**National Welfare Systems, Residency Requirements and EU Law: Some Brief Comments**

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The papers brought together in this special issue offer a wealth of insights into the national welfare systems and their interactions with EU law. In particular, they explore and illuminate one of the key tensions in the field. On the one hand, territoriality is a central feature of many national welfare systems – especially when it comes to non-contributory benefits, where qualification based on residency (whether of greater or lesser duration) plays a crucial role in delimiting the financial and moral limits of a given society’s responsibilities towards the vulnerable. On the other hand, such residency requirements run into potential conflict with the free movement and equal treatment rights of migrant Union citizens. Given the significant expansion in the personal and material scope, and indeed in the sheer geographical reach, of those EU law rights, the potential for conflict has been exacerbated in two main categories of situation: access by economically inactive persons to non-contributory welfare support within a host state; and the potential to export public benefits from the home state to another territory. Moreover, that tension must be played out within an unusually complex legal framework: without even thinking about the often mind-boggling technical labyrinth of national social security regulations, the EU legal space is occupied by a matrix of Treaty provisions, secondary legislation and case law which (often clumsily) divides migrant citizens into different categories possessed of highly variegated rights.[[1]](#footnote-1)

The legal position is further complicated by the growing political tensions surrounding the question of EU law and the national welfare systems. As the papers in this collection demonstrate, the debates certainly differ from country to country. But in some Member States for sure, the highly charged issue of immigration is widely understood as a direct threat to the sustainability of the national welfare model. Immigration in this context is not limited to the unprecedented numbers of third country nationals entering the Union – whether as economic migrants or as those in need of bona fide international protection – but also focuses on the free movement of fellow EU citizens. Furthermore, it is not only the situation of the economically inactive Union citizen that attracts negative attention; even the movement of workers, who undoubtedly contribute to the economy and treasury yet might also make certain claims upon the public purse of the host state, has become a focus for critical debate – especially since the experience of enlargement into central and eastern Europe.

Even if the actual evidence to support such concerns is often decidedly flimsy, that does not stop the public discourse adopting the tone of a primarily moral debate: which categories of the vulnerable should we feel obliged to support and what welfare duties do we really owe to foreigners? It also becomes increasingly difficult to disentangle the debate on migration from the wider political culture of austerity during and following the financial crisis and its consequent sovereign debt crisis across the Union and particularly within the Eurozone: in many Member States, restricting welfare support, including and maybe even especially for migrants, has become an integral part of the agenda for “modernising” the national welfare system, without it being obvious which is the cause and which the effect.

Against that background, one should add that the EU legal framework is also evolving both rapidly and unclearly – not least when it comes to the decisive role played by the European Court of Justice. Judgments such as *Brey*, *Dano* and *Alimanovic* signal a more accommodating judicial attitude towards Member State attempts to limit the impact of free movement and equal treatment rights upon national welfare schemes – especially when it comes to issues surrounding the access by economically inactive citizens to non-contributory benefits within a host society.[[2]](#footnote-2)

Before those judgments, it seemed tolerably clear that economically inactive migrants would enjoy a right to residency under EU law conditional upon certain requirements (the possession of sufficient resources and of comprehensive health insurance) which were nevertheless to be policed by the host state in accordance with the principle of proportionality, so that the true test was not simply whether an individual sought access to public support but did so in a manner that would render him / her an unreasonable burden upon the host society.[[3]](#footnote-3) Almost as a separate legal proposition, economically inactive migrants also enjoyed a right to equal treatment under EU law as regards all matters falling within the scope of the Treaties, though when it came to indirectly discriminatory restrictions on access to welfare – precisely such as residency conditions – the host state was entitled to insist that the claimant had a real link to its society. Again, however, that requirement was to be enforced having due regard to the principle of proportionality – which often meant that residency alone was not to be treated as a decisive criterion but only one factor in an overall assessment of the claimant’s personal circumstances.[[4]](#footnote-4) Those rights to residency and equal treatment met at an unusual “Catch 22” junction: the claimant’s exercise of his / her right to equal treatment might eventually render them an unreasonable burden upon the host society and entitle the Member State to order their expulsion from its territory. But for so long as the claimant was treated by the Member State as entitled to remain within its borders, even if this was little more than a matter of administrative inaction, the right to equal treatment would persist – thus facing the Member State with a corresponding dilemma, i.e. whether to actively pursue the removal of migrant Union citizens who no longer fulfilled the requirements for lawful residency under EU law itself.[[5]](#footnote-5)

In the light of *Brey*, *Dano* and *Alimanovic*, the Court seems to be moving closer to a legal framework under which the Treaty-based rights to residency and equal treatment are more closely aligned and inter-linked together. In order to enjoy the right to equal treatment under EU law, a claimant must also enjoy a right to residency under EU law. Furthermore, when it comes to assessing both the unreasonableness of any burden posed by the welfare claims of an economically inactive migrant (for the purposes of determining their right to reside) and the existence of a real link between a claimant and their host society (when it comes to assessing the proportionality of national restrictions on public support), the Court appears to be moving away from a truly individualised assessment through the principle of proportionality, in favour of greater deference towards the regulatory choices laid down by the Union legislature in measures such as Directive 2004/38 and Regulation 883/2004 and thus towards the bald residency conditions employed by Member States within their national welfare systems.[[6]](#footnote-6) And crucially, the avenue of falling back on residence merely as a matter of national law, as a means of continuing to enjoy equal treatment rights unless and until the Member State proactively seeks expulsion, is rapidly shutting down: the terms of the “Catch 22” dilemma have changed, and not in the migrant’s interests, since they might well be faced with the stark choice of either leaving the territory altogether or instead falling into utter destitution.

As the papers brought together in this special issue demonstrate, the Court’s latest case law is already provoking a rapid response in various Member States. But will a more restrictive approach to the residency and equal treatment rights of the economically inactive be enough to quell the political clamour over free movement and welfare across the Union?

The UK position may be an extreme one, but it is not the only Member State to argue the case for more far-reaching reforms, even if none of the others have gone so far as to make this a high profile issue in an imminent public choice about whether to remain within the Union at all. The Prime Minister’s terms for renegotiating the UK’s membership, published on 10th November 2015, contain various demands to limit and indeed reduce immigration from the rest of the EU into the UK – on the supposed grounds that the UK benefits system exerts too great a draw across Europe and has led to free movement on an unsustainable scale.[[7]](#footnote-7) Although the details remain sketchy, the UK’s demands essentially reflect the 2015 election manifesto pledges of the Conservative Party: that EU nationals must live and work in the UK for four years before qualifying for in-work benefits or social housing; and that we should cease the exportation of child benefit for non-resident family members in accordance with Article 67 of Regulation 883/2004.[[8]](#footnote-8) The reaction of other Member States to these demands will partly depend on precisely what the UK wants: for example, is it asking for special treatment, to exercise powers that would directly derogate from existing Treaty obligations and probably require the amendment of primary EU law; or for changes to Union secondary legislation that would impose or allow new restrictions on residence, equal treatment or exportation across every Member State; or merely for high-level political endorsement of essentially national measures that would indirectly discriminate against EU migrants while also affecting certain UK nationals as well?

Many will find it almost surreal that the continued membership status of a major nation could possibly depend, to any appreciable degree, upon securing a technical deal that would restrict access to certain benefits by certain migrants. But it is surely a sign of how sour the Union’s well-intended aspirations can turn when confronted by the political dynamics churned up within a Member State in the light of its own political, economic and social experience and given the specific legal and budgetary construction of its own welfare system. As these papers remind us so well, the general framework of EU law and the debates we can theorise about at the EU level acquire much more acute and diverse, even contradictory, realities when located within their national contexts.

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   From a vast literature, e.g. A P van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003); M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing, 2005); A Iliopoulou, *Libre circulation et non-discrimination, éléments du statut de citoyen de l’Union européenne* (Bruylant, 2007); U Neergaard, R Nielsen and L Roseberry (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (DJØF Publishing, 2009). [↑](#footnote-ref-1)
2. Case C-140/12, *Brey,* EU:C:2013:565; Case C-333/13, *Dano,* EU:C:2014:2358; Case C-67/14, *Alimanovic*, EU:C:2015:597. [↑](#footnote-ref-2)
3. Consider, e.g. Case C-184/99, *Grzelczyk,* EU:C:2001:458; Case C-413/99, *Baumbast*,EU:C:2002:493. [↑](#footnote-ref-3)
4. Consider, e.g. Case C-224/98, *D’Hoop*, EU:C:2002:432; Case C-138/02, *Collins*, EU:C:2004:172; Case C-209/03, *Bidar,* EU:C:2005:169. [↑](#footnote-ref-4)
5. Consider, e.g. Case C-85/96, *María Martínez Sala*, EU:C:1998:217; Case C-456/02, *Trojani*, EU:C:2004:488. [↑](#footnote-ref-5)
6. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77; Regulation 883/2004 on the coordination of social security systems, OJ 2004 L166/1. For an earlier example of such deference, concerning restrictions on equal treatment for migrant students, consider Case C-158/07, *Förster*, EU:C:2008:630. [↑](#footnote-ref-6)
7. The full text of the Prime Minister’s letter to the President of the European Council is available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf>. [↑](#footnote-ref-7)
8. Conservative Party, “Strong Leadership. A Clear Economic Plan. A Brighter, More Secure Future” (2015) available via <https://www.conservatives.com/manifesto>. [↑](#footnote-ref-8)