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Article

EU Citizenship and Direct Taxation 'The European Court of Justice in the Era of Public Decline for a Citizen's Europe'

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The Treaty of Maastricht introduced the status of EU citizenship to the nationals of Member States. Central to that status is the right to move and reside freely within the territory of the Member States, in combination with the right to non-discrimination on the ground of nationality. This contribution discusses, amongst others, whether or not the ECJ has been immune for the decline of the enthusiasm for a citizen's Europe as a result of the economic crisis since the late 2000s. The contributions centres on the development of the ECJ's case law on EU citizenship until now and compares it with case law in which the influence of the notion of EU citizenship on the interpretation of the traditional economically based free movement rights on the free movement of persons ('market freedoms') is acknowledged. The contribution also discusses whether the ECJ's changed perspective on the scope of the treaty freedoms for economically active persons is recognized in the ECJ's Schumacker case law.

1 Introduction

The Treaty of Maastricht introduced the status of EU citizenship to the nationals of Member States (Article 20 TFEU). Central to that status is the right to move and reside freely within the territory of the Member States, in combination with the right to non-discrimination on the ground of nationality (Article 21 TFEU). Twenty years after the introduction of the status of EU citizenship, it has mainly been the European Court of Justice (ECJ) that has given substance to the status of EU citizenship and the connected free movement and residence rights. In the context of the economic crisis since the late 2000s, the public debate centred on intra EU solidarity. At first, this public debate was in relation to the public debt crisis and later turned to migration and the possible negative effects on national welfare systems. Against this background, the enthusiasm for a citizen's Europe declined.

In this contribution, I will discuss whether or not the ECJ has been immune for this development. Section 2 identifies and discusses, in general, the four different periods in the development of EU citizenship that can be recognized in the ECJ's case law until now. Section 3 discusses how the introduction of EU citizenship has influenced the ECJ's interpretation of the traditional economically based free movement rights on the free movement of persons ('market freedoms') and how this interpretation relates to the development of the ECJ's case law on EU citizenship as discussed in section 2. Section 4 examines whether the ECJ's changed perspective on the scope of the treaty freedoms for economically active persons is also recognized in the ECJ's Schumacker case law. Finally, section 5 gives some final remarks on the main question addressed in this contribution.

2 The coming of age of EU citizenship: From the market citizen to the reinvention of national belonging[1]

2.1 Period 1: The Market-Citizen

Prior to the introduction of EU citizenship, the TFEU provisions on economically active persons related to the establishment of the internal market. The original aim of the internal market was to be achieved by the free movement of goods and production factors between Member States. For this purpose, free movement rights were introduced on which economic actors could base their claim whenever a Member State impeded their inter Member State movement. The focus of these freedoms was therefore mainly economically based.

However, the ECJ's case law, predating the introduction of EU citizenship, already shows signs of a broad interpretation of the rights of economic migrants; protecting them beyond their role as economic actors.[2] Exemplary in this regard is the *Carpenter* judgment.[3] Mr

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1 This paragraph is, to an extent, an abstract of E. W. Ros, *EU Citizenship and Direct Taxation* Ch. 11 (EUCOTAX series, nr. 54, Kluwer Law International 2017).

2 In this regard, Spaventa refers to the ECJ's case law on access to social and tax advantages; on family and education rights and on the rights of the returning migrant. *See* E. Spaventa, *Earned Citizenship – Understanding Union Citizenship Through Its Scope*, in *EU Citizenship and Federalism, The Role of Rights* 206–207 (D. Kochenov eds, Cambridge University Press 2017).

3 Case C-60/00 (Carpenter).

Carpenter exercised his rights under Article 49 TEC (56 TFEU), because he sold services to nationals of other Member States and he occasionally travelled to other Member States. The ECJ found that the ability for Mr Carpenter to provide services was impaired in case his spouse was deported, due to the fact that she was responsible for the children when her husband was away on business. The ECJ only used Article 49 TEC (56 TFEU) to bring the case within the ambit of EU law, in order to assess national rules with fundamental rights.[4]

2.2 Period 2: EU Citizenship as a Fundamental Status Beyond Market Roots

After the introduction of EU citizenship in the Treaty of Maastricht, the ECJ followed an ambitious agenda to free citizenship and the integration project from its market *rationale*. During this period, the ECJ argued in various judgments that EU citizenship is the *'fundamental status'* of nationals of Member States.[5] The first case law of the ECJ on Article 18 TEC (21 TFEU) dealt with specific categories of persons in relation to the right to social assistance in the host Member State. The 'limitations-clause' of Article 18 (1) TEC (21 (1) TFEU) referred to the three 1990 directives, conferring a general right of movement and residents for students, retired persons and those with independent means.[6] In fear of migration waves to Member States with favourable social assistance schemes, these directives posed two general conditions on free movement and residence within the EU by economically inactive migrants. The conditions are that a person must have sufficient sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the Member State.

The case law of the ECJ concerning persons with an unclear status in the host Member State, students and job seekers, clearly showed that the ECJ expanded the scope of circumstances by which an EU citizen is entitled to social assistance in the host Member State.[7] This case law is characterized by an expansion of the rights of EU citizens beyond those explicitly conferred by secondary legislation. For instance, the *Martinez Sala* judgment[8] and the *Trojani* judgment[9] concerned persons who did not fulfil the requirement of having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. The condition was laid down in secondary legislation.[10] In both cases the claimants were lawfully residing in the host Member State. The ECJ held in the *Martinez Sala* judgment and the *Trojani* judgment that as an EU citizen is lawfully resident in the host Member State, based on national law, the EU citizen could invoke the principle of non-discrimination on ground of nationality to claim equal access to those social benefits which were available to nationals on the basis of their nationality or residence, despite the fact that the requirement of having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State was not met.

2.3 Period 3: Consolidation of EU Citizenship's Rights in Directive 2004/38 (CRD)

The previous period in the development of EU citizenship showed that the ECJ was willing to free citizenship and the integration process from its market origins. The next phase in the development of EU citizenship is characterized by fine tuning of the ECJ's case law,[11] the development of important new EU citizenship case law, relating to the exportability of grants[12] and derived rights of third country nationals' (TCNs) parents and,

[4] The ECJ was also willing to interpret the personal scope on the free movement of economically active persons broadly. The free movement of workers covered the pursuit of effective and genuine activities to the extent that part-timers were covered. The ECJ also extended the personal scope to job-seekers, family members and other related categories. The case law with regard to economic migrants, predating the introduction of EU citizenship, shows that the ECJ went far beyond what was necessary to insure free movement rights for economic migrants. In this case law the *'embryo'* of what will later become EU citizenship can be seen.

[5] For instance; Case C-184/99 (Grzelczyk), at 31; Case C-224/98 (D'Hoop), at 28; Case C-413/99 (Baumbast), at 82.

[6] These directives have now been replaced by Directive 2004/38 (CRD). The CRD consolidates all existing rules on the free movement of persons as they result from the EU treaties, secondary legislation and ECJ case law. *See also* s. 2.3 of this contribution.

[7] For a more extensive discussion of this case law, *see* Ros, *supra* n. 1, at Ch. 11, 203–222. In this regard, also mention is made of Case C-224/02 (Pusa) and Case C-520/04 (Turpeinen) which clearly show that Art. 18 TEC (Art. 21 TFEU) can be used against the Member State of origin.

[8] Case C-85/96 (Martinez Sala).

[9] Case C-456/02 (Trojani).

[10] Directive 90/364/EEC on the rights of residence for persons of sufficient means, Directive 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity and Directive 90/366/EEC on the rights of residence for students, repealed and replaced by Directive 93/96.

[11] In the *Bidar* judgment (C-209/03), the ECJ stated that it is *'legitimate for a host Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State'*. Member States have a right to protect themselves against 'grant-tourism' in order to *'ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'*. The ECJ ruled that Dany Bidar was to be considered as *'settled'* as he did have *'a genuine link'* with the UK. However, the Bidar judgment did not make clear what precisely constituted a *'certain degree of integration'*. The later *Förster* judgment (C-158/07) sheds further light on where the balance lies between a *certain degree of financial solidarity* between Member States and the pressure of including non-nationals in Member State's systems of study finance. Only after a period of five years of lawful and uninterrupted residence can a student be entitled to equal treatment regarding social benefits in the host Member State. The five years term also completely corresponds with the CRD, which at the time was not applicable. It seems that the *Förster* judgment and the CRD have overruled the earlier *Bidar* judgment with regard to the condition of being sufficiently integrated.

[12] In the *Morgan and Bücher* judgment (joined Cases C-11/06 and C-12/06) the ECJ decided that the right of a student loan can also be limited for 'outbound' students, when a Member State runs the risk of bearing an unreasonable burden. In the *Prinz and Seeberger* judgment (joined Cases C-523/11 and C-585/11), the ECJ found

most important, the codification of the ECJ's case law in Directive 2004/38 (CRD).[13] The CRD consolidates all existing rules on the free movement of persons as they result from the EU treaties, secondary legislation and ECJ case law. In this period two emerging trends can be recognized.

On the one hand, it can be acknowledged that the ECJ moves *'the battleground of citizenship'* to the interpretation of the provisions of the CRD.[14] The *Martinez Sala* judgment and *Trojani* judgment showed that a right to social assistance in the host Member State can be granted based on EU citizenship as long as the national residence title is not withdrawn. Based on the *Dano* judgment, however, a Member State may now refuse social assistance in case the criteria of the CRD are not met, despite the fact that an indefinite residence permit was issued under national law.[15] The Dano case concerned Mrs Dano and her son (both Romanian nationals) staying in Germany. Mrs Dano is not seeking employment. She is not trained in a profession and she had never worked in Romania and/or Germany. Mrs Dano has a residence permit for unlimited duration in Germany. Mrs Dano and her son live with Mrs Dano's sister who provides for them. Mrs Dano and her son applied for benefits by way of basic provision in Germany, which are only for job-seekers. Jobcenter Leipzig, however, refused to grant the benefits.

The ECJ noted that based on the CRD the host Member State is not obligated to give social assistance in the first three months. In case the period of residence is more than three months, but less than five years (which is the case with Mrs Dano and her son), the right of residence for economically inactive persons is sided by the requirement of having sufficient resources to avoid becoming a burden to another Member State's social assistance system.[16] The requirement tries to avoid claims of inactive EU citizens who move to another Member State solely to obtain that Member State's social assistance.

However, the referring German court did not find the case as straightforward. The ECJ has in the past regularly overridden the system of the CRD based on EU citizenship. The ECJ concluded that Mrs Dano and her son did not have sufficient resources and could therefore not claim a right of residence in Germany under the CRD. Therefore they cannot rely on the principle of non-discrimination as put forward in the CRD and were denied the social benefits in Germany. When compared to the *Martinez Sala* judgment and the *Trojani* judgment, with the *Dano* judgment it now seems necessary in order to claim social assistance benefits on equal footing with nationals under Article 18 TFEU and Article 24 CRD, that the EU citizen must be lawfully resident under the conditions of the CRD and not just solely on the basis of the terms in national law. Also in the *Alimanovic* judgment, the ECJ noted that with regard to access to social benefits, the right to equal treatment can only be upheld by EU citizens if the residence requirement in the host Member State is in compliance with the CRD.[17] Remarkable in the *Alimanovic* judgment is that the ECJ does not mention EU citizenship or puts Article 20 TFEU into play. It seems that with the Alimanovic judgment, an economically inactive EU citizen who does not satisfy the conditions provided in the CRD, falls outside the scope of Article 21 TFEU and cannot claim social benefits on equal footing with nationals of the host Member State.

On the other hand, in relation to the free movement rights for economically active citizens, the ECJ's case law does not show that the application of the treaty rights is affected by codification in the CRD. Exemplary, in this regard, on the relation between the provisions of the CRD and primary EU law are the joined cases of *Vatsouras* and *Koupatantze*.[18] The two cases concerned Greek nationals who entered Germany in 2006 as job-seekers. The German court ('Sozialgericht Nürnberg') took the view that the Greek nationals were not entitled to the basic job-seekers benefits they had been receiving in Germany, since *'brief minor'* professional activity of Mr Vatsouras *'did not ensure him a livelihood'* and the activity pursued by Mr Koupatantze *'lasted barely more than one month'*. According to Article 24 (2) CRD a Member State is not obliged to confer entitlement to a social assistance benefit on EU citizens who are not economically active. The German court questioned whether Article 24 (2) CRD was compatible with the principle of equal treatment in Article 12 TEC (18 TFEU).

The ECJ first asked the German court to analyse the status of the Greek nationals as 'workers'. The ECJ stated that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 TEC (Article 45 TFEU) and therefore enjoy the right to equal treatment to a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[19] A Member State may, however, legitimately grant such an allowance only to job-seekers who have a real link with the labour market of that Member State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work

that in relation to 'outbound' students, a three year residence condition in German law in order to obtain a student loan is too general and exclusive in relation to the determination of a genuine link with Germany. Also in Case C-359/13 (Martens), the ECJ found a three out of six year residence requirement for outbound students too general and exclusive.

13 Spaventa, *supra* n. 2, at 208.

14 *Ibid.*

15 Case C-333/12 (Dano).

16 Art. 7 Directive 2004/38.

17 Case C-67/14 (Alimanovic).

18 Joined Cases C-22/08 (Vatsouras) and C-23/08 (Koupatantze).

19 Case C-258/04 (Ioannidis).

in the host Member State. If the German court were to conclude that Mr Vatsouras and Mr Koupatantze had the status of workers, they would be entitled, in accordance with Article 7 (3) (c) CRD, to receive the requested benefits for at least six months after losing their jobs.

The ECJ then goes on to examine the possibility of refusing a social assistance benefit to job-seekers who do not have the status of workers. In that regard the ECJ noted that, in view of the establishment of EU citizenship, job-seekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. The ECJ states that EU citizens seeking employment in other Member States are also workers under Article 45 TFEU and that benefits designed to facilitate access to employment in the labour markets of those Member States must consequently be protected under that article as well. The derogation provided for in Article 24 (2) CRD must, therefore, be interpreted in accordance with Article 39 (2) TEC (45 (2) TFEU). The ECJ therefore stated that benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24 (2) CRD.

When comparing these two trends with regard to the relationship between the provisions of the CRD and primary EU law, it can be acknowledged that the prime focus on the market citizen in the ECJ's case law is restated in comparison to the case law on economically inactive EU citizens. With the *Alimanovic* judgment, the ECJ makes the CRD both *'the floor and ceiling'*[20] of EU citizenship rights and it tones down its earlier *'fundamental status of EU citizenship'* rhetoric in relation to the right to social assistance in the host Member State for an economically inactive EU citizen.

2.4 Period 4: The Conservative Phase in the Development of EU Citizenship and the Unclear 'Substance Of Rights' Test

The current period in the development of EU citizenship can be viewed as a conservative phase which seems to point to the recognition of the prime focus on the nationality link of the EU citizen over any other status. In order to fall within the scope of the Treaty, an EU citizen needs to establish a cross-border link. The ECJ has, however, noted that the absence of a cross-border link does not have the automatic consequence that the situation falls outside the scope of the TFEU. According to the *Garcia Avello* judgment of the ECJ, a situation is not purely internal if the contested national rule is capable of imposing an obstacle on the EU citizen's future ability to move.[21] While the 'cross-border movement'-requirement seems easy to fulfil with regard to the market freedoms, this does not seem to be the case with regard to EU citizenship.[22] For instance, in the *Lida* judgment, the ECJ found that the purely hypothetical prospect that the right to move might be obstructed was not enough to establish a sufficient link with EU law.[23] In the *Garcia Avello* judgment, however, the ECJ found the situation to fall within the scope EU law, despite the fact that the claimants had not moved and were not intending to do so in the near future. Both judgments show that, with regard to EU citizenship, it is difficult to determine the proximity between rule and obstacle for the rule to fall within the scope of the TFEU.

A case is also not purely internal, if the rule affects the *genuine enjoyment of the substance of the rights* conferred by the EU citizenship provisions. According to the ECJ, this is the case where the EU citizen would be deprived of her nationality (*Rottmann* judgment) or where rules would imply that an EU citizen has no choice but to leave the territory of the EU (*Zambrano* judgment).[24] In the *Zambrano* judgment, the ECJ used the EU citizenship status of the two minors to serve as a justification for an approach which transcended the cross-border requirement. The ECJ found that Article 20 TFEU precludes a Member State from denying residence to the TCN parent of an EU citizen child, notwithstanding that that EU citizen child had not exercised his right of free movement within the EU, *'in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'*. Therefore, the ECJ concluded that Mr Zambrano could derive work and residence rights from EU law. No cross-border element was required for EU law to apply in this case.

The *McCarthy* judgment[25] and *Dereci* judgment[26] further defined the '*substance of rights*' doctrine to exceptional cases in which the alternative of leaving the territory of the EU would be disproportionate. In the *McCarthy* judgment, McCarthy, basically, was an adult, and denial of access to her EU rights did not have the same effect as a similar measure did on the Zambrano children. The national decision did not *oblige her to leave*

[20] Spaventa, *supra* n. 2, at 220.

[21] This was the case in the *Garcia Avello* judgment, where Mr Garcia Avello (Spanish national) and his wife (Belgian national), living in Belgium, requested the Belgian authorities to change the surnames of their children, in accordance with Spanish law, to the first surname of the father followed by that of the mother. The ECJ found that the situation was not wholly internal, as the children are nationals of one Member State lawfully residing in the territory of another Member State. The Belgian authorities could therefore not refuse to treat the children as Spanish nationals with respect to their application for a change of surname in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to Spanish law. *See* Case C-148/02 (Garcia Avello), at 26–28.

[22] *See* for instance cases Gourmet (C-405/98) and Freskot (C-355/00).

[23] Case C-40/11 (Lida), at 77.

[24] Case C-135/08 (Rottmann) and Case C-34/09 (Zambrano).

[25] Case C-434/09 (McCarthy).

[26] Case C-256/11 (Dereci).

the territory of the EU, as a negative decision would have done in the *Zambrano* judgment.[27] In the *Dereci* judgment, the ECJ noted that the criterion relating to the *denial of the genuine enjoyment of the substance of EU citizens' rights* refers to situations in which the EU citizen has, in fact, to leave not only the territory of the Member State of which (s)he is a national but also the territory of the EU as a whole. It seems that the mere desirability of keeping a family together is not enough, since expulsion of the TCN from the EU in this situation will not inevitably force the EU citizen to leave too.

The precise scope of what is exactly meant by *'genuine enjoyment of the substance of rights of EU citizens'* is not clear and therefore problematic. First, the ECJ's test has a speculative element consisting of presumptions about family structures and personal affiliation with regard to the question if the child has no choice but to leave the territory of the Member State. Is it relevant for the ECJ which of the parents is going to be deported and should EU law have something to say about the priority of parental ties?[28] Furthermore, the open nature of the substance of rights test is problematic, because it's difficult to know which of the rights granted by the EU treaties are considered the 'core' rights. Is it only free movement rights? The free movement rights *and* the residence rights? The free movement rights *or* the residence rights? And what about the right not to be discriminated against or the right to vote in the European Parliament elections? And what is exactly the standard proof required for cases in which an EU citizen has to leave the territory of the EU under this doctrine?[29]

In this regard the *Alokpa* judgment is relevant.[30] The case concerned a Togolese national who came to Luxembourg, where she gave birth to twins. After their birth, a French national, recognized paternity of the twins. As a result, the twins became French nationals and were issued French passports and identity cards. No contact was maintained with the father. Mother and sons lived together in Luxembourg as a family in a hostel and were dependent on the State. The mother was offered a job for an indefinite period in Luxembourg, but her lack of residence and work permit impeded her from working. When the mother's application for a residence permit as a family member of two EU citizens was rejected, the authorities reasoned that the children could easily receive their necessary medical treatment in France. The ECJ found that if Article 21 TFEU did not preclude a refusal of a right of residence, in exceptional circumstances, Article 20 TFEU could grant a right of residence if the effectiveness of the EU citizenship – status of the children were otherwise to be undermined. The ECJ concluded, that being forced to leave Luxembourg would not result in an obligation to leave the whole territory of the EU, as the children were French nationals. The mother therefore has the right to reside in France as the sole caregiver of minors. And therefore, the refusal by the Luxembourg authorities does not constitute a deprivation of the genuine of enjoyment of the twins' EU rights. This is the case even though the mother and the twins had no links, family or friends, in France. The *Zambrano* judgment and *Alokpa* judgment show that it is very difficult to take the *'substance of rights'*- doctrine seriously. How can, as in the *Zambrano* judgment, the hypothetical prospect of leaving the EU territory affect the substance of the rights of citizenship, but, as in the *Alokpa* judgment, the denial of any possibility to reside in a state other than that of nationality leave the substance of those same rights in tact?[31]

The end result of the *Zambrano* judgment and the *Alokpa* judgment is to grant the responsibility of the EU citizen firmly to the state of nationality; even where an individual assessment should have led the ECJ to the conclusion that the twins in the Alokpa case had formed a real link with their host state (Luxembourg) and had no link with their state of nationality (France). This case law shows that the ECJ is privileging the abstract notion of belonging based on allocation by birth at the expense of the supra-national notion of belonging by choice; so favoured in its earlier case law. The ECJ has chosen for a narrower interpretation of EU citizenship rights which seems to point to the recognition of the centrality of the nationality link over any other status; thereby indicating that it sees EU citizenship, at this moment, as a mere and minor status in addition to national citizenship rather than a true supranational status. A perception, reflecting the change in public appetite for EU citizenship.

[27] For a discussion of the Zambrano judgment and the McCarthy judgment, I refer to A. P. van der Mei, S. C. G. Bogaert & G. R. de Groot, *De arresten Ruiz Zambrano en McCarthy*, (6) Nederlands tijdschrift voor Europees recht 188–199 (2011).

[28] The *Zambrano* judgment was reaffirmed and expanded in the *Chavez-Vilchez* judgment (C-133/15) in which was stated that Art. 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

[29] *See* Spaventa, *supra* n. 2, at 209–214.

[30] Case C-86/12 (Alokpa).

[31] *See* Spaventa, *supra* n. 2, at 215.

3 EU CITIZENSHIP AND FREE MOVEMENT OF ECONOMICALLY ACTIVE PERSONS

3.1 Introduction

The previous section showed that the ECJ chose for a more conservative interpretation of EU citizenship rights in the current stage of the development of these rights. This section focuses on the relationship between EU citizenship and the free movement provisions for economically active persons, in order to find out what the impact of EU citizenship has been on the interpretation of these market freedoms.[32] Section 3.2 discusses how the market freedoms, prior to the introduction of EU citizenship, appeared to be interpreted as merely tools for the construction of the internal market. Section 3.3 examines the overall impact of EU citizenship on the interpretation of the market freedoms after the Treaty of Maastricht.

It is argued that the ECJ's post-Maastricht case law on the market freedoms cannot be explained under a purely internal market *rationale*. The ECJ's case law demonstrates that these market freedoms developed from instrumental freedoms for the purpose of contributing to the economic aims of the Treaty to sources of fundamental economic rights for EU citizens. The beneficiaries of these market freedoms can be EU citizens who should now enjoy certain economic rights simply because they are EU citizens and not merely for contributing to the economic aims of the Treaty.[33]

3.2 The Interpretation of the Market Freedoms Prior to the Introduction of EU Citizenship[34]

Advocates of the non-discrimination model argue that the internal market should be construed by allowing goods and persons to move freely within the EU. The effect of the non-discrimination model is to see to it that imported goods and migrants satisfy the rules laid down by the host Member State, provided that those rules apply equally to domestic goods and persons. Free movement of goods and persons within the EU can on the other hand only be reached if domestic and foreign goods and persons are treated equally both in form and substance; implying that both domestic and foreign goods and persons should only be subjected to one set of regulatory standards. This is called the principle of mutual recognition, as explained by the ECJ in the *Cassis de Dijon* judgment.[35]

Advocates of the non-discrimination model also argue that the TFEU is only concerned with equal treatment and the elimination of protectionism. As a result, the judicial scrutiny of the ECJ should only extend to negative integration, by ensuring that national laws do not subject foreign goods and persons to more than one set of regulatory standards. In this view, the ECJ would go beyond the basis provided for in the TFEU and it would intervene with national regulatory policies, not related to free movement within the EU, if it also curtails non-discriminatory national measures.[36] Other commentators argue that the rationale behind the internal market and free movement is to allow economic operators the right to pursue an economic activity in another Member State or even in one's own country. In that regard, it is argued in literature that a broader market access test should be applied which should result in the unlawfulness of national rules hindering or preventing market access, regardless of whether they discriminate against imported goods or migrants.[37]

As from the mid-1990s, the ECJ started to change its perspective on what constitutes an impediment to inter Member State movement with regard to the treaty provisions on the free movement of economically active persons from a non-discrimination approach to a broader market access approach. The ECJ broadened the free movement of economically active persons provisions to not only include directly and indirectly discriminatory restrictions, but also any national rule which hinders or otherwise makes free movement between Member States less attractive. This was first seen in the *Säger* judgment, concerning the freedom to provide services. The ECJ stated:

> *Article (49 TEC) requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and*

[32] When the term market freedoms is mentioned, reference is made to the free movement of workers (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU) and the freedom to provide services (56 TFEU).

[33] On this subject, *see* A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016), Part II. Here (at 65) also mention is made that the constitutionalization of the market freedoms was (implicitly) required by the Treaties and the broader non-economic aims, which had been set for European integration from the very beginning. The re-reading of the market freedoms, which goes back to the 1960s, can be seen as one of the tools used for furthering the main aim of the EU, which has always been to achieve peace in Europe and a better life for all; the ultimate goal of the EU which, was hidden by the subsequent pragmatic stress on economic goals. However, the introduction of EU citizenship has been immensely important in the process of constitutionalizing the market freedoms and without it the transformation of these provisions into sources of fundamental rights, would probably not have taken place.

[34] Para. 3.2.1 is an abstract of Ros, *supra* n. 1, at Ch. 9, parts 9.1 and 9.3.

[35] Case 120/78 (Cassis de Dijon).

[36] For instance, N. Bernard, *Discrimination and Free Movement in EC Law*, 45 Int'l & Comp. L.Q. 82 (1996) and G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer Law International 2003).

[37] C. Barnard, *The Substantive Law of the EU, The Four Freedoms* 18–25 (4th ed., Oxford University Press 2013). Advocates of this view are A-G Jacobs in his Opinion of 24 Nov. 1994 in Case C-412/93 (Leclerc-Siplec); S. Weatherill, *After Keck: Some Thoughts on How to Clarify the Clarification*, 33 Common Mkt. L. Rev. 885 (1996); C. Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw*, 26 Eur. L. Rev. 35 (2001).

> *to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.*[38]

This view was followed in the *Alpine* judgment, another case relating to the freedom to provide services, where the ECJ found that the Dutch provisions on cold calling were within the ambit of Article 49 TEC (56 TFEU), because they *'directly affected access to the market in other Member States'.*[39] Also in the *Schindler* judgment, again relating to the freedom to provide services, the ECJ held that a general lottery prohibition which applies without distinction to both foreign and national operators, but which is 'liable to prohibit or otherwise impede' the provision of services by an operator established in another Member State may also be caught by the free treaty provision on services.[40] In the *Bosman* judgment the ECJ stated that the transfer system at issue directly affected football *'players' access to the employment market in another* Member State'.[41]

The general conclusion is that, prior to the introduction of EU citizenship, the aim of the market freedoms has been to enable Member State nationals to take up economic activities in another Member State to be permanently pursued there or in a cross border context. The market freedoms were instrumental to the realization of the economic aims of the treaty. It appeared that the market freedoms were interpreted as merely tools for the construction of the internal market and were not yet also seen as fundamental economic rights for EU citizens.

3.3. The Impact of EU Citizenship on the Market Freedoms

3.3.1 Introduction

The ECJ's pre-Maastricht case law shows that the market freedoms were interpreted as tools for the realization of the internal market. Following the introduction of EU citizenship, the ECJ extended the scope of the market freedoms beyond its initial economic aims. An explicit recognition to interpret the market freedoms in light of EU citizenship, is found in the *Collins* judgment. In the *Collins* judgment, the ECJ for the first time had to address the question whether a Member State national seeking a job in another Member State could ask for a social benefit in the host Member State.[42] Mr Collins situation was only covered by Article 39 TEC (Article 45 TFEU).[43] Based on the *Lebon* judgment,[44] this did not help Mr Collins. The expansion of Article 39 TEC (Article 45 TFEU) to job seekers initially only entailed equal rights to access to employment and did not cover equal access to financial benefits. However, the ECJ explicitly used the introduction on EU citizenship to interpret Article 39 TEC (Article 45 TFEU) in the more general light of equal treatment of EU citizens. The ECJ stated that *in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union*, it is no longer possible to exclude from the scope of the free movement of workers a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[45] In the *Collins* judgment, the ECJ overruled its earlier case law, under which the right to equal treatment for job seekers only related to the access to employment in the labour market of the host Member State. Prior to the *Collins* judgment, the expansion of the free movement right for workers to job seekers did not entail the right to financial benefits in the host Member State.[46]

Other ways in which the influence of EU citizenship on the market freedoms can be recognized, relate to the application of the market freedoms to situations that would not fall under the scope of the market freedoms under a purely instrumental reading ('treaty access'), the elimination of the requirement of a cross-border specificity of a national measure in order to fall under the scrutiny of the market freedoms and the unsatisfactory market access test as an explanation for the broad scope of the market freedoms. These developments will be discussed in the remainder of this section.

3.3.2 EU Citizenship and Treaty Access

In order to distinguish between the interpretation of the market freedoms before and after the introduction of EU citizenship, first a basic description is given of situations that were excluded from the scope of application of the market freedoms, but would be included under its scope after the introduction of EU citizenship. Second, ECJ case law is discussed in which situations were brought

[38] Case C-76/90 (Säger), at 12.
[39] Case C-384/93 (Alpine), at 38.
[40] Case C-275/92 (Schindler), at 43–45.
[41] Case C-415/93 (Bosman), at 103.
[42] Case C-138/02 (Collins).
[43] Case C-138/02 (Collins), at 43.
[44] Case 316/85 (Lebon).
[45] Case C-138/02 (Collins), at 63. Exactly the same reasoning was applied in the *Ioannidis* judgment (C-258/04, at 22) and in the *Vatsouras and Koupatantze* judgments (C-22&23/08, at 37). One month after the *Collins* judgment, the ECJ addressed the effect that the introduction of EU citizenship has had on the interpretation of the derogations of the market freedoms in its *Orfanopoulos and Oliveri* judgment (joined Cases C-482/01 and C-493/01).The ECJ held that a particularly restrictive interpretation of the derogations from the freedom of movement for workers is required by virtue of a person's status as a citizen of the Union (at 65 & 79). The ECJ found that national legislation that required the automatic expulsion of nationals of other Member States, who had received certain sentences for specific offences, was not justified on the grounds of public policy. Also the same derogation precluded a national practice which did not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters and a positive development in that person which occurred after the final decision of the competent authorities.
[46] Ros, *supra* n. 1, at Ch. 11, part 3.3.

under the scope of application of the market freedoms that would be excluded under a purely internal market *rationale* of these market freedoms.

A situation was brought under the free movement of workers and the freedom of establishment if a person exercised an inter Member State movement in order to take up an economic activity as a worker or self-employed person in the host Member State and (s)he is unjustifiably restricted in doing so.[47] The ECJ found that these criteria were cumulative and needed to be connected. The free movement of workers and the freedom of establishment involved taking up an economic activity in another Member State, thereby requiring a change in the location of the economic activity and the economic base of the economic actor.[48]

This was illustrated in the *Werner* judgment.[49] The most important question raised in this case, was whether Mr Werner had access to the eec Treaty establishing the European Economic Community (TFEU). The sole intra Community aspect of this case was the fact that Mr Werner had moved his residence to another Member State. This did not constitute an *economic* intra-Community movement covered by the TEC (TFEU), as was required by the ECJ's instrumental reading of the market freedoms. The ECJ found that there was no factor connecting Mr Werner's situation to Community law. The ECJ stated that Article 43 TEC (Article 49 TFEU) does not preclude a Member State from imposing on its nationals, who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there, a heavier tax burden if they do not reside in that Member State than if they do. The *Werner* judgment showed that if a national of a Member State does not participate in an inter Member State movement in order to take up an economic activity as a worker or self-employed person in the host Member State, under a purely instrumental reading, the free movement of workers and the freedom of establishment do not apply and lead to reverse discrimination that cannot be solved under these freedoms.[50]

However, the ECJ's case law after the introduction of EU citizenship now seems to have abandoned the requirement of a change of the economic base of the economic actor and/or the location of the economic activity for the application of the market freedoms. All market freedoms now also appear to be sources of a primary right to pursue an economic activity in a cross-border context, even where there is no change in the economic base of the economic actor and/or in the place of the economic activity.[51] This view can be acknowledged in the *Ritter-Coulais* judgment.[52] Mr and Mrs Ritter-Coulais are German nationals and work as secondary school teachers in Germany. Mr and Mrs Ritter-Coulais were jointly assessed in Germany as persons liable to income tax on their total income. Mrs Ritter-Coulais also has French nationality. They live in a private dwelling in France. Mr and Mrs Ritter-Coulais requested the German tax authorities to take the negative income from the use of their house as a dwelling into account for the purpose of determining the rate for their German tax liability in 1987.

A sufficient intra-EU situation must be acknowledged in order to bring this case within the ambit of EU law. The facts of the Ritter-Coulais case have to be analysed from the perspective of the German authorities. The facts in the Ritter-Coulais case concerned German tax legislation and from that perspective the Ritter-Coulais couple earned their family income in Germany and only moved to France to return to their residence. During the facts of the Ritter-Coulais case, the free movement of persons was only seen from an intra-EU *economic* perspective and from that view the case should fall outside the scope of the market freedoms as the only cross-border element concerned the change of residence. The ECJ, however, took the view that *any EU national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of article 48 TEC* (Article 45 TFEU).[53] The ECJ overturned its *Werner* judgment, by accepting that only the change of residence to another Member State from the Member State of employment is sufficient to fall within the ambit of the market freedoms.

The ECJ extended its line of reasoning in the *Ritter-Coulais* judgment to the context of the freedom of establishment in the *N* judgment.[54] The ECJ stated that residence in another Member State can be sufficient to rely on the economic EU freedoms, even if that residence is not necessarily connected to an economic activity in another Member State. The ECJ found that a resident of one of the Member States who has a 100% shareholding in a company, established in another Member State, is sufficient to rely on the right of establishment.

[47] Frontier workers have also been included within the scope of the free movement of workers and the freedom of establishment, because, whilst they have maintained their residence, their situation does include the initiation of an economic activity in another Member State.

[48] Tryfonidou, *supra* n. 33, at 76–79. In this regard, a distinction should also be made between, one the one hand, the freedom to provide services and, on the other hand, the free movement of workers and the freedom of establishment. The freedom to provide services ensures that while the economic base of the economic actor remains the same, the location of the economic activity changes temporarily (the service provider moves to another Member State to provide services), or the mode of pursuit of the economic activity changes (the service initially being provided in a purely domestic situation to being provided across borders). *See* for instance, the *Koestler* judgment (Case 15/78).

[49] Case C-112/91 (Werner).

[50] Ros, *supra* n. 1, at Ch. 10, part 4.

[51] Tryfonidou, *supra* n. 33, at 88. This was already the case with regard to the freedom to provide services. *See* fn. 16.

[52] Case C-152/03 (Ritter-Coulais).

[53] Case C-152/03 (Ritter-Coulais), at 31. This perspective was also confirmed in the later *Renneberg* judgment (C-527/06).

[54] Case C-470/04 (N).

The ECJ expressly stated that the contested Dutch legislation was capable of discouraging Mr N from transferring his residence outside The Netherlands and that a taxpayer wishing to transfer his residence outside The Netherlands, is an aspect of the exercise of the rights guaranteed to him by Article 43 TEC (49 TFEU). This view was again confirmed in the later *Geurts* judgment where the ECJ decided that in a case of a sole shareholder of two Dutch companies who only transferred his residence, Article 43 TEC (49 TFEU) was applicable for determining if the refusal of the Belgian tax authorities to grant Mr Vogten's heirs the benefit of an exemption provided under Belgian law, which required that the family undertaking in which the shares are held has to employ at least five employees in the Flemish Region during the three years preceding the deceased's death, was contrary to EU law.[55]

The discussed case law demonstrates that the ECJ has accepted that the scope of the market freedoms now include any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to taking up an economic activity in the host Member State.[56]

3.3.3 *EU Citizenship and the Abandonment of the Requirement of Cross-Border Specificity of a National Rule*

As already mentioned, under a purely instrumental reading, the market freedoms were merely seen as tools for building the internal market. Under the market freedoms, the internal market is mainly built through negative harmonization. This implies that the main regulatory responsibility stays with the Member States and the EU should not interfere when Member States regulate an economic activity in a neutral manner. Only national measures that lead to cross-border situations being treated less favourable than purely national situations should be caught by the market freedoms.[57] Genuinely non-discriminatory national measures imposed by the host Member State, therefore, are incapable of impeding the taking up of an economic activity in the territory of that Member State by nationals of other Member States more than they can of its own nationals. Hence, under a purely instrumental approach of the interpretation of the market freedoms, genuinely non-discriminatory national measures have no cross-border specificity and therefore fall outside the scope of the market freedoms; even if they limit the freedom of economic actors altogether.[58] However, the ECJ seems to have broadened the scope of the market freedoms by also catching national measures that do not have a cross-border specificity and limit the freedom of economic actors in a neutral manner.

In the *Schindler* judgment, the ECJ held that a general lottery prohibition in the UK which applies without distinction to both foreign and national operators, a genuinely non-discriminatory national measure, was caught by the freedom to provide services.[59] Another important judgment relating to the scope of the market freedoms is the *Gebhard* judgment.[60] The rules in the Gebhard case concerned the required registration of lawyers with the Italian bar in order to use the title *avvocato*. The rules at issue were not to the particular detriment of migrants. The rules affected Mr Gebhard to the same degree as Italian lawyers. By allowing Mr Gebhard to question those rules under a necessity and proportionality assessment, the ECJ dissolves the line between the national rule at issue and the specific effect on free movement of that national rule. It seems that the intra-EU specificity of a national rule, which is the case when there is a double burden or a cross border issue, is no longer relevant to bring the national rule under the scope of EU law. The Italian registration requirement formed the barrier to Mr Gebhard's freedom of establishment. After the *Gebhard* judgment it seems that any national rule which merely regulates an economic activity can be brought under EU law, even though there is no intra-EU specificity.

This view is also supported by the *Gourmet* judgment. In the *Gourmet* judgment the claimant was a company which published a magazine.[61] The company was established in Sweden. In one of the issues of the magazine, three pages for advertisement for alcohol beverages were placed. That placement was in breach of the almost total ban on alcohol advertising, imposed by Swedish legislation. The ECJ found this case to be covered by Article 49 TEC (56 TFEU), despite the fact that the rules at issue prevented the existence of the national Swedish advertising market for alcoholic beverages altogether. The barrier arises from the very existence of national rules.[62] The only intra-community element was the *possibility* that some of the clients of the Swedish company *might* be established in another Member State. The approach in the *Gourmet* judgment signals a considerable expansion of the scope of Article 49 TEC (56 TFEU), because the Swedish company was challenging the very illegality of the provision of services in its Member State of establishment, which was the only regulator. Also the intra-community element was weak due to the fact that the presence of a foreign service recipient was an incidental matter.[63]

[55] Case C-464/05 (Geurts).
[56] For a discussion of these cases, *see* Ros, *supra* n. 1, at Ch. 12.
[57] Opinion of A-G Poiares Maduro in joined Cases C-158 & 159/04 (Vassilopoulos), at 41.
[58] Tryfonidou, *supra* n. 33, at 91–95.
[59] Case C-275/92 (Schindler), at 43–45.
[60] Case C-55/94 (Gebhard).
[61] Case C-405/98 (Gourmet).
[62] Ros, *supra* n. 1, at Ch. 9.
[63] E. Spaventa, *Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context* 46–47 (The Netherlands: Kluwer Law International 2007).

3.3.4 EU Citizenship and Market Access[64]

It is also questionable if the broad market access approach is the only concept underlying the ECJ's judgments. For instance, the *Gourmet* judgment cannot be put in line with a market access analysis, because the Swedish advertising rules on alcohol restricted the existence of alcohol advertisement in Sweden altogether and did not have an impact on access to the market of another Member State.[65] Also, in the *Freskot* judgment, the ECJ found that a person was allowed to challenge the rules of its Member State of establishment on purely hypothetical grounds, whereas that person *might* have wanted to insure the risk and *might* have chosen a provider from another Member State, *if* Greece had not imposed the compulsory insurance at issue.[66] In the *Carpenter* judgment, relating to deportation rules for those who overstayed their welcome, cannot be put in line even with the broadest notion of market access.[67] The alleged obstacle in the *Gebhard* judgment arose from the very existence of rules in the host Member State and it was of no relevance to the ECJ if Germany had the same rules as Italy.

The question rises if the market access test can explain the *Gebhard* judgment and provide clarity as to the scope of the market freedoms. After the *Gebhard* judgment it seems that any national rule which merely regulates an economic activity can be brought under EU law, even though there is no double regulatory burden or intra-EU specificity. This view is also supported by the *Gourmet* judgment and the *Freskot* judgment, where the facts of the cases were brought within the ambit of EU law, based on hypothetical grounds or despite the fact that the rules at issue did not have a specific cross-border effect. As mentioned, the rules in the *Gourmet* judgment did not prevent access to a foreign market; they only prevented the existence of the national Swedish market.

The ECJ's case law indicates that non-discrimination and market access are not the only underlying rationale of the market freedoms anymore. Spaventa notes that the underlying rationale of this case law is that those who have exercised their right to move should not be subject to unnecessary regulation, to a disproportionate interference with their right to pursue an economic activity. Spaventa acknowledges that her view is not helpful in drawing the outer boundaries of the market freedoms and does not differ substantially from the market access test. However, she stipulates that her view is useful in that it explains the case law of the ECJ more accurate, because the market access test does not give guidance as to what constitutes a barrier to movement or why such barriers fall within the scope of the free movement provisions. Spaventa's view highlights the fact that the free movement provisions have evolved into a broader right which resembles familiar rights known in constitutional law, the right not to be hindered in the pursuit of an economic activity without good reason. She suggests that the scope of 'free movement' should include the right to exercise an economic activity in a cross border context, rather than a broad right to market access. The *Gebhard* judgment, *Gourmet* judgment and *Freskot* judgment can be viewed in this light. In this perspective, the free movement provisions can be seen as a weapon to challenge regulatory behaviour of the Member States.[68]

3.3.5 Free Movement: From an Instrumental Right to a Fundamental Right?

The discussed case law shows that the market freedoms are now sources of two rights; the right to *take up* an economic activity in *another Member State* and the right to *start pursuing* an economic activity in a cross-border context. The right to *take up* an economic activity in *another Member State* can be fully justified on an instrumental reading of the market freedoms, because this is what is necessary in order for an internal market to be *built*, as workers and entrepreneurs can *work* in any other Member State they wish. Under an instrumental reading, the market freedoms are seen as tools for the realization of the internal market.

However, the internal market rationale cannot explain the second right originating from the market freedoms. By expanding the scope of the market freedoms to also entail the right to *start pursuing* an economic activity in a cross-border context, the ECJ has pushed the scope of the market freedoms beyond their initial economic aim (building an internal market). As Tryfonidou notes; does the ability of Member States nationals to choose where to live in the EU, while continuing to pursue an economic activity permanently in their home state, contribute in any way to building an internal market by removing obstacles to the initiation of an economic activity in another Member State? The answer is clearly 'no'.[69]

The market freedoms are no longer merely sources of the right to take up and then pursue an economic activity in another Member State in a cross-border context under the same conditions as are imposed under purely internal situations. The requirement of a cross border specificity was an important aspect of the ECJ's instrumental interpretation of the market freedoms, because it served as a tool to only scrutinize those national rules which did not regulate an economic activity in a neutral manner. The abandonment of the requirement of cross-border specificity of a national

[64] This paragraph is an abstract of Ros, *supra* n. 1, at Ch. 9, para. 5.
[65] Case C-405/98 (Gourmet).
[66] Case C-355/00 (Freskot). *See* Spaventa, *supra* n. 63, at 48.
[67] Case C-60/00 (Carpenter).
[68] Spaventa, *supra* n. 63, at Ch. 5.
[69] Tryfonidou, *supra* n. 33, at 110–113.

rule has as a consequence that it catches national measures that do not have a cross-border specificity and limit the freedom of economic actors in a neutral manner. The market freedoms are now seen as sources of a broader right, implying that those who have exercised their right to move should not be subject to unnecessary regulation, to a disproportionate interference with their right to pursue an economic activity.[70] As Spaventa notes, these cases *represent not only a step towards a considerable expansion of the scope of the free movement provisions, but also a qualitative leap in the content of the free movement right. Thus, if previously the Court's interpretation of the persons' provisions was instrumental – or could be so explained and justified – to the achievement of the internal market, the move towards a non-discriminatory assessment adds a new dimension to the rights conferred upon individuals by the community.*[71] The ECJ's case law indicates that non-discrimination and market access are not the only underlying rationale for bringing national measures under the scope of the market freedoms anymore.

Article 20 (2) TFEU states that *'(c)itizens of the Union shall enjoy the rights and be subject to duties provided for in the Treaties'*. It seems that this suggests that since the introduction of EU citizenship in 1993, the market freedoms should be re-read as part of a package of rights that the EU seeks to provide its citizens.[72] As A-G Poiares Maduro points out: *'It is important that the freedoms of movement fit into a broader framework of the objectives of the internal market and European citizenship. At present, the freedoms of movement must be understood to be one of the essential elements of the fundamental status of nationals of the Member States'*.[73] The internal market should now also be seen as an area in which EU citizens can freely exercise their fundamental rights they derive from the EU treaties as EU citizens and not only as economic operators. As Spaventa puts it:

> *(n)ot only Europe has progressed towards an integrated economy, but the European project has evolved to create a new constitutional dimension which 'puts the individual at the heart of its activities'. The Union citizen is then not merely instrumental to the economic welfare of the Community – rather, she achieves an additional status, and with that, an additional layer of fundamental rights protection.*[74]

In this context Tryfonidou argues that the market freedoms, when invoked by EU citizens, should be read together with the provisions on EU citizenship.[75]

An explanation for this broad interpretation of the market freedoms by the ECJ, therefore, can be found in the view that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU citizens; the right to pursue an economic activity in a cross border context, irrespective of whether the economically active EU citizen contributes to the aims of the internal market. For instance, this preference towards the individual explains the case law, where there is no issue of barrier to movement. The normative treaty justification of the free movement of persons as to encompass the right to pursue an economic activity in a cross border context can be found in the introduction of EU citizenship.[76] In this view, the market freedoms are no longer instrumental rights, but are rights granted to EU citizens for their owns sake and can, therefore, be considered as fundamental economic rights.

4 The Schumacker case law: The 'always somewhere' approach as part of an economic fundamental right?

The *Schumacker* judgment concerned a Belgian resident who has always lived in Belgium with his wife and children. After first working in Belgium, he was employed in Germany where he earned the entire family income.[77] The Double Tax Convention between Belgium and Germany concluded that Germany was appointed the right to tax Mr Schumacker's wages. The family income was entirely exempted from taxation in Belgium. Because of his Belgian residence, Mr Schumacker was subjected to a limited tax liability in Germany, therefore denying him several tax advantages. Mr Schumacker was denied personal allowances in Germany, especially the income tax regime allowing couples to benefit from a lower progression ('splitting regime'). The splitting regime was only granted to German residents. Essentially, the ECJ had to address the question if the denial of the tax advantages to Mr Schumacker was contrary to the free movement of workers.

The ECJ stated in this regard that in the field of direct taxation residents and non-residents are not in a comparable situation, because normally the major part of the income is concentrated in the Member State of residence and, according to international tax law, the personal and family circumstances therefore have to be taken into account in that state, because the state of residence has the information available to assess the taxpayer's overall ability to pay tax and taxes the taxpayer's total ability to pay tax. Belgium should take Mr Schumacker's personal and family circumstances into account. However, the ECJ made an exemption in the *Schumacker* judgment to the distinction between residents and non-residents. The ECJ acknowledged that a non-resident who undertakes

[70] *Ibid.*, at 100.
[71] Spaventa, *supra* n. 63, at 101.
[72] Tryfonidou, *supra* n. 33, at 168.
[73] Opinion of A-G Poiares Maduro in joined Cases C-158/04 and 159/04, para. 40.
[74] Spaventa, *supra* n. 63, at xv.
[75] Tryfonidou, *supra* n. 33, at 168–169.
[76] Spaventa, *supra* n. 63, at Ch. 5.
[77] Case 279/93 (Schumacker).

significant economic activity in a Member State and derives his income entirely or almost entirely from the economic activity, is deemed to be comparable with resident taxpayers. Therefore, Mr Schumacker could rely on Article 39 TEC (Article 45 TFEU) in order to take his personal and family circumstances into account on the same footing as German residents, when addressing his tax position in Germany.[78]

The Schumacker doctrine was further specified in various judgments and the personal and family circumstances were extended to '*all the tax advantages connected with the non-resident's ability to pay tax*'.[79] It is not exactly clear under which conditions the ECJ finds that these circumstances have to be taken into account by the source Member State in case the Member State of residence is not in a position to do so. It seems that the ECJ requires equal treatment of non-residents by the source Member State in case '*all or almost all income*' is derived there (quantitative requirement) but at the same time in the *Commission v. Estonia* judgment[80] the ECJ finds that even a non-resident who earns 50% of his income in the source Member State and who could not effectively benefit from the personal tax allowances in the Member State of residence, should be granted the same personal tax allowances as residents in the source Member State, implying, in my view, an 'always somewhere' approach with regard to taking account of the personal and family circumstances (qualitative requirement). The ECJ seems to have relaxed its quantitative requirement in the *Kieback* judgment[81] from *'all or almost all income'* to the 'major part of the income'; without exactly defining what constitutes a *'major part'*.[82]

In the *X* judgment, the ECJ had to decide in a case where in the Member State of residence no taxable income was earned to take account of the personal and family circumstances of a resident taxpayer and in neither source Member States the quantitative requirement of earning *'all or almost all'* (*'major part'*?) the income was met.[83] The case concerned a Dutch national, residing in Spain with only negative income from an owner occupied dwelling in Spain. The Dutch national received his positive income from the Netherlands (60%) and Switzerland (Non-EU; 40%). The Dutch national did not earn *'all or almost'* all his income in the Netherland or Switzerland and neither had positive income in Spain to set off the negative income from his owner occupied dwelling there; implying that his personal and family circumstances would not be taken into account anywhere.[84] The ECJ ruled that since the non-resident taxpayer could not claim deductions for personal and family circumstances in his Member State of residence (i.e. Spain), because he was not receiving income there, the Member State of activity must permit a proportionate deduction of the negative income relating to a dwelling in the Member State of residence. The non-resident taxpayer may claim a deduction in proportion to the share of income received in each Member State of activity (in this case 60% in the Netherlands). The *X* judgment stipulates that it is not decisive whether the taxpayer earns all or almost all his income in one Member State but rather if the Member State of residence is not in a position to take into account his personal and family situation. In that case it is the Member States of activity that should take into account the personal and family situation of the taxpayer proportionally.[85]

However, the discussed case law on the market freedoms in previous sections indicated that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader right for all economically active EU citizens to pursue an economic activity in a cross-border context, rather than to only protect the instrumental right to move between Member States for the purpose of taking up or pursuing an economic activity. In this regard, after the *X* judgment, the question arises whether or not, in a comparable situation, a Dutch national would only be able to take into account the personal and family situation proportionally in The Netherlands if (s)he would have claimed before the ECJ that (s)he could not set off the negative income from the owner occupied dwelling in Spain against income earned in other states. Based under an *'always somewhere'* approach an EU citizen would be discouraged from the pursuit of an economic activity in a cross-border context in case his personal and family circumstances would not be taken into account somewhere. In case the ECJ were to uphold this view, it would mean that the negative income from an owner occupied dwelling in Spain can be set off in total against the 60% positive income in The Netherlands.

New 'Schumacker case law' will have to point out if the ECJ is willing to uphold its economic fundamental right reading of the market freedoms in the area of direct taxation and consequently address citizens as citizens, rather than as market actors; at the expense of Member State tax autonomy. If this is the case, than the ECJ is moving on a slippery slope with its case law. It is not for the ECJ to determine which circumstances affect a

[78] Ros, *supra* n. 1, at Ch. 12, 232–234.

[79] Case C-182/06 (Lakebrink). For a discussion of the Schumacker case law, *see* Ros, *supra* n. 1, at Ch. 12.

[80] Case C-39/10 (*Commission v. Estonia*).

[81] Case C-9/14 (Kieback).

[82] For a discussion of the Schumacker case law, Ros, *supra* n. 1, at Ch. 12.

[83] Case C-283/15 (X).

[84] In the *Renneberg* judgment, this was already decided for a non-resident taxpayer who earned all his income in The Netherlands. In that case, the ECJ found the situation of a resident and a non-resident comparable and that discrimination would arise from the fact that the personal and family circumstances of Mr Renneberg (i.e. his negative income from an owner occupied dwelling in Belgium) would not be taken into account under Dutch tax legislation. However, this case differs in the sense that only 60% of the income is earned in The Netherlands.

[85] Ros, *supra* n. 1, at Ch. 12, 294–296.

person's ability to pay and where these circumstances should be taken into account, because these circumstances are explained very differently in the tax systems of Member States. By determining which circumstances effect a person's ability to pay and where they should be taken into account, the ECJ is moving on a territory that is best left to the (European) legislator.

5 Concluding remarks

The case law discussed in section 2 points out that the ECJ has chosen for a narrower interpretation of its case law on EU citizenship. The discussed case law shows that the CRD is now both '*the floor and ceiling*' of EU citizenship rights and that the ECJ's earlier '*fundamental status of EU citizenship*' rhetoric in relation to the right to social assistance in the host Member State for an economically inactive EU citizen is toned down. The case law on EU citizenship also seems to point to the recognition of the centrality of the nationality link of an EU citizen over any other transnational status.

However, as section 3 point out, the introduction of EU citizenship has also influenced the ECJ's interpretation of the market freedoms. The market freedoms are no longer merely tools for the construction of the internal market. The market freedoms are now seen as sources of a broader right, implying that those who have exercised their right to move should not be subject to unnecessary regulation, to a disproportionate interference with their right to pursue an economic activity. An explanation for this broad interpretation of the market freedoms by the ECJ can be found in the view that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU citizens; the right to pursue an economic activity in a cross border context, irrespective of whether the economically active EU citizen contributes to the aims of the internal market. In this view, the market freedoms are no longer instrumental rights, but are rights granted to EU citizens for their owns sake and can, therefore, be considered as fundamental economic rights.

The distinction in the case law of the ECJ between economically inactive EU citizens and economically active EU citizens clearly restates the importance of the centrality of the market citizen in the ECJ's case law. While, at this moment, the ECJ case law on EU citizenship reflects a conservative approach to EU citizens' rights, the case law on economically active EU citizens can be explained under a broad fundamental economic rights approach. In this regard, it remains the question if the ECJ will uphold its broad fundamental economic rights approach in future Schumacker case law by furthering an '*always somewhere approach*' under which personal and family circumstances always have to be taken into account somewhere, having as a possible consequence that negative income from an owner occupied dwelling must be set off in full wherever there is taxable income to do so at the expense of Member State tax autonomy. It seems that under the current change in public appetite for EU citizenship, the ECJ finds that some EU citizens are more equal than others. A perception far away from a true fundamental status for EU citizens; economically active or not.