**(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?**

1. **Introduction**

The United Kingdom electorate sent shockwaves through Europe when it voted, in June 2016, to leave the European Union. Nevertheless, that decision was represented, to some extent, as falling within the range of possibilities of an historically Eurosceptic Member State that had long positioned itself at the outer fringes of European integration. According to the Bratislava Declaration, ‘while one country has decided to leave, the EU remains indispensable for the rest’.[[1]](#footnote-1) In addition, the other Member States reaffirmed the need to realise citizens’ wishes to live, study, work, move and prosper across [the] continent’.[[2]](#footnote-2) When set against even more recent developments in regional and global politics, however, the referendum result seems less of an anomalous, if ‘painful’,[[3]](#footnote-3) decision by a misfit Member State, and more part of a series of political events that, at best, suggests a fundamental disconnection between what the EU envisages for its citizens and the citizenry itself, and, at worst, risks undermining the Union project as a whole. Yet at this very political juncture, at which the UK’s future relationship with the Union remains far from clear, and at which anti-immigration, anti-EU and populist politics appear to be steadily but not yet decisively on the rise across Europe,[[4]](#footnote-4) there are frustratingly few tools to survey the Union’s evolving *legal* constitutional landscape.[[5]](#footnote-5)

This chapter advances that, while no longer of formal legal relevance, the UK’s pre-referendum renegotiation of its relationship with the EU, agreed by the European Council in February 2016,[[6]](#footnote-6) and in particular the so-called ‘emergency brake’ on in-work benefits contained therein (safeguard/safeguard mechanism), provides fertile ground for assessing the contemporary political and legal environments of Union citizenship and, more broadly, European integration. Further, exploration of the legality of the safeguard also provides a means of reflecting on the institutional dynamics behind the current constitutional state of play.

Having provided an overview of the mechanism in section two, the chapter will postulate, in section three, that despite doubt as to its legality upon its unveiling, the safeguard is likely to have been permitted by the Court of Justice. However, two more significant, and still pertinent, observations arise from this finding, relating, in particular, to the Court’s contribution to the present political and legal climate. First, it is the both the judicial construction and, more recent, deconstruction of Union citizenship that provides the safeguard with its clear legal foundations. Second, the seemingly paradoxical combination of initial doubt as to the Court’s acceptance of the safeguard with the judicially-driven constitutional evolution that ultimately grounds its legality, brings into sharp focus the increasingly constitutionalised nature of Union law and the growing dominance of the Court in the EU’s institutional dynamics. Consequently, what emerges from the analysis is that the Court-driven rights of Union citizens contribute, somewhat ironically, to perceptions, rightly or wrongly, of democratic deficit within the EU, of a loss of sovereignty by the Member States, and to the growing political tension surrounding Union citizenship. Ultimately, the result of these historical, constitutional, and institutional roots is that, rather than being consigned to the parallel realm of a British ‘Remain’ result, the safeguard mechanism continues to represent a potential Pandora’s Box in terms of how Member States, either unilaterally or collectively, might seek to redefine the outer boundaries of both Union citizenship and the internal market.

Section four recognises that the potential re-emergence of the safeguard mechanism would nevertheless have considerable implications. Regardless of the fact that the safeguard is both legally salvageable and politically explainable, its re-appearance would represent a significant change in direction for the Union, leaving the Court in an unenviable position. On the one hand, as a brake on in-work benefits would introduce blatant discrimination against Union workers, a finding of incompatibility or invalidity would seem to fall comfortably within the CJEU’s institutional role. On the other hand, since its tendency to push the EU’s constitutional and institutional boundaries can be viewed as a contributing factor in the Union’s emerging existential crisis, the CJEU may have little choice, at this crucial juncture - at which the fundamental tenets of the Union constitution are at risk, and at which the Court would, ironically, properly act as a check on the EU’s political branches - to accept some restriction on the equal treatment rights of Union workers. Interestingly, the overall analysis demonstrates that the very evolution of the internal market and Union citizenship would allow the Court to present this acceptance as fitting comfortably within its own jurisprudence.

1. **An overview of the safeguard mechanism**

The safeguard mechanism, as contained within the now formally redundant European Council Decision on a new settlement for the United Kingdom[[7]](#footnote-7) (the Decision), would have introduced the possibility for Member States to restrict access to in-work benefits for newly arriving Union citizens. Employment of the safeguard would have been subject to certain processes and conditions. First, the Member State concerned would have needed to notify the Commission and Council of a ‘situation affect[ing] essential aspects of its social security system, [presenting] serious…and persisting difficulties in its employment market, or [exerting] excessive pressure on the proper functioning of its public services’.[[8]](#footnote-8) Second, the Commission would have needed to propose that the Council authorise utilisation of the safeguard by the applicant State. Following Council authorisation, the Member State would have been permitted to use the mechanism for a maximum period of seven years. At the individual level, in-work benefits restrictions would have been limited to the newly arrived EU citizen’s first four years of employment, with access nevertheless increasing gradually as links with the host State developed over that time.[[9]](#footnote-9) The rationale behind the safeguard mechanism was the apparent need to ‘address the pull factor arising from a Member State’s in-work benefits regime’ arising from the ‘diverse structure of different Member States’ social security systems’.[[10]](#footnote-10) The safeguard mechanism was to be employed as ‘a response to situations of inflow of workers from other Member States of exceptional magnitude over an extended period of time’. It was claimed, this could be done ‘without creating unjustified direct or indirect discrimination’.[[11]](#footnote-11)

Despite a general presumption, before the UK Deal was published, that any restriction on the equal treatment of Union workers would require Treaty change, the Decision stated that the proposed safeguard mechanism would be realised via amendment to secondary legislation and that this would be ‘fully compatible with the Treaties’.[[12]](#footnote-12) Yet, by restricting the equal treatment rights of the Union *worker*, the safeguard mechanism appeared to cross a line that many would have considered to be untraverseable. Specifically, it placed limitations on the right to non-discrimination on grounds of nationality and the general free movement rights of Union citizens contained in primary Union law.[[13]](#footnote-13) Moreover, by erecting clear barriers to economic integration, the safeguard appeared to strike directly at the heart of the foundational goals of the Union, developed even before Maastricht.

The safeguard mechanism would have been implemented through amendment of Article 7, Regulation No 492/2011 which requires that Union workers enjoy the same social and tax advantages as national workers.[[14]](#footnote-14) In *Even*, the Court held that this provision[[15]](#footnote-15) was adopted ‘in implementation’ of Article 45 TFEU on the free movement of workers:

For this purpose [the Regulation] provides for the abolition of all differences in treatment between national workers and workers who are nationals of other Member States as regards conditions of employment, work and remuneration and gives workers who are nationals of the other Member States…access to the same social and tax advantages from which national workers benefit.[[16]](#footnote-16)

Accordingly, in *Even,* the right to equal access to social and tax advantages was presented as a concrete expression of the principle of non-discrimination contained in Article 45(2) TFEU. Consequently, the compatibility of the proposed amendment to Regulation No 492/2011 with the Treaties, in particular Article 45(2) and the more general right to non-discrimination on grounds of nationality in Article 18 TFEU, was open to more serious debate than the Decision seemed prepared to admit.

1. **The judicial (de)construction of Union citizenship: the Court-furnished foundations of the safeguard mechanism**

Despite the clear tension between the purpose and proposed method of implementation of the safeguard mechanism, on the one hand, and the seemingly well-established scope and operation of primary free movement law, on the other, the drafters of the Decision nevertheless spoke directly to CJEU case-law, asserting that the public interests the safeguard sought to protect fell within the Court’s own jurisprudence.[[17]](#footnote-17) By examining judicial responses to previous legislative modifications within the internal market, alongside the CJEU’s more recent approach to EU citizenship rights, this section argues that the Court might well have accepted the mechanism, despite its legal controversies. More importantly, by conducting an in-depth investigation of the Court’s case-law, beyond the seminal cases that most commonly provide the focal point of assessment, this analysis is able to demonstrate that, rather than representing a cynical attempt to speak the language of the Court, the safeguard mechanism is firmly rooted in the Court-led construction of EU citizenship. In short, ironically, CJEU judgments generally viewed as progressive – in terms of pushing the constitutional boundaries of citizenship rights – simultaneously provided firm foundations for the current more retrogressive approach to those same entitlements. Meanwhile, the CJEU’s institutional boundary pushing has played its own part in the political climate surrounding the safeguard’s introduction.

* 1. ***Amending free movement rules via secondary legislation: a brief history of the Court’s responses***

Reviews of the case-law by Sorensen, Davies and Horsley outline a number of approaches utilised by the CJEU when confronted with the question of the compatibility of Union secondary legislation with the Treaties.[[18]](#footnote-18) First, the Court might simply find that the EU norm is valid[[19]](#footnote-19) or, second, that it is invalid.[[20]](#footnote-20) Third, the Court might seek to interpret the secondary legislation consistently with primary law. Fourth, the Court might find EU secondary law capable of operating within the parameters of primary law, concluding instead that the Member State’s method of implementation breaches Treaty rules.[[21]](#footnote-21) Finally, a parallel system of rights, operating directly under the Treaties, while not affecting the validity of secondary Union law, might render the rules underlying the secondary legal framework nugatory.[[22]](#footnote-22) Ultimately, pockets of case-law could be used to support any of these approaches. However, the evolution of the jurisprudence indicates that the Court would have been most likely simply to find the safeguard mechanism valid and, more importantly, that it might be open to accepting a future safeguard in an alternative form, including one adopted unilaterally by a Member State.

* + 1. *Validity*

Nevertheless, one potentially determinative feature of the safeguard contained in the Decision was its origins in *Union* secondary law. Often, *Tobacco Advertising II*[[23]](#footnote-23) is presented as evidence that the Court offers more latitude to the EU legislature than to individual Member States in validity or compatibility assessments. Yet while the Court might adopt a ‘decidedly deferential approach’ to Union secondary norms in respect of competence control,[[24]](#footnote-24) the picture in relation to compliance with the free movement provisions is rather less clear. The Court has held on several occasions that Union legislation is as subject to Treaty free movement rules as domestic norms.[[25]](#footnote-25) EU secondary law is also processed in the same way, via establishment of a *prima facie* breach of free movement, followed by consideration of whether this can be justified in principle and practice.[[26]](#footnote-26) Indeed, the Decision implicitly accepted that the safeguard mechanism would constitute a prima facie restriction of free movement, simply asserting that it would not create *unjustified* direct or indirect discrimination.[[27]](#footnote-27)

Nonetheless, Sorensen has suggested that the Union legislator may enjoy more elbow room when it comes to the application of the proportionality test.[[28]](#footnote-28) Crucially, a number of central features of the case-law in which the Court has taken a permissive approach correspond directly to the key characteristics of the safeguard. First, the Court has held that nationality-based limitations on free movement, whilst sometimes permissible, ‘cannot be established unilaterally by the Member States in their national rules’.[[29]](#footnote-29) Accordingly, the requirement of a Commission recommendation and Council authorisation before a Member State could have triggered the emergency benefits brake appears to comply with existing institutional safeguards relating to free movement restrictions.

Second, the Court has held that market partitions may be imposed where they seek to ‘maintain *a normal flow of trade*’ and are taken ‘in *exceptional circumstances*’.[[30]](#footnote-30) The text of the Decision replicates this language verbatim in order to highlight these same situations.[[31]](#footnote-31)

Third, the CJEU has previously shown a willingness to accept barriers to trade, and even restrictions on fundamental rights, so long as they are temporary.[[32]](#footnote-32) Thus, an applicant State would only have been permitted to use the safeguard mechanism for seven years, while application at the individual level was limited to four. Moreover, the gradual access to in-work benefits for Union citizens over this four year period, to reflect their growing connection with the host State labour market, is a clear effort to demonstrate adherence to suitability, necessity and general proportionality. Crucially, the Court has previously held that the Union legislature ‘must be allowed a broad discretion in an area…which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments’.[[33]](#footnote-33) As a result, *Union* secondary legislative measures have often only faced the question of whether they are ‘manifestly inappropriate’ having regard to the objective pursued.[[34]](#footnote-34) Not only would graduated access appear to meet this low threshold, but the Decision was at pains to highlight the assessment of evidence by the Union’s political and administrative institutions of the UK’s purportedly individual situation.[[35]](#footnote-35)

* + 1. *Invalidity*

However, the Court has not always been consistent and has also shown increasing confidence in declaring Union legislation invalid for breach of Treaty free movement rules. In *Ramel*, an EU instrument that permitted France to limit imports, following the ‘exceptional inflow’ of wines from Italy, was invalidated.[[36]](#footnote-36) In *Lancry,* the Court stated that dock dues, authorised by Union secondary legislation, could not be permitted regardless of the fact their application was temporally limited.[[37]](#footnote-37) Crucially, the CJEU has been particularly unreceptive to Union legislation that permits difference in treatment between Union workers. *Pinna* concerned Article 73(2) Regulation No 1408/71,[[38]](#footnote-38) which provided France with a time-limited exemption from the exportability of child benefit. The Court stated that:

[T]he achievement of the objective of securing free movement for workers within the Community…is facilitated if conditions of employment, including social security rules, are as similar as possible in the various Member States. That objective will, however, be imperilled…if unnecessary differences in the social security rules are introduced by Community law.[[39]](#footnote-39)

This stance would seem directly transferable to the circumstances of the safeguard mechanism: regardless of the time limitations in place, barriers to free movement already arise as a result of an absence of harmonisation in the field of social welfare. Further distinctions between national and EU workers, which would exacerbate the problem, cannot be permitted.[[40]](#footnote-40) More broadly, there is evidence that the Court is gaining confidence in intervening where EU secondary legislation operates in breach of fundamental rights protected by the Union Charter (CFR).[[41]](#footnote-41)

Thus, the picture so far is mixed. On the one hand, the Decision clearly speaks directly to the language used by the Court in those cases in which it has permitted Union-level restrictions on free movement. More broadly, the processes and justifications within the Decision largely emulated those already used for temporary restrictions on workers from recently acceded Member States, albeit via primary law.[[42]](#footnote-42) On the other hand, the CJEU has rejected other EU legislation that mirrors instruments it has accepted in the past: those of a temporary nature, focused on exceptional in-flows and disturbances to the domestic market, and not explicitly turning on the question of nationality. Indeed, a permissive approach is often more likely where restrictions form part of a longer-term plan for graduated harmonisation.[[43]](#footnote-43) A clearer picture – ultimately suggesting acceptance - nevertheless emerges when recent judicial developments within Union citizenship are considered.

* + 1. *Consistent interpretation or a parallel primary law framework*

Depending on whether it were the safeguard mechanism itself or the Member State’s implementation of it that were challenged, it would be open to the Court either to interpret the safeguard as far as is possible in line with the principle of non-discrimination, or find that, while the safeguard itself was compliant, domestic implementation was not. This would be consistent with the Court’s general presumption that Union legislation does not authorise Member State acts that are in breach of the Treaty free movement rules and their derogating provisions.[[44]](#footnote-44) Given the blatant discrimination the safeguard mechanism permits against non-national Union workers – authorised by the EU legislature – however, this approach seems improbable.

In assessing the originating Union legislation directly, the CJEU might have ‘emasculated’[[45]](#footnote-45) the safeguard mechanism as it did in relation to the derogation from equal treatment for jobseekers contained in Article 24(2) Directive 2004/38. In *Vatsouras*[[46]](#footnote-46) the Court placed jobseekers’ allowance outwith the concept of ‘social assistance’, contained in the Article 24(2) derogation, to ensure access to this form of support for Union citizen work-seekers, in line with its *Collins*[[47]](#footnote-47) judgment. Regarding the safeguard mechanism, the Court might, for instance, have claimed exhaustive definitional authority over the concept of ‘in-work benefits’ or taken a generous approach when determining a ‘real link’ to the labour market or the manner of ‘gradual’ access to social support.

Alternatively, litigants might have sought to bypass the amendment to Regulation No 492/2011 by seeking equal treatment directly under primary law. Previously, this has been most visible in *Chen*[[48]](#footnote-48)and *Ruiz Zambrano,*[[49]](#footnote-49) in which third country national carers were able to derive residence entitlements from the Union citizenship rights of their children, despite falling outwith the scope of Directive 2004/38.[[50]](#footnote-50) In the area of the cross-border provision of healthcare, the Court has effectively created a parallel system of rights directly under Article 56 TFEU, with more easily met conditions than those operating under the more restrictive framework created by secondary Union legislation.[[51]](#footnote-51) Such an approach to the safeguard seems unlikely, however, given the CJEU’s recent decisions in cases such as *Dano* or *Commission v UK*, in which it has taken a literal, rather than Treaty-infused teleological, approach to Union secondary legislation and sidestepped the opportunity to bypass its requirements by means of the primary free movement and non-discrimination rules.[[52]](#footnote-52)

Indeed, when the Court’s most recent citizenship case-law is considered, judicial receptivity to the safeguard seems increasingly probable. In *Alimanovic* and *García-Nieto*,[[53]](#footnote-53) in which it was unclear where the social support in question was ‘minimum subsistence’ – for which Member States may derogate from equal treatment in respect of jobseekers – or ‘financial assistance facilitating access to employment’ – for which they may not, the Court was deferential to domestic definitions. This casts doubt on the suggestion above that, in line with *Vatsouras*, the Court might have claimed definitional authority over the concept of ‘in-work benefits’ and defined them narrowly.

Moreover, in both *Alimanovic* and *Garcia-Nieto*, the Court took a literal approach to Directive 2004/38, using it to confirm temporally-defined categories of residence, with consequent impact on equal treatment rights.[[54]](#footnote-54) Accordingly, the CJEU might well have accepted both the seven year period for the safeguard’s overall application and any potential timeframe for demonstrating the growing links to the host State labour market required to unlock gradual access to welfare over a citizen’s four years’ employment there.

Recent CJEU decisions on Union citizenship also indicate a sea change in respect of key definitional methodologies affecting the operation of primary free movement law: specifically, the manner in which direct discrimination and other forms of market barrier are differentiated. The Decision itself openly acknowledged that the safeguard mechanism was discriminatory but denied that this discrimination was direct in nature. Rather, it stated that the safeguard would be based on ‘objective consideration independent of the nationality of the persons concerned’.[[55]](#footnote-55) The importance of this distinction is obvious: it opens up the range of justificatory options for overcoming a prima faciebreach of free movement. Thus, the Decision makes reference to a range of overriding requirements, in addition to the public policy derogations provided by Article 45(3) TFEU.[[56]](#footnote-56)

Yet a legal mechanism that requires non-national workers to demonstrate some supplementary link to the job market, beyond employment, which national workers need not establish, before they may access social support seems directly discriminatory. Indeed, in its early case-law, the Court expressly forbade secondary EU legislation authorising particular Member States to discriminate against non-national Union workers, even where there was no overt reference to nationality in its text.[[57]](#footnote-57)

On the other hand, the Court has proven itself capable of legal acrobatics in other internal market contexts where it was strategically expedient to widen the range of justificatory options by categorising direct discrimination as indirect.[[58]](#footnote-58) *Commission v UK* is particularly instructive here.[[59]](#footnote-59) The case concerned the UK’s use of a ‘right to reside’ test for access to certain forms of social security. The test formed part of a wider assessment of whether an individual was ‘habitually resident’ in the UK, applicable to both nationals and EU citizens. However, while British nationals overcome this threshold through nationality and residence, non-national EU citizens had to demonstrate a ‘right to reside’ via residence in accordance with Directive 2004/38. Generally speaking, this meant that non-national EU citizens had to be workers or self-employed to be eligible, since an application for social support would suggest that non-economically active Union citizens did not meet the Directive’s self-sufficiency requirements. Ultimately, the Commission simply conceded that, since the habitual residence test was applied to all, this was not direct discrimination but it remains of interest that the Court did not consider whether the ‘right to reside’ component constituted an additional, directly discriminatory, burden. Instead, the Court simply focused on the fact that ‘habitual residence’ was more easily satisfied by host State nationals and, thus, that indirect discrimination was established.[[60]](#footnote-60)

The cursory manner with which the Court deals with this issue can be illustrated through an examination of the dissenting judgment of Lord Walker in the previous domestic case of *Patmalniece,*[[61]](#footnote-61)alsoconcerning the right to reside test. His Lordship accepted the test constituted indirect discrimination following the CJEU’s previous approach to cumulative conditions in *Bressol*.[[62]](#footnote-62) However, he questioned this classification since the right to reside assessment was ‘a necessary condition…automatically satisfied by every British national’.[[63]](#footnote-63) Drawing on a similar rationale for the test as used for the safeguard, the Secretary of State argued in *Patmalniece* that the ‘right to reside’ threshold was a justifiable means of assessing economic or social integration in the UK and of protecting the public purse against exploitation, irrespective of nationality.[[64]](#footnote-64) For Lord Walker, this argument was disingenuous. The test was rooted in nationality, since *every* British national had a right to reside automatically, while non-nationals had to meet the set criteria of specific categories.[[65]](#footnote-65) He noted, by way of example, that a non-economically active British citizen, recently arrived in the UK from Latvia, with no family or social connections, or financial resources in the UK would be automatically entitled to the social security in question; a recently arrived Latvian in the same situation would not. As a result, Lord Walker argued that the ‘right to reside’ test could not be justified.[[66]](#footnote-66)

Ultimately, the majority in *Patmalniece* disagreed, finding the ‘right to reside’ component to be justified by the need to protect the public purse. As we have seen, the CJEU, in *Commission v UK,* did not torture itself with these definitional anxieties in any case. Crucially, while the Advocate-General engaged more deeply with the issue, his examination suggested growing acceptance of unavoidable difference in treatment based on the fact that ‘as EU law currently stands, being a national of a particular Member State is not irrelevant when it comes to exercising freedom of movement and residence’,[[67]](#footnote-67) echoing a similar conclusion by the Court, in relation to Directive 2004/38, in *Dano*.[[68]](#footnote-68)

There are important parallels between the conclusions drawn in *Commission v UK* and the strongest arguments against the legality of the safeguard. One might instinctively categorise the safeguard mechanism as directly discriminatory. Presumably, if the requirement to demonstrate a ‘real link’ to the Member State’s labour market were applied exclusively to non-national EU workers, this would indeed be the case. However, following *Commission v UK*, should the safeguard mechanism, or its domestic implementing instrument, instead require that *all* applicants for in-work benefits demonstrate a ‘real link’ to the labour market, the discrimination would become indirect. This would be so even if national workers were able to establish a sufficient connection simply by reference to their nationality and residence, while non-national Union workers were required to proffer something more. Indeed, in light of *Commission v UK,* presumably, it would not be problematic if even national workers returning to the labour market after a period abroad would also automatically pass the test. As Lord Walker noted in *Patmalniece*:

‘it seems a discriminatory purpose does not, on the present state of the law, prevent unequal treatment being regarded as no more than indirect discrimination, which is capable of justification. There is an obvious temptation for governments, in face of understandable popular feeling (in this case, against “benefit tourism”) to try to draft their way out of direct into indirect discrimination, with a view to avoiding having to distribute large sums out of public funds…to beneficiaries whom their electors would not regard as deserving’.[[69]](#footnote-69)

*3.1.4. The relevance of Union citizenship case-law to EU workers’ rights*

Of course, in one potentially crucial way, the safeguard mechanism went further than the recent citizenship case-law. Focused on the rights of non-economically active EU citizens, that line of jurisprudence implicitly relies on the fact that, since Article 21 TFEU allows conditions to be placed on free movement by secondary law, non-compliance with Directive 2004/38 may take EU citizens outwith the scope of that provision, and therefore outside the ambit of the prohibition of nationality-based discrimination in Article 18 TFEU. By contrast, EU workers reside in their host State in accordance with the Directive and therefore clearly fall within the scope of Article 18 TFEU. Article 45(2) TFEU also prohibits nationality-based discrimination against Union workers, specifically, in relation to employment, remuneration and other conditions of work and employment. In short, there are question marks over the extent to which the citizenship case-law – centred on the rights of non-economically active citizens – can be used as evidence that restrictions on the equal treatment rights of Union *workers* would be legally acceptable to the Court.

And yet, nationality-based discrimination is a surprisingly frequent feature of the Union legal framework. Four pertinent examples offer useful illustrations. First, there is little denying that the post-*Dano* case-law differs fundamentally from the Court’s early citizenship jurisprudence. *Martinez Sala* and *Grzelczyk*[[70]](#footnote-70) made clear that individuals resident in the host State exercise their free movement rights under Article 21 TFEU, and therefore benefit from the principle of non-discrimination under Article 18 TFEU. The logical presumption arising from *Grzelczyk* and *Trojani*[[71]](#footnote-71) is that, should an EU citizen not meet residence conditions, steps may (sometimes)[[72]](#footnote-72) be taken to remove them. Until that point they benefit from the right to equal treatment by virtue of their citizenship. What *Dano et al* indicate is a tendency among some Member States to accept the presence of EU citizens on their territory - regardless of whether they meet the formal requirements of Directive 2004/38 and without taking steps to remove them – while discriminating against them in terms of equal access to social assistance.[[73]](#footnote-73) Crucially, the Court’s closer alignment of the scope of Articles 21 and 18 TFEU with the requirements of the Directive in those judgments makes such an approach permissible. Accordingly, it is not beyond the realms of possibility that a similar sea change could occur in respect of workers. Existing worker case-law aside, the Court might accept a narrowing of the material scope of Article 45(2) TFEU. In-work benefits do not relate to employment or remuneration stricto sensuwhile the Court could accept the restrictive influence of any amendments to Regulation No 492/2011 on the definition of ‘other conditions of work and employment’. Indeed, this would be in line with the Court’s contemporary approach to Directive 2004/38.[[74]](#footnote-74)

Compliance with Article 18 TFEU appears less obvious, since that provision offers a more general prohibition of discrimination. Nevertheless, Article 45 TFEU could represent a *lex specialis* of that provision, given that Article 18 is explicitly without prejudice to more focused provisions. A similar argument might be made in relation to Article 21 and 34 CFR. Alternatively, as is the case for non-economically active Union citizens, emphasis could have been placed on the fact that free movement rights under Article 21 TFEU, which bring an EU citizen within the scope of Article 18 TFEU, are themselves subject to limitations in secondary law. In those States relying on the safeguard, related secondary Union legislation would then form part of the definitional framework of Article 21. Those seeking to reside in their host State outwith the confines of the safeguard would not be exercising free movement rights. This might have seemed legally tenuous in the days of *Even* or *Grzelczyk*. Yet, when viewed against the contemporary picture painted by *Dano et al,* it seems rather more plausible.

Our second example of discrimination relates to the political rights of EU citizens. Despite the prohibition of *any* nationality-based discrimination by Article 18 TFEU, Union citizens, including EU workers, may be excluded from voting in national elections in their host State. On the one hand, such voting rights might be comfortably excluded from the scope of the Treaties, which is required to trigger Article 18. On the other hand, writers have cogently argued that political disenfranchisement constitutes a clear barrier to movement, particularly since non-national EU citizens will have no say over the political institutions that, *inter alia*, control taxation and social security systems.[[75]](#footnote-75) Indeed, given the, at times, ephemeral connections found by the Court between domestic rules and free movement, in order to bring, for example, national immigration law[[76]](#footnote-76) or even legislative instruments relating to names,[[77]](#footnote-77) within the scope of Union law, the position in relation to political rights appears somewhat arbitrary, at least from legal perspectives.

A third example arises in the context of EU enlargement. Direct discrimination, in relation to employment or equal treatment, against workers from newly acceding Member States, is now a permanent feature of accession agreements purportedly in order to take account of the scale of accession and the differences between Member State economies.[[78]](#footnote-78) Indeed, the Decision drew links between the purported exceptional inflow of workers into the UK, and the fact that it has not always made full use of the transitional periods provided by recent accession frameworks.[[79]](#footnote-79) Of course, such arrangements function at the level of primary Union law. Nevertheless, they highlight that the principle of non-discrimination against EU workers is more nuanced than the simple prohibitions contained in Articles 18 and 45(2) TFEU.

However, our final, most significant, example appears at the point at which Union citizenship and the internal market converge; specifically in the Court’s treatment of jobseekers. Following the formalisation of Union citizenship at Maastricht, the CJEU explicitly held in *Collins*[[80]](#footnote-80) that jobseekers resided in their host State legally under Article 45 TFEU and that this brought them with the scope of the Article 18 TFEU.[[81]](#footnote-81) Consequently, the UK’s use of an habitual residence test to restrict access to jobseekers’ allowance was permissible only because it applied ‘independently of nationality’.[[82]](#footnote-82) Though indirectly discriminatory, it could be justified by the legitimate need to establish a ‘real link’ between the host State job market and the EU citizen.

This very precise route to justification appears, however, to have been forgotten in *Vatsouras*.[[83]](#footnote-83) It will be recalled that the Court was required to assess the validity of Article 24(2) Directive 2004/38 – which, for jobseekers, derogated from the requirement of equal access to social assistance – against its interpretation of Articles 20 and 45 TFEU in *Collins*. Rather than find the measure invalid, the CJEU held that jobseekers’ allowance did not constitute social assistance but was ‘financial support intended to facilitate access to the job market’. This focus on maintaining access to jobseekers’ allowance in fact permits nationality-based discrimination against jobseekers in relation to all other forms of social assistance to slip through unnoticed and, critically, via secondary Union legislation. This despite the fact that, post-*Collins*, jobseekers fall within the scope of Article 45 TFEU, and therefore within the Article 18 general prohibition of nationality-based discrimination.

*Collins* and *Vatsouras* accordingly provide critical insights into the legality of key aspects of the safeguard mechanism. Had the safeguard been applied exclusively to non-national Union workers, *Vatsouras* already offers limited precedent for permitted direct discrimination against Union citizens covered by Articles 45 and 18 TFEU, via secondary legislation, and without, as yet, much in the way of justificatory requirements. *Collins* and *Vatsouras*, also provide stronger authority for host States to discriminate indirectly against individuals included within Articles 45 and 18 TFEU, in order to ensure a ‘real link’ between the applicant and the host State employment market and protect the public purse. Indeed, the application of a ‘real link’ test to workers – rather than workseekers - has already been permitted by the CJEU in *Geven* and *Hartmann*.[[84]](#footnote-84) Thus, a safeguard mechanism requiring all applicants for in-work benefits – whether nationals or (other) EU citizens – to demonstrate a real link to the employment market could have relied on existing case-law for its justification.

The only notable difference between those judgments and the safeguard would be whether the manner of assessing a ‘real link’ was truly indirectly discriminatory. The residence requirements in *Collins, Geven* and *Hartmann* were applied to both national and non-national EU citizens, with it simply being inherently easier for the former to meet that condition. By contrast, presumably, under the safeguard mechanism, national workers would be able to demonstrate a ‘real link’ to the host State job market by virtue of employment and residence, while non-national EU workers would be required to demonstrate something more; a growing connection over time. However, through the links between the internal market and citizenship case-law forged in cases like *Collins* and *Vatsouras*, *Commission v UK* could be used as authority to find that sub-requirements, additional to the ‘real link’ test, imposed solely on EU nationals, are nonetheless indirectly discriminatory.

Ultimately, then, despite the mixed picture painted by the Court’s jurisprudence, its most recent case-law on Union citizenship indicates that it would have accepted the safeguard mechanism as legal. While the safeguard mechanism would clearly have gone further than the restrictions on free movement operating in the context of Union citizenship – since it imposes barriers to the movement of EU *workers* – the detailed examination of the case-law conducted here demonstrates that this does not cast doubt, on the influence and authority of that body of judgments on legal assessments of the safeguard. In fact, what emerges from the above *technical* assessment of safeguard’s legality is a more profound *constitutional* finding: that, while traditionally seeking to find means of securing greater rights for Union citizens, ironically, the historical development of Union citizenship rights – principally by the CJEU - furnishes the safeguard mechanism with its legal foundations.

* 1. ***The historical and constitutional roots of the safeguard***

While the internal market origins of Union citizenship are well-known,[[85]](#footnote-85) these foundations are traditionally, and pertinently, used within the literature to question the ability of EU citizenship to recognise the personhood of non-economically active Union citizens when it still vests, largely, in movement and economic activity.[[86]](#footnote-86) By contrast, analysis of the safeguard mechanism demonstrates the potentially restrictive influence of rules developed by the Court during its development of Union citizenship on the more generous principles operating in the context of the internal market. In particular, while the Court sought to extend the free movement provisions to a wider range of actors in its early (market) citizenship jurisprudence, it also offered a number of placatory limitations on these rights to allay potential Member State concerns about over-extension. However, the internal market foundations of Union citizenship allow for the cross-pollination of certain of these restrictions – developed in the particular context of economic inactivity – across legal structures shared by the internal market and citizenship alike. This is particularly visible within two categories of EU citizen – the service recipient and the jobseeker – since they most clearly straddle the divide between internal market and Union citizenship. However, since Union workers are *also* EU citizens, they too exercise their free movement rights simultaneously under Articles 45 and 21 TFEU. As a result, the reciprocal influence of the two spheres is inevitable.

The Court, alongside the Union legislature, recognised in the internal market’s infancy that free movement would be inhibited if the human needs of the EU’s economic actors were not met.[[87]](#footnote-87) Therefore, as is well-known, in addition to their right to carry out their economic activity, actors became able, for instance, to access social and tax advantages on an equal basis with host State nationals and to bring certain of their family members with them. Through this form of ‘market citizenship’, free movement emerged as a means by which a wider form of integration, beyond the economic, might be achieved.[[88]](#footnote-88) Nevertheless, since these benefits could only be enjoyed by those falling within the scope of the internal market’s free movement provisions, the Court sought to bring a wider range of individuals within their scope. For example, its inclusion of the service *recipient* within the ambit of Article 56 TFEU on service provision ensured access to the principle of non-discrimination to Member State nationals who would otherwise not benefit from it.[[89]](#footnote-89)

Developments such as this paved a crucial road to the formal Union citizenship recognised at Maastricht. And yet, this same historical evolution forms the basis for legitimate criticism that Union citizenship is intrinsically limited in what it can offer non-economically active Union citizens. Conversely, it is also at the heart of emerging restrictions on the rights of EU workers. Specifically, in recognition of its own boundary pushing, the Court’s introduction of the concept of service recipient was accompanied by the arrival and extension of a new justification – the risk of seriously undermining the financial balance of the social security system – where previously purely economic justifications had not generally been permissible.[[90]](#footnote-90) More broadly, since the formalisation of Union citizenship, the need to avoid ‘unreasonable burden’ on host State social assistance systems has become an ever-present justification for denying access to social support for non-economically active Union citizens.[[91]](#footnote-91) As the service recipient – who continues to have one foot in the internal market and the other in Union citizenship – demonstrates, the construction of Union citizenship upon internal market foundations provides an historical synapse across which justifications can move back and forth. Accordingly, while many might reasonably have considered protection of public funds to be a legally unavailable rationale for the application of the safeguard mechanism to EU workers, it is firmly rooted in the historical development of, and interrelationship between, the internal market and Union citizenship.

Similarly, the immediate effect of the Court’s decision, in *Collins*, to bring workseekers within the scope of Article 45 TFEU as a direct result of Union citizenship is greater access to social support for individual Union citizens and, therefore, the apparent adding of flesh to the bones of Union citizenship. The novelty of the judgment nevertheless led, also, to the CJEU’s acceptance of the host State’s professed need to protect its social assistance schemes and to the introduction of the ‘real link’ criterion. Consequently, *Collins* in fact leaves jobseekers straddling Article 45 TFEU, under which Union workers are entitled to access social assistance on the same basis as national workers by virtue of their free movement rights, and Article 21 TFEU, pursuant to which the free movement and, therefore equal treatment rights, of non-economically active Union citizens may traditionally be limited. By reinforcing the links between the rights enjoyed as a Union citizen and those conferred by internal market rules, *Collins* offers a means by which rules designed in relation to economically inactive or not yet active EU citizens could transfer into the operation of the equal treatment rights of economic actors.

As noted above, this in fact happened in *Geven* and *Hartmann*.[[92]](#footnote-92) There, national rules that required evidence of ‘substantial work’ before frontier workers could access child benefit, were permissible based on the need to demonstrate a ‘real link’ to the host State labour market. This approach contradicted the otherwise well-established rule that individuals are to be defined as workers, and have full access to ensuing rights, where their work is ‘genuine and effective’ and not ‘marginal and ancillary’.[[93]](#footnote-93) The transfer of Union citizenship mechanisms has therefore already, at times, reversed more inclusive approaches established in the free movement of worker context.[[94]](#footnote-94)

Since *Geven* and *Hartmann*, the Court has sought to minimise the application of the ‘real link’ criteria to Union workers. Thus, in *Commission v Netherlands,*[[95]](#footnote-95) participation in the labour market was found ‘in principle’ to offer a sufficient link to the host State to grant equal treatment rights.[[96]](#footnote-96) Yet the consequence of the Court’s decision not to overrule *Geven* and *Hartmann*, but to hold, instead, that work ‘in principle’ meets the requirements of the real link test is that the door is left open for that test to restrict the rights of Union workers in the future. Interestingly, the Court also stated in *Commission v Netherlands* that the sufficient link arose from ‘the fact that, through the taxes which he pays the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State’.[[97]](#footnote-97) Arguably, the connection forged in this judgment, between the establishment of a ‘real link’ and one’s financial contributions to the host State’s social security system, is mirrored in the safeguard’s ‘gradual’ access to welfare to reflect a ‘growing connection’ to the host State.

Ironically, then, the Court’s constitutional boundary pushing during the evolution of Union citizenship – which historically endeavoured to extend free movement rights – now appears, through the introduction of placatory limitations on those expansions, to provide a framework for their restriction. Similarly, the CJEU’s institutional boundary pushing, whilst initially of clear benefit to Union citizens’ enjoyment of free movement rights might, nevertheless, and paradoxically, has contributed to the growing political pressure to limit them. Specifically, the achievement of a functioning internal market and an increasingly meaningful Union citizenship through the constitutionalisation of EU primary and secondary law frequently transfers essentially political decision-making to non-political institutions, whilst limiting the capacity of legislative organs to respond.[[98]](#footnote-98) In the longer-term, this approach might actually serve to damage, rather than strengthen, connections between the EU and its citizenry, particularly since the Court tends not to relinquish its institutional dominance even as it seeks to pacify the Member States.

* 1. ***The institutional roots of the safeguard***

Almost since its inception, the EU has faced accusations of democratic deficit. Questions over the Union’s democratic legitimacy are, however, most commonly levelled at its political institutions, in particular the historically weak, through growing, power of the European Parliament.[[99]](#footnote-99) However, the constitutional and institutional roots of the safeguard offer a significant example of what Grimm argues is an often over-looked factor in the Union’s legitimacy deficit: the over-constitutionalisation of both primary and secondary Union law by the CJEU.[[100]](#footnote-100) For Grimm, constitutions serve to furnish the basic structure and lasting principles for politics, while politics fills the spaces constitutions leave behind according to changing political preferences and circumstances.[[101]](#footnote-101) Yet, the often open-textured nature of constitutional norms, he notes, creates the potential for courts to interpret them in a manner which reduces this political space, with consequential cementing effects on the law and marginalisation of the legislature.[[102]](#footnote-102) Schmidt identifies the CJEU as one such court and its overconstitutionalisation of Union norms as one of the causes of disconnection between the EU and its citizenry. For her, this is particularly pertinent in the contemporary context of Brexit, since ‘non-majoritarian decision-making weakens ‘voice’ and strengthens the relevance of exit.[[103]](#footnote-103) Crucially, the evolution of the safeguard represents a clear means of charting this phenomenon.

The pivotal role played by the Court of Justice in the constitutionalisation of the EU Treaties - via assertions as to the status of EU law as a ‘new legal order’ that is supreme and may have direct effects in national legal systems,[[104]](#footnote-104) as well as to the far-reaching obligations arising directly under the free movement provisions[[105]](#footnote-105) – is well-known. The benefits of this route to economic integration over the slower path, grounded in legislative harmonisation, arguably envisaged by the Treaties themselves,[[106]](#footnote-106) are evident in the contemporary functioning of the internal market. The resultant changing dynamic between the Union’s legislative organs, on the one hand, and its administrative and judicial branches on the other, however, is also clear. Moreover, as Grimm notes, an immediate consequence of the Court’s famous *Van Gend* and *Costa* judgments is that the direct participation of the Member States in the development of the internal market through the EU’s political institutions is no longer as central.[[107]](#footnote-107)

The tensions that arise from this judicially-driven evolution of the Union constitution are starkly visible in the Court’s (in)famous *Laval* line of case-law, which, when viewed through this lens, also establishes the safeguard mechanism, similarly, as the product of such tensions.[[108]](#footnote-108) In these judgments, the Court held that the Posted Workers’ Directive[[109]](#footnote-109) (PWD) offers a ceiling, rather than a floor, of protection for posted workers, despite the widely-held view that the Union legislature had adopted that instrument principally as an anti-social-dumping measure.[[110]](#footnote-110) For the Court, the PWD gave concrete expression to the freedom to provide services, which represented a ‘fundamental principle of the Union’.[[111]](#footnote-111) Consequently, collective action seeking terms and conditions of employment going above and beyond the core nucleus of protection contained in the PWD was a prima facie breach of Union law. In other words, as a result of Article 56’s status as a directly effective fundamental principle of EU primary law, the social objectives clearly inherent to the PWD could not contribute to the definitional framework of that broad-brush provision. Of course, the Court examined the legitimate interest in worker protection as a justification to the prima facie breach of Article 56 but, critically, this transfers the definitional scope of cross-border service provision from the legislature to the judiciary.

Importantly, ‘since an interpretation of the Treaty effectively *becomes* the Treaty’, as Davies reflects,[[112]](#footnote-112) it can become difficult for the Union legislature to respond to the political consequences of CJEU judgments. Union efforts to address the aftermath of the *Laval* case-law have been unsuccessful, somewhat ironically, after national parliaments made their first use of the Lisbon Treaty’s ‘yellow card’ procedure to question, inter alia, whether the proposed Regulation on the exercise of the right to take collective action adequately respected the division of competences between the Union and its Member States.[[113]](#footnote-113)

Regardless of whether one would agree with the factual outcome of individual cases, similar institutional dynamics are equally visible in the evolution of Union citizenship - that forms the backdrop to the safeguard - by means of the Court’s (clearly pivotal) teleological approach to the Treaty’s citizenship provisions. For instance, despite the fact that Article 21 TFEU makes plain that free movement rights may be limited by secondary legislation, the Court considered in *Grzelczyk* and *Baumbast* that, as a result of Union citizenship, any secondary law restrictions, as limitations on directly effective Treaty provisions, were subject to proportionality. Accordingly, a non-economically active EU citizen might still be legally resident, and entitled to equal treatment, even if she/he does not have sufficient resources,[[114]](#footnote-114) or entirely comprehensive medical cover[[115]](#footnote-115) as required by secondary Union law.

Those cases could, of course, be explained by the game-changing introduction of formally recognised EU citizenship into the Treaties after the secondary law instruments in questions entered into force. These restrictions were nevertheless retained by subsequent Directive 2004/38. As Davies reports, the process of replacing the pre-citizenship free movement directives took place amid quite some debate about how far Union citizens’ free movement rights should go and in knowledge of the existing case-law.[[116]](#footnote-116) Since Article 21 TFEU itself allows limits on free movement via secondary legislation, suggesting judicial deference, Directive 2004/38 might have been understood as a comprehensive statement of movement rights: ‘the legislature had spoken on a subject where their authority is not in doubt, [and] where the policy context is complex and politicised’.[[117]](#footnote-117) Nevertheless, while some cases appeared to show judicial responsiveness to legislative policy choices,[[118]](#footnote-118) others appear to deprive the Directive of its intended consequence, subordinating it to the open-textured, judicially-refined primary citizenship framework.

Our consideration, above, of how the Court might have bypassed some of the restrictive aspects of the safeguard via its approach in *Vatsouras*, offers a striking example of this. In *Vatsouras,* it seemed clear from the explicit exclusion of jobseekers from equal access to social assistance in Article 24(2) CRD that the Union legislature sought to override the Court’s earlier *Collins* judgment. In preserving its own case-law, the CJEU clearly frustrated the intent of the Union legislature by placing jobseekers’ allowance outwith the concept of social assistance. As Davies argues:

[W]hile it may seem reasonable that secondary legislation is subject to primary law, it should be remembered that the Treaty says nothing about work-seekers. When the Court speaks of interpreting in the light of Article 45 TFEU, it really means interpreting in light of the castle of principles and ideas that it has built’.[[119]](#footnote-119)

*Chen* and *Ruiz Zambrano* were also explored above as offering a potential route around the requirements of the safeguard and thus also provide further examples of the dominance of principles developed by the CJEU.[[120]](#footnote-120) While clearly contributing a route to residence rights crucial at the individual level, those judgments also suggest a rejection by the CJEU of arguably very clear policy choices by the EU legislature: that non-dependent ascendants are not beneficiaries of derived residence entitlements; or that, regardless of long-standing, fervent criticism, cross-border movement remains decisive in triggering Union citizenship rights.[[121]](#footnote-121) The non-political mode of decision-making visible in this case-law does not alter the political character of the decisions made and yet importantly, as Grimm notes, ‘the political means to secure democratic legitimacy and accountability are rendered inoperative’.[[122]](#footnote-122)

Further, where the EU legislature has added flesh to the bones of the Treaties via secondary legislation, it also risks the ‘legislative ossification’ of these policy choices, and may subsequently find it hard to change direction should the political environment alter.[[123]](#footnote-123) Indeed, the largest question mark over the legality of the safeguard mechanism arguably arose from the constitutionalisation of Article 7, Regulation No 492/2011, as a concrete expression of Article 45(2) TFEU in *Even*. Thus, although it was always open to the Member States to amend the Treaties to allow for discrimination against Union workers – admittedly with significant legal and political obstacles along the way – and irrespective of the fact that the safeguard struck at the heart of foundational Union goals, doubt as to its legality can itself provide ammunition to those who argue that the ‘Masters of the Treaties’ in fact operate within a judicial straitjacket.

In sum, the CJEU’s teleological approach has done much to ensure that EU citizenship offers meaningful rights to Union citizens. From principled and moral perspectives, we might both welcome these developments and question whether they go far enough. Yet, when viewed through an *institutional* lens, the judicial evolution of Union citizenship, and more broadly the internal market, has left itself open to criticism in terms of democratic legitimacy: ‘when [the] legislature constructs a limited regime, and it is widely accepted that there is no political will to extend [it], this does not disturb the path…of the case-law…the Court, in practice, trumps the law-maker’.[[124]](#footnote-124) Accordingly, while the judicial evolution of Union citizenship might have been critical in coming to the aid of EU citizens in the short and medium-term, the manner of its development might ironically undermine the Union’s connection with its citizens in the longer-term.[[125]](#footnote-125) Indeed, research conducted by Blauberger and Schmidt indicates that Union citizenship rules:

[P]romising to build the Union from below on the basis of equal legal entitlements, may, in fact, risk rousing further nationalism and decrease solidarity across the Union. The welfare state relies on reciprocity and court-driven rights cannot legitimate entitlements, which require legislative decisions.[[126]](#footnote-126)

Of course, arguably the citizenship rights under the Treaties, much like fundamental rights, exist to offer crucial basic protections against changing political winds. One could rightly argue that greater responsibility lies with other actors, particularly politicians and the media, to withstand and/or cease the perpetual othering of non-nationals within domestic debates. Despite the fact that academic research continues to indicate that non-national EU citizens are net contributors to the UK, while their take up of benefits is disproportionately lower than the national population,[[127]](#footnote-127) there is, generally speaking, political consensus in the UK on the need to address EU immigration. This was visible in Cameron’s renegotiation and by both the Remain and Leave campaigns in the run-up to the referendum.[[128]](#footnote-128)

Yet, the Court has played its own part here too. The CJEU’s constitutional and institutional boundary pushing has often been accompanied by placatory limitations on those expansions, thus, at least in part, confirming popular concerns about so-called benefit tourism. Yet, crucially, rather than offering flexibility to the Member States in their implementation of CJEU-derived rules – which might serve to lessen the impact of over-constitutionalisation – the terms of the Court-proffered leeway are uncertain and ultimately remain within the control of the Union judiciary. Ultimately, this serves only to increase the administrative burden placed on Member States and mobile EU citizens, whilst not being particularly visible to voters.[[129]](#footnote-129)

The previous sub-section provided the ‘real link’ test as a pertinent example of this development. To this we can add the introduction of the concept of ‘social tourism’ by Advocate-General Geelhoed.[[130]](#footnote-130) Indeed, the causal link the Advocate-General drew between the lack of harmonisation in the area of social security and the risk of social tourism[[131]](#footnote-131) is replicated in the safeguard mechanism, which asserts that the diverse structures of Member States’ social security systems ‘may [themselves] attract workers to certain Member States’.[[132]](#footnote-132)

Most recently, of course, we have seen the CJEU demonstrate further receptivity to changing political sentiment in Europe. The *Dano* line of case-law sees a more literal approach to Directive 2004/38 and a growing permissiveness to restrictions on the equal treatment rights of non-economically active Union citizens, which often appears diametrically opposed to the CJEU’s expansive approach post-*Grzelczyk*.[[133]](#footnote-133) These newer cases, however, offer the worst of both worlds, since they neither maintain the claim that the ‘fundamental status’ of Union citizenship is a route to equal treatment, nor enhance its democratic legitimacy. Specifically, the more literal approach to Directive 2004/38 visible in recent judgments does not alter wider reliance on broad, and rather vague, principles.

Member States are still required to permit the entry and residence of employees whose work is ‘genuine and effective’; of jobseekers who are ‘seeking work and have a genuine chance of being engaged’; of non-economically active Union citizens with ‘sufficient resources’; and of family members whose removal would deny a Union citizen ‘the genuine enjoyment’ of the rights arising from that status. Inaction from individual Member States in respect of such ambiguous Court-derived concepts continues to be legally unacceptable yet riddled with political potholes, themselves endorsed by the Court’s increased recognition of apparent social tourism.[[134]](#footnote-134) As placatory limitations, the CJEU offers the Member States equally ambiguous concepts, such as the ‘real link’ requirement or the notion of ‘unreasonable burden’. The Member States’ response is frequently administrative in nature,[[135]](#footnote-135) with the burden often transferred to the individual Union citizen, who as part of case-by-case assessments must provide evidence that their work is ‘genuine and effective’;[[136]](#footnote-136) that they have a ‘genuine chance of becoming employed’; or that they are ‘legally resident’ and not an ‘unreasonable burden’ when applying for social assistance.[[137]](#footnote-137)

Since these administrative burdens are generally only visible to those who must endure them, Union citizenship is doubly undermined: it continues to suffer from a legitimacy deficit at the constitutional and institutional level, whilst exacerbating the othering of Union citizens and making access to equal treatment harder on the ground. As Grimm argues, ‘the stronger the challenges are, the sooner politics will re-appear to circumvent the constitution’.[[138]](#footnote-138) The safeguard concretely demonstrates this: an attempt by the Member States to reassert to the citizenry their status as ‘Masters of the Treaties’ and re-assure them of their ability to respond politically.

Given the historical development of the internal market and of Union citizenship, however, the EU’s political institutions were still able to construct the safeguard in a manner which would have been legally palatable to the Court. Crucially, what emerges from the analyses conducted thus far is that the safeguard mechanism did not spring from adversity, tailored to the specific need to convince a Member State teetering on the edge of exit to remain. Rather, both the emergence and form of the safeguard have clear, and broader, historical foundations. Consequently, regardless of its formal abandonment following the UK referendum result, the UK renegotiation has demonstrated that something like the safeguard is possible and it now retains the potential energy to reappear in the future.

1. **Gone but not forgotten? Speculating on the re-emergence of the safeguard**

This section considers, first, what a re-emerged safeguard mechanism might look like. Released from the formalities of the Decision, the safeguard could now take a number of shapes. Notably, the content, rather than the form, of the Decision, indicates that *unilateral* decisions to discriminate against workers are now possible. The section acknowledges, second, that, regardless of the fact that it is constitutionally-rooted and politically explainable, the safeguard would still represent a significant change in direction for the EU, with far-reaching repercussions should it be employed.

* 1. ***Up for grabs: the potential future shape of the safeguard mechanism***

First, given the demonstrated legality of the safeguard as contained in the Decision, an identical mechanism could emerge at the Union-level in the future. On the one hand, this seems unlikely. In the Bratislava Declaration, published shortly after the UK vote, the other 27 Member States highlighted the need ‘to serve better the…wishes [of EU citizens] to live study, work, move and prosper freely across our continent and benefit from the rich European heritage’.[[139]](#footnote-139) In responding to the referendum result, the emphasis was on improving communication between the EU institutions, the Member States, and Union citizens and on challenging the ‘simplistic solutions of extreme or populist political forces’.[[140]](#footnote-140) On the other hand, in late 2016, the Commission announced less ambitious proposals for reform to the Social Security Regulation that would place some restrictions on EU workers’ ability to aggregate contributions for unemployment benefit across Member States.[[141]](#footnote-141)

Crucially, some Member States continue to face pressure domestically to tackle perceived problems with intra-EU migration and, in particular, benefit tourism.[[142]](#footnote-142) The post-*Dano* case-law demonstrates that some Member States are already testing the water in terms of increased restrictions on the free movement rights of non-economically active Union citizens. Indeed, emboldened by the *Alimanovic* ruling, in December 2016, Germany adopted new legislation restricting access to a number of social benefits for the unemployed (outwith those directly related to facilitating access to the labour market) during the first five years of an EU citizen’s residence there.[[143]](#footnote-143) The UK renegotiation now presents a new possibility that might previously have been viewed as untouchable: restrictions on the equal treatment rights of Union *workers*. Indeed, Austria has already voiced plans to restrict access to employment for (other) EU citizens even if it quickly backtracked.[[144]](#footnote-144) The German government is also putting pressure on the Commission to re-introduce the option for host States to limit exported child-benefit to the amount that would be paid in an EU citizen’s home State;[[145]](#footnote-145) a mechanism that first appeared in the UK’s pre-referendum renegotiations.[[146]](#footnote-146) Critically, while the Decision spoke also to older CJEU case-law on Union-level internal market restrictions, our analysis demonstrates that the safeguard’s legal palatability is largely grounded in the Union citizenship case-law; judgments concerning *unilateral* Member State restrictions on free movement. Most significantly, the safeguard’s requirement that Union workers demonstrate a ‘real link’ to the host State labour market before gaining graduated access to its social security system, is drawn from domestic limitations on free movement rights in *Collins, Vatsouras* and, importantly, *Geven* and *Hartmann*. This finding is reinforced by the conceptualisation of domestic nationality-based discrimination as indirect in nature in *Commission v UK*. So long as, technically-speaking, domestic rules require all applicants for in-work benefits in a given Member State to demonstrate a ‘real link’ to its employment market, this will be legally acceptable, regardless of whether nationals demonstrate this by virtue of their nationality and residence, while other EU citizens have to proffer something more.

Unilateral adoption of the safeguard would necessarily neglect the amendment of secondary legislation envisaged by the Decision. Prima facie, domestic restrictions on access to social assistance would seem in conflict with Article 7 Regulation 492/2011, on equal access to social and tax advantages, as well as Article 24(1) Directive 2004/38, offering a general right to equal treatment. Yet, in *Commission v UK*, the Court demonstrated a willingness to interpret legal residence as a *substantive,* internal condition for access to social security, rather than as a rule potentially in conflict with Union secondary law determining the Member State responsible for providing specific social security entitlements. A ‘real link’ test could be similarly viewed as a substantive condition of access to in-work benefits, applicable to all applicants. This would then constitute justifiable indirect discrimination, whether as a matter of primary or secondary law.

That is not to say, of course, that the reappearance of the safeguard would not have considerable repercussions for the direction of EU law.

* 1. ***The technical, constitutional and institutional implications of the safeguard***

While clearly the precise consequences of the re-emergence of the safeguard would depend on its form, a number of technical, constitutional and institutional repercussions can be identified. Moreover, the interlinked nature of these effects serves to reinforce conclusions as to the ripple effect of constitutional boundary pushing.

The re-emergence of the safeguard at Union-level would raise technical questions about the relationship between secondary EU legislation, outwith the larger question of compliance with primary law discussed in previous sections. In particular, how would amendments made to Regulation No 492/2011 interact with the principle of equal treatment contained in Article 24(1) Directive 2004/38? On the one hand, the Directive increasingly dominates over other secondary Union legislation in this area of EU law.[[147]](#footnote-147) On the other, this dominance tends to operate to restrict access to welfare.[[148]](#footnote-148) Accordingly, it would not be out of line with the Court’s current methodology, for instance, to consider amendments to Regulation No 492/2011 to supersede Article 24(1) Directive 2004/38. Interestingly, however, following the Court’s decision in *Commission v UK* to treat legal residence as a substantive condition for access to welfare within domestic social security systems, conflict is more simply avoided if the safeguard re-appears at the Member State, as opposed to Union, level.

The re-appearance of the safeguard, at either level, raises further technical questions: how would a ‘real link’ to the host State labour market be assessed and how would *graduated* access to in-work benefits progress? Clearly the guidance on the ‘real link’ test in *Collins*, focused on habitual residence and evidence of genuine work-seeking would not be appropriate here. It seems more likely that the focus would be on duration of employment or financial contributions to the host State social security system, particularly given the Court’s focus on this in *Commission v Netherlands*.[[149]](#footnote-149) This raises further questions: *how much* of a contribution would Union workers be expected to make and for *how long*?

Crucially, emphasis on duration and/or financial contributions would be particularly problematic for low-paid, temporary workers, for whom access to in-work benefits is likely to be most necessary, and who might be unlikely to demonstrate the requisite links for some time. Specifically, O’Brien has argued that the analogous focus on *continuous, legal* residence for EU citizens to qualify for permanent residence[[150]](#footnote-150) would indicate that some Union citizens might be required to wait much longer, in practice, than the four years featured in the Decision for full access to welfare. Only residence in accordance with Directive 2004/38 – through work, self-employment, or self-sufficiency – is considered legal for the purposes of acquiring permanent resident status. Consequently, periods between employment, or time taken for caregiving would, at best, not count towards the four year total, or worse, break continuity of residence, should a similar approach be adopted.[[151]](#footnote-151) Indeed, comparable issues already arose in the context of the UK’s Worker Registration Scheme, once applicable to EU8 and EU2 workers, since it required *continuous* work for 12 months before the relevant Union citizens could work and access benefits without registration.[[152]](#footnote-152)

In any case, demonstrating a growing connection to the host State employment market will be more administratively burdensome for low-paid, temporary, or zero-hours contract workers, who will accumulate much more paperwork than those in permanent work. Benefits might be most easily accessed by Union workers enjoying longer-term, better-paid employment, who would meet the substantive and administrative requirements of a ‘real link’ test more easily. The result would be a step backward in terms on Union integration, since similar criticism could then be levelled at free movement of workers that already faces Union citizenship: that it operates principally as a safety net ‘for distressed gentlefolk during periods of temporary financial hardship’ and creates tiers of citizen.[[153]](#footnote-153) Yet cases such as *Collins* and *Brey*[[154]](#footnote-154) indicate that Union-level examination of these consequences of the safeguard is unlikely. What is more probable is the continued finding that prima facerestrictions on Union law are proportionate as a result of case-by-case assessments at the domestic level,[[155]](#footnote-155) and therefore the continued transfer of the administrative burden to the Union citizen.

From this emerges a third repercussion, both constitutional and technical in nature: the fact that restrictions on in-work benefits cause a very real barrier to trade. For example, the emphasis of the Decision on the apparent ‘pull factor’ of the UK’s ‘generous’ benefits system overlooks that the UK’s employment market is also increasingly defined by low-paid, zero hours contract work that is often only possible as a result of in-work benefits.[[156]](#footnote-156) Consequently, restrictions on equal access to social assistance constitutes a genuine barrier to movement that undermines not only the ambition of Union citizenship but the foundational goals of the internal market formed at Rome. Though this chapter demonstrates that the historical evolution of the internal market provides constitutional foundations for the safeguard, those developments were still, at their core, about acknowledging that economic integration required recognition of the human needs of workers. That the safeguard would potentially represent a reconfiguration of the Union’s central objectives is all the more explicit in the reference in the Decision to ‘difficulties that are serious and liable to persist in the [host State’s] employment market’ as a potential reason for triggering the safeguard. This would introduce pure protectionism into the justificatory gamut.[[157]](#footnote-157)

Such constitutional issues trigger institutional questions about interactions between the Union’s legislative and judicial branches. On the one hand, we have seen that the constitutionalisation of Union primary and secondary Union law has, to some extent, contributed to the current state of affairs. As Horsley argues, since, through its transformation of the EU legal order, the Court has created for itself the role of leading policymaker in European integration, it should also accept the limits the Treaty places upon it as an institutional actor. Horsley identifies the requirement in Article 13(2) TEU, that the Union institutions practise mutual sincere cooperation, as imposing a primary law requirement on the Court to respect the policy choices of the Union legislature where appropriate.[[158]](#footnote-158) Similarly, Davies argues that the concept of inter-institutional balance suggests that Treaty interpretation should be viewed as a shared activity, with both the Union’s political and judicial organs contributing to what concepts within the Treaty, such as free movement, might mean.[[159]](#footnote-159)

On the other hand, a brake on in-work benefits would clearly introduce obvious barriers to trade, undermining the foundational goals of the Union and well-established approaches to their achievement, long-accepted by the Member States. In rejecting the employment of a safeguard mechanism, the Court would arguably be acting appropriately within its institutional role of ‘ensuring that in the application of the Treaties, the law is observed’, pursuant to Article 19 TEU. And yet, ironically, at the very point at which the Court might properly act as a check on the EU’s political branches – since central values of the Union’s constitution appear to be at risk – its own institutional boundary pushing may leave it with little choice but to accept this change in direction for the Union. This is already visible in the Court’s more literal approach to Directive 2004/38 post-*Dano*. Indeed, ultimately, despite being backed into a corner, the Court’s pre-emptive approach to the current political climate in that line of case-law – alongside the fact that the safeguard mechanism is built on the judicially-driven evolution of Union citizenship – will allow it to present its acceptance of any future safeguard as securely in-line with its own jurisprudence.

1. **Conclusion**

Regardless of its formal irrelevance following the decision of the UK electorate to leave the EU, the emergency brake on in-work benefits, introduced as part of the UK’s now abandoned renegotiation of its EU membership, provides a useful lens through which to assess the current limits of Union citizenship, the internal market and, more broadly, European integration, as well as the institutional dynamics at play there. By introducing discrimination against the Union *worker*, the safeguard mechanism appeared to do the constitutionally unthinkable. Yet the analysis demonstrates not only that the safeguard was legally salvageable but also that it was firmly rooted in the constitutional evolution of Union citizenship from the internal market. Consequently, while the UK will now willingly relinquish the Union citizenship rights of its own nationals, it might also leave a restrictive legacy – by virtue of the backdrop to its departure – for those who remain EU citizens. It has opened a Pandora’s Box in respect of how other Member States might now seek to redefine the outer boundaries of Union citizenship and the internal market in response to political pressure.

Crucially, since the legality of the safeguard is largely grounded in CJEU case-law arising from domestic restrictions on free movement, there appears no reason why a Member State must wait for the re-emergence of the safeguard at the Union-level. Of course, such blatant discrimination against EU workers would go further than Member State limitations have successfully gone before. Accordingly, a finding of invalidity or incompatibility in relation to any future re-introduction of the safeguard would appear an uncontroversial performance of the Court’s institutional role. And yet, the Court’s previous institutional boundary-pushing might leave it constrained at the very moment when it might appropriately act to protect foundational principles of Union law. However, given that any future safeguard is likely to arise unilaterally from individual Member States, by means of justifiable indirect discrimination, the CJEU will be able to present the safeguard as in-line with its own jurisprudence. Startlingly then, the re-emergence of the safeguard might fail on both fronts, since it would present genuine obstacles to the free movement and equal treatment rights of Union citizens, while doing little to address Union citizenship’s ongoing existential crisis.

1. The Bratislava Declaration, 16 September 2016, Statement 517/16 (Institutional Affairs), 1 [↑](#footnote-ref-1)
2. *Ibid* [↑](#footnote-ref-2)
3. Statement of EU Leaders and the Netherlands Presidency on the Outcome of the UK Referendum, 24 June 2016, Press Release 381/16 (Institutional Affairs) [↑](#footnote-ref-3)
4. At the time of writing, the UK Prime Minister Theresa May has indicated the government’s plan to trigger Article 50 TEU proceedings in March 2017 and the UK’s intention to leave the single market whilst seeking a bespoke deal on the customs union. However, the Government has yet to indicate how this might be achieved in practice. The Italian prime minister Matteo Renzi resigned in December 2016, following defeat in a constitutional referendum, which, for some, represented a wider opportunity for Eurosceptic parties to present their political alternative; Austria elected left-leaning President Alexander Van der Bellen over far-right, anti-immigration and anti-EU candidate Norbert Hofer; Marine le Penn, of Le Front National, prepares for the French presidential elections. [↑](#footnote-ref-4)
5. Though others emerge from the other legal mechanisms borne in response to other EU ‘crises’, such as the European Stability Mechanism. See M Ruffert, ‘The European Debt Crisis and European Union Law’, (2011) 48 *CML Rev* 1777 [↑](#footnote-ref-5)
6. European Council Meeting (18th/19th February 2016), Brussels, 19th February 2016, EUCO 1/16, 1 [↑](#footnote-ref-6)
7. Decision of the Heads of State or Government meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex I to the Conclusions of the European Council Meeting (18th/19th February 2016), Brussels, 19th February 2016, EUCO 1/16, 8 [↑](#footnote-ref-7)
8. European Council, (note 7), 23 [↑](#footnote-ref-8)
9. European Council, (note 7), 23 [↑](#footnote-ref-9)
10. European Council (note 7), 23 [↑](#footnote-ref-10)
11. European Council, (note 7), 19 [↑](#footnote-ref-11)
12. European Council, (note 6), 1-2 [↑](#footnote-ref-12)
13. Arts.18 and 21 TFEU respectively [↑](#footnote-ref-13)
14. Reg No.492/2011 of the European Parliament and Council of 5th April 2011 on freedom of movement for workers within the Union, OJ L141/1 [↑](#footnote-ref-14)
15. In the form of Art.7 Reg No 1612/68 of the Council of 15 October 1968 on freedom movement of workers in the Community, OJ L257/2 [↑](#footnote-ref-15)
16. Case 207/78 *Even* ECLI:EU:C:1979:144, para.21 [↑](#footnote-ref-16)
17. European Council, (note 7), 21 [↑](#footnote-ref-17)
18. K Sorensen, ‘Reconciling secondary legislation with the Treaty rights of free movement’, (2011) 36 *ELRev* 339; G Davies, ‘Legislative Control of the European Court of Justice’ (2014) 51 *CMLRev* 1579; T Horsley, ‘Institutional Dynamics Reloaded: The Court of Justice and the Development of the Internal Market’, in P Koutrakos and J Snell (eds), *Research Handbook on EU Internal Market Law*, (Cheltenham, Elgar, forthcoming) [↑](#footnote-ref-18)
19. Case 15/83 *Denkavit* ECLI:EU:C:1984:183 [↑](#footnote-ref-19)
20. Joined Cases 80/77 and 81/77 *Ramel* ECLI:EU:1978:87; Case C-363/93 *Lancry* ECLI:EU:C:1994315 [↑](#footnote-ref-20)
21. Case 128/89 *Commission v Italy* ECLI:EU:C:1990:311 [↑](#footnote-ref-21)
22. Case C-200/02 *Chen* ECLI:EU:C:2004:639; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124; Case C-120/95 *Decker* ECLI:EU:C:1998:167 [↑](#footnote-ref-22)
23. Case C-380/03 *Germany v Parliament and Council* ECLI*:*EU:C:2006:772 [↑](#footnote-ref-23)
24. Horsley, (Institutional dynamics) [↑](#footnote-ref-24)
25. Case 15/83 *Denkavit* ECLI:EU:C:1984:183; Case C-51/93 *Meyhui* ECLI:EU:C:1994:312 [↑](#footnote-ref-25)
26. Ibid [↑](#footnote-ref-26)
27. European Council, (note 7), 19 [↑](#footnote-ref-27)
28. Sorensen, (Secondary legislation), 355 [↑](#footnote-ref-28)
29. Case C-299/02 *Commission v Netherlands* ECLI:EU:C:2004:620, para.24 [↑](#footnote-ref-29)
30. Case 10/73 *Rewe Zentral AG v Hauptzollamt Kehl* ECLIEU:C:1973:111; Case 136/77 *Racke* ECLI:EU:C:1978:114 [↑](#footnote-ref-30)
31. European Council, (note 7), 23 [↑](#footnote-ref-31)
32. C-193/94 *Skanavi* ECLI:EU:C:1996:70; in Case C-236/09 *Test Achats* ECLI:EU:C:2011:100, the Court found a provision of a Directive to be invalid because the permission it granted to discriminate on grounds of sex for a set period, contrary to Arts.21 and 23 CFR, could be renewed *indefinitely*. [↑](#footnote-ref-32)
33. Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449, para.52 [↑](#footnote-ref-33)
34. *Ibid*; c.f. Case C-413/99 *Baumbast* ECLI:EU:C:2002:493 [↑](#footnote-ref-34)
35. European Council, (note 7), 34 [↑](#footnote-ref-35)
36. Joined Cases 80/77 and 81/77 *Ramel* [↑](#footnote-ref-36)
37. Case C-363/93 *Lancry* [↑](#footnote-ref-37)
38. Regulation No 1408/71 of the Council of 14th June 1971 on the application of social security schemes to employed persons and their family members moving within the Community, OJ L149/02 (repealed) [↑](#footnote-ref-38)
39. Case 41/84 *Pinna* ECLI:EU:C:1986:1, para.21 [↑](#footnote-ref-39)
40. See also Case 20/85 *Roviello* ECLI:EU:C:1988:283 [↑](#footnote-ref-40)
41. Case C-236/09 *Test Achats*; Case C-34/10 *Brüstle* ECLI:EU:C:2011:669; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238. For analysis contrasting the Court’s approach to competence control and fundamental rights review, see Horsley (Institutional dynamics) [↑](#footnote-ref-41)
42. E.g. Annex VI, Treaty of Accession of Bulgaria and Romania (2005) OJ L157/11 [↑](#footnote-ref-42)
43. Case C-193/94 *Skanavi*; Case C-299/02 *Commission v Netherlands* ECLI:EU:C:2004:620 [↑](#footnote-ref-43)
44. Case 128/89 *Commission v Italy* [↑](#footnote-ref-44)
45. Davies, (Legislative control), 1591 [↑](#footnote-ref-45)
46. Case C-22/08 *Vatsouras* ECLI:EU:C:2009:344 [↑](#footnote-ref-46)
47. Case C-138/02 *Collins* ECLI:EU:C:2004:172 [↑](#footnote-ref-47)
48. Case C-200/02 *Chen* [↑](#footnote-ref-48)
49. Case C-34/09 *Ruiz Zambrano* [↑](#footnote-ref-49)
50. In *Chen* because the mother was not dependent on the child; in *Ruiz Zambrano* because the Union citizen had not crossed an intra-EU border. [↑](#footnote-ref-50)
51. Case C-120/95 *Decker* [↑](#footnote-ref-51)
52. Case C-333/13 *Dano* ECLI:EU:C:2014:2358;Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436 [↑](#footnote-ref-52)
53. Case C-67/14 *Alimanovic* ECLI:EU:C:2017:597; Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114 [↑](#footnote-ref-53)
54. Ibid [↑](#footnote-ref-54)
55. European Council, (note 7), 21 [↑](#footnote-ref-55)
56. European Council, (note 7), 20 [↑](#footnote-ref-56)
57. Case 41/84 *Pinna;* Case 20/85 *Roviello* [↑](#footnote-ref-57)
58. Case C-2/90 *Commission v Belgium* (*Walloon Waste)* ECLI:EU:C:1992:310 [↑](#footnote-ref-58)
59. C-308/14 *Commission v UK* [↑](#footnote-ref-59)
60. Case C-308/14 *Commission v UK*, paras.78-79 [↑](#footnote-ref-60)
61. *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11 [↑](#footnote-ref-61)
62. Case C-73/08 *Bressol* ECLI:EU:C:2010:181 [↑](#footnote-ref-62)
63. *Patmalniece,* paras.63-65 [↑](#footnote-ref-63)
64. Quoted at para.76. [↑](#footnote-ref-64)
65. Para.77 [↑](#footnote-ref-65)
66. Para.79 [↑](#footnote-ref-66)
67. Case C-308/14 *Commission v UK* (Opinion) ECLI:EU:C:2016:666, para.76 [↑](#footnote-ref-67)
68. Case C-333/13 *Dano,* para.77 [↑](#footnote-ref-68)
69. *Patmalniece*, para.72 [↑](#footnote-ref-69)
70. Case C-85/96 *Martinez Sala* ECLI:EU:C:1998:217; Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 [↑](#footnote-ref-70)
71. Case C-456/02 *Trojani* ECLI:EU:C:2004:488 [↑](#footnote-ref-71)
72. Consider the need for support for ‘temporary hardship’ in *Grzelczyk* [↑](#footnote-ref-72)
73. See also Case C-140/12 *Brey* ECLI:EU:C:2013:565 or within UK domestic jurisprudence *Okafor v SSHD* [2011] EWCA Civ 499. For analysis, see D Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’, (2015) 52 *CML Rev* 17 [↑](#footnote-ref-73)
74. Eg in Case C-67/14 *Alimanovic* and Case C-299/14 *García-Nieto* [↑](#footnote-ref-74)
75. J Shaw, ‘EU Citizenship and Political Rights in an Evolving European Union’, (2007) 75 *Fordham Law Review* 2549 [↑](#footnote-ref-75)
76. Case C-60/00 *Carpenter* ECLI:EU:C:2002:434 [↑](#footnote-ref-76)
77. Case C-148/02 *García-Avello* ECLI:EU:C:2003:539 [↑](#footnote-ref-77)
78. Treaty of Accession of Romania and Bulgaria, (note 42) [↑](#footnote-ref-78)
79. European Council, (note 7), 34 [↑](#footnote-ref-79)
80. Case C-138/02 *Collins* [↑](#footnote-ref-80)
81. Para.62. Interestingly, by contrast, the Court held at paras.26-33 that jobseekers were not workers for the purposes of equal access to social and tax advantages under Article 7, Reg No 1612/68 [↑](#footnote-ref-81)
82. Para.73 [↑](#footnote-ref-82)
83. Case C-22/08 *Vatsouras* [↑](#footnote-ref-83)
84. Case C-213/05 *Geven* ECLI:EU:C:2007:438; Case C-212/05 *Hartmann* ECLI:EU:C:2007:437 [↑](#footnote-ref-84)
85. For discussion, see M Everson, ‘The Legacy of the Market Citizen’*,* in J Shaw and G More (eds), *New Legal Dynamics of European Union*, (Oxford, OUP 1995), 73 [↑](#footnote-ref-85)
86. C O’Brien, ‘I Trade, Therefore I Am: Legal Personhood in the European Union’.(2013)50 *CML Rev* 1643; N Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move On?’ (2002) 39 *CML Rev* 731 [↑](#footnote-ref-86)
87. Eg Reg 492/2011 and Dir 2004/38 and their previous incarnations; Case 32/75 *Cristini*; Case 207/87 *Even*; Opinion of AG Trabucchi Case 7/75 *Mr and Mrs F* ECLI:EU:C:1975:75; Case C-237/94 *O’Flynn* ECLI:EU:C:1996:206 [↑](#footnote-ref-87)
88. In 1961, the Commission already recognised free movement as ‘*le premier aspect d’une citoyenneté européenne*’, P.E. Deb., No.48, 135. 22 November 1961 [↑](#footnote-ref-88)
89. Case 186/87 *Cowan* ECLI:EU:C:1989:947 [↑](#footnote-ref-89)
90. Case C-158/96 *Kohll* ECLI:EU:C:1998:171; Case C-368/98, *Vanbraekel* *a.o.* ECLI:EU:C:2001:400. For discussion, see N Nic Shuibhne and M Maci, ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case-Law’ (2013) 50 *CML Rev*, 965 [↑](#footnote-ref-90)
91. Case C-456/02 *Trojani;* Case C-333/13 *Dano*  [↑](#footnote-ref-91)
92. Case C-213/05 *Geven;* Case C-212/05 *Hartmann* [↑](#footnote-ref-92)
93. Case 53/81 *Levin* ECLI:EU:C:1982:105; Case 139/85 *Kempf* ECLI:EU:C:1986:223 [↑](#footnote-ref-93)
94. N Nic Shuibhne, ‘The Outer Limits of EU Citizenship Displacing Economic Free Movement Rights?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law*, (Oxford, Hart, 2009), 167, 182 [↑](#footnote-ref-94)
95. Case C-542/09 *Commission v Netherlands* ECLI:EU:C:2012:346 [↑](#footnote-ref-95)
96. Para.65 [↑](#footnote-ref-96)
97. Para.66 [↑](#footnote-ref-97)
98. And, as S Schmidt argues in this volume, renews pressure on *national* political institutions to act. ‘Extending Citizenship Rights and Losing it All: Brexit and the Perils of Over-Constitutionalisation’, Ch.?, p.? (currently p.16) [↑](#footnote-ref-98)
99. Eg A Follesdal and S Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533 [↑](#footnote-ref-99)
100. D Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’, (2015) 21 *ELJ* 460 [↑](#footnote-ref-100)
101. Ibid, 464 [↑](#footnote-ref-101)
102. Grimm, (Democratic costs), 464 [↑](#footnote-ref-102)
103. Schmidt, (Over-constitutionalisation), currently p.2 [↑](#footnote-ref-103)
104. Case 6/64 *Costa* ECLI:EU:C1964:66*;* Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 [↑](#footnote-ref-104)
105. Eg Case 8/74 *Dassonville* ECLI:EU:C:1974/82; Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:43*,* Case C-55/94 *Gebhard* ECLI:EU:C:1995:411 [↑](#footnote-ref-105)
106. Consider, particularly, the more programmatic nature of the free provision of services and establishment under Arts 59 and 52 EEC [↑](#footnote-ref-106)
107. Grimm, (Democratic costs), 467; see also Schmidt, (Over-constitutionalisation), [currently] p.1 [↑](#footnote-ref-107)
108. Case C-341/05 *Laval* ECLI:EU:C:2007:809; Case C-346/06 *Rüffert* ECLI:EU:C:2008:189 and Case C-319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350 [↑](#footnote-ref-108)
109. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L18/1. [↑](#footnote-ref-109)
110. Eg EP Decision of the Committee Responsible, 2nd reading, COD/1991/0346, 24/07/1996, ‘The aim is to eliminate unfair competition by ensuring that “posted” workers do not receive lower wages and are not subject to less favourable working conditions in the member state concerned’; C. Barnard, ‘Social Dumping or Dumping Socialism’ (2008) 67 *CLJ* 262 [↑](#footnote-ref-110)
111. Case C-341/05 *Laval*, para.101 [↑](#footnote-ref-111)
112. Davies, (Legislative control), 1583 [↑](#footnote-ref-112)
113. Proposal for a Council Regulation on the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final; Commission Decision to withdraw the proposal: <http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/letter_to_nal_parl_en.htm> [↑](#footnote-ref-113)
114. Case C-184/99 *Grzelczyk*. [↑](#footnote-ref-114)
115. Case C-413/99 *Baumbast* [↑](#footnote-ref-115)
116. Davies, (Legislative control), 1598 [↑](#footnote-ref-116)
117. Davies, (Legislative control), 1599 [↑](#footnote-ref-117)
118. Compare pre-Dir 2004/38 Case C-209/03 *Bidar* ECLI:EU:C:2005:169 with post-Dir 2004/38 Case C-158/07 *Förster* ECLI:EU:C:2008:630 [↑](#footnote-ref-118)
119. Davies, (Legislative control), 1601 [↑](#footnote-ref-119)
120. Case C-200/02 *Chen*; Case C-34/09 *Ruiz Zambrano* [↑](#footnote-ref-120)
121. Compare and contrast also the requirements arising re: cross-border health case in Case C-102/95 *Decker* with Reg No 1408/71 [↑](#footnote-ref-121)
122. Grimm, (Democratic costs) 470; see also Schmidt, (Over-constitutionalisation) [↑](#footnote-ref-122)
123. Davies, (Legislative control), 1597; also Grimm (Democratic costs), 464 [↑](#footnote-ref-123)
124. Davies, (Legislative control), 1605 [↑](#footnote-ref-124)
125. See Schmidt, (Over-constitutionalisation), [currently] p.10 [↑](#footnote-ref-125)
126. M Blauberger and S Schmidt, ‘Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits’, (2014) *Research and Politics*, 1, 6 [↑](#footnote-ref-126)
127. See S Currie, *Migration, Work and Citizenship in the Enlarged European Union*, (Cornwall, Ashgate 2008) 45; Eurofound Report, ‘Social Dimension of intra-EU Mobility: Impact on Public Services’, December 2015 [↑](#footnote-ref-127)
128. Remain campaign materials on immigration tended to focus on the renegotiation or on the fact the exit would not lower immigration levels, rather than on the advantages of free movement e.g. [https://d3n8a8pro7vhmx.cloudfront.net/in/pages/688/attachments/original/1467881907/BSIE\_A5\_LEAFLETS\_(MYTH)\_v15\_PRINT.pdf?1467881907](https://d3n8a8pro7vhmx.cloudfront.net/in/pages/688/attachments/original/1467881907/BSIE_A5_LEAFLETS_%28MYTH%29_v15_PRINT.pdf?1467881907) . The Leave campaign was more explicit, asking voters to imagine what the UK would be like when poorer countries join the EU, given the purported strain the UK was already under. That campaign also focused on the perceived powered of the CJEU to dictate who could enter the country: <http://www.voteleavetakecontrol.org/why_vote_leave.html> [↑](#footnote-ref-128)
129. See also Schmidt, (Over-constitutionalisation), [currently] p.15, who also argues that the constraints of over-constitutionalisation were particularly prominent within the UK legal system [↑](#footnote-ref-129)
130. (Opinion) Case C-456/02 *Trojani* ECLI:EU:C:2004:112, paras.13 and 18 [↑](#footnote-ref-130)
131. Para.18 [↑](#footnote-ref-131)
132. European Council, (note 7), 19 [↑](#footnote-ref-132)
133. For Schmidt, (note 98), this is case of ‘too little too late’, in terms of judicial response to the will of political actors, (note 98) currently p.9 [↑](#footnote-ref-133)
134. Eg Case C-333/13 *Dano*, para.76 [↑](#footnote-ref-134)
135. Blauberger and Schmidt (Welfare migration) [↑](#footnote-ref-135)
136. Individuals not meeting the UK’s minimum earnings threshold must provide additional evidence that their work is ‘genuine and effective’. For discussion of other administrative hurdles facing EU citizens in the UK, see Schmidt (Over-constitutionalisation), [currently] pp.13-14 [↑](#footnote-ref-136)
137. See the UK’s ‘right to reside’ test, found to be lawful in Case C-308/14 *Commission v UK* [↑](#footnote-ref-137)
138. Grimm (Democratic costs), 464 [↑](#footnote-ref-138)
139. Bratislava Declaration, (note 1), 1 [↑](#footnote-ref-139)
140. Bratislava Declaration, (note 1), 2 [↑](#footnote-ref-140)
141. Proposal for a Regulation of the European Parliament and Council amending Regulation No 883/2004 on the coordination of social security systems, COM(2016) 815 final, 12 [↑](#footnote-ref-141)
142. Eg an association of German cities stated in 2013 that low-qualified migrants without sufficient financial means and health insurance were becoming an increasing burden for several municipalities, Blauberger and Schmidt (Welfare migration), 5 [↑](#footnote-ref-142)
143. Law of 22 December 2016, [German] Federal Law Gazette 2016 I, No. 65, 3155 [↑](#footnote-ref-143)
144. N Neilsen, ‘Austria wants to discriminate against EU workers’, EUObserver, 12 January 2017 [↑](#footnote-ref-144)
145. <http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s3155.pdf> [↑](#footnote-ref-145)
146. European Council, (note 7), 22 [↑](#footnote-ref-146)
147. Specifically, Reg 883/2004 in Case C-140/12 *Brey*;Case C-333/13 *Dano* [↑](#footnote-ref-147)
148. Ibid [↑](#footnote-ref-148)
149. Case C-542/09 *Commission v Netherlands* [↑](#footnote-ref-149)
150. Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13 [↑](#footnote-ref-150)
151. C. O’Brien, ‘Why the Emergency Brake on Migrants; Benefits is Sexist’, The Conversation, 4February 2016 [↑](#footnote-ref-151)
152. Currie, (Migration), ch.3 [↑](#footnote-ref-152)
153. M Dougan, ‘The Constitutional Dimension to the Case-Law on Union Citizenship’, (2006) 31 *ELRev* 613, 622 [↑](#footnote-ref-153)
154. Case C-14/12 *Brey* [↑](#footnote-ref-154)
155. Though, in the context of non-economically active Union citizens, even this requirement is increasingly side-lined: Case C-333/13 *Dano;* Case C-67/14 *Alimanovic* [↑](#footnote-ref-155)
156. K Puttick, ‘EEA Workers’ Free Movement and Social Rights after *Dano* and *St Prix*: Is a Pandora’s Box of New Economic Integration and ‘Contribution’ Requirements Opening?’ (2015) 37 *Journal of Social Welfare and Family Law*, 253 [↑](#footnote-ref-156)
157. And creates a window for restrictions on access to employment, as reported by Neilsen (note 144) [↑](#footnote-ref-157)
158. Horsley, (Institutional dynamics), 941; 960 [↑](#footnote-ref-158)
159. Davies, (Legislative control), 1586 [↑](#footnote-ref-159)