009, available at <http://borderpeople.info/cross-border-mobility>. Given EU enlargements since that time, the number of frontier workers has conceivably risen. In 2014, the European Commission issued a memorandum on EU labour mobility, estimating approximately 1.1 million cross-border workers. Labour market flexibility, the impact of the economic crisis on worker mobility and the ever-closer integration of national markets are contributing to further boosting the phenomenon. See European Commission, *Memo: Labour Mobility within the EU*, 2014, available at http://europa.eu/rapid/press-release_MEMO-14-541_en.htm.

⁴² It has been remarked that governance of the foreign workforce in many Member States is leading to skills and origin-based preferences, rather than enhancing workers' mobility rights in the EU: R. PAUL, *Strategic contextualization: free movement, labour migration policies and the governance of foreign workers in Europe*, in *Policy Studies*, 2013, n. 2, pp. 122-141.

⁴³ *Inter alia*, Court of Justice, judgment of 19 March 1964, *Unger*, case 75/63; Court of Justice, judgment of 3 July 1986, *Lawrie-Blum*, case 66/85, par. 16-17.

⁴⁴ Court of Justice, judgment of 12 December 2002, *de Groot*, case C-385/00, par. 76; Court of Justice, Grand Chamber, judgment of 21 February 2006, *Ritter-Coulais*, case C-152/03, par. 31.

⁴⁵ All Treaty provisions relating to free movement of persons are intended to facilitate the pursuit by EU

covered by equal treatment provisions enshrined in the relevant secondary legislation, such as Regulation (EU) 492/2011⁴⁶ and Directive 2014/54/EU⁴⁷ on the freedom of movement of workers and Regulation (EC) 883/2004⁴⁸ on the coordination of national social security systems.

Mindful of this legal background, the CJEU initially held that economically active EU citizens exercising their freedom of movement should be automatically accorded access to welfare benefits in the host State⁴⁹. Therefore, the recipients of a benefit were not required to reside within the territory of the State of employment⁵⁰. The Court also prevented the States from making the payment of a social advantage contingent upon “the completion of a given period of occupational activity”⁵¹.

This stance marked a clear distinction between economically active and inactive citizens, since the genuine link test applied only to the latter. The direct implication of the requirement of integration was a differentiated attitude towards non-discrimination on grounds of nationality. On the one hand, workers benefited from full equality of treatment with nationals in the Member State of employment. On the other, inactive citizens faced “a more nuanced approach to equality”⁵², subjected to a qualitative assessment of their personal situation. Consequently, Member States could more easily justify indirectly discriminatory measures affecting inactive EU citizens aimed at pursuing legitimate objectives in the public interest.

nationals of occupational activities of all kinds throughout the Union. They preclude measures that might place EU citizens at a disadvantage when they wish to pursue an economic activity in the territory of another State. Court of Justice, judgment of 7 July 1992, *Singh*, case 370/90, par. 16; Court of Justice, judgment of 4 March 2004, *Schilling and Fleck-Schilling*, case C-290/01, par. 23.

⁴⁶ In line with this approach, while barring discrimination from the national work force, Regulation (EU) 492/2011 makes no distinction between migrant and cross-border worker. In fact, recital 5 thereof clarifies that freedom of movement must be enjoyed “without discrimination by permanent, seasonal and frontier workers”. Moreover, Art. 7 of the Regulation codifies the principle of equal treatment of any worker, in respect of any conditions of employment and work, including vocational training and social and tax advantages. From this point of view, the Court deems Art. 7 a specific expression, in the field of the granting of such advantages, of Art. 45, par. 2, TFEU: Court of Justice, Grand Chamber, judgment of 11 September 2007, *Hendrix*, case C-287/05, par. 53; Court of Justice, judgment of 20 January 2013, *Giersch*, case C-20/12, par. 35. See Regulation (EU) 492/2011 of the European Parliament and the Council, *on the free movement for workers within the European Union*, of 5 April 2011, in OJ L 141, 27 May 2011, pp. 1-12.

⁴⁷ Directive 2014/54/EU of the European Parliament and the Council, *on measures facilitating the exercise of rights conferred on workers in the context of the freedom of movement for workers*, of 16 April 2014, in OJ L 128, 30 April 2014, pp. 8-14.

⁴⁸ Regulation (EC) 883/2004 of the European Parliament and of the Council, *on the coordination of social security systems*, of 29 April 2004, in OJ L 166, 30 April 2004, pp. 1-123.

⁴⁹ The concept of social advantage covers all advantages that, whether or not linked to a contract of employment, are generally granted to national workers “primarily because of their objective status as workers or by virtue of the mere fact of their ordinary residence on the national territory, and the extension of which to migrant workers therefore seems likely to facilitate their mobility within the Community”. Court of Justice, judgment of 12 May 1998, *Martinez Sala*, case C-85/96, par. 25.

⁵⁰ Court of Justice, judgment of 27 November 1997, *Meints*, case C-57/96, par. 51; Court of Justice, judgment of 8 June 1999, *Meeusen*, case C-337/97, par. 21.

⁵¹ Court of Justice, judgment of 9 July 1987, *Frascogna*, case 256/86, par. 25; Court of Justice, judgment of 21 June 1998, *Lair*, case 39/86, par. 42.

⁵² C. O'BRIEN, *Real Links, Abstract Rights and False Alarms: the Relationship between the ECJ's Real Link Test Case Law and National Solidarity*, in *European Law Review*, 2008, n. 3, pp. 643-665.

However, in *Hartmann* and in *Geven*, the Court of Justice upheld a major reversal of its case law and extended the genuine link criterion to frontier workers⁵³. According to the Court, the specific situation of cross-border commuters allows the Member State of employment to verify whether an adequately close attachment to its territory exists. The lack of a “sufficiently substantial occupation” in the State of employment amounts to justifying a refusal to grant a social advantage⁵⁴. Therefore, the Court accepted that indirectly discriminatory legislation restricting the scope of Art. 7 of the Regulation in relation to frontier workers could be objectively justified and proportionate to a legitimate objective pursued by a State⁵⁵.

The *revirement de jurisprudence* was later confirmed in *Commission v. Netherlands*⁵⁶, where the Court underlined that economically active citizens’ access to social advantages can be conditioned on the demonstration of a genuine link with the State concerned. Nonetheless, the Court tried to scale down the impact of this statement, by urging a restrictive interpretation of the integration test, by pointing out that residence requirements are in principle inappropriate to demonstrate the (frontier) worker’s sufficient degree of integration. Participation in the employment market *per se* establishes close connections to the State of employment. What is more, as further underlined in subsequent case law⁵⁷, through the taxes the (cross-border) worker pays by virtue of his economic activity, he contributes to the State of employment’s social policies and general welfare. Therefore, the Court envisaged a strong presumption of integration centred on a change of paradigm from mobility within the internal market to the economic effects of stability after the exercise of the freedom of movement⁵⁸. Like any departure from a general principle of EU law, this presumption should be rebutted only in exceptional circumstances, in light of the specific features of each case⁵⁹.

However, the case law on the subject is far from settled and soon after *Commission v. Netherlands* the Court watered down its own statements. In *Giersch*, where access to a study grant for a frontier worker’s daughter was at stake, the Court rejected the presumption of equivalent integration of migrant workers and cross-border commuters. In particular, it contended that access to financial aid could be subjected to the condition

⁵³ 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, n. 1, pp. 167-194.

⁵⁴ Court of Justice, *Hartmann*, cit., par. 36; Court of Justice, Grand Chamber, *Geven*, cit., par. 26.

⁵⁵ Court of Justice, Grand Chamber, *Hendrix*, cit., par. 54-55, with regard to a residence condition.

⁵⁶ Court of Justice, judgment of 14 June 2012, *Commission v. Netherlands*, case C-542/09.

⁵⁷ Court of Justice, *Commission v. Netherlands*, cit., par. 66. In its preliminary ruling in *Caves Krier*, cit., par. 53, the Court underlined that the worker’s contribution to the social policies of the State of employment is essential to demonstrate his sufficient degree of integration, regardless of his personal situation.

⁵⁸ S. O’LEARY, *The curious case of frontier workers and study finance: Giersch*, in *Common Market Law Review*, 2014, n. 2, pp. 601-622; S. BARBOU DES PLACES, *The integrated person in EU law*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds.), *Constructing the person in EU law. Rights, roles, identities*, Oxford, 2016, pp. 179-202.

⁵⁹ The Court has confirmed this approach with regard to job seekers: Court of Justice, *Caves Krier*, cit., par. 55.

of a minimum period of five years of work in Luxembourg, the State of employment⁶⁰. This threshold was considered an appropriate demonstration of the frontier worker's actual attachment to the labour market of that State and to its society as a whole. *A contrario*, a shorter period would not have fulfilled the integration requirement imposed by national legislation.

The reversed presumption modelled by the Court represented a clear departure from a fully-fledged application of the principle of non-discrimination on grounds of nationality to frontier workers and their family members. Admittedly, it was (also) meant to address the risk - whether real or perceived - of study grant forum shopping referred to by the State concerned and by several other Member States submitting written observations⁶¹. Indeed, the Luxembourg government took advantage of the condition of a significant period of occupation suggested by the Court to amend its relevant national law accordingly, thereby restricting access to study grants.

Recently, the revised legislation has been fundamentally endorsed by the Court of Justice in *Bragança Linares Verruga*⁶², confirming the possibility to make receipt of financial aid for study purposes conditional on a parent having worked for at least five years in the State where the benefit is claimed. However, it clarified that this period must not necessarily be continuous, "inasmuch as short breaks are not liable to sever the connection" between the recipient and the Member State concerned⁶³. Proportionality comes in the back door and, at least, prevents the blind application of the chronological integration requirement.

At the present stage, in sum, the economic connection to the State of employment no longer automatically allows a frontier worker to receive support from that State. Of course, frontier workers cannot be expected to fulfil a residence requirement. However, national authorities are entitled to make a case-by-case assessment in order to verify the fulfilment of the genuine link requirement. To perform this task, the national court needs to scrutinize the degree of economic integration in light of elements such as the features of the activity pursued, the duration and continuity of the occupational period, and the worker's actual contribution to the financing of the State of employment. Therefore, even if the Court itself had clarified elsewhere that the acquisition of a qualification or a period of employment does not "assign [a person] to a particular geographical market"⁶⁴, frontier workers' personal situation is assessed on a quantitative basis. Quantity can imply the quality of one's degree of integration, though this is not an automatic equation.

⁶⁰ Court of Justice, *Giersch*, cit., par. 78-80.

⁶¹ Court of Justice, *Giersch*, cit., par. 80, where the Court acknowledges the need to avoid tourism of social benefits.

⁶² Court of Justice, judgment of 14 December 2016, *Bragança Linares Verruga*, case C-238/15.

⁶³ Court of Justice, *Bragança Linares Verruga*, cit., par. 69. A student's parents had been working in Luxembourg for eight years separated by a few short breaks to seek new employment opportunities. In such situations, national legislation must be flexible enough to allow the national authority to consider the applicant's overall personal condition.

⁶⁴ Court of Justice, *Prete*, cit., par. 45.

The test applied to frontier workers plays a permissive function in favour of the interests of the Member States⁶⁵ and endows the national authorities with an additional margin of discretion as to the selectivity of their welfare systems⁶⁶. This is a major gap between law in the books and law in action. Pursuant to the Court's settled case law, indirectly discriminatory national measures cannot be justified solely on grounds of alleged budgetary concerns⁶⁷ or vague and undefined social policy goals⁶⁸. The appropriateness and proportionality of the State's arguments should be accompanied by "specific evidence"⁶⁹. As clarified by the Court, "such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks" to the interest invoked⁷⁰. It follows that, in principle, the burden of proof by which the national authorities are bound shall be particularly stringent, to the extent that it can even undermine Member States' reliance on public interest justifications⁷¹.

Nonetheless, the case law on frontier workers' access to social benefits widens the mesh of the net of judicial scrutiny of national governments' justifications. *Giersch* and *Linares Verruga* are emblematic in this respect. The Court accepts that a study grant should be reserved to frontier workers' children who will likely return to the Member State having financed their studies. The closer the link with such a State, the higher the probability that the student will contribute to that State's development, thus repaying the financial aid received. The standard of proof is significantly undemanding, as the Court is satisfied with general assumptions on the national educational policy, namely the increase of the proportion of residents with a higher education degree⁷². This generous approach further exacerbates the restrictive stance taken by the Court of Justice.

⁶⁵ E. NEFRAMI, *Principe d'intégration et pouvoirs de l'Etat membre*, in *Revue des affaires européennes*, 2014, n. 4, p. 705-714.

⁶⁶ To uphold this variable geometry of social benefits, it has been pointed out that employment-related benefits differ from residence-based benefits, as a legitimate expression of territorially organised solidarity, acknowledged by Article 7 of Regulation (EU) 492/2011. In addition to having social and employment ties, residents are taxable in the concerned State and therefore contribute fully to financial welfare. However, a closer look at the Court's recent judgments reveals that the social advantages that frontier workers were seeking were not related to a stable residence connection. Instead, the justifications usually raised by national governments and the way that they have been addressed by the Court highlight that the drivers of this restrictive trend are based mainly on national budgetary concerns. On the attitude of the Member States to their budgetary constraints and the impact on compliance with internal market regime see R. PALLADINO, *Protezione delle finanze degli Stati membri*, cit., pp. 533-556.

⁶⁷ Court of Justice, judgment of 20 March 2003, *Kutz-Bauer*, case C-187/00, par. 59; Court of Justice, judgment of 10 March 2005, *Nikoloudi*, case C-196/02, par. 53. In any event, the Court has always acknowledged that budgetary considerations may underlie more demanding national policy choices, in terms of healthcare service organization, social policy and environmental policy.

⁶⁸ Court of Justice, judgment of 13 June 1989, *Rinner-Kühn*, case C-171/88, par. 14.

⁶⁹ Court of Justice, judgment of 18 March 2004, *Leichtle*, case C-8/02, par.45; Court of Justice, *Commission v. Netherlands*, cit., par. 82.

⁷⁰ Court of Justice, Grand Chamber, judgment of 13 April 2010, *Bressol*, case C-73/08, par. 71, where the French government intended to preserve public health.

⁷¹ N. NIC SHUIBHNE, M. MACI, *Proving the public interest. The growing impact of evidence in free movement case law*, in *Common Market Law Review*, 2013, n. 5, pp. 965-1006.

⁷² Luxembourg has the largest proportion of frontier workers in the EU. They have been continuously increasing since the 1970s, and were more than 170 000 in 2015, representing about 45% of the work force:

2.3. From the genuine link to the residence test: An additional substantive condition for granting welfare benefits

The multi-faceted scenario of economically inactive citizens exercising freedom of movement offered an opportunity to the Court of Justice to further elaborate on the interplay between formal right to residence and a person's actual links with the host State. In *Brey*, the Austrian Pensions Insurance Institution had refused to grant a German citizen a non-contributory compensatory supplement to his retirement pension. In the Austrian authorities' view, Mr. Brey could not be granted social welfare support, on the ground that, owing to his low pension, he didn't have enough resources to establish his lawful residence in Austria.

The Court stated that the granting of financial aid could be legitimately subjected to the fulfilment of the requirements imposed by domestic law for obtaining a right to residence⁷³. As a matter of fact, the exercise of the right to reside can be subordinated to the legitimate interest of the Member State to protect its social assistance system and general public finances from excessive burdens⁷⁴. What the Court firmly rejected was the idea that the failure to fulfil the conditions for lawful residence under national law could automatically lead to impede access to welfare assistance. Instead, the national referring judge has to establish whether *in concreto* the burden on the host State welfare system is unreasonable pursuant to Directive 2004/38/EC, also in relation to the specific situation of the person seeking for social assistance⁷⁵.

Although in principle automatic exclusion from welfare benefits is banned, the more recent case law on other sub-categories of economically inactive citizens reveals certain critical implications of a blind use of the right-to-reside test. In the well-known *Dano* preliminary ruling⁷⁶, the Court stated that the Member States should be allowed to deny non-contributory cash benefits covering subsistence costs of nationals of other Member States who do not have sufficient resources to provide for themselves. In those situations, the basic economic pre-condition for exercising the right to stay laid down by Directive 2004/38/EC would be fulfilled solely because of the financial support granted by the host State⁷⁷. This is the reason why, in the Court's view, an individualized assessment of proportionality is unnecessary in case of EU citizens exercising their freedom of

see the official data available at http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=12928&IF_Language=eng&MainTheme=2&FldrName=3&RFPATH=92.

⁷³ Court of Justice, judgment of 19 September 2013, *Brey*, case C-140/12, par. 44.

⁷⁴ Court of Justice, *Brey*, cit., par. 30 and 55; Court of Justice, Grand Chamber, *Förster*, cit., par. 39.

⁷⁵ The Court calls for "An overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterizing the individual situation of the person concerned", Court of Justice, *Brey*, cit., par. 64.

⁷⁶ Court of Justice, Grand Chamber, judgment of 11 November 2014, *Dano*, case C-333/13.

⁷⁷ Court of Justice, Grand Chamber, *Dano*, cit., par. 79.

movement solely to obtain social benefits⁷⁸. In particular, only “the financial situation of the person concerned should be examined specifically”⁷⁹, for the precise purpose of determining whether a right to reside does exist. All other individual factors and circumstances are left aside, so that automatic exclusion from welfare benefits *de facto* strikes back.

This is further confirmed by a recent line of cases concerning the job seekers’ regime. In *Alimanovic* and *Garcia Nieto*⁸⁰, the Court of Justice stated that the provisions of Directive 2004/38/EC on the retention of the status of worker provide a sufficiently gradual system capable of taking into account individual circumstances. Job seekers “know, without ambiguity, what their rights and duties are”, so that an adequate level of legal certainty and transparency on the award of social assistance is guaranteed⁸¹. Therefore, no individual assessment is needed, since a normative exclusionary precondition is not fulfilled⁸².

Moreover, while the scope of the right-to-reside test was at first limited to economically inactive citizens claiming non-contributory social assistance, the latest case law has broadened its scope to any social security advantage. In *Commission v. United Kingdom*⁸³, in particular, the Luxembourg Court described this check as a “substantive condition which economically inactive citizens must meet in order to be eligible” for social benefits⁸⁴.

This means that the right-to-reside test is capable of automatically excluding anyone who fails to fulfil it from social advantages in the host State. The Court allows national authorities to dispose of any assessment of the other elements demonstrating the degree of personal and social integration. Irrespective of any considerations of proportionality, the presumption of a sufficient and genuine link in the event of lawful residence is replaced by a blanket rule of exclusion negatively affecting economically inactive citizens⁸⁵.

3. Failed integration? The impact of criminal behaviour on EU citizenship rights

⁷⁸ D. THYM, *The elusive limits of solidarity. Residence rights of and social benefits for economically inactive Union citizens*, in *Common Market Law Review*, 2015, n. 1, pp. 17-50.

⁷⁹ Court of Justice, Grand Chamber, *Dano*, cit., par. 80.

⁸⁰ Court of Justice, Grand Chamber, judgment of 15 September 2015, *Alimanovic*, case C-67/14; Court of Justice, judgment of 26 February 2016, *Garcia Nieto*, case C-299/14.

⁸¹ Court of Justice, Grand Chamber, *Alimanovic*, cit., par. 60.

⁸² For a critical appraisal of the trend of the Court with regard to job seekers see M.E. BARTOLONI, *Lo status di cittadino dell’Unione in cerca di occupazione: un limbo normativo?*, in *European Papers*, 2016, n. 1, pp. 153-162.

⁸³ Court of Justice, judgment of 14 June 2016, *Commission v. United Kingdom*, case C-308/14.

⁸⁴ Court of Justice, *Commission v. United Kingdom*, cit., par. 72.

⁸⁵ The Court did not answer to the Commission’s complaint concerning the disproportionate nature of the residence test provided by the national legislation.

EU citizenship is usually considered a rights-oriented status, under which Member State nationals are granted certain prerogatives stemming from EU law⁸⁶. The narrative on European citizenship often underscores the absence of clear citizenship duties at the EU level⁸⁷. However, recent analyses have identified a “generational shift towards the rising significance of conditions and limits”, whereby the full enjoyment of EU citizenship rights is *de facto* conditioned by increasing implied duties⁸⁸. Such implied obligations emerge from the practice of the Member States and the case law of the Court, by means of responsibilities and conditions. Many of them, regardless of their formal qualification, call into play the achievement of quantitative and/or qualitative levels of integration in the host society. The trends of the Court of Justice on the acquisition of permanent residence by EU citizens’ family members and protection against deportation are particularly instructive in this respect.

With regard to the former, Art. 16 of Directive 2004/38 makes the granting of permanent residence to an EU citizen’s family member contingent on certain quantitative connecting factors, intended to demonstrate an adequate level of attachment to the host society. Namely, the family member must have resided continuously and legally in that Member State with the EU citizen for at least five years.

According to a settled line of reasoning of the Court, Art. 16 must be read in light of Recital 17, which states that permanent residence aims at strengthening “the feeling of Union citizenship” and “promoting social cohesion”. Therefore, “the integration objective which lies behind the acquisition of the right to permanent residence [...] is based not only on territorial and time factors, but also on qualitative elements, relating to the level of integration in the host State”⁸⁹. In *Dias*, reliance on the achievement of a proper qualitative degree of attachment to the host State led the Court to consider that periods completed on the basis solely of a residence permit can, by analogy, be compared to the periods of absence pursuant to Art. 16, par. 4, of the Directive⁹⁰.

The Court went one step further in *Onuekwere*, where it wondered under what circumstances, if any, a period of imprisonment might constitute legal residence for the purposes of permanent residence⁹¹. On this occasion, the Court took an even stricter

⁸⁶ See E. TRIGGIANI (ed.), *Le nuove frontiere della cittadinanza europea*, Bari, 2011; E. GUILD, C.J. GORTÁZAR ROTAECHE, D. KOSTAKOPOULOU (eds.), *The reconceptualization of European Union citizenship*, Leiden, 2014, in particular Parts II and III.

⁸⁷ D. KOCHENOV, *EU citizenship without duties*, in *European Law Journal*, 2014, n. 4, pp. 482-498.

⁸⁸ N. NIC SHUIBHNE, *Limits rising, duties ascending: The changing legal shape of EU citizenship*, in *Common Market Law Review*, 2015, n. 4, pp. 889-938. See also Bellamy’s critique to Kochenov’s arguments on the absence of EU citizenship duties: R. BELLAMY, *A duty free Europe? What’s wrong with Kochenov’s account of EU citizenship rights*, in *European Law Journal*, 2015, n. 4, pp. 558-565.

⁸⁹ Court of Justice, judgment of 21 July 2011, *Dias*, case C-325/09, par. 64.

⁹⁰ Court of Justice, *Dias*, cit., par. 63. The Court extended the scope of application of Art. 16(4) of the Directive 2004/38: “Even though it refers only to absences from the Host Member State, the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that State without having a right of residence”.

⁹¹ Court of Justice, judgment of 16 January 2014, *Onuekwere*, case C-378/12. Mr. Onuekwere was a Nigerian national married to an Irish woman. Thanks to his family links, in 2000 he obtained a five-years residence permit, but was later convicted and sentenced twice and spent more than four years in prison. In

stance. It considered that the commission of a criminal offence disrupts the qualitative aspect of integration, because it infringes on the moral values expressed by the society of the host State. Such an occurrence “justifies the loss of the right [at issue] even outside the circumstances mentioned in Article 16(4) of Directive 2004/38”⁹², because it is in plain contrast with the objectives pursued by EU law⁹³. It follows that, in principle, regardless of a proportionality scrutiny, time spent in prison does not constitute legal residence for the purposes of acquiring the right to permanent residence⁹⁴. Moreover, it negatively affects continuity of residence, so that aggregation of pre- and post-imprisonment periods is not permitted.

The same rationale allowed this restrictive approach to spread very quickly to protection from deportation under Articles 27 and 28 of Directive 2004/38. These Articles provide for an ascending scale of protection, the intensity of which is directly related to the duration of residence in the host State⁹⁵. In *Tsakouridis*⁹⁶, the first preliminary ruling concerning the interpretation of the provisions at issue, the Court stressed the importance of the distinction between the incremental levels of protection. In particular, the “imperative grounds of public security” mentioned in Article 28(3)(a) with regard to EU citizens having resided in a Member State for more than ten years allow for restrictions to the right to move and reside in the Union only in cases of extremely serious threats to public security⁹⁷. The Court viewed this threshold to be “considerably stricter” than the reference to general public security concerns and to the serious grounds of public policy or security stated in Articles 27(1) and 28(2) respectively.

However, subsequent case law has gradually dismantled this theoretical legal framework and the rationale underpinning it. In *PI*⁹⁸, a preliminary ruling concerning expulsion of a sexual offender from Germany, the Court interpreted Article 28(3)(a) as requiring continuity of residence, notwithstanding the lack of clear wording and

2010, after successfully resisting an order of expulsion, he submitted a request for a permanent residence card. However, the Secretary of State dismissed his request and the immigration and Asylum Chamber of the Tribunal confirmed he had a right of residence, but could not rely on permanent residence.

⁹² Court of Justice, *Onuekwere*, cit., par. 25.

⁹³ Here the Court adjusted the interpretation of the concept of social cohesion mentioned in Recital no. 17, by stressing the predominance of moral concerns over a more nuanced socio-economic reading.

⁹⁴ Besides this qualitative assessment, the Court resorted to a literal interpretation of Art. 16, where it requires the family member to live with the EU citizen. In principle, a period spent in prison excludes *per se* cohabitation, so that acquisition of permanent residence is necessarily precluded. However, this literal reading was soon watered down by the Court, due to its potential systemic implications: spouses can be forced to live separately for many ordinary and licit reasons, such as work or health. Therefore, in *Ogierakhi*, the Court stated that a too formalistic interpretation of Art. 16 would not have been consistent with the object and purpose of Directive 2004/38. Court of Justice, judgment of 10 July 2014, *Ogierakhi*, case C-244/13, par. 40.

⁹⁵ In particular, under Article 27, par. 1, Union citizens who do not have permanent residence can be deported for reasons of public security or public health. Instead, Article 28, par. 2, requires serious grounds of public policy or public security in case of permanent residents. Lastly, Art. 28, par. 3, confines deportation of minors and citizens residing for more than ten years to imperative grounds of public security.

⁹⁶ Court of Justice, Grand Chamber, judgment of 23 November 2010, *Tsakouridis*, case C-145/09.

⁹⁷ Court of Justice, Grand Chamber, *Tsakouridis*, cit., parr. 40-41.

⁹⁸ Court of Justice, Grand Chamber, judgment of 22 May 2012, *PI*, case C-348/09.

legislative will in this respect⁹⁹. Moreover, in a subsequent case it contended that for the ten-year period for the maximum degree of protection against deportation to be invoked, it “[had to] be calculated by counting back from the date of the decision ordering the person’s expulsion”¹⁰⁰. The expulsion order certifies failure to genuinely integrate in the host society. As such, it justifies a departure from the case law according to which the period for acquiring permanent residence starts when lawful residence commences¹⁰¹.

The “counter-intuitive trend”¹⁰² also affected the intensity of protection against deportation. In *PI*, the Court underlined that the criminal conduct at issue “disclose[d] particularly serious characteristics” that could constitute “a direct threat to the calm and physical security of the population”¹⁰³, thereby justifying deportation under Art. 28(3) of Directive 2004/38.

Nonetheless, the Court had previously clarified that public security deals with exceptional situations, such as “a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations”¹⁰⁴. The commission of a criminal offence can be in plain contrast with accepted societal values, but generally does not reach the degree of systemic disturbance inherent to the definition of public security, as provided by Luxembourg case law. With certain exceptions, crimes are in principle a matter of public policy, which is not listed in Art. 28(3) as grounds for expulsion¹⁰⁵. Consequently, the Court applied this provision analogically and lowered the threshold of public security, blurring the line separating it from public order. It follows that any serious criminal behaviour - and in particular the offences listed in Art. 83(1) TFEU - may lead to the expulsion of EU citizens, regardless of their duration of residence in the host State and of the other qualitative factors demonstrating one’s degree of integration¹⁰⁶. This interpretative approach is in plain contrast with the wording and

⁹⁹ See the harsh critique in D. KOCHENOV, B. PIRKER, *Deporting the citizens within the European Union: A counter-intuitive trend in case C-348/09 PI v Oberbürgermeisterin des Stadt Remscheid*, in *Columbia Journal of European Law*, 2013, n. 3, pp. 369-390.

¹⁰⁰ Court of Justice, judgment of 16 January 2014, *MG*, case C-400/12, par. 24.

¹⁰¹ These statements are in plain contrast with the Commission’s written guidance on the interpretation and application of Articles 27 and 28. See the Communication from the Commission to the European Parliament and the Council COM(2009) 313 final, of 2 July 2009, on guidance for better transposition and application of Directive 2004/38/EC on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹⁰² D. KOCHENOV, B. PIRKER, *Deporting the citizens*, cit., p. 369.

¹⁰³ Court of Justice, Grand Chamber, *PI*, cit., par. 28. In the Court’s view, it is for the Member States to decide to regard serious crimes as constituting a threat to a fundamental interest of society and to frame them as imperative grounds of public security. In particular, domestic jurisdictions are endowed with this task, which they have to perform in light of the circumstances of each specific case.

¹⁰⁴ Court of Justice, Grand Chamber, *Tsakouridis*, cit., par. 44.

¹⁰⁵ Accordingly, Advocate General Bot pointed out the heinous offences occurred, but confined it within the ambit of public order: Opinion of Advocate General Y. BOT, delivered on 6 March 2012, in the case C-348/09, *PI*, par. 49-56.

¹⁰⁶ It has been underlined that the imposition of qualitative criteria of integration further exacerbates the risk of incoherence and weakened protection across the EU: E. SPAVENTA, *Earned citizenship. Understanding Union citizenship through its scope*, in D. KOCHENOV (ed.), *Citizenship and federalism in Europe: The role of rights*, Cambridge, 2017, pp. 204-220.

purpose of the relevant secondary provisions, and strengthens the discretion of the States on offender deportation¹⁰⁷. Bad citizens do not deserve a higher protection against deportation, nor does the stigma of imprisonment allow them to pursue and obtain reintegration into society during and after detention¹⁰⁸.

4. Policing integration complexity: Concluding remarks

EU citizenship has benefited from a couple of decades of “vast jurisprudential endeavour”¹⁰⁹ aimed at strengthening the “fundamental status of nationals of the Member States”¹¹⁰. At the same time, narratives on integration have developed accordingly, as these concepts are profoundly intertwined and mutually influence one another. EU law and Union citizenship challenge the peoples of Europe with new collective modes of existence¹¹¹. Individuals and local or national populations no longer dominate the agenda, as the European integration process has brought about an enlarged political and legal scenario where different people are “united in diversity” under the aegis of the principle of non-discrimination on grounds of nationality¹¹². Mother tongues, institutions, schools, societal steps such as birth and marriage and all other factors that demonstrate belonging have suddenly been rediscovered and are now framed within a supranational scenario that increasingly interacts with national cultural and moral backgrounds¹¹³. Of course, “EU law does not impose [...] a uniform scale of values”, so that Member States preserve a significant degree of moral autonomy¹¹⁴. However, as Advocate General Poiares Maduro stated, “Citizenship of the Union must encourage Member States to no longer conceive

¹⁰⁷ See D. KOSTAKOPOULOU, *When EU citizens become foreigners*, in *European Law Journal*, 2014, n. 4, pp. 447-463. The author contends that this approach is an intrinsic edge of EU citizenship status and represents the outcome of the clash between the European dimension of citizenship and its link with national citizenship regimes.

¹⁰⁸ Some authors have underlined that this approach is not coherent with national criminal systems and boosts the impact of punishment. Through banishment, the national authorities are entitled to set aside undesired citizens, thereby rejecting centuries of reflections on the purpose of punishment, which should instead enhance the offender’s chances of reintegration into society. In particular, Kochenov and Belavusau write about the rise of a European version of US theories on civil death: U. BELAVUSAU, D. KOCHENOV, *Kirchberg dispensing the punishment: Inflicting “civil death” on prisoners in Onuekwere (C-378/12) and MG (C-400/12)*, in *European Law Review*, 2016, n. 3, p. 557-577. It has also been underlined that this restrictive stance encroaches with the case law on the optional grounds for refusal of mutual recognition and judicial cooperation in criminal matters: L. MANCANO, *The place for prisoners in European Union law?*, in *European Public Law*, 2016, n. 4, pp. 717-748.

¹⁰⁹ Opinion of Advocate General M. SZPUNAR, delivered on 4 February 2016, in the case C-165/14, *Rendón Marin*, par. 110.

¹¹⁰ Court of Justice, *Grczelczyk*, cit., par. 31.

¹¹¹ L. AZOULAI, *The European individual and collective entities*, cit., pp. 204-205.

¹¹² D. KOSTAKOPOULOU, *When EU citizens become foreigners*, cit., p.450.

¹¹³ F. DE WITTE, *Sex, drugs & EU law: The recognition of moral and ethical diversity in Europe*, in *Common Market Law Review*, 2013, n. 6, pp. 1545-1578.

¹¹⁴ Court of Justice, judgment of 18 May 1982, *Adoui and Cornuaille*, joined cases 115/81 and 116/81, par. 8.

of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union”¹¹⁵.

Still, as several commentators have noted, European citizenship now faces a reverse reactionary phase¹¹⁶: the Court of Justice is being roundly and harshly criticized for having taken a restrictive stance¹¹⁷, sacrificing “the last vestiges of EU citizenship to the altar of [...] nativist tendencies”¹¹⁸. An increasingly substantial body of case law is seen as deconstructing some of the key advances of the integrative implications stemming from EU citizenship¹¹⁹.

The case law discussed above demonstrates that the concept of integration is a powerful driving force in this trend. The permissive effects of the extended genuine link, the even stricter exclusionary implications of the right-to-reside test and the limits to permanent residence and protection against deportation are all powerful tools in the hands of national authorities to accommodate national interests to the detriment of a fully-fledged Union citizenship regime.

In particular, the treatment of frontier workers signals that the restrictive turn denounced in the literature for economically inactive citizens is also affecting the condition of workers. In principle, the Court continues to uphold an expansive definition of migrant worker. Settled case law confirms that only marginal and ancillary activities prevent a person from fitting this definition¹²⁰. It follows that economically inactive citizens should represent a residual category. However, recent surveys on national legislations and practices concerning flexible types of work have revealed that many Member States are establishing stricter thresholds for a person to be considered a migrant worker¹²¹. Marginal and precarious workers are increasingly being treated as inactive citizens and *de facto* deprived of the guarantees provided by EU law¹²². In this framework, case law shapes the frontier workers and job seekers regime according to the economically inactive citizen paradigm, under which the achievement of a high degree of integration is a well-established condition to being granted social advantages. This approach abandons the dynamic, extensive and all-encompassing reading of the freedom

¹¹⁵ Opinion of Advocate General M. POIARES MADURO, delivered on 28 February 2008, in the case C-499/06, *Nerkowska*, par. 23.

¹¹⁶ E. SPAVENTA, *Earned Citizenship*, cit., p. 204.

¹¹⁷ S. GIUBBONI, *Free movement of persons and European solidarity revisited*, in *Perspectives on Federalism*, 2015, n. 3, pp. 1-18.

¹¹⁸ C. O'BRIEN, *Civil capitalist sum: Class as the new guiding principle of EU free movement rights*, in *Common Market Law Review*, 2016, n. 4, pp. 937-978.

¹¹⁹ Beyond legal arguments, some authors note the Court's attempt to be a political actor facing the turbulence of the economic crisis. D. KOCHENOV, *The essence of European citizenship emerging from the last ten years of academic debate. Beyond the cherry blossoms and the moon?*, in *International Comparative Law Quarterly*, 2013, n. 1, pp. 97-136; C. O'BRIEN, *The ECJ sacrifices citizenship in vain. Commission v. United Kingdom*, in *Common Market Law Review*, 2017, n. 1, pp. 209-243.

¹²⁰ Court of Justice, judgment of 21 February 2013, *LN*, case C-46/12; Court of Justice, judgment of 25 March 2015, *Fenoll*, case C-316/13.

¹²¹ C. O'BRIEN, E. SPAVENTA, J. DE CONINCK, *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, FreSsco Comparative Report 2015, available at <http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>.

¹²² C. O'BRIEN, *Civil capitalist sum*, cit., p. 937.

of movement of workers the Court had been used to. On the one hand, the concept of worker for the purposes of Regulation 492/2011 is uniform and all migrant workers formally share the same regime. On the other, in light of the described trend, different degrees and forms of exercise of the freedom of movement are triggering a variable geometry of guarantees. The gap between formal definitions and the actual level of protection of individual rights impacts weaker categories of migrant workers and is at odds with the principle of non-discrimination on grounds of nationality. Integration becomes a defensive tool in the hands of national governments, through which an increasing number of potential recipients is excluded from welfare benefits. The ever-expanding use of integration conditionality affects the EU concept of worker and may have a managerial impact on intra-EU mobility as a whole, by discouraging the freedom of movement of weak sub-categories of workers.

The right-to-reside test further exacerbates the potential risks behind the concept of integration, as it eliminates any assessment of an individual's actual degree of attachment to the host society. In order to assuage national fears of welfare tourism, integration conditionality has evolved into a formal pre-integration requirement and widens the net of its exclusionary effect. It inflates rigidity in a complex system where flexible job markets, non-standard forms of employment and undeclared illegal work often lead to a misalignment between the EU concept of worker and the national attitude towards the label of inactive citizen¹²³. The lack of a case-by-case proportionality assessment could likewise be detrimental to people with a reduced work capacity due to duty of care, disability, language or cultural barriers. Secondly, the test under consideration "occurs a stage before" that of the principle of non-discrimination on grounds of nationality¹²⁴. In *Commission v. United Kingdom*, the Advocate General submitted that a certain degree of discrimination is an inherent and almost inevitable feature of the freedom of movement¹²⁵. Nonetheless, the exclusionary effects of the right-to-reside test neutralize any considerations on the actual degree of integration of the person concerned. European citizenship no longer triggers the principle of equality with a few proportionality-based exceptions. Instead, citizenship rights - and access to welfare benefits in particular - can be restricted by a *de facto* automatic mechanism, to the exclusion of all other elements representing one's actual degree of integration.

Lastly, recent case law on the acquisition of the right to permanent residence and on protection from deportation is particularly suggestive of the strict dynamics of exclusion potentially underpinning narratives on integration. The mutual influence between the intensity of citizenship rights and degree of integration is frustrated by the exclusion of prisons from the spaces where integration can actually take place. The Court raises a firewall between good and bad citizens, ignoring centuries of reflections and legal efforts

¹²³ C. O'BRIEN, *I trade, therefore I am. Legal personhood in the European Union*, in *Common Market Law Review*, 2013, n. 6, pp. 1643-1684

¹²⁴ Opinion of Advocate General P. CRUZ VILLALÓN, delivered on 6 October 2015, in the case C-308/14, *Commission v. United Kingdom*, par. 77.

¹²⁵ Opinion of Advocate General P. CRUZ VILLALÓN, cit., parr. 75-76.

towards the liberalization of prisoners' rights, as well as the extensive debate on the rehabilitative nature of punishment. Instead of emphasizing the rationale and the potential effects of criminal punishment on the offender, the Court constructs a "post-punishment"¹²⁶, through which the stigma of imprisonment leads to banishment and further restriction of rights. The serious offender faces civil death: he cannot be considered integrated and deserves no future chances, because his presence would represent a persistent (perceived?) threat to the host society.

In all these areas, the critical nexus between EU citizenship and integration reveals a number of common traits. Evidently, integration is far from a neutral concept, bringing with it political choices, legal priorities and moral preferences. At first glance, its increasing impact on EU law might appear paradoxical. In fact, the vocabulary of integration marks a paradigm shift from internal market and free movement to stability and settlement. While promoting mobility, the European legal order attaches key importance to the degree of sedentary life and derives from it significant limitations to EU citizenship and free movement regimes. This circular dynamic of integration issues highlights the level of complexity that the European Union has reached over the years. It enriches the internal market discourse with deeper reflections on the need to seek a balance between diversity and coexistence, rights and duties, solidarity and national interests in a community of law.

The current approach to the concept of integration reveals a great deal about the remarkable progress of European legal order, but also exposes its inherent quandary. This predicament is well mirrored by the different opinions expressed by scholars on the irresistible rise of EU citizenship rights. Many commentators have noted the increasing legal significance of EU citizenship with favour, while others complain about its "narcissistic" amplification, which "glorif[ies] the individual and humiliat[es] the State"¹²⁷.

The emergence of the concept of integration also underscores a moral turn in EU law and policies. While the fragmentation of national legal orders reflects the enduring moral autonomy of Member States, the impact on rights stemming from Union citizenship of a failure to comply with accepted societal values shows that EU law is not immune from some sort of policing role. In this vein, it has been highlighted that the development of the integration vocabulary in Luxembourg adds substance to EU citizenship, since it overcomes the traditional passive idea of incorporation in the host society and embraces a more dynamic and proactive dimension. Individuals seeking protection from EU law are required to recognize "the common space of values he or she is given to live in, in the form that is particularized in the host society"¹²⁸.

¹²⁶ D. KOCHENOV, U. BELAVUSAU, *Kirchberg dispensing the punishment*, cit., p. 575.

¹²⁷ G. DAVIES, *The humiliation of the State as a constitutional tactic*, in F. AMTENBRINK, P.A.J. VAN DEN BERG (eds.), *The constitutional integrity of the European Union*, The Hague, 2010, pp. 147-174.

¹²⁸ L. AZOULAI, S. COUTTS, *Restricting Union citizen's residence rights on grounds of public security: where Union citizenship and the AFSJ meet: P.I.*, in *Common Market Law Review*, 2013, n. 2, pp. 553-570.

Therefore, the daily contest between national interests and EU citizenship rights leads EU law to swing between the “empowerment and disempowerment” of the individual¹²⁹. As such, it forces decision-makers to choose from among opposing expectations, thereby exposing themselves to inevitable criticism. However, it is one thing to show a yellow card to players, but it is another matter altogether to ban them from the match. The exclusionary potential of integration conditionality should be more carefully handled by the Court, in terms of in-depth legal reasoning and a prudent assessment of the impact on the persons concerned and EU citizenship as a whole. The described trends of Kirchberg case law water down the complexity of the concept of integration, and risk amplifying the perception of otherness across the EU and undermining the “feeling of Union citizenship”¹³⁰ and its actual legal regime.

ABSTRACT: The article addresses the impact of the concept of social integration on the European Union citizenship regime. Despite the lack of a clear legal definition, integration is gradually becoming a key cross-cutting category of EU law. The degree of integration in the host society influences the intensity of protection granted by EU law, as Member States often resort to forms of integration conditionality to protect their core interests. The analysis contends that recent Court of Justice case law acknowledges the compelling rise of this elusive concept. However, the Court fails to address its intrinsic complexity and does not take into due consideration the impact of its exclusionary effect on the scope of application of Union citizenship rights.

KEYWORDS: Integration – EU citizenship – Genuine link – Residence – Deportation.

¹²⁹ M. DOUGAN, N. NIC SHUIBHNE, E. SPAVENTA (eds.), *Empowerment and disempowerment of the European citizen*, Cheltenham, 2012.

¹³⁰ See Directive 2004/38/EC, cit., recital n. 17.