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EUROPEAN POLICY ANALYSIS

European Citizenship in a Constitutional Context: where the 'social' coexists with the 'market'

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Summary

The idea behind EU citizenship has been one of fostering deeper integration. Deciphering what it really means to be an EU citizen remains contentious, as the rights protected under EU law seem to vary both in nature and in scope and often depend on cross-border movement and economic activity. This legal fragmentation is at odds with our experience at the national level, where constitutions generally provide that every citizen is entitled to the rights and benefits of citizenship subject to the limits provided for in them.

What exactly is the position in relation to EU citizenship within the EU constitutional context? Does the current EU constitutional framework promote inclusive citizenship, embracing a set of fundamental rights and freedoms? And, if it is more than a symbolic gesture, how does EU citizenship reinforce EU constitutional values? Does the binary distinction between market citizenship and social citizenship help us understand the kind of EU citizenship that the EU constitution currently showcases?

This policy analysis sheds light on these questions and links EU citizenship to constitutional developments in the Treaties. It also offers a critique of the role of the Court of Justice of the European Union in cementing this evolution through its emphasis on the status of EU citizenship as a fundamental freedom as opposed to merely a free movement right corollary to the internal market principles. In conclusion I argue that EU citizenship is a composite of the 'social' coexisting alongside the 'market' (sometimes in unequal proportions). Positing the two against each other may produce counterproductive oppositions within the narrative of a concept which is still very much in flux.

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1. Introduction

The European Union is a union of rights and values. It is a union within which 'the State must respect not only the individual's physical well-being, but also his dignity, moral integrity and sense of personal identity'.[1] Such enduring qualities have found expression in EU citizenship as a legal, political, and social concept beyond nationality. The CJEU has protected such qualities by using the spirit of the Treaties as an implementation guide to enhance cross-border movement helping social and economic activity across the EU. While the mobility of economic resources is central to the internal market, individuals are not included or excluded from EU citizenship according to their productivity as workers or service providers. Their contribution to the market economy is juxtaposed against their genuine enjoyment of the substance of the rights conferred by virtue of EU citizenship as equal parts of the European integration narrative.[2]

While 'market citizenship' (which sees individuals as utility maximisers) is part of the DNA story of EU citizenship, it is a term that is now often used in a derogatory manner against the current state of EU citizenship.[3] It has become a criticism predicated on the conviction that there is no such thing as a transition from market citizenship to a real or social European citizenship (including rights not directly contained in the market).[4] This is because the boundaries of EU citizenship as a legal construct and the extent to which they are restrained by national identities and economic considerations have weakened the earlier findings of the CJEU in relation to the right to reside. To the majority of critics this translates to limiting the future applicability of EU citizenship to only a single form of citizenship (that of market citizenship). Accordingly, the rights an individual enjoys are strictly based on her accomplishments in the market, excluding individuals at disadvantage in society or those lacking material resources who rely on national welfare and assistance.

> '[…] what if the binary distinction between social and market citizenship repeated in different iterations in the citizenship literature creates false oppositions?'

The purpose of my analysis is not to refute the above criticism but to add some thoughts to the conversation regarding more nuanced formations of market citizenship.[5] For instance, what if the binary distinction between social and market citizenship repeated in different iterations in the citizenship literature creates false oppositions? What if there is no single form of EU citizenship, and as such the dignity-friendly judgments of the CJEU sit alongside more market-driven case law on citizenship and vice versa? The analysis is built on a model of 'market'-'social' citizenship coexistence and interplay which recognises that the 'social'

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1 Case C–168/91 *Konstantinidis* [1993] ECR I–1191 at para 39 of AG Jacobs' Opinion.

2 See for instance *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECLI:EU:C:2011:124. The case concerned two Belgian nationals (children) living in Belgium with their third-country national (Colombian) parents. The CJEU held that the expulsion of the parents from Belgium would inevitably result in the departure of the children, and would therefore jeopardize their genuine use of the substance of their EU citizenship rights.

3 Market citizenship has been defined as follows: 'Market citizenship directly links the individuals who are the beneficiaries of Treaty-based free movement rights, as construed by the Court of Justice, to the process of building a single market without internal frontiers. [….] it is the 'market citizen' dimension of the EU citizen which has been most highly developed, both in terms of the range of rights made available (as consumer, worker, professional, employer, trader, etc.), which comprise passive and active market access rights (i.e. including the right to receive services or goods from other Member States, as well as information about such goods and services), and in terms of the legal sophistication of those rights.' J. Shaw, 'Citizenship of the Union: Towards post-national membership' Harvard Jean Monnet Working Papers No 6, 1997. Available from: https://jeanmonnetprogram.org/archive/papers/97/97-06-.html

4 See M. Van Den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement' in F. Amtenbrink et al. (eds) *The Internal Market and the Future of European Integration* (Cambridge: Cambridge University Press, 2019).

5 See N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' *Common Market Law Review* 47.6 (2010) 1597–1628.

versus 'market' distinction may still be a work-in-progress. After all, EU citizenship is part and parcel of what Dawson and De Witte describe as

> the narrative that runs deep throughout much of EU law: a limbo between, on the one hand, a reflex towards more integration and replication of the structures of the nation state on the European level, and, on the other hand, the reflex to protect the economic, social and cultural visions of life articulated on the national level.[6]

The current environment of defiance towards EU membership obligations that has taken various shapes and forms in the Member States adds another layer of complexity. In recent years the EU has been threatened by constitutional backsliding from EU values enshrined in the Treaty (most recently the rule of law under Article 2 TEU in Poland and Hungary) which has had a profound effect on, *inter alia*, individuals' right to effective judicial protection. It has also seen national constitutional courts disregarding the CJEU's exclusive powers of treaty interpretation (see the German Constitutional Court's PSPP judgment and the danger of stretching the concept of constitutional identity against further integration).[7]

'In recent years the EU has been threatened by constitutional backsliding from EU values enshrined in the Treaty [...].'

Moreover, the withdrawal of EU citizenship became possible, with Brexit, which constituted a major change of status for British nationals whether they had availed themselves of the opportunities provided by EU citizenship or not. As Advocate General Collins recently opined in *EP v Prefet du Gers*, '[as] a matter of law, all British nationals were Union citizens before the United Kingdom withdrew from the European Union, regardless of what use they may have made of that status. Any issue of legitimate expectations [following from revocation of EU citizenship] is a matter to be taken up with the State of which they are nationals, that is to say, the United Kingdom.'[8] Last, the response to COVID-19 pandemic found Member States closing their borders, restricting citizens' movement, one of the basic tenets of EU citizenship.

The above context challenges our understanding of the concept of EU citizenship as it was first conceived. Hence, my analysis does not purport to provide a solution to the citizenship conundrum, though it may offer an informed *tour d'horizon* and justification about the current state of play. It carries out this task by first mapping out the constitutional bases of EU citizenship within the Treaties and secondary legislation (section 1), setting out the benchmarks against which the activities of the EU and its Member States can be interpreted and reviewed. It then moves on to consider the constitutional evolution of EU citizenship in the courtroom (section 2) – what Nic Shuibhne calls the 'creative interpretation of the boundaries of the Treaties by the Court of Justice'.[9] It concludes with a discussion about EU citizenship's constitutional limitations, including the market-social binary distinction (section 3), which cohere around the acceptance of the concept of EU citizenship by the State, and its current evolutionary form.

2. The constitutional basis of EU citizenship

It is commonly established that the universal acceptance by Member States of the rights and obligations arising from the EU Treaties carries with it a permanent limitation of their sovereign constitutional rights. That compromise has become particularly important in the context of the EU's perceived (or desired) transition from an economic integration community concerned with cross-border movement of all factors of production to that of a political and constitutional union legitimised by a common European identity and citizenry.

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6 M. Dawson and F. de Witte, *EU Law and Governance* (Cambridge, Cambridge University Press, 2022), 151.

7 See T. Konstadinides, 'The German Constitutional Court's decision on PSPP: Between mental gymnastics and common sense', UK Constitutional Law Association Blog (14 May 2020). Available at https://ukconstitutionallaw.org.

8 Case C-673/20 *EP v Préfet du Gers, Institut National de la Statistique et des Études Économiques* [2022] ECLI:EU:C:2022:129.

9 Nic Shuibhne, 'The Resilience of EU Market Citizenship'.

The Treaty of Maastricht introduced the concept of EU citizenship additional to national citizenship and stipulated that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by this Treaty and by the measures adopted to give it effect'. EU citizenship provided a new lens through which to view the fundamental principle of equal treatment and the elimination of discrimination on the grounds of nationality. Currently, it finds expression in the Treaty with Articles 20 and 21 TFEU on EU citizens' right to move and reside freely, and is subject to *conditions and limits defined* therein and measures adopted in accordance with the Treaty. These provisions can be read in the light of Article 18 (1) TFEU that prohibits discrimination on the grounds of nationality. As such, unlike the general prohibition of discrimination in Article 18, Article 21 TFEU has a broader scope insofar as it can be invoked not only by economically active persons, but all EU citizens. As Advocate General Sharpston stressed almost a decade ago in her Opinion in *Zambrano*:

> In *Baumbast*, the Court stated that Article 18 EC (now Article 21 TFEU) has direct effect, conferring on non-economically active individuals a free-standing right of free movement. In so holding, it extended rights of free movement to persons having no direct connection with the economics of the single market, who were therefore unable to invoke 'classic' free movement rights. The evolution was, I suggest, both coherent and inevitable, following logically from the creation of citizenship of the Union. If the European Union was to evolve into something more than a convenient and effective framework for the development of trade, it had to ensure a proper role for those it had decided to start calling its citizens.[10]

The codification of EU citizenship in a legally binding text therefore carried enormous symbolic and practical significance. It expressly acknowledges that, while Member States place emphasis on their own separate identities and nationality, they nevertheless voluntarily accepted the merging of sovereignty in certain key areas, including aspects of citizenship. Since the coming into force of the Treaty of Lisbon, the legal basis of EU citizenship has been expanded. Not only was the right of persons to move and reside freely in the Member States confirmed by the Treaty of Lisbon, it was also included in the general provisions on the Area of Freedom, Security and Justice (AFSJ) designed to ensure the free movement of persons within the EU and to offer a high level of protection to citizens.[11]

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Another central element to the constitutional evolution of EU Citizenship which occurred with the Treaty of Lisbon was the incorporation of 'Democratic Principles' in Title II of TEU, which introduced active citizenship as a vital component of EU citizenship by placing emphasis on representative democracy, citizens' participation, dialogue with civil society, and the role of national parliaments. The European Citizens' Initiative (ECI), a mechanism by which a proposal supported by the signatures of one million EU citizens may influence the Commission's legislative initiatives became central to achieving the objectives of Title II, TEU.[12] The ECI presents EU citizens with a real prospect for participation in EU law making as a matter of constitutional right making the citizen an active part of the solution to the EU's

[10] Opinion of Advocate General Sharpston in Case C-34/09 *Zambrano* [2011] ECLI:EU:C:2011:124, para. 125.

[11] See also the Stockholm Programme 9–10 December 2009 whose ambition was to establish an open and secure Europe serving and protecting citizens. Council of the European Union, 'The Stockholm Programme: An open and secure Europe serving and protecting citizens'. 5731/10, Brussels, 3 March 2010.

[12] See A. Karatzia, 'The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking' *Common Market Law Review* 54.1 (2017) 177–208. Karatzia mentions that of all the provisions in Part II TEU, the ECI is the first and only one so far to have a detailed legal framework by virtue of Regulation 211/2011 ('ECI Regulation'), as amended by Regulation 2019/788 which set out the details of the process of organising an ECI.

democratic deficit. There has been a surge of interest in deliberative democracy across the EU, and involving citizens in an open and inclusive debate about the future of Europe constitutes a key priority for the European Commission, as highlighted by its 2020 EU Citizenship Report.[13]

'The Charter enshrines and reaffirms a range of rights for EU citizens in relation to dignity, liberty, equality, solidarity, citizenship, and justice.'

EU citizens' rights are also determined by secondary legislation which flows into domestic law, such as the adoption of the so-called 'Citizenship Directive' (2004/38) which entered into force in 2006.[14] The political, democratic, mobility and residence rights guaranteed by EU primary and secondary law have also been further strengthened by the EU Charter of Fundamental Rights, which gained binding force with the Treaty of Lisbon. The Charter enshrines and reaffirms a range of rights for EU citizens in relation to dignity, liberty, equality, solidarity, citizenship, and justice. More specifically, the Charter elevated two rights – the right not to be discriminated against on the basis of nationality, within the scope of application of the Treaties Article 21(2) of the Charter, and the right to move and reside freely within the territory of the Member States Article 45(1) of the Charter of the Charter) – to the level of fundamental rights. Of course, the Charter's application is limited by its Article 51 which states that its provisions are addressed to the Member States (i.e. are binding on them) only when they are implementing EU law.

As has been remarked by commentators connecting the dots between EU citizenship and European constitutional processes, it is clear that the legal provisions above established constitutional benchmarks against which the activities of the EU and its Member States could be interpreted and reviewed.[15] What is not entirely clear, however, especially when one reviews the relevant case law of the CJEU, is the extent to which the protection of such primary rights can be used by EU Institutions to expand EU regulatory intervention in areas of exclusive competence of Member States including nationality, family law and the granting of special non-contributory benefits. As will be discussed in the next section, citizenship cases often impact upon core issues regarding the delimitation of EU and national competence. This has especially been the case when the CJEU is called upon to strike a balance between, on the one hand, the right to reside on the basis of domestic law and, on the other, the right to equal treatment under EU law, when resolving disputes between EU citizens and the host Member States.

3. The constitutional evolution of EU citizenship within the Court's jurisprudence

The development of the case law of the CJEU on EU citizenship can be divided into two phases. I call these the citizenship-enhancing and the citizenship-consolidating phase. The first phase was largely driven by the CJEU, while the second phase is characterised by resistance from Member States regarding the scope of application of EU citizenship. This section will elaborate on each of these two phases in more detail.

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[13] *EU Citizenship Report 2020: empowering citizens and protecting their rights.* Available at https://ec.europa.eu/info/sites/info/files/eu_citizenship_report_2020_-_empowering_citizens_and_protecting_their_rights_en.pdf

[14] See 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. The Directive concerned EU citizens' exercise of their right to move and reside freely within the Member States: it cut back administrative formalities, provided a better definition of the status of family members, and limited the scope for refusing entry or terminating the right of residence. See also Regulation 492/2011 on freedom of movement of workers within the EU.

[15] See E. Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' in Cambien et al. (eds) *European Citizenship under Stress* (Leiden: Brill, 2020) and H. van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Groningen: Europa Law Publishing, 2014).

3.1 The citizenship-enhancing phase

Early in its case law, the CJEU established that EU law norms apply and are to be interpreted throughout the EU in a uniform manner. Such uniformity 'is intended to guarantee the equal treatment of all EU citizens within the EU, emphasising the perspective of the legal subjects by its reference to non-discrimination and legality.'[16] At the same time, uniformity leaves less manoeuvring space for Member States to apply their own standards and reduces considerably their autonomy in areas including fundamental national values.

For instance, in its judgment in *Rottman* the CJEU did not explicitly state that a Member State's decision as to the acquisition or loss of national citizenship, without any cross-border element, falls outside the scope of EU law.[17] Instead, Member States must reflect on the proportionality of their actions when these adversely affect rights conferred by EU citizenship. Such a reading of the Treaty chimes with the principles of uniformity, sincere co-operation and proportionality, which are fundamental constitutional principles of EU law. Its roots can be found in the early citizenship case law of the Court which established that national competence does not constitute a purely domestic issue.[18] On the contrary, national competence to lay down conditions for the acquisition and loss of nationality must be exercised with due respect to Member States' EU law obligations.

A review of the CJEU's early case law gives the sense of a move towards deconstruction of national welfare arrangements under the auspices of Article 21 TFEU (later complemented by the 'Citizenship' Directive 2004/38).[19] Indeed, the spill-over effect that resulted from the enforcement of social rights in previously exclusive areas of national competence subjected national regulatory power to standards of review that went beyond the strict letter of EU law. For instance, in a case concerning the situation of job-seekers' social assistance, the CJEU accepted that, once they cease their economic activity, EU citizens would retain their status for at least six months.[20] This was the case despite the fact that the maximum residence period permitted under Directive 2004/38 (Article 6) had been exceeded and despite the non-availability of another residence right. This can also be understood to reflect the importance of the principle of effectiveness as a driving force behind EU citizenship case law. Effectiveness (including the effective promotion of values as a constitutional narrative) promoted the aim of protecting the right to re-integration of unemployed EU citizens who previously engaged in minor economic activity.[21]

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Through this active period of EU citizenship case law, the CJEU also took the opportunity to draw lines of demarcation with regard to the boundaries of national competence. According to that demarcation, supranational intervention was triggered the moment Member State nationals

[16] D. Buchardt, 'The relationship between the law of the European Union and the law of its Member States - a norm-based conceptual framework' *European Constitutional Law Review* 15.1 (2019) 73–103, 92.
[17] Case C-135/08 *Rottmann* [2010] ECR I-01449. See for comment: T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality from the Perspective of EU Citizenship' *European Law Review.* See also Case C-221/17 *Tjebbes* ECLI:EU:C:2019:189.
[18] Case C-369/90 *Micheletti* [1992] ECR I-4239.
[19] See for instance Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C60/00 *Carpenter* [2002] ECR I-6279; Case C-127/08 *Metock* [2008] ECR I-6241. For an overview of the case law developments in the late 2000s see K. Hylten-Cavallius, *EU Citizenship at the Edges of Freedom of Movement* (Oxford: Hart Publishing, 2020).
[20] Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-04585.
[21] See also Case C-310/08 *Ibrahim* [2010] ECR I-01065; Case C-480/08 *Teixeira* [2010] ECR I-01107.

exercised a freedom enshrined in the Treaty.[22] Not only would they fall automatically within the scope and protection of EU law but also, as a consequence, national measures liable to impede the exercise of their right to move and reside freely within the territory of a Member State constituted restrictions to these freedoms and were therefore deemed to be in conflict with EU law, unless they were shown to be justified and proportionate.

As such, in the first twenty years of the CJEU's citizenship jurisprudence, the CJEU established EU citizenship as a means of averting injustice stemming from national legislation which placed EU citizens at a disadvantage simply because they exercised their freedom to move and reside within the EU. This approach by the CJEU brings to the fore solidarity as a constitutional value of EU law, pointing to a 'web of mutual commitments among members of a community'.[23] More specifically, solidarity entails:

> […] rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[24]

The CJEU's approach demonstrates that the EU has engendered a new model of supranational cooperation which gives rise to duties of reciprocity. Such model challenges the claim that solidarity is constrained to a national context or the view that solidarity requires a common identity.

Beyond solidifying the constitutional principles of sincere cooperation, proportionality, effectiveness, and solidarity, the reasoning of the CJEU's landmark judgment in *Zambrano*, as subsequently applied in other cases, provided an additional type of ammunition pertaining to the personal scope of the EU constitution. It enabled citizens to invoke provisions on EU citizenship against their own Member State as well as in dual national situations.[25] The CJEU was also prepared to allow such claims form the basis of secondary derivative claims for family members who are third country nationals and thereby to protect them from removal under national immigration laws.

Still, there was a fundamental problem with this approach of the CJEU, namely the firm scope of EU law and the way it defines 'beneficiaries' of the rights pertaining to EU citizenship within secondary legislation. For instance, the Citizenship Directive (2004/38) does not apply to children who are still in their home Member State. Derivative rights could therefore only be developed by the CJEU from the core Treaty rights in a top-down fashion.

Accordingly, the CJEU took the approach that Article 20 TFEU and Article 21 TFEU are designed to protect EU citizens' genuine enjoyment of the substance of their rights and facilitate the effectiveness of EU family members free movement rights.[26] *Zambrano* constitutes a landmark in the evolution of EU citizenship because it relied on the dependency of EU child-citizens on their third country national parents. Not only did such dependency became the determining factor for granting a residence permit to the parent, but it also became the key to the enjoyment of the EU citizen-children's right to reside in the EU.

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[22] Case C-186/87 *Cowan* [1989] ECR 195.

[23] T.H. Brandes, 'Solidarity as a Constitutional Value' *Buffalo Human Rights Law Review* 27 (2021) 59–89, 60.

[24] From the judgement in Case T-883/16 *Poland v Commission (OPAL)* [2019] ECLI:EU:T:2019:567 which concerns the principle of energy solidarity, at 70.

[25] Case C-34/09, EU:C:2011:124. In *Zambrano* the CJEU held that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.' (paras 42–45) See also Case C-165/16 *Lounes* [2017] ECLI:EU:C:2017:862 and Case C673/16 *Coman* [2018] ECLI:EU:C:2018:385.

[26] See *Baumbast* for the foundations of the process of derivative rights from EU citizenship and *Chen* on rights of residence to non-EU citizens as a route to make EU citizenship rights effective.

Solanke has, therefore, accurately commented that '*Zambrano* gave birth to two new important statuses in EU law: the "Zambrano carer' and the 'Zambrano citizen." The latter refers to a non-migrant minor EU citizen; the former to the primary carer of such a citizen.'[27] This was perhaps one of the most important judgments during the *citizenship-enhancing phase* which, along with other landmark decisions, cemented the fundamental nature of the supranational rights of the Member States' citizens and therefore precluded Member States from alienating them by relying on immigration laws or international legal principles.

3.2 The citizenship-consolidating phase

In contrast to this first period of judicial development in respect of EU citizenship, the citizenship-consolidating phase is characterized by the CJEU's efforts to address the fragmented legal positions of economically inactive EU citizens and those who find themselves on EU territory without being EU citizens themselves. In restating its case law on EU citizenship and recognising that EU citizenship is a fundamental status with autonomous content (i.e. not parasitic upon exercising free movement rights), the CJEU appeared to have cut the umbilical cord between citizenship and economic activity and consequently the requirement of residence. Instead, it was the exercise of the substance of the rights of EU citizens that took centre stage. Within this new constitutional paradigm, the CJEU established that rights are also conferred on the basis of one's dependence on another, often a child's dependency on their parents.

The rights of third-country national partners and other family members of EU nationals therefore became part and parcel of the CJEU's expansive view. Decisions such as *Coman*, regarding the derived right of residence for a same-sex, non-EU citizen spouse despite a Member State's refusal to recognise same-sex marriage, put diversity and inclusiveness at the heart of citizenship rights. The question of rights conferred through citizenship, as opposed to through the exercise of the right of movement puzzled some Member States. For instance, *Coman* raised issues in Romania about how to reconcile this new line of case law, which gravitates around the genuine enjoyment of the rights associated with EU citizenship, with the EU's Treaty commitment in Article 4(2) TEU to respect the national political and constitutional identities as inherent in the Member States' fundamental structures. This is because the implementation of the CJEU's judgment (still pending) necessitated striking down, as unconstitutional, the prohibition in the Romanian Civil Code regarding the non-recognition of same-sex marriages outside Romania.

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Other national courts also reacted to the CJEU's approach to the genuine enjoyment of EU citizenship in the absence of migration to engage EU law. This was especially due to the knock-on effect of the way the CJEU constructed the concept of genuine enjoyment upon the right of access to welfare benefits. In the UK for instance, in *HC & Sanneh* the Court of Appeal was ready to take a narrow view of the application of *Zambrano* with regard to third country nationals who were primary carers of British citizens seeking access to social assistance.[28] It held that 'Zambrano carers' were entitled to an amount that is deemed sufficient to enable them to support themselves and their EU citizen children. However, they were excluded from social assistance equivalent to that paid to EU citizens lawfully residing in the UK (or indeed to British nationals). The case went to the UK Supreme Court which dismissed the appeal emphasising that the *Zambrano* right is limited to 'Zambrano citizens'.[29] No reference was made to the CJEU and the matter was closed.

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[27] I. Solanke, 'HC and Sanneh – genuine enjoyment does not include social welfare', Electronic Immigration Network blog, December 2013: https://www.ein.org.uk/blog/hc-and-sanneh-genuine-enjoyment-does-not-include-social-welfare

[28] [2015] EWCA Civ 49.

[29] [2017] UKSC 73.

The reaction of Member States to *Zambrano* was soon to be echoed in Luxembourg. While the CJEU remained loyal to its theory about derivative rights of residence as a necessary component of EU citizenship in later cases, it clarified the exceptional nature of the *Zambrano* ruling (i.e. that it applies only in the case of carer relationships) while confirming the symbolic connection between citizenship and territory.[30] This included allowing considerable room for manoeuvre to both Member States in relation to their immigration rules as well as the UK with regard to its post-Brexit EU Settlement Scheme. For example, prior to the recent High Court's decision in *Akinsaya*, the UK treated third country nationals who were primary carers of British citizens and had limited leave to remain as falling outside the definition of 'Zambrano carers'.[31] Beyond the UK, which is no longer an EU Member State, the CJEU's post-*Zambrano* approach has left open questions in all Member States in relation to 'Zambrano citizens' and the scope of application of the general principles of EU law, including the principle of equal treatment for a Member State's own nationals exercising the right to reside.[32]

More specifically, in contrast with the citizenship enhancing phase in the lifecycle of EU citizenship, the last ten years of the CJEU's jurisprudence have challenged the theory that EU citizenship exists as a legal status that confers universal rights to equal treatment. The limitations, visible from the outset, had their origin in the logic upon which the internal market itself is constructed: on the one hand, the exercise of economic free movement rights prohibited national protectionist arguments to justify restrictions on imported goods or services. On the other hand, the exercise of non-economic free movement rights allowed national protectionist arguments to justify obstacles.

Likewise, from the beginning of the CJEU's citizenship jurisprudence the shadow cast on European judges' teleological interpretation has been too visible to ignore: i.e. that an individual must ensure they are not a financial burden in order to benefit from non-economic free movement rights. This requirement has been criticised in the literature for, *inter alia*, allowing some citizens to assert rights that are not available to others. As Davies contends, for instance, it is in this way that EU citizenship 'creates new legal divisions' spawning a 'new legal class of transnational Europeans' which excludes from the protection of EU law individuals without sufficient resources who have not been granted a residence right under national law.[33]

The last ten years of political instability and crises in Europe have exacerbated the tension between migration and enforcement of citizens' rights as well as the enjoyment of fundamental human rights available to everyone and the rights based on EU citizenship status alone, which are limited in nature. The CJEU appears to have yielded to these pressures in, among others, the *Dano* and *Alimanovic* decisions concerning the free movement of EU citizens and their cross-border access to social benefits (as opposed to benefits relating to labour market access).[34] Indeed, the role of proportionality and individual assessments in EU

[30] Case C-434/09 *McCarthy* (2011) and Case C-87/12 *Kreshnik* appeared to disapply the *Zambrano* rule to EU citizens who never exercised their free movement rights. *McCarthy* was about a dual Irish-UK national (non-self-sufficient), who tried unsuccessfully to rely on her EU citizenship rights to secure a right of residence for her Jamaican husband in the UK. The CJEU held that the Citizenship Directive was inapplicable in her case as she had not exercised her free movement right. Likewise, she could not claim protection from Article 21 TFEU as the UK's denial of residence right for her husband did not oblige her to leave the EU. Case C-256/11 *Dereci* also established that an EU citizen who has never moved and has stayed in the Member State of her nationality is not regarded as a 'beneficiary' for the purpose of the Treaty. Furthermore, in *O & B* the CJEU established that the residence in question must be 'genuine residence' which satisfies the terms of Directive 2004/38 and is longer than three months. At the same time, however, in *Ermira Bajratari v Secretary of State for the Home Department*, C-93/18 the CJEU remained loyal to its principles and held that the unlawful nature of the income cannot serve as a valid ground for UK authorities to consider that the requirement of sufficient resources was not met.

[31] *R (Akinsanya) v SSHD* [2021] EWHC 1535 (Admin).

[32] See the Opinion of Advocate General Szpunar in Case C-165/14 *Marin* [2016] ECLI:EU:C:2016:75.

[33] G. Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans' *European Papers* 4.3 (2019) 675–94, 677.

[34] Case C-333/13 *Dano* ECLI:EU:C:2014:2358; Case C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597.

residency and welfare access cases has given way to a more orthodox approach. The *Dano* decision, in particular, has been criticised as marking the end of the social rights driven case law of the CJEU.[35]

In relation to access to social assistance, EU citizens can only claim equal treatment under the Citizenship Directive (Article 24) where they have first established a lawful right to reside under the Directive (Article 7(1)(b) excludes economically inactive citizens with insufficient resources). As confirmed more recently by the CJEU, Member States can therefore refuse access to social benefits to economically inactive citizens who move without sufficient resources and who cannot claim a right of residence under the Citizenship Directive.[36] The only saving grace, perhaps, for those EU citizens is to secure a lawful right to reside under domestic law and argue that they should not be refused access to social assistance if such prohibition breaches their rights under the EU Charter of Fundamental Rights (e.g. Articles 1, 7 and 24).[37] This route, of course, is not available to individuals who cannot secure a lawful right to reside in the host Member State under domestic law.[38]

There is, therefore, force in the criticisms of some of the recent reasonings of the CJEU which identify a U-turn in the CJEU's case law.[39] Muir observes, in particular, that 'the case law of the CJEU has progressively proceeded to a "deconstitutionalisation" process (i.e. shifting attention from the right enshrined in primary law to the rights provided for in secondary law).'[40] Muir refers here to the CJEU's statement in *Dano* that Article 18 TFEU can only be relied on in and of itself where the Treaty does not lay down specific rules on non-discrimination. In a free movement scenario, where there is discrimination on the grounds of nationality against an EU citizen, the CJEU has emphasised that the Citizenship Directive (Article 24) contains a specific expression of the principle of non-discrimination which, in relation to social assistance, can only apply if the residence criteria set by the Directive have first been met.

> 'This development in the protection of the rights of non-economically active persons can be interpreted as having been driven by the concerns of Member States who wish to prevent what they see as unreasonable burdens on their social assistance systems.'

This development in the protection of the rights of non-economically active persons can be interpreted as having been driven by the concerns of Member States who wish to prevent what they see as unreasonable burdens on their social assistance systems. It can also be viewed as indicative of the CJEU's anticipation of the limits of judicial activism pertaining to the EU citizenship rulebook – a gesture of deference to the EU legislature and an example of judicial self-restraint – during this consolidation phase. It is a development, however, that can be seen to have forged what Davies criticises as a 'new class of transnational Europeans' or, what De Witte euphemistically calls 'liminal Europeans'.[41] Within this new dispensation, 'Zambrano carers' and 'Zambrano citizens' can find themselves at the mercy of the social state with only partial protection from homelessness, destitution and acute poverty, and little opportunity to claim equal treatment in another Member State on the basis of EU primary law.[42]

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[35] See M. Blauberger *et al.*, 'ECJ judges read the morning papers: Explaining the turnaround of European citizenship jurisprudence' *Journal of European Public Policy* 25.10 (2018) 1422–41, 1426.
[36] Case C-709/20, *CG v Department for Communitites in N Ireland* [2021] ECLI:EU:C:2021:602.
[37] *ibid.*, para 89.
[38] *Dano* para 87, 91.
[39] See A. Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Oxford: Hart Publishing, 2020).
[40] E. Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members', 177. See also Case 140/12 *Brey* [2012] ECLI:EU:C:2013:565.
[41] F. de Witte, 'The Liminal European: Subject to the EU Legal Order' *Yearbook of European Law* 40 (2021) 56–81.
[42] C. O'Brien (2016) '"Hand-to-mouth" citizenship: decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment' *Journal of Social Welfare and Family Law* 38.2, 228–45.

4. EU citizenship's constitutional limitations and the market-social binary distinction

It is often argued that EU citizenship was conceived as part of a polity-construction project conferring a fundamental status on all citizens of the Member States. Article 20 TFEU provides that every person who holds the nationality of a Member State shall enjoy the rights and be subject to the duties provided for in the Treaties. In addition, as discussed, the CJEU has breathed life into this provision by establishing that, irrespective of physical cross-border movement, Article 20 TFEU precludes national measures that have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status.

> 'But for all its accomplishments as a constitutional right, EU citizenship has been criticised for falling short in its most fundamental role: infusing individuals across the continent with a sense of solidarity and of belonging to a community which shares a common political destination.'

But for all its accomplishments as a constitutional right, EU citizenship has been criticised for falling short in its most fundamental role: infusing individuals across the continent with a sense of solidarity and of belonging to a community which shares a common political destination. This sentiment has been exacerbated by the recent pandemic as well as the financial, migration and rule of law crises of the last few years which have made some European states more reluctant to further integrate. Brexit is a reminder that EU citizenship is a reversible status – one which cannot surpass national politics of sovereignty. At the same time, it is a status that can be unilaterally restricted by existing Member States – such restrictions vary from controls on free movement due to the recent pandemic to national administrative measures that may impact upon the very institutions that are called to implement the fundamental freedoms of movement and residence and protect the rights of EU citizens.

While the above developments have given the topic a new resonance, the citizenship discourse is not itself new. The nature of the EU as a polity of states and people, and its claim to constitute its people as citizens, attracted considerable attention in legal literature following the introduction of EU citizenship in the Treaty of Maastricht.[43] Most discussion cohered around the place of EU citizenship within the context of the state as the most powerful institution with which 'most people engage' and through which, 'for most, their contact with international organizations is mediated'.[44] Constitutional studies on EU citizenship inevitably focused on the distinction between market citizenship and social citizenship, often asking the same ontological question about whether EU citizenship extends beyond the market.[45]

Social citizenship, on the other hand, provided a different (and more optimistic) conceptual framework. It has often been described as the optimum state of affairs, a real citizenship with the individual at the epicentre of European integration. Chronologically this includes the citizenship-enhancing phase and also perhaps the beginning of the citizenship-consolidation period discussed earlier up until *Zambrano*. Kramer says (and this is characteristic of the social citizenship conceptualization):

> The 'heydays' of Union citizenship were probably situated around the turn of the century, when the Court employed the primary right of equal treatment attached to Union citizenship to extend social welfare entitlements to mobile Union citizens regardless of their economic status, thereby including the 'economically inactive', 'simply' on the basis of their being citizens of the Union. As this bold move was neither anticipated nor considered politically and historically neutral, it was no surprise that it provoked a lively debate on Union social citizenship.[46]

[43] D. O'Keeffe, *Legal Issues of the Maastricht Treaty* (London: Chancery Law Publishers, 1994).
[44] N. Barber, *The Constitutional State* (Oxford: Oxford University Press, 2012), 56.
[45] M. van Den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement', 246.
[46] Kramer, D. 'Earning Social Citizenship in the EU: Free movement and access to social assistance benefits reconstructed' *Cambridge Yearbook of European Legal Studies* 18 (2021) 270–301.

There are a number of problems with the above construction of EU citizenship. First, its compatibility with the reciprocal nature of the welfare state is questionable. Second it does not chime well with the wording of the Treaty. This can be hardly surprising given that it is debatable whether EU citizenship was conceived with the *person* in mind as 'a fundamental moral unit of a European social structure'.[47] While there is truth in the above arguments, the way in which the ideological framework of EU citizenship based on market citizenship has been supplemented by the CJEU's more 'social' jurisprudence has played a pivotal role in sharpening the image of market citizenship. The two foci seem to coexist side by side within the same nucleus.

The above interplay informs the development of EU citizenship and the web of principles that shape it. As Lord Mance, former deputy president of the UK's Supreme Court, opined: citizenship is *a constitutional right* that is fundamental both in domestic law as it is in European and international law.[48] Within the EU Treaties, the *constitutional charter* of the EU according to the CJEU,[49] citizenship rights under Article 20 TFEU are underpinned by the common values laid down in Article 2 TEU, including respect for democracy, the rule of law, equality and fundamental rights.[50] As Shaw has argued, EU citizenship is not therefore a mere 'formal legal concept'. It carries

> a huge intellectual baggage concerning the content, meaning and symbolism of citizenship which cannot be ignored and indeed can be used positively in the interpretation of the meaning of Union citizenship in the light of the rather bare provisions of the EC and EU Treaties.[51]

When it comes to the interpretation of the meaning of EU citizenship in the light of the Treaty provisions and the general principles of EU law, the role of the CJEU has been paramount in safeguarding fundamental rights and freedoms and the rule of law. The two phases of the CJEU's adjudications on citizenship discussed in this paper have therefore been crucial in balancing the extent to which market citizenship has placed the individual at the epicentre of the EU's constitution.

As regard the former (citizenship-enhancing) phase, by recognising their best interests and family setting as key to their well-being, the CJEU's lineage of case law provides a clear endorsement of the importance of EU citizenship as a means of protecting both current and potential future exercise of Treaty rights. Cases like *Zambrano* broke new ground for future litigation pertaining to residence rights that expanded beyond the strict scope of the Treaty. The latter (citizenship-consolidating) phase based on the post-*Zambrano* empirical evidence gravitates around the realisation that the CJEU's teleological narrative needs to conform with the reality under the Treaties and secondary legislation as the underlying basis for EU law. This includes, *inter alia*, respect for EU competences, especially the principles enshrined in Article 4 TEU (conferral of competences, respect for national identity, sincere cooperation), the practical reality that EU citizenship is derivative of national citizenship, and the restrictive conditions applying to economically inactive citizens during their stay in another Member State.

I do not contest the view that the CJEU's decision in *Zambrano* set a particularly expansive tone in its

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[47] C. O'Brien, 'I trade, therefore I am: legal personhood in the European Union' *Common Market Law Review* 50.6 (2013), 1643–1684. See also D. Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union', in F. Amtenbrink et al (eds.) *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge, Cambridge University Press, 2019).

[48] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 97.

[49] See *Opinion 1/91* [1991] ECR I-6079.

[50] European Commission, 'EU Citizenship Report 2020: Empowering citizens and protecting rights', 15 December 2020. Available at https://ec.europa.eu/info/sites/info/files/eu_citizenship_report_2020_-_empowering_citizens_and_protecting_their_rights_en.pdf. See also T. Konstadinides and N. Nic Shuibhne, 'A Constitutional Reading of Union Citizenship' in L. Besselink, N. Lupo and M. Wendel, *Research Handbook in EU Constitutional Law* (Cheltenham: Edward Elgar, forthcoming).

[51] J. Shaw, 'The Interpretation of European Union Citizenship' *Modern Law Review* 61.3 (1998) 293–317, 297. Shaw goes on to talk about the mixed message delivered by the elevation of the free movement of persons (a market principle) to a fundamental right. This mixes up the idea of the market citizen with that of the true citizen, which involves the political connotation of the *demos* as the sovereign in a democratic political system.

interpretation of EU citizenship core rights. What I argue is that what happened in its aftermath was that the phrase 'genuine enjoyment of the substance of the right of EU citizenship' had to be read in subsequent cases in such a way that it was not unsettling to national competence, sovereignty and its expressions, including constitutional identity as well as the relevant restrictions that apply to EU citizens by virtue of EU secondary law. While this is true, the CJEU has not missed the opportunity to reaffirm on occasion and even perhaps refine *Zambrano* in relation to European citizens and their non-European families. *Chavez* is an important recent case in this direction as it established that an EU child citizen who moves to another Member State is entitled to bring along his non-EU family. This is also the case if he subsequently returns with his family to his Member State of origin.[52] What is crucial here is the CJEU's focus on the best interests of the child and the negative effects of separation from the third-country national parent for the child's development, which aligns the protection offered by EU law with the UN Convention on the Rights of the Child (1989). This is a very significant step as the emphasis on the child's emotional development in *Chavez* goes beyond the CJEU's previous emphasis on children's best interests as protected by the Charter (Article 24(2)) and Article 3 (3) TEU.[53]

The positive message of *Chavez* regarding social protection and the protection of children's rights has not been strong enough to dampen the post-*Zambrano* shockwaves in the Member States with regard to the scope of EU citizenship, and the derivative rights flowing from it which are still to find their way in the Treaties or secondary legislation. This reticence on the part of the Member States is acknowledged in the case law of the CJEU. For instance, last year's judgment of the CJEU in *CG* took a narrow approach to the right to equal treatment (confining it within the Citizenship Directive instead of Article 18 TFEU) and reaffirmed the CJEU's *Dano* line of case law.[54] The judgment is capable of reigniting the criticism that market citizenship is less than 'full' citizenship insofar as the economically inactive citizen can only reap the benefits of EU citizenship if she is wealthy, healthy and in good behaviour.[55] In this regard, the argument goes, the current manifestation of EU citizenship constitutes a retreat from the expansive interpretation of the CJEU during what Kramer described as the 'heydays of Union citizenship'.[56]

> "[...] concepts such as the best interests and emotional development of the child have enabled EU law to occupy new territory and expand to a novel category of otherwise domestic-legal situations."

While the above criticism is accurate, we also need to acknowledge how concepts such as the best interests and emotional development of the child have enabled EU law to occupy new territory and expand to a novel category of otherwise domestic-legal situations. Some commentators have even gone as far as arguing that 'the character and functions of the child's best interests provide strong arguments for this concept to be viewed as a general principle of EU law.'[57] As is well documented, the general principles of EU law comprise a set of adaptable principles which are common to all the national legal systems of the EU countries and compatible with EU objectives. They are perhaps the most important contribution of the

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[52] See Case C-133/15 *Chavez-Vilchez v Others* ECLI:EU:C:2017:354. See also commentary by M. Haag in the *European Law Blog*, 30 May 2017. Available via: https://europeanlawblog.eu.
[53] See Case C-165/4 *Marin* (2016).
[54] Case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602.
[55] E. Spaventa, 'Earned Citizenship: Understanding Union Citizenship through its scope' in D. Kochenov (ed.) *EU Citizenship and Federalism: the Role of Rights* (Cambridge: Cambridge University Press, 2015).
[56] See above note 47.
[57] I. Goldner Lang, 'The Child's Best Interests as a Gap Filler and Expander of EU Law in Internal Situations' in K. Ziegler *et al* (eds.) *Research Handbook on General Principles of EU Law* (Cheltenham: Edward Elgar, 2019).

CJEU in ensuring the coherence of EU law as a functioning constitutional system.[58]

Recent jurisprudence concerning the extent to which EU citizenship interacts with broader debates about European and national constitutional identities is indicative of a balancing exercise between the 'social' and the 'market' aspects of citizenship. As Advocate General Kokott opined in a case involving parenting by same-sex couples, a balance needs to be struck between the national identity of the Member States and the right to freedom of movement of the child and of his or her parents.[59] The CJEU, deciding the case along the same lines, held that EU citizens can be accompanied by their same-sex parents in all Member States to which they move. What is more, the CJEU established that failure to recognise the parent-child relationship where there is evidence of exercise of EU free movement rights can amount to a breach of fundamental rights under the EU Charter of Fundamental Rights.[60]

'[...] a hard binary distinction between social against market may not be the most helpful way to understand EU citizenship.'

Therefore, while market-based access to social citizenship is a work-in-progress (especially on the issue of access to social benefits for third-country national parents of EU citizens) judgments like *Zambrano* and *Chavez* have occupied an important constitutional place alongside more market-driven case law on citizenship. Accordingly, a hard binary distinction between social against market may not be the most helpful way to understand EU citizenship. It rather weakens the CJEU's 'social' findings and brings us into a one-way street where the manner in which this opposition evolves is considered to be the ultimate determinant of the whole of EU citizenship as a legal status and set of rights.

5. Concluding remarks

The panoply of judicial protection developed by the CJEU for the purpose of providing avenues to Member States' nationals for redress as part of the EU citizenship package can hardly be understated. This development has both improved the Member States' compliance with the constitutional rules governing freedom of movement, equality and non-discrimination, and strengthened structural principles such as uniformity, sincere cooperation and solidarity.

At the same time, the smooth implementation of the EU citizenship rulebook in the Member States has been historically obstructed by constitutional concerns expressed at the domestic level about sovereignty and the role of EU citizenship as 'a complementary facet of national citizenship' or as 'an institution in its own right'.[61] Such concerns have been compounded by populism and induced alarm, in some Member States, over mass migration and the alleged phenomenon of benefit tourism. Within this dispensation, the CJEU case law tactfully continues to consolidate EU citizenship by articulating rules that Member States should observe and defining the limits of national autonomy in this regard.

The apparent conservatism of the CJEU's approach in some of the cases discussed has been attributed by some authors to strong opposition to the Court's previous interpretation of social citizenship and cross-border welfare access, including threats of retaliation by Member States.[62] The restrictive interpretation of the right to equal treatment of economically inactive EU citizens is indeed responsive to its environment. But, as discussed, EU citizenship still has something 'social' to offer to those who would expect their dignity and family life to be protected. This is vital for the EU as a polity of states and people in the current environment of defiance towards EU membership obligations described earlier. The transition from mobility to full citizenship rights may take more time to materialise than the founding

[58] See K. Lenaerts and J.A. Gutierrez-Fons, 'The Constitutional allocation of powers and general principles of EU law' *Common Market Law Review* 47.6 (2010) 1629–69.
[59] See AG Opinion in Case C-490/20 *V.M.A. v Stolichna Obshtina, rayon Pancharevi.*
[60] Case C-490/20.
[61] G. de Groot and N. Chun Luk, 'Twenty years of CJEU jurisprudence on Citizenship' *German Law Journal* 15.5 (2014), 821–34.
[62] M. Blauberger *et al.*, 'ECJ judges read the morning papers'.

fathers anticipated but this should not cloud our perception of what has so far been achieved.

As I have argued in this analysis, EU citizenship is a status which is part of EU constitutional heritage. It is therefore a status that is inevitably interwoven in 'the apolitical rationale of the internal market' which still forms a key objective of the EU.[63] Social citizenship is the future aspiration and direction of citizenship progression. Until greater weight for fundamental social rights is written into the overarching framework of EU law, the CJEU's case law on the application of citizenship rights is bound to be a mixed bag of reasonings which furnishes gains and concessions that do not always correlate with each other.

[63] D. Kochenov and U. Belavusau, 'After the celebration: Marriage equality in EU law post *Coman* in eight questions and some further thoughts' *Maastricht Journal of European and Comparative Law* 27.5 (2020) 549–72.

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