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Abstract

'Organised solidarity' of a mediated legal form constitutes the backbone of the modern welfare state built on solidarity between strangers. The interplay between the single market and the national social systems is key in defining who owes what to whom under the 'transnationalised' European solidarity. Free movement rights have increased the 'entanglement' of national social systems' revenue and expenditure sides, considered to jeopardise their steering capacity. As a corollary to free movement, transnational solidarity does not take place beyond or between national welfare states, but rather within: as solidarity with strangers. Here transnational solidarity is applied by way of a sociological framework to trace the evolutionary path of free movement of persons as it fluctuates between 'commodification' and 'decommodification'. Against that backdrop, this article reviews whether a paradigm shift is currently promoted as to the question where solidarity with strangers begins and ends.

Introduction

The principles of the single market superseded the institutional compromise between 'capital' and 'labour', which was constitutive for the development of welfare capitalism in the postwar era. By furthering the mobility of the production factors of capital and labour, economic freedoms also changed the balance of power between more or less mobile social groups.[1] Free movement rights have increased the 'entanglement' of national social systems and may eventually put in jeopardy their steering capacity. Whereas the free movement of capital may restrict the fiscal sovereignty of the Member States, or their control of the revenue side, the free movement of persons may

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[1] W. Streeck, 'Industrielle Beziehungen in einer internationalisierten Wirtschaft', in S. Leibfried (ed.) *Standort Europa: Sozialpolitik zwischen Nationalstaat und europäischer Integration* (Suhrkamp, 1998), 169-202, at 177-178.

compromise the financial sustainability of welfare systems, or control of the expenditure side. In both areas of law, the question is thus under what conditions Member States may invoke economic reasons to restrict individual rights to free movement.[2]

In this article, our focus is on the free movement of persons, which can be understood in terms of the 'transnationalisation' of solidarity. The specific type of solidarity that we are concerned with is 'solidarity between nationals and migrants',[3] or between static national citizens and mobile EU citizens. Since the introduction of free movement of factors of production, and the first efforts at removing obstacles to them, EU law has modified the rules of membership in national social systems, which grant access to organised solidarity and which define who owes what to whom. Our aim is to clarify the conditions of this transnational 'solidarity with strangers' and its implications for national welfare systems.

Proceeding from a sociological framework, the article first outlines the concept of transnational solidarity, which guides our analysis. This is followed by an overview of the development of Union citizenship law in terms of the 'commodification' or 'decommodification' of free movement rights. Next, we turn to an analysis of the economic arguments that have been put forward in favour or against the expansion of free movement rights with regard to workers and so-called 'economically non-actives'.[4] Finally, we speculate on the future development of this area of law. It is suggested that the debate preceding and following the Brexit referendum may promote a paradigm shift with regard to the rights of workers, for which economic reasoning limiting the rights of 'non-actives' has paved the way.

The free movement of persons as transnational solidarity with strangers

The subject matter of this article is the transformation of 'organised solidarity', which forms the backbone of the modern welfare state and takes a mediated, legal form. Hence, we are less interested in the evolvement of feelings of solidarity, which are often the product, rather than the precondition, of organised solidarity,[5] than in the development of individual rights and duties as they are posited in laws and regulations.

The 'Europeanisation' of welfare capitalism entails, at least in tendency, a transformation of solidarity from national to transnational rights and duties. This transnationalisation of solidarity

[2] J. Snell, J, 'Free Movement of Capital: Evolution as a Non-Linear Process', in P. Craig and G. de Búrca (eds) *Evolution of EU Law*, (Oxford University Press, 2n ed., 2011), 547-574, at 574.
[3] Cf. C. Barnard, 'EU Citizenship and the Principle of Solidarity', in M. Dougan and E. Spaventa (eds) *Social Welfare and EU Law* (Hart Publishing, 2005), 157-180, at 166. Barnard speaks of transnational solidarity only with regard to 'medium-term residents', whereas we include 'long-term residents' and 'new arrivals' as well. Cf. *ibid.*, at 166-175.
[4] See Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).
[5] S. Börner, 'From National to European Solidarity? The Negotiation of Redistributive Spaces', in S. Börner and M. Eigmüller (eds) *European Integration, Processes of Change and the National Experience* (Palgrave Macmillan, 2015), 166-188, at 176.

mainly proceeds through 'negative' integration, that is, through economic freedoms and accessory social rights, due to lack of competence for 'positive' integration through EU-level social policies.[6]

The national welfare state has been characterised by an 'abstract, legally mediated solidarity between strangers',[7] which distinguishes it from earlier, more concrete and personalised forms of solidarity. The 'strangers' are, in this case, citizens of the same 'imagined' nation, who may eventually develop a strong sense of community. However, ideally speaking, 'solidarity between strangers' is not premised on an ethnically homogenous national collective, or 'a community of fate shaped by common descent, language and history',[8] but may also extend beyond national borderlines. In this process, law plays an eminent role.

In the European context, the free movement of persons created a situation in which national collectives are indeed opened to 'strangers', which are, in this case, nationals from a different Member State. In Simmel's sociology of space, the stranger is defined as the guest who stays.[9] The prototype of a stranger, thus understood, was a trader '[who] settle[d] down in the place of his activity, instead of leaving it again'.[10] Union citizenship law sets, or limits, the conditions – for traders and non-traders, workers and non-workers – under which 'strangers' may turn into 'members' of national social systems.[11] Accordingly, the transnationalisation of solidarity does not take place beyond or between national welfare states, but rather within.

The question is where this solidarity with strangers begins and where it ends. In times of economic crisis, the pressure to justify transnational solidarity is particularly high. With regard to the adjudication of Union citizenship rights, it has been suggested that a changing economic context 'will have the greatest effect at the fringe rather than at the core', which means that the rights of economically non-active mobile EU citizens are more delicate than the rights of mobile EU workers, not to mention the rights of third-country nationals who are family members of Union citizens.[12] What we aim to show in this article is that the rights of workers are not exempt from economic reevaluation either. Instead, recent developments seem to indicate that a paradigm shift is underway.

Union citizenship law between commodification and decommodification

[6] On the European level, Treaty defined aspects of social policy fall within shared competence (Art. 4 TFEU). Since the Maastricht Treaty (1992), EU social policy provisions specifically 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Art. 153(4) TFEU). The Lisbon Treaty (2007) made an 'emergency brake' available for Member States should a proposed *EU measure* on *social security* for *workers* 'affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system' (Art. 48(2) TFEU).
[7] J. Habermas, 'Why Europe Needs A Constitution', (2001) 11 *New Left Review*, 5-26, at 16.
[8] *Ibid.*, at 15.
[9] A. Loycke (ed.) *Der Gast, der bleibt: Dimensionen von Georg Simmels Analyse des Fremdseins* (Campus, 1992).
[10] G. Simmel, 'The Stranger', in G. Simmel, *The Sociology of Georg Simmel*, ed. by Kurt H. Wolff (Free Press, 1950 [German original published in 1908]), 402-408, at 403.
[11] Cf. M. Dougan and E. Spaventa, '"Wish You Weren't Here…": New Models of Social Solidarity in the European Union', in M. Dougan and E. Spaventa (eds) *Social Welfare and EU Law* (Hart Publishing, 2005), 181-218, at 185-186.
[12] U. Šadl and M. R. Madsen, 'Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis', (2016) 22 *European Law Journal*, 40-60, at 57.

According to Esping-Andersen, 'the core idea of a welfare state' is social citizenship, that is, an emphasis on social rights, next to civil and political rights.[13] Against the backdrop of the 'commodification of labour', or the subjection of wage-setting to market forces, in the 'market society' of the nineteenth century,[14] the aim of welfare capitalism, as it developed in the twentieth century, was 'a de-commodification of the status of individuals *vis-à-vis* the market'.[15] In this sense, social citizenship implies a (certain) decoupling of social security from individual performance, or even participation, in the labour market.

The terminology of 'commodification' and 'decommodification' has occasionally been used to reconstruct the development of Union citizenship law.[16] Since Union (social) citizenship is complementary to national (social) citizenship, we may expect that developments on the national level are reflected in similar developments on the supranational level. However, as an accessory status that is tied to the integration process, Union citizenship also follows a logic of its own, which requires some adaptations in the terminology.

In the European context, the notions of 'commodification' and 'decommodification' are used to refer to the presence or relative absence of an economic rationale in furthering the free movement of persons and, indirectly, solidarity with strangers. Drawing on the relevant literature,[17] but also going beyond, we will distinguish between three strands or stages of Union citizenship law, which we dub 'commodification', 'decommodification' and 'recommodification'.

Commodification: focusing on the rights of workers

Taking the freedom of movement as 'the core of contemporary EU citizenship'[18] allows retracing its beginnings, or antecedents, not only to the EEC Treaty (1957) but to the ECSC Treaty (1951). The Article on the free movement of coal and steel workers[19] was included as it was 'the key condition for Italian participation' that the Treaty facilitates export of Italy's surplus agricultural

[13] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity, 1990), at 21; cf. T. H. Marshall, 'Citizenship and Social Class', in T. H. Marshall *Citizenship and Social Class and Other Essays* (Cambridge University Press, 1950), 1-85.
[14] K. Polanyi, *The Great Transformation* (Beacon Press, 1957 [1944]).
[15] Esping-Andersen, above, n. 13, at 21.
[16] Most recently by E. Hartmann, 'European Social Policy: Social Cohesion through Competition?', in E. Hartmann and P. Kjaer (eds) *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave Macmillan, 2015), 121-137; see also W. Streeck, 'Competitive Solidarity: Rethinking the "European Social Model", in K. Hinrichs, H. Kitschelt and H. Wiesenthal (eds), *Kontingenz und Krise: Institutionenpolitik in kapitalistischen und postsozialistischen Gesellschaften* (Campus, 2000), 245-261; J. A. Caporaso and S. Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets', (2009) 63 *International Organization*, 593-620; S. B. Hager, '"New Europeans" for the "New European Economy": Citizenship and the Lisbon Agenda', in J. Drahokoupil and L. Horn (eds) *Contradictions and Limits of Neoliberal European Governance* (Palgrave Macmillan, 2009), 106-124; M. Höpner and A. Schäfer, *Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration*, MPIfG Discussion Paper (2010) 10/8, available at http://www.mpifg.de/people/mh/paper/Hoepner%202010%20-%20Polanyi%20in%20Brussels.pdf.
[17] See above, n. 16.
[18] W. Maas, 'The Genesis of European Rights', (2005) 43 *Journal of Common Market Studies,* 1009-1025, at 1010; reference omitted.
[19] Art. 69(1) ECSC: 'Member States undertake to remove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognised qualifications in a coalmining or steel-making occupation, subject to the limitations imposed by the basic requirements of health and public policy.'

labour to Belgium for work in the coal mines.[20] Its 'relatively narrow interpretation' privileged particularly 'skilled' coal and steel workers, who alone were able to benefit from a system of international work permits.[21] Opposition to the ECSC Treaty in national parliaments raised the issue of commodification, in that workers would become merchandise in the same manner as goods.[22]

Learning from the practical failure of the Article, the EEC Treaty extended the free movement from workers in the coal and steel industries to workers in general. Moreover, it mentioned the abolition of obstacles to freedom of movement for persons as an objective, albeit only originally included Articles on workers and self-employed persons.[23] The EEC Treaty already contained a general prohibition of discrimination on grounds of nationality, as well as specific expressions of it in the Articles on workers and self-employed persons as well as service providers.[24] After a transitional period, once necessary secondary legislation existed, these privileged groups were to be treated no differently than nationals of the host Member State in similar situations and would be able to exercise their right to free movement and residence, unless this was denied on the basis of distinctly non-economic grounds for general derogations (public policy, public security, and public health grounds).

Hence, at the outset, Treaty-based rights to free movement existed only for economically active Member State nationals, first of all workers. To the extent that access to social benefits was derived from this status, the first generation of European social rights can be considered 'commodified'.[25] Inasmuch as the *objective* was to create a common market for the European labour force which could then be allocated between the Member States according to the logic of demand and supply, this label seems justified. However, the *means* to achieve this was the removal of obstacles to free movement, such as a loss of acquired social rights and advantages due to labour mobility. As a case in point, social insurance programmes covering the risk of lost earnings, e.g., in times of sickness or old age, obviously reduce the market dependence of the beneficiaries. In this sense, 'decommodification' on the national level was preserved and, eventually, given a European dimension. Nonetheless, the main target group of the first generation of European social rights were mobile workers, that is, those actively participating in the labour market of another Member State.

It is in this respect that, from the present day perspective, the 'pre-Maastricht paradigm' as to the scope of application of EU law, and hence reliance on non-discrimination, has been characterised

[20] Maas, above, n. 18, at 1012. According to Maas, the Italian *Movimento Federalista Europeo* around 1943 and the Dutch European Action group around 1948 both called for European citizenship to supplement national citizenship, see 1012 *ff*.
[21] *Ibid.*, at 1016.
[22] *Ibid.*, 1014-1015.
[23] See Art. 3(c) EEC and the sub-heading of Part Two, Title III, which refers to the 'Free Movement of Persons, Services and Capital'. The sub-chapters refer to 'workers', the 'right of establishment', 'services', and 'capital'.
[24] Art. 7(1) EEC; cf. currently Art. 18 TFEU. See also Arts 48(2) EEC (now 45 TFEU), 52(2) EEC (now 49 TFEU), and 60 EEC (now 56 TFEU), and as to the free movement right of service recipients: Joined cases 286/82 and 26/83 *Luisi and Carbone,* EU:C:1984:35, para. 10.
[25] Hartmann, above, n. 16, at 131.

as being 'based on the purely market-oriented cross-border-logic'.[26] In practice, the 'commodified' form of European solidarity, together with equally low but less concentrated mobility than today, complemented national solidarity, but seems to have had a minor potential to curb national social rights.

Decommodification: expanding the rights of economically non-actives

In the following decades, the Member States extended transnational solidarity to certain groups of economically non-active citizens whereby free movement became 'more redistributive in nature.'[27] Whereas in the first generation of European social rights, a central aim was to close possible 'insurance gaps' resulting from labour mobility, in the second generation the emphasis turned from contributory in-work benefits to non-contributory out-of-work benefits, or from social insurance to social assistance. For some observers, Union citizenship is inherently connected with this 'decommodification' of European social rights.[28] Programmatically, this required developing the 'incipient form – still embryonic and imperfect – of European citizenship'[29] enclosed in the free movement of workers in all its dimensions.

However, the way to Union citizenship was fraught with ambiguities. On the one hand, Wiener finds the explicit roots of Union citizenship in the early 1970s, when emerging European citizenship policies and practices formed part of a project to further European identity and solidarity,[30] and not the Common Market. On the other, according to Olsen, the market had already provided an implicit legal framework (free movement and non-discrimination) for transnational European citizenship.[31] Whatever the reading of legal or political history, in the 1980s 'market making' gained momentum and the economic core of European free movement rights was again emphasised. Commodified and decommodified visions of European citizenship continued to exist side-by-side.

In the run-up to the Maastricht Treaty (1992), a Spanish initiative to the Intergovernmental Conference in 1990 is credited with putting forward a concept of European citizenship that would include economic, political, and social rights.[32] In contrast to prior policy initiatives, which 'have not managed to go beyond the idea of "privileged aliens"' in the European (Economic) Community, this 'full-scale European citizenship' would amount to 'citizenship of European Political Union'.[33]

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[26] D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', (2012) 37 *European Law Review*, 369-396, at 376.
[27] Hartmann, above, n. 16, at 131.
[28] *Ibid.*, at 132.
[29] M. L. Levi-Sandri, 'Free Movement of Workers in the European Community', in (1968) Vol. 1, No. 11 *Bulletin of the European Communities*, 5-9, at 6.
[30] A. Wiener, 'From *Special* to *Specialized* Rights: The Politics of Citizenship and Identity in the European Union', in M. Hanagan and C. Tilly (eds) *Extending Citizenship: Reconfiguring States* (Rowman and Littlefield, 1999), 195-227, at 207.
[31] E. D. H. Olsen, *Transnational Citizenship in the European Union: Past, Present, and Future* (Continuum, 2012), at 11. For a (market) rights-based view, see also W. Maas *Creating European Citizens* (Rowman and Littlefield, 2007).
[32] Wiener, above, n. 30, at 210-211.
[33] Spanish Memorandum 'Towards a European Citizenship', Council Document SN 3940/90, available at http://eudo-citizenship.eu/policy-documents, at 329.

The Maastricht Treaty established a general right to free movement,[34] which in turn broadened the scope of application of non-discrimination in terms of entitlements as well. Arguably, two more decades had to pass until the breakthrough of the 'post-Maastricht paradigm' of citizens' rights became evident with *Rottmann*.[35] As to previously commodified free movement rights, the post-Maastricht process made welfare benefits more accessible to other EU nationals than those of economically active status. However, the principle of equal treatment does not necessarily imply an equal upgrading of social rights for everyone, but it also allows to limit everybody's entitlements in a non-discriminatory manner. Moreover, citizenship rights conferred by Article 20 TFEU remain a residual category of rights, a protected nucleus of the status,[36] whereas the Treaty-based Union citizens' free movement rights are offset with duties that remain economic in nature for both the economically active and non-active.[37] In the end, extension of the scope of Union citizenship does not exclude a 'recommodification' of its substance inasmuch as social rights are concerned.

Recommodification: turning from rights to duties in Union citizenship

Creating Union citizenship has in practice meant that transnational solidarity is no longer limited to the technically 'unified' European labour force.[38] However, by the time that European social rights had become more inclusive, the 'Keynesian welfare state' of the postwar era had already given way to a 'Schumpeterian workfare state'.[39] The turn 'from welfare to workfare' describes a reorientation of national welfare systems 'towards work, labor-force attachment, and the deterrence of welfare claims',[40] or 'activating labour market policies'. To meet this target, non-contributory social benefits are made more conditional on individual efforts to take up and stay in employment. Streeck speaks of a shift from 'protective and redistributive' to 'competitive and productive solidarity', or a reorientation from the 'de-commodification of individuals' to the 'creation of equal opportunities for commodification'.[41]

It is against this backdrop that the European conception of (social) citizenship, which came to complement this political agenda on the supranational level, has been marked, once again, as 'commodified'.[42] Reference is made, first of all, to the field of unemployment policy, 'where a

[34] See currently Art. 21(1) TFEU and, on that it confers direct effect, Case C-413/99 *Baumbast and R,* EU:C:2002:493, para. 84.
[35] Case C-135/08 *Rottmann,* EU:C:2010:104. See Kochenov and Plender, above, n. 26, at 385-386.
[36] The limits of that nucleus were first considered in Case C-34/09 *Ruiz Zambrano,* EU:C:2011:124, para. 42, according to which Art. 20 TFEU guaranteed 'genuine enjoyment of the substance of the rights'.
[37] In this sense, the 'citizenship duty' of economically non-actives is to comply with the (economic) conditions of Directive 2004/38, above, n. 4, especially Art. 7(1), before acquiring the right to permanent residence. See also N. N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', (2015) 52 *Common Market Law Review*, 889-938, at 901.
[38] Hartmann, above, n. 16, at 129.
[39] B. Jessop 'Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy', (1993) 40 *Studies in Political Economy,* 7-39.
[40] J. Peck, 'The Rise of the Workfare State', (2003) *Kurswechsel* No. 3, 75-87, at 78.
[41] Streeck, above, n. 16, at 252-253; emphasis omitted.
[42] Hager, above, n. 16, at 107; cf. C. Colliot-Thélène, 'What Europe Does To Citizenship', in D. Chalmers, M. Jachtenfuchs and C. Joerges, Christian (eds) *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press, 2016), 127-145, at 140-141.

meaningful EU-level response, in the form of social rights, to the crisis of structural unemployment was cast aside in favour of promoting the citizen's *duty* to become "employable" and "adaptable" in the face of labour market flexibility'.[43] Inasmuch as Union citizenship law still contains, at its core, a '"socially-thin" [concept of] market citizenship',[44] it seems more in line with these activating policies than against it. At least, there is little reason to expect that the 'recommodification' of national social rights could be counteracted by European legal means. Instead, Union citizenship law might not only complement but eventually reinforce these rights-curbing tendencies under the premise of non-discrimination.

In the 'new welfare contract',[45] the focus is on economic incentives, or the behavioural conditions of social transfers, and not on who may enter the contract in the first place. However, economic reasoning also plays a role in how membership in national social systems is defined, or re-defined, in the European context. Attention then turns to the question of who has access to organised solidarity in national social systems, and to what extent. Along with the 'universalisation of strangeness' in contemporary societies,[46] in which intra- and transnational mobility is a common phenomenon,[47] Union citizenship works towards a denationalisation of social rights,[48] and their (further) rationalisation in legal and economic terms. In this sense, the 'Europeanisation' of social rights may actually go hand in hand with an 'economisation' of what national social rights are all about.[49]

The right to free movement between European resource and national burden

The political economy of free movement has changed during the course of the integration process, as has the rationale for extending national solidarity to strangers and, just as importantly, for limiting it. In the following, we will approach the question of who owes what to whom from the viewpoint of what constitutes a 'burden' and, eventually, an 'unreasonable burden', for national welfare systems in the context of the free movement of persons. This terminology recently gained currency in EU legal parlance in the context of economically non-actives claiming access to national solidarity. It is intricately connected with economic arguments, whereas restricting the free movement of economically actives should not be possible on (purely) economic grounds. However, extending rights to economically non-actives may have had the counter-intuitive effect of restricting those of economically actives. We will first sum up relevant legal developments for the core of workers and then turn to recent case-law on economically non-actives.

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[43] Hager, above, n. 16, at 111; original emphasis; reference omitted.
[44] *Ibid.*, at 110.
[45] This concept is connected with the 'Third Way' of 'New Labour' in the UK; see, for example, M. Powell, 'New Labour and the Third Way in the British Welfare State: A New and Distinctive Approach?', (2000) 20 *Critical Social Policy*, 39-60.
[46] V. Marotta, 'Georg Simmel, the Stranger and the Sociology of Knowledge', (2012) 33 *Journal of Intercultural Studies*, 675-689, at 677.
[47] Compared to the society that Simmel described; cf. Simmel, above, n. 10.
[48] D. Friedrich, P. Nanz and K. Blome, 'Free Movement and the Emergence of Social Citizenship', (2012) 41 *Österreichische Zeitschrift für Politikwissenschaft*, 383-398, at 395.
[49] On how individualism makes national solidarity appear 'ugly and unkind', A. Somek, 'Solidarity Decomposed: Being and Time in European Citizenship', (2007) 32 *European Law Review*, 787-818, at 816.

Mobile Union citizens as a European resource: establishing the free movement of workers

In the Spaak Report of 1956,[50] which led to the EEC Treaty, we do find a notion of burden in the context of the free movement of workers, albeit not with regard to their host Member States but to their home Member States, namely those suffering from structural unemployment.[51] Accordingly, the promise of enhanced labour mobility was that 'the unemployed workforce, instead of being a burden for some countries, turns into a resource for Europe'.[52] Exporting the domestic burden – the unemployed – abroad was thus desirable at the outset of the European project, even though this was not the only available option.[53]

The Regulation on the free movement of workers, issued in 1968,[54] and the 'Coordination Regulation', issued in 1971,[55] still reflected the idea of exporting domestic burden, though the former also foresaw '[m]easures for controlling the balance of the labour market'[56] in case of serious 'disturbances.'[57] Moreover, its preamble described the freedom as a fundamental right and outlined the expected mutual benefits for migrant workers and Member States: 'mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, *while helping to satisfy the requirements of the economies of the Member States*'.[58]

The Coordination Regulation aimed to guarantee that migrant workers receive their social rights and advantages determined by applicable national legislation whilst preventing unjustified overlaps. It established a network of competent institutions that in certain situations reimburse expenses for paid-out benefits to each other, but did not include any safeguards regarding the

[50] 'Spaak Report' (full version in French 'Rapport des chefs de délégation aux ministres des affaires etrangères', Comité Intergouvernemental créé par la conférence de Messine, Secrétariat, Bruxelles, 1956, available at http://aei.pitt.edu/996/1/Spaak_report_french.pdf.

[51] Among the six founding Members of the EEC this was, as we have seen, first of all Italy. Cf. W. Molle and A. v. Mourik, 'International Movements of Labour under Conditions of Economic Integration: The Case of Western Europe', (1988) 26 *Journal of Common Market Studies*, 317-342, at 322-323.

[52] Spaak Report, above, n. 50, at 18; our translation.

[53] According to the theory of international trade, 'a country where labour is abundant and hence cheap, might just as well import capital and export labour as export labour-intensive goods'; see Molle and v. Mourik, above, n. 51, at 329. The then Vice-President of the Commission opined that '[i]t is for capital to go where there is labour and not vice versa'; see Levi-Sandri, above, n. 29, at 6.

[54] Council Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1-12).

[55] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1-99) which entered into force in 2010).

[56] Reg. 1612/68, above, n. 54, sub-heading of Title III.

[57] *Ibid.*, Art. 20(1).

[58] Third recital of the preamble to Reg. 1612/68, above, n. 54; emphasis added. Post-Single European Act, possibly a reading in light of the state of evolution of EU law at that point, AG Jacobs's interpretation of the same recital in Case 344/87 *Bettray,* EU:C:1989:113, point 29, is: 'The recital makes it clear that *labour is not*, in Community law, *to be regarded as a commodity* and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States.'; emphasis added.

balancing or burdening of the finances of the host Member State. In line with the non-discrimination provisions of the Treaty, those within the scope of its application 'shall be subject to the same obligations and enjoy the same benefits […] as the nationals of the State'.[59]

Hence, at its inception, the free movement of workers was premised on the fact that 'the labour market was tight in all Member States except Italy'.[60] In fact, intra-EU migration was far from sufficient to satisfy the demand for labour in the receiving Member States. This changed with the economic crisis of the 1970s, which led to a change in national migration policies. Not unlike today, 'economic factors' were reinforced by 'socio-cultural factors' related to 'feelings of *Ueberfremdung*' (over-exposure to foreigners), with the effect being a considerable decline in the total numbers of foreign workers, including third-country nationals, in the six founding Member States: 'from nearly 4.5 million to 3.3 million from 1974 to 1984'.[61] However, despite higher levels of unemployment across Europe and increasing disparities in the enlarged Community from the early-1970s onwards, mobile workers remained a privileged group in the free movement of persons, some national policy fluctuation notwithstanding.

In light of secondary EU legislation, of both then and now, workers are quite obviously considered a resource rather than a burden for the host Member States. Workers' privileges were confirmed in Directive 2004/38[62] as it excludes them from the scope of burdening analysis and economic grounds as reason for their expulsion. What EU law determines as a worker – a resource – has not, according to case-law and literature, required the worker to make a positive net contribution – or any income tax contribution – to the host Member State's public finances.[63]

The fundamentally positive assessment of incoming workers is also reflected in recent case-law, which refers back to the above-mentioned passage in the preamble of the 1968 Regulation when it analyses the appropriateness, or not, of a residence requirement for establishing a 'sufficient link of integration' between the (partially) migrant worker and the host Member State. However, in assessing justification for (un)equal treatment of workers, the Court specifically suggests this link 'arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers'.[64] Accordingly, 'migrant workers and frontier workers' can expect in return for their contributions – work and taxes – to the host Member State the same solidarity – social and tax

[59] Art. 3(1) Reg. 1408/71, Case 82/86 *Laborero and Sabato,* EU:C:1987:356.
[60] Molle and v. Mourik, above, n. 51, at 322.
[61] *Ibid.*, at 325.
[62] Dir. 2004/38 above, n. 4.
[63] Case 53/81 *Levin,* EU:C:1982:105, paras 15-17; Case 139/85 *Kempf,* EU:C:1986:223, para. 14; and Case 196/87 *Steymann,* EU:C:1988:475. Recently, see F. de Witte, *Justice in the EU: the emergence of transnational solidarity* (Oxford University Press, 2015), at 87, and A. Iliopoulou-Penot 'Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment', (2016) 53 *Common Market Law Review*, 1007-1036, at 1021. On the 'inevitability' of problems of application emerging from the underdefined – by the Court – EU concept of worker, see S. O'Leary, 'Free Movement of Persons and Services' in P. Craig and G. de Búrca (eds), above, n. 2, 499-545, at 527, and Case C-14/09 *Genc,* EU:C:2010:57.
[64] Case C-542/09 *Commission v The Netherlands*, EU:C:2012:346, paras 63-67.

advantages – as national workers and resident workers. However, several judgments also suggest that frontier workers' right to equal treatment can be more easily curbed than resident workers'.[65] In a case concerning the right of a frontier worker's child to student aid in the parents' Member State of work, the Court states in the abstract that 'the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State' while finding this would be a disproportionate conclusion in the case at hand.[66] Nonetheless, a formal residence requirement is considered 'too exclusive in nature' to determine who has access to nationally organised solidarity and who has not.[67]

Mobile Union citizens as a national burden: economic rationalisation of transnational solidarity

Extending the right to free movement to economically non-active Member State nationals preceded the Maastricht Treaty by only half a year.[68] Preambles of those Directives introduced the notion that 'beneficiaries of the right of residence must not become an *unreasonable burden* on the *public finances* of the host Member State', and Articles required the beneficiaries to have 'sufficient resources to avoid becoming a *burden* on the *social assistance system* of the host Member State during their period of residence'.[69] The entry into force of the Maastricht Treaty not only constitutionalised the right to free movement of all Member State nationals (achieving the aim set in 1957 of free movement of persons) but also stipulated on a general level that Union citizenship was subject to the 'limitations and conditions' of primary or secondary EU law.[70] A clash between the new rights-based EU regime and the leave-based national migration regimes was heightened by a debate over whether the new primary law could confer direct effect, the need to reinterpret the secondary law issued prior to Treaty changes in accordance with it, and at times the perplexing reasoning of the Court.[71]

Post-Maastricht, the Court in *Grzelczyk* interpreted Union citizenship as the fundamental status of Member State nationals to require 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States', allowing economically non-actives to burden host Member State public finances, or the social assistance system, to some extent but not too much.[72] *Grzelczyk*, *Bidar* and *Trojani* together with *Baumbast* form the post-Maastricht

[65] The case-law addressing this situation, engaging the Coordination Regulation and involving exportability of special non-contributory benefits, developed rather late, in 2007, that is, after the case-law allowing for objectively justified restrictions to the equal treatment of the mobile economically non-active and work-seekers had emerged. Case C-212/05 *Hartmann,* EU:C:2007:437 , Case C-213/05 *Geven,* EU:C:2007:438, and Case C-287/05 *Hendrix,* EU:C:2007:494.
[66] Case C-20/12 *Giersch*, EU:C:2013:411, para. 65.
[67] See also Case C-379/11 *Caves Krier Frères Sàrl*, EU:C:2012:798, para. 53; Case C-220/12 *Thiele Meneses*, EU:C:2013:683, para. 40.
[68] Council Directives 90/364/EEC, 90/365/EEC, and 90/366/EEC (replaced by 93/96/EEC), all of 28 June 1990, on the right of residence, the right of residence for employees and self-employed persons who have ceased their occupational activity, and the right of residence for students, respectively (OJ 1990 L 180, p. 26; OJ 1990 L 180, p. 28; and OJ 1990 L 180, p. 30, its replacement, of 18 December 1993, OJ 1993 L 317, p. 59).
[69] Emphasis added.
[70] Art. 21(1) TFEU.
[71] J. Shaw and N. Miller 'When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law', (2013) 38 *European Law Review*, 137-166. See also S. Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing, 2013).
[72] Case C-184/99 *Grzelczyk*, EU:C:2001:458, paras 44 and 31.

baseline of legal interpretation: only unreasonable burdening was considered a legitimate ground for the host Member State to end lawful residence which in turn ended the right to equal treatment;[73] although this and more recent case-law both state that '[i]n any event, the limitations and conditions which are referred to in Article [21 TFEU] and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union *can be subordinated to the legitimate interests of the Member States*.'[74] This implies a balancing exercise between the legitimate financial interests of the host Member States and the 'conditional' right to free movement conferred by the Treaty.[75] The difference between 'unreasonable burden' and 'burden' is retained in the current Directive.[76] This may well be on purpose, as the legislator did choose to converge the reference point of what is burdened into the narrower notion of 'social assistance system', while omitting the more general reference to the 'public finances' of the host Member States.

Yet recent case-law (2011–) seems to have reached a 'tipping point' in how this balance is struck: Shuibhne speaks of 'a profound shift in emphasis towards the rising significance of conditions and limits, and a less explicit but discernible ascension of duties, in the application and interpretation of citizenship rights',[77] evident in *Dano.*[78] Spelling out the implications of the 'limitations and conditions' of the right to free movement for economically non-active Union citizens leads to the accentuation of individual duties, such as the 'obligation or responsibility' to have sufficient resources.[79] Inasmuch as the change of emphasis in recent case-law reflects the political, or popular, concern that economically non-actives are indeed not active enough and, at worst, 'have no intention of being so and deliberately abuse Union law',[80] it is in line with the thinking behind the 'new welfare contract'. Especially *Ziolkowski and Szeja* and *Alimanovic* can be read in a similar light.[81] While the right to rely on Article 18 TFEU (prohibiting discrimination on grounds of nationality) is still dependent on lawfulness of residence, like in the baseline case-law, the present conception of the concept of lawful residence is different. According to Spaventa, this means that

[73] *Ibid.*, para. 42, Case C-456/02, *Trojani*, EU:C:2004:488, para. 45 and Case C-209/03 *Bidar,* EU:C:2005:169, para. 47.
[74] Case C-413/99 *Baumbast and R,* EU:C:2002:493, para. 90; emphasis added. See also Case C-200/02 *Zhu and Chen,* EU:C:2004:639, para. 32 and Case C-408/03 *Commission v Belgium,* EU:C:2006:192, paras 37 and 41. Recently, see Case C-140/12 *Brey*, EU:C:2013:565, para. 55.
[75] E.g. Case C-356/98 *Kaba*, EU:C:2000:200, para. 30; Joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, EU:C:2004:262, para. 47; and Case C-406/04 *De Cuyper*, EU:C:2006:491, para. 36. The bridge between qualifying a right as not un*conditional* and the wording of Article 21(1) TFEU (referring to 'limitations and conditions') was semiotic, instead of doctrinal.
[76] On the German language version of Dir. 2004/38, above, n. 4, omitting 'burden' entirely and hence alternatively not allowing any recourse to social assistance, see D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens', (2015) 52 *Common Market Law Review*, 17–50, at 26.
[77] Shuibhne, above, n. 37, at 891.
[78] Case C-333/13 *Dano*, EU:C:2014:2358.
[79] Shuibhne, above, n. 37, at 901; emphasis omitted.
[80] *Ibid.*, at 936.
[81] Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja,* EU:C:2011:866, paras 46-47; Case C-333/13 *Dano* EU:C:2014:2358 paras 69-73; Case C-299/14 *García-Nieto and Others* EU:C:2016:114 paras 38 and 50; and Case C-67/14 *Alimanovic* EU:C:2015:597, para. 49, are central for the stricter reading as to compliance with conditions of Art 7(1) of Dir. 2004/38, above, n. 4, and thereby to lawful residence. See also D. Thym, 'When Union Citizens Turn Into Illegal Migrants: The *Dano* Case', (2015) 40 *European Law Review*, 249-262, at 253.

'the Court has become more sensitive to the political compromise made in Directive 2004/38, a compromise which clearly excluded a meaningful notion of transnational solidarity beyond the internal market'.[82]

Criticism against the Court is mounting. De Witte finds that the Court has not consistently followed any type of transnational solidarity in elaborating norms of justice.[83] Moreover, as Davies has put it: 'the asymmetry between the capacity of the Court to present the underlying values and vision of this part of EU law so powerfully, and its inability to articulate or recognise the underlying values and visions of national measures when these are challenged, is striking'.[84] Yet, as the case-law on mobile students illustrates, the genuine link or sufficient degree of integration, besides prior residence, could be borne by 'the nationality of the student, his schooling, family, employment, language skills or the existence of other social and economic factors', which explicitly includes 'the employment of the family members on whom the student depends', that is, their economic contribution to the benefit-providing Member State.[85] Hence, surprisingly or not, it all comes down to work and taxes again.

Directive 2004/38 is formally, not substantively, a remedy for the sector-by-sector piecemeal approach of secondary legislation, by collecting the relevant provisions into one more encompassing instrument. Though the Court long managed to maintain a seemingly coherent body of case-law in terms of the relationship between primary and secondary EU law, its rhetoric and strategic manipulation of recent cases is raising doubts about the legitimacy of its interpretations in the legal community[86] and, arguably, also in the constituency of the Court. In Davies's words: 'The social legitimacy that citizenship case-law lends to the EU in some groups may be more than matched by alienation that it will inspire in others.'[87] Be this as it may, our main point is that what started out as an exercise of reviewing access to national welfare for the economically non-actives has reached the 'economically actives' as well.

Present developments build on how the Court has deferentially assessed the lawful residence of non-actives, real links of mobile students or frontier workers, and not addressed mobile atypical or part-time workers,[88] all of which has left national courts and legislators leeway in defining who

[82] E. Spaventa, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in P. Koutrakos, N. N. Shuibhne, and P. Syrpis (eds) *Exceptions from EU Free Movement Law: Derogations, Justifications and Proportionality* (Hart Publishing, 2016) 32-51, at 51.
[83] De Witte, above, n. 63, at 10-12.
[84] G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', (2015) 21 *European Law Journal*, 2–22, at 20.
[85] Case C-359/113 *Martens*, EU:C:2015:118, para. 41.
[86] See case-comments and other literature addressing the Court cited above and below. As to legal change or divisions within the Court, after all these years of interpreting legislation applicable to mobile *students*, the outcomes of the AG and the Court differ in, e.g., *ibid.*, Case C-158/07 *Förster*, EU:C:2008:630, Case C-73/08 *Bressol*, EU:C:2010:181, and Case C-20/12 *Giersch*, EU:C:2013:411.
[87] Davies, above, n. 84, at 20. See also S. Currie, 'The Transformation of Union Citizenship' in M. Dougan and S. Currie *50 Years of the European Treaties* (Hart Publishing, 2009), M. Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union citizens' in M. Adams et. al. (eds) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013), 127-154, at 153.
[88] See Shuibhne, above, n. 37, Šadl and Madsen, above, n. 12, and C. O'Brien 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', (2016) 53 *Common Market Law Review*, 937-978.

qualifies as worker.[89] The logic behind the primarily national restrictive approach is difficult to pin down with precision, especially by using the narrow economic terms or arguments the Court engages with in reviewing the acceptability and rationality of national measures from an EU law perspective. Our guess is that it is a combination of the effects of workfare, which concerns non-contributory in-work benefits as much as non-contributory out-of-work benefits,[90] together with competitive pressure exerted on national workers by mobile EU workers under conditions of national treatment[91] – yet any such rationale remains insufficiently quantified and theorised.

Whatever the rationale, it appears to be bringing the (de)commodification development mapped out above full circle. Present reality seems to exclude transnational solidarity also in part within the internal market, not just outside it. What is more, national law recoupling market performance with access to the welfare system seems to comply, more than expected, with EU law's requirements.[92] Hence the present situation seems more reminiscent of the "safety valve" and 'labour market disturbance' logic found in the 1968 Regulation on the free movement of workers,[93] than of the period immediately prior to lifting the remaining transitional restrictions on workers after EU's eastern enlargement. In fact, contrary to what AG Jacobs argued in 1989, labour seems to be a commodity and precedence is given to its 'helping to satisfy the requirements of the economies of the Member States'[94] over workers' rights.[95] A gaping hole has therefore appeared, or become visible, in the legally organised form of transnational solidarity.

The UK example and the Brexit debate: solidifying the paradigm shift?

The question of who owes what to whom in the transnational setting of Union citizenship gained high profile in the 'Brexit debate'. The British renegotiation agenda which the UK presented to the European Council meeting of 18-19 February 2016 found support in all European leaders. The suggested reforms aimed to limit access to certain non-contributory in-work benefits to (resident) mobile EU nationals working in the UK, and thus went to the heart of the free movement of

[89] According to information collected from FreSsco's (Free Movement and Social Security Network for the European Commission) national experts, many Member States apply an expansive understanding of what is considered marginal and ancillary work – or, in the obverse, a narrow worker definition – meaning that though they are working, they are considered economically non-active, see O'Brien, Spaventa and De Coninck, *The Concept of Worker under Article 45 TFEU and Certain Non-standard Forms of Employment*, (2016) FreSsco Comparative Report 2015, available at www.ec.europa.eu/social/BlobServlet?docId=15476&langId=en.

[90] Both types of benefits can be instrumentalised to increase labour market participation, at the price of creating a class of 'working poor'. (See also O'Brien, above n. 88, at 939.) In Peck's terms, '[u]nder conditions of wage stagnation, growing underemployment, and job casualization, workfarism maximizes (and effectively mandates) participation in contingent, low-paid work by churning workers back into the bottom of the labor market'; see Peck, above, n. 40, at 80; reference omitted. For a short note on the EU, see J. F. Handler, 'Welfare, Workfare, and Citizenship in the Developed World', (2009) 5 *Annual Review of Law and Social Science*, 71-90, at 87.

[91] A. Saydé, *Freedom as a Source of Constraint: Expanding Market Discipline Through Free Movement*, EUI Working Paper LAW 2015/42, at 19, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728673.

[92] Case C-308/14 *Commission v UK*, EU:C:2016:436.

[93] Reg. 1612/68, above, n. 54.

[94] *Ibid.*, third recital of the preamble to Reg. 1612/68.

[95] See AG Jacobs, above, n. 58.

persons. More specifically, two measures were sought: first, the option of a ban on (or indexing of) exportable child benefits and, second, the option of resorting to a safeguard mechanism that would, in exceptional circumstances, allow for a limited period of time to restrict workers' access to non-contributory in-work benefits to the extent considered necessary.[96] To facilitate Prime Minister Cameron's campaign for the UK's continued membership in the EU, the European Council Conclusions contain commitments to change secondary legislation in order to accommodate these requests.[97]

The (domestic) Brexit-discussion focused on low-paid workers from other Member States and side-lined mobility of economically non-actives as financially a secondary issue. The novelty here is not that restricting free movement struck a chord with national leaders who make up the (European) Council,[98] however, what is new is that the suggested move would close access to the UK welfare system for all new mobile EU workers. As the votes in the referendum on the UK's EU membership on 23 June 2016 were in favour of British withdrawal from the EU, that offer is off the table.

What is more, the UK position on habitual residence, that is, the test that withstood the Commission's infringement action on it roughly a week before the referendum,[99] is an effective way of nationally defining the boundaries of the welfare state, and hence can be used for curbing transnational solidarity. This test that in effect decides whether or not one has access to national social security (e.g., child benefits and child tax credits) includes in the evaluation one's 'degree of attachment and intention to remain in the UK' and requires that the length of residence is not determinate.[100] It seems safe to say that tests of this type will not disappear from but instead proliferate in other Member States as well. Several Member States have continued interest in restricting mobile workers' access to child benefits when their families do not move with or follow

[96] European Council Conclusions (18 and 19 February 2016, EUCO 12/16), available at http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, at 23. The safeguard mechanism would require amending Reg. 492/2011 (above, n. 54) which in turn would allow suspending mobile Member State workers' access to non-contributory in-work benefits for their four first years in the UK, during a seven year safeguard period. Commission Declaration annexed (Annex VI) to the same Conclusions states that 'present circumstances in the UK qualify as exceptional', allowing the triggering of the safeguard mechanism at the UK's request. On the absence of data on the circumstances (i.e., in terms of both revenue and expenditure), see Iliopoulou-Penot, above, n. 63, at 1029.

[97] The wording of the Declaration of the European Commission (Annex V) in the 18-19 February 2016 European Council Conclusions is somewhat unclear ('option to index such benefits to the conditions of the Member State where the child resides') as to whether child benefits would be indexed at the level of local cost of living or to match the local level of child benefits in amending Reg. 883/2004. Indexing would have applied to new claims with immediate effect, but could have been extended to all claims from 1 January 2020. Interestingly, the same Conclusions clearly state that the 'Commission does not intend to propose that the future system of optional indexation of child benefits be extended to other types of exportable benefits, such as old-age pensions' (at 22).

[98] See, e.g., Letter by the Ministers of the Interior Mikl-Leitner, Friedrich, Teeven and May addressed to the President of the European Council for Justice and Home Affairs Shatter, April 2013.

[99] Case C-308/14 *Commission v UK*, EU:C:2016:436.

[100] *Review of the Balance of Competences between the United Kingdom and the European Union – Single Market: Free Movement of Persons*, 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf, at 20.

the worker to the host Member State.[101] Further rescaling is, as well, underway with regard to non-workers. For example, the German government recently passed a law stipulating that job-seekers from other Member States would no longer gain access to social assistance after six months of residence, as the Federal Social Court had ruled a year before, but only after five years.[102]

Drawing on the prototypes, or stereotypes, of migrant workers in postwar Belgium and today's UK, we can contrast the Italian steel worker of the Spaak Report with the Polish construction worker[103] lurking behind the Brexit debate. Whereas the former was considered a resource for Europe, the latter is increasingly considered a burden by the host Member State. In Simmel's account of the stranger, because the stranger is not 'organically connected' to the group he or she is living in, the relation to him or her is of a 'more abstract nature'.[104] In practice, the presence of the stranger has goaded the host Member State to rationalise and objectify its social system in relation to nationals and migrants alike. In this sense, the 'Polish plumber' exerts disciplining effects not only on the national labour market,[105] but also on the system of nationally organised solidarity, changing it from within. Residence requirements, like the 'habitual residence test', take a different route, presuming that the stranger is not settling down but soon leaving again.

[101] The option to index child benefits, as envisioned in the European Council Conclusions, above, n. 96 and n. 97, was favourably commented on, amongst others, by the German chancellor towards the end of the summit, see P. Oltermann, 'Germany Among EU Countries Keen To Copy UK Child Benefit Peg', *The Guardian*, 23 February 2016, available at https://www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg. Eight months after the Brexit referendum, whose negative outcome nullified this provision, three Austrian ministers urged in a letter to the President of the EU Commission to put the option to index child benefits back on the European agenda, as was reported by the *Austria Presse Agentur* on 14 November 2016, which had received a copy of the letter.

[102] See the decision of the Federal Social Court (*Bundessozialgericht*) of 3 December 2015, B 4 AS 44/15 R, available in German at http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/list.py?Gericht=bsg&Art=en, as well as the draft law of the German government, Drucksache 18/10211 (7 November 2016) and the recommendation for a decision and the report of the responsible parliamentary committee, Drucksache 18/10518 (30 November 2016), available in German at http://pdok.bundestag.de/index.php. The German parliament approved the amended draft law on 1 December 2016.

[103] A. Spigelman, 'The Depiction of Polish Migrants in the United Kingdom by the British Press After Poland's Accession to the European Union', (2013) 33 *International Journal of Sociology and Social Policy*, 98-113.

[104] Simmel, above, n. 10, at 404 and 406 (emphasis omitted).

[105] Cf. A. Saydé, above, n. 91, who distinguishes between a 'mutual-recognition plumber' and a 'national-treatment plumber'.