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EUROPEAN CITIZENSHIP

and the Constitutionalisation of the European Union

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and the constitutionalisation of the European Union

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ABBREVIATIONS

AJIL	American Journal of International Law
CJCEL	Columbia Journal for European Constitutional Law
CJEL	Colombian Journal of European Law
CML Rev.	Common Market Law Review
CRISPP	Critical Review of International Social and Political Philosophy
ECL Rev.	European Constitutional Law Review
EJLS	European Journal of Legal Studies
ELJ	European Law Journal
EJML	European Journal of Migration and Law
EL Rev.	European Law Review
EPL	European Public Law
ER	Europa Recht
FL Rev.	Fordham Law Review
HILJ	Harvard International Law Journal
HLR	Hanse Law Review
IJCL	International Journal of Constitutional Law
JCMS	Journal of Common Market Studies
JEPP	Journal of European Public Policy
JSP	Journal of Social Philosophy
LCP	Law and Contemporary Problems
LIEI	Legal Issues of Economic Integration
MJECL	Maastricht Journal of European and Comparative Law
MLR	The Modern Law Review
NTER	Nederlands Tijdschrift voor Europees recht
OJLS	Oxford Journal of Legal Studies
REALaw	Review of European Administrative Law
SEW	SEW Tijdschrift voor Europees en Economisch Recht

TDS	Teoria del Diritto e dello Stato
UJIEL	Utrecht Journal of International and European Law
YEL	Yearbook of European Law
YLJ	Yale Law Journal

"Nous ne coalisons pas des Etats,
nous unissons des hommes."[1]

CHAPTER 1

Introduction: The role of European citizenship in the constitutionalisation of the European Union

1.1 CONTEXT OF THE RESEARCH

It has been 20 years since Union citizenship was introduced under the Treaty of Maastricht, yet it remains a topical and contemporary issue. The year 2013, in which this PhD thesis was finalised, has been designated the European Year of Citizens, "to enhance awareness and knowledge of the rights and responsibilities attached to Union citizenship."[2] In the past two decades, European citizenship and its impact have been the topic of debate in rather voluminous academic literature.[3] These contributions focussed on subjects such as political rights, social rights, the scope of these rights and the interaction with national policy areas and more recently the constitutional consequences of European citizenship. In the present thesis the constitutional impact of European citizenship is analysed in a horizontal way, to explore the role of EU citizenship in the constitutionalisation of the European Union. To this end, the different aspects of European citizenship are specifically linked within a constitutional context. In this thesis it will be assessed whether the introduction of, and the case law and legislation on European citizenship have affected the system and nature of the European Union.

Ever since its introduction in the Treaty of Maastricht, the concept of European citizenship has been criticised from different angles, either as being too weak, or as being too intrusive. Weiler stated in 1998 that "the Citizenship clause in the TEU is little

1 "We are not uniting states, we are uniting men." Speech by Mr Jean Monnet at the National Press Club, Washington DC, 30 April 1952, French version accessible on http://aei.pitt.edu/14364/.

2 Decision No. 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013), OJ 23/11/2012, L 325/1.

3 E.g., but not limited to, Closa (1992), Closa (1995), O'Leary (1997), Jacqueson (2002), Dougan (2006), Shaw (2007) (a), Spaventa (2008), Borgmann-Prebil (2008), Schrauwen (2008), Nic Shuibhne (2010), Shaw (2011), Eijsbouts (2011), Dougan (2012), Lenaerts (2012) (a), Barnard (2013).

more than a cynical exercise in public relations."[4] Others have stressed that European citizenship case law of the Court of Justice of the European Union (the Court or Court of Justice), after 1998, exceeded the limits of Union law.[5] In national media, and in policies and documents of European institutions, Union citizenship has been a topical theme. In the case law of the Court, many Member States intervene in cases concerning Union citizenship. The initial fear, at its introduction, that Union citizenship would only be of symbolic value, that Union citizenship would be nothing more than pie in the sky, has proved unfounded. In contrast, European citizenship case law has, today, even been criticised as being too intrusive in national policies.

In the present context of the developments within the European Union, European citizenship is not only perceived positively, but is also seen as a threat to welfare and national sovereignty. Moreover, the economic crisis did not bring the EU citizen closer to the European Union. On the contrary, individuals seem to feel closer to their own Member States. As Jo Shaw emphasised: "In practice, under the current conditions, where the edges of Europe seem to threaten in ever more immediate ways the very core of the integration project, the presence of a concept of citizenship at the supranational level is more likely to be seen as a provocation and a threat to the continued existence and relevance of the Member States, under whose protective umbrella (however leaky) citizens still want to take refuge in times of crisis."[6]

According to a report of the European Commission on European citizenship, awareness of the relevant specific legal rights is lacking. Of the 500 million European citizens only a small percentage seem to exercise their rights as Union citizens and are acquainted with the rights attached to the status of European citizenship.[7] The Eurobarometer Spring 2013 reveals that a majority of 53% Europeans feel that they do not know their rights as citizens of the European Union.[8] The Commission has placed raising awareness of the legal consequences of Union citizenship and the removal of obstacles to exercise Union citizens' rights high on its agenda.[9]

Being aware of this broader context, of the criticism on the concept of European citizenship, this thesis wants to provide a legal view on the constitutionality of European citizenship. Not only may European citizenship, despite its weaknesses, be regarded constitutional in nature, it can also be stated that the European Union is constitutionalising under the influence of European citizenship.

1.2 RESEARCH QUESTION

In this broader context of European citizenship it has become clear that in practice the European Union and European citizenship in particular are not, unanimously, embraced

4 Weiler (1998) (b), p. 10.
5 Hailbronner (2005), pp. 1263-1264.
6 Shaw (2012), p. 14.
7 EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights, COM (2010)206.
8 Standard Eurobarometer 79, European citizenship – Spring 2013, p. 35, available on http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_citizen_en.pdf, last accessed 5 December 2013).
9 EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights, COM (2010)206 and Progress towards Effective EU Citizenship 2011-2013, COM (2013)270 final and EU Citizenship Report 2013 EU citizens: Your Rights, Your Future, COM (2013)0269 final.

by the nationals of the Member States. Nevertheless, the legal picture of European citizenship may just reveal that much more is to be disclosed in terms of the legal effects of European citizenship. The main question of this thesis is:

How does European citizenship affect the process of constitutionalisation of the European Union?

This research question implies that European citizenship is of a constitutional nature and affects the characteristics of the European Union, transforming from an international organisation cooperating on economic aims towards a more constitutional legal order.[10] Constitutionalisation of the European Union is regarded as the process in which the European Union acquires more features that are commonly found in a constitution, and which is explored through the prism of four constitutional elements.

The main research question of the present thesis is triggered by, at least, three different aspects.

In the first place, European citizenship is a transnational form of citizenship, which on the one hand rests on familiar concepts, but is, on the other hand, a new concept within European Union law.
Citizenship is a concept well-known in the context of national legal systems. It is a constitutional concept. From a national perspective, the status of being a citizen expresses the relation between an individual and the state. Citizens are equal members of the polity and have basic rights to protect them from arbitrary use of public power. These basic rights also constitute safeguards against threats to their freedom and equality.
The introduction of citizenship in the European Union was therefore a significant legal development.[11] It established a transnational concept of citizenship, in addition to the national citizenship of nationals of the Member States. The concept of citizenship in this relatively new legal order of the Union has its own meaning and dynamics compared to national citizenship. One of the important questions regarding this transnational form of citizenship is how to place this European citizenship in a constitutional context in the European Union.

In the second place, the Court of Justice proclaimed that European citizenship is "destined to be the fundamental status of nationals of the Member States."[12] The question up until the present is what exactly is meant by this qualification of Union citizenship as the destined fundamental status. It seems that the Court was initially inspired by Advocate General La Pergola, who stated in his Opinion in *Martínez Sala*:

10 Weiler (1991), pp. 2403-2483.
11 See also First Report from the European Commission on Citizenship of the Union COM(93)702, in which the Commission also refers to the constitutional status of the EU citizenship rights, p. 2.
12 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31, C-224/98, *D'Hoop* [2002] ECR I-06191, par. 28, C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 22, C-403/03, *Schempp* [2005] ECR I-06421, par. 15, C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 41.

> "Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way. Let us say that it is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union."[13]

The formulation of the Court is somewhat more careful in its wording "destined fundamental status", but it developed this phrase into a famous definition of Union citizenship in its case law.[14] The formulation seems to be used by the Court to legitimise case law favouring European citizens. Nowadays the language of the preamble of the Treaty and of the Charter of Fundamental Rights of the European Union (the Charter) expresses this destined fundamental status of Union citizens as well. The Charter emphasises that the individual is placed at the heart of the activities of the Union, referring to Union citizenship and to the creation of the Area of Freedom, Security and Justice.

The connotation that this 'fundamental status' may have is that it implies certain fundamental guarantees and rights, which should feature in a constitutional document, triggering the question of whether this status of Union citizens may also be placed within a constitutional context.[15] If European citizenship as such may be qualified as a constitutional feature of the European Union, as a (destined) fundamental status of nationals of the Member States, how does European citizenship relate to and affect the nature of the European Union?

In the third place, case law concerning European citizenship seems to produce constitutional effects, particularly in terms of changing the nature and scope of Union law and the scope of judicial review by the Court.[16] As expressed by Advocate General Cosmas in one of the first cases on Union citizenship,[17] the introduction of European citizenship in the Treaty marked a constitutional moment, rather than the sole extension of the internal market to individuals without a clear economic link with EU law. He stressed that the free movement of Union citizens

> "constitutes a goal in itself and is inherent in the fact of being a citizen of the Union, and is not merely a parameter of the common market, it does not merely have a different regulatory scope: it also, and primarily, differs in terms of the nature of the rights it bestows on individuals and the breadth of the guarantee that Community and national principles must accord it."[18]

13 Opinion Advocate General La Pergola in C-85/96, *Martínez Sala* [1998] ECR I-02691, par. 18.

14 Although the Court proclaimed this destined fundamental status of nationals of the Member States in *Grzelczyk* in the context of market citizenship, the Court has repeated this 'EU citizenship mantra' outside the scope of the internal market in more recent case law. Compare C-184/99, *Grzelczyk* [2001] ECR I-06193 and *Ruiz Zambrano* [2011] ECR I-01177.

15 On the fundamental status of EU citizenship and its constitutional and actual meaning also see Eijsbouts (2011).

16 Dougan (2006), p. 613.

17 C-378/97, *Wijsenbeek* [1999] ECR I-06207, paras 81-87.

18 Opinion of Advocate General Cosmas, C-378/97, *Wijsenbeek* [1999] ECR I-06207, par. 86.

From the assumption that European citizenship is constitutional in nature and that its meaning and content go beyond the four classic economic freedoms, the question arises to what extent Union citizenship contributes to constitutional processes in the Union. In this thesis, the constitutional effects of European citizenship within European constitutionalisation are analysed horizontally, focussing on the impact that EU citizenship has had on elements that are commonly found in constitutions.

Chapter 2 presents the analytical framework and the structure of this thesis. The analysis in Chapters 3 through 6 covers the four constitutional elements: the division of powers, common ideology, justiciability and hierarchy of norms. Chapter 3 addresses the vertical division of powers. Chapter 4 on fundamental rights and Chapter 5 on democracy analyse the existence of a common ideology. Chapter 6 combines the two elements of justiciability and constitutional primacy. Each chapter explores the related impact of European citizenship on the constitutionalisation of the European Union, to finally answer the main research question in Chapter 7.

"[T]o move towards Political Union […] radically changes the existing situation and requires the creation of an integrated common area in which the European citizen occupies a central and fundamental position"[1]

CHAPTER 2

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Analytical framework and structure

2.1 INTRODUCTION TO THE ANALYTICAL FRAMEWORK

2.1.1 Context of research and main research question

In this thesis two developments in European Union law are connected: The development of constitutionalisation of the European Union and the concept of European citizenship. As observed in the introduction, the research question of the present thesis is triggered by the constitutional nature of citizenship, which is placed in a transnational context in the European Union, by the qualification of Union citizenship as the destined fundamental status of Union citizens by the Court of Justice, and by the case law on European citizenship that seems to produce constitutional effects. The present thesis explores the concrete effects of European citizenship on the constitutionalisation of the European Union, answering the main research question:

How does European citizenship affect the process of constitutionalisation of the European Union?

2.1.2 Structure of the present chapter

The two main concepts that are brought together in this thesis, European citizenship and European constitutionalisation, need further explanation. Both concepts have been developed along separate lines: the constitutionalisation of the European Union has been developing ever since the Court proclaimed that the Community's legal order was a legal order that established new relations between the Member States

1 Spanish Proposal for a European Ombudsman, Intergovernmental Conference on Political Union, 21 February 1991, p. 329.

and its individuals.[2] On the timeline of the process of constitutionalisation, European citizenship was formally introduced quite recently. However, the early contours of the concept of Union citizenship can be detected in the early years of European integration, since the Court explicitly involved the individuals affected by European Union law as legal actors within the system of the Union in the cases *Van Gend & Loos* and *Costa E.N.E.L.*[3] The nationals of the Member States could derive rights and rely on rights directly stemming from Community law. Union citizenship can be qualified as a product of the process of constitutionalisation, and as such it stimulates the continuing process of constitutionalisation of the European Union at the same time.
In this chapter, the research question is elaborated on by defining the concepts and analytical framework of this thesis. In Section 2.1.3, European citizenship, as the main component of the study, is discussed with regard to its historical background. Section 2.1.4 discusses the concept of European citizenship in terms of constitutional and market citizenship. In the subsequent chapters of this thesis, the case law and legislation concerning European citizenship is analysed in depth. From Section 2.1.5 to Section 2.1.7, constitutionalisation and related subjects are discussed and defined in general. The central subject is constitutionalisation of the European Union, which is discussed more specifically in Section 2.2. Subsequently, this chapter examines dominant as well as critical voices in the debate on constitutionalisation in the European Union. Section 2.3 and 2.4 define four main constitutional building blocks that serve as the central framework of this thesis. Section 2.4.2 of this chapter outlines the structure and methodology of the thesis.

2.1.3 Historical background and development of European citizenship in the Union

European citizenship was formally introduced in Articles 17 to 21 of the Treaty Establishing the European Community (EC Treaty), now Articles 20 to 25 of the Treaty on the Functioning of the European Union (TFEU). Article 20 TFEU provides that European citizenship builds upon the nationality of the nationals of the Member States. Union citizenship does not replace national citizenship, but is additional to it.[4]

The inclusion of specific rights for European citizens in the former EC Treaty did not come out of the blue, but resulted from earlier initiatives to create a Europe for people. Ideas concerning a certain form of citizenship of the European Union had already been the subject of debate since the 1970s. After the Paris Summit (1974), Leo Tindemans, the Belgium Prime Minister, drew up the so-called Tindemans report on the future of the European Union, which contained several proposals for further European integration.

2 On this early constitutionalisation process: Weiler (1991), pp. 2403-2483.
3 Case 26/62, *Van Gend & Loos* [1963] ECR 1 and Case 6/64 *Costa E.N.E.L.* [1964] ECR special edition, p. 585.
4 In the original text in the old Article 17 EC the term 'complementary' was used instead of 'additional'. The question how to evaluate the difference between 'additional' and 'complementary' is still unanswered. One might argue that additional citizenship of the Union indicates that the concept of EU citizenship had become more independent from national citizenship. See on this point also Schrauwen (2008), p. 60, Shaw (2011), pp. 599-600.

The report also included a separate chapter on European citizenship.[5] Tindemans emphasised the need to involve the nationals of the Member States in the European Union by manifesting solidarity and protecting rights, stating:

> "The proposals for bringing Europe nearer to the citizen are directly in line with the deep-seated motivations behind the construction of Europe. They give it its social and human dimension. They attempt to restore to us at Union level that element of protection and control of our society which is progressively slipping from the grasp of State authority due to the nature of the problems and the internationalization of social life. They are essential to the success of our undertaking: the fact that our countries have a common destiny is not enough. This fact must also be seen to exist."[6]

In 1974, the European Parliament adopted a resolution on the granting of special rights to the citizens of the European Community in which it urged that civil and political rights should be granted to the citizens of the Community.[7] Four-and-a-half years later, the European Commission submitted a proposal for a Directive on the right of residence for nationals of the Member States, irrespective of the existence of an economic link, as required by the classical free movement of persons (Articles 45 and 49 TFEU).[8] In this proposal, the Commission stressed that the introduction of a free movement right for Union citizens would be an important step "in the progressive development of the European Community from a market Community to a community of citizens."[9] This proposal was not adopted by the Council, but eventually led to a Commission proposal for three separate Directives on the free movement of persons in June 1989. In 1990, the Council adopted these Directives on free movement for students,[10] for pensioners[11] and for persons with sufficient means and comprehensive healthcare insurance.[12]

At the Intergovernmental Conferences of 1990-1991, the Spanish delegation submitted a proposal on the inclusion of European citizenship rights into the EU Treaty. In its proposal, entitled 'The road to European citizenship', the need for citizenship in the European Union "with special rights and duties that are specific to the nature of the Union and are exercised and safeguarded specifically within its boundaries" was stressed.[13]

In addition to these political and legislative initiatives on European citizenship, the Court of Justice has contributed significantly to the development of Union citizenship. As observed, a notion of European citizenship can be inferred from early case law, in

5 Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76.

6 Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76, Chapter IV. A Citizen's Europe, p. 28.

7 Resolution on the granting of special rights to the citizens of the European Community in implementation of the decision of the Paris Summit of December 1974 (point 11 of the final communiqué).

8 Proposal for a Council Directive on a right of residence for nationals of Member States in the Territory of another Member State, OJ 1979 C 204; COM(79) 215 Final.

9 Explanatory Memorandum of proposal COM(79) 215 Final.

10 Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students.

11 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

12 Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

13 Intergovernmental Conference on Political Union, European Citizenship, 21 February 1991, Spanish Memorandum "The Road to Citizenship", p. 329.

Van Gend & Loos.[14] In that case, the Court already referred to the citizens of the Member States as subjects of Union law. With the establishment of direct effect and supremacy, the 'peoples of Europe' were directly affected by and involved in the Community legal order.

Hence, the introduction of European citizenship in the EC Treaty in 1993 with its specific rights may be seen as the codification of a concept that had long been developing as part of the integration of Community (and Union) law. In other words: the Community of coal and steel transformed step-by-step into a community of citizens. The establishment of the European Union at Maastricht marked "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."[15] This phrase is also found in the Lisbon Treaty, which proclaims that the process of creating an ever-closer union among the peoples of Europe should be continued.

One of the most important rights specifically granted to European citizens is the right to free movement within the Union.[16] Moreover, political and electoral rights have been granted to citizens.[17] Specific rights for Union citizens are included in Title V of the Charter of Fundamental Rights of the European Union (the Charter), which has had the same legal status as the Treaties since the entry into force of the Treaty of Lisbon.[18] The rights provided for in the Charter correspond to the rights included in the Treaty as specific citizenship rights. The electoral rights with regard to European and municipal elections,[19] the right to submit complaints to the European Ombudsman[20] and the right to petition to the European Parliament,[21] the right to move and reside freely in the EU[22] as well as the right to equal diplomatic and consular protection in third countries[23] are all included in the Charter. In addition, the Charter adds two citizenship rights. Firstly, the right to good administration is a right of Union citizens provided in the Charter.[24] Secondly, the right to access to documents of the European Parliament, Council and Commission has been categorised under citizens' rights in the Charter.[25] Both rights, however, are not exclusively granted to European citizens.[26] One of the criticisms of

14 Verhoeven (2002), pp. 166-167.
15 Article A of the Maastricht Treaty, Article 1 of the EC Treaty.
16 Article 21 TFEU.
17 Articles 22, 23 and 25 TFEU.
18 Article 6(1) EU.
19 Articles 39 and 40 of the Charter.
20 Article 43 of the Charter.
21 Article 44 of the Charter.
22 Article 45 of the Charter.
23 Article 46 of the Charter.
24 Article 41 of the Charter.
25 Article 42 of the Charter.
26 Article 41 of the Charter grants the right to good administration to every person". The right to access to documents provided for in Article 42 of the Charter is granted to European citizens, but also to any natural or legal person residing or having its registered office in a Member State. See also Article 15(3) TFEU and Regulation (EC) No. 1049/2001 granting access to documents to EU citizens as well as persons residing or having a registered office in one of the Member States. Article 15(3) TFEU is broadly formulated as access to documents of Union institutions, Regulation 1049/2001 grants access to documents of the Commission, the European Parliament and the Council.

European citizenship is that the provisions on European citizenship do not include any citizens' duties.[27] One of the main duties of Union citizens may be to comply with the law of the Member State they reside in. Such a duty was explicitly mentioned in the Spanish proposal on European citizenship in 1991, but did not make it into the Treaty.[28]

In May 1998, the Court decided its first case on European citizenship. Ever since, the Court of Justice has played a crucial role in the development of Union citizenship. The rights laid down in the specific Union citizens' provisions nowadays have their own meaning and interpretation based on case law of the Court, a case law which is still in development.[29] The case law on Union citizenship is discussed in detail in the different chapters of this thesis.

2.1.4 European citizenship: a constitutional concept or market citizenship?

One of the topical debates centering around European citizenship is the question of how the concept relates to market citizenship and to a constitutional form of citizenship that is found in the nation state.[30] Since the presumption of this thesis is that European citizenship is a constitutional concept, rather than a market-based concept, attention is paid to this issue.

Market citizenship is a form of citizenship in which the individual European is qualified as an economic actor. Market citizenship is therefore connected to the internal market in the European Union. In contrast, a constitutional form of European citizenship involves a constitutional connection between the nationals of the Member States with the European Union, rather than an economic link.[31] From the establishment of European citizenship the concept has been debated in terms of either market citizenship or constitutional citizenship.[32] The concept has shifted from a market-based concept to a more constitutional concept. Various actors in the European Union approached European citizenship constitutionally, even in its early days.

In *Wijsenbeek,*[33] one of the first Union citizenship cases, Advocate General Cosmas already argued that citizenship of the European Union had a specific character. He emphasised that the free movement of Union citizens is of another nature than the free movement of economically active persons. This latter category of free movement rights may be qualified as functional to the economic aims of the Union. With regard to the free movement of Union citizens, this freedom

27 Reich (2001), pp. 20-23.
28 Article 5(2) Spanish delegation, Intergovernmental Conference on Political Union, European Citizenship, 21 February 1991.
29 See for instance the case law on Article 20 TFEU, which was introduced in *Ruiz Zambrano*. C-34/09, *Ruiz Zambrano* [2011] ECR I-01177.
30 Nic Shuibhne (2010), pp. 1597-1628.
31 See also Everson (1995), pp. 73-90.
32 See also Shaw (2011).
33 Opinion of Advocate General Cosmas, C-378/97, *Wijsenbeek* [1999] ECR I-06207.

> "constitutes a goal in itself and is inherent in the fact of being a citizen of the Union, and is not merely a parameter of the common market, it does not merely have a different regulatory scope: it also, and primarily, differs in terms of the nature of the rights it bestows on individuals and the breadth of the guarantee that Community and national principles must accord it."[34]

Hence, the right to move and reside freely is "linked to the fundamental right to personal freedom, which is at the apex of individual rights."[35] Not only Advocates General, or the Court, defined European citizenship as a form of constitutional citizenship, also Member States referred to European citizenship in that sense. The Portuguese government expressed, for instance, the same constitutional relevance of Union citizenship in *Grzelczyk*:[36]

> "Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic factors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. The only limitations and conditions attached to freedom of movement now are those imposed on grounds of public policy, public security and public health."[37]

It should be noted that the four fundamental freedoms, the economic free movement rules, are approached by the Court as the important foundations of the European Union as well. A strong argument in favour of a more limited idea of European citizenship ('market citizenship'), is the language and approach of the Court of Justice. Although in European citizenship constitutional phraseology is obviously present, the four freedoms have been put in such a constitutional setting as well. It can be regarded as common language of the Court of Justice to use the term 'fundamental freedom' when referring to the four economic freedoms, highlighting the importance of these economic freedoms in European law.
The most important difference is the economic foundation of the free movement provisions. Whereas equal treatment of workers, for instance, is connected to the internal market and is legitimised by the fact that the particular Union citizen contributes to the economy of the (host) Member State, this economic argument for equal treatment is not present with regard to Union citizens' free movement. Equality rights are, in that situation, based on the status as Union citizens as such, rather than on economic grounds. Moreover, rather than a functional status, European citizenship is a status for all nationals of the Member States, irrespective of their economic contribution to the European Union.

The constitutional terminology of European citizenship and the rights bestowed upon those with this status are telling.[38] The right to vote, the right to free movement and

34 Opinion of Advocate General Cosmas, C-378/97, *Wijsenbeek* [1999] ECR I-06207, par. 86.
35 Opinion of Advocate General Cosmas, C-378/97, *Wijsenbeek* [1999] ECR I-06207, paras 88-89.
36 C-184/99, *Grzelczyk* [2001] ECR I-06193.
37 Opinion of Advocate General Alber in C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 52.
38 Shaw (2007) (a), pp. 96-99.

the right to protection by the polity (in third countries for instance) are rights that are traditionally of a constitutional nature, granted to citizens just because they are citizens of a state, rather than because of their particular contributions to society.[39] Already in 1977 the European Parliament pleaded for the political inclusion of European citizens, arguing that the European Union should lead "to profound changes of the civil and political status of Community citizens."[40] The inclusion of political rights for European citizens was, moreover, explicitly argued for by Member States.[41] European citizenship has been debated by several Member States with the view to creating a political Union.[42] Political rights for European citizens were explicitly mentioned in the first proposal on European citizenship by the Spanish delegation.[43]

Although European citizenship has its roots in the internal market, formulated once as a 'market-citizenship plus' status, it developed in a more constitutional sense, adding a constitutional and political status to that of the nationals of the Member States.

2.1.5 Constitutionalisation and constitutionalism: What's in a name?

The second important ingredient of this thesis is the development that has been called the constitutionalisation of the European Union. In the following sections constitutional concepts are discussed in more general terms. Section 2.2 deals with constitutionalisation of the European Union specifically.

The meaning of constitutionalisation, in general, is not easy to grasp, since the term is used in different ways and viewed from various angles. In general, constitutionalism and constitutionalisation are concepts that are not only used in legal science, but may also be viewed from a political or philosophical perspective. Even within the area of public law, constitutionalism refers to different matters, for instance to issues of the legitimacy and interpretation of constitutions.[44]
Constitutionalism is the ideology that underlies a constitution: the values, norms and traditions that control the way the constitution is designed. It may therefore serve as the underlying ideology or as a template to arrange a constitution. Constitutionalism is a normative idea about the norms that should be included in a constitution. Part of constitutionalism constitutes values such as fundamental rights and democracy as guiding principles to legitimise and govern the exercise of public power. Constitutionalisation

39 In that sense Andrew Evans argued in 1991 that the "constitutional principle would seem to demand that the relationship between individuals in the Community and the Community itself should develop into one of citizenship." Evans (1991), p. 197.
40 Resolution on the granting of special rights to the citizens of the European Community in implementation of the decision of the Paris Summit of December 1975, OJ 12 December 1977, C 299/26.
41 O'Leary (1996), pp. 23-31.
42 See for instance Agence Europe No. 5255, 16 May 1990, p. 3 and No. 5258 of 19 May 1990, p. 3 (some Member States already saw European citizenship as a part of the political European Union, others (the UK) held that it was premature to consider citizenship as a constitutive element).
43 Spanish Prime Minister Mr Gonzalez in the COREPER meeting debating a political union. Agence Europe, No. 5252 of 11 May 1990.
44 See for an overview Craig (2001), pp. 127-128, Van Eijken (2011), pp. 65-69.

is the process in which these underlying values and norms are incorporated in the community by constitutional norms of governance. Usually, these constitutional norms are written in a small document, the constitution. However, not all constitutional provisions are featured in a constitution, nor is a constitution necessarily a written document.

The connection between constitutionalism, constitutionalisation and constitutions may be defined as follows: constitutionalism is the underlying ideology of constitutional values and features. Constitutions include such constitutional values in constitutional provisions (either written or unwritten). Constitutionalisation, is the process in which the legal system acquires more constitutional features and becomes more constitutional in nature.[45] With regard to the European Union, the process of constitutionalisation has a specific meaning. In this context the term constitutionalisation refers to the transformation of the European (Economic) Community from a "simple" cooperation between Member States into a constitutional legal order.[46] The emphasis concerning constitutionalisation of the Union, usually, lies on the achievement of those features that can be called constitutional because they affect the legal positions of individuals, rather than solely producing legal effects for the contracting states. In this thesis, constitutionalisation is defined as a process in which constitutional elements are enhanced under the influence of Union citizenship. In this process the European legal order obtains more characteristics that belong to a constitution. This specific notion of European constitutionalisation is discussed in more detail in Section 2.2 of the present chapter. To place this process of the European Union in a theoretical context, the notion of what constitutes a constitution and the rule of law in relation to constitutionalism is discussed first.

2.1.6 Constitutions

The term 'constitution' also evokes different meanings and connotations. Although it is difficult to capture a constitution in general terms, for the purposes of this thesis a elementary definition is used. In general, constitutions embody organisational structures and normative commitments from the members of a particular community.[47] For the purposes of this thesis, it is essential that a constitution establishes competences for the public authority; it divides these competences between different institutions, while at the same time introducing safeguards with regard to the exercise of public powers by the polity.

Constitutions can furthermore be categorised as either formal or material constitutions.[48] Material constitutions are constituted by various written and unwritten norms that are labelled 'constitutional' according to their content (such as certain fundamental rights).

45 See for a more detailed and general analysis of constitutionalism, constitutionalisation and constitutions Loughlin (2010), pp. 47-69.
46 Craig (2001), pp. 127-128.
47 Tsagourias (2007), p. 1, Verhoeven (2002), p. 15.
48 Kelsen (1949), pp. 124-125 and Barber (2011), pp. 75-76.

A formal constitution codifies certain elements of the material constitution in a written document. Since it does not include the unwritten constitutional norms, a formal constitution is more limited in scope. Not surprisingly, the question of which norms are labelled as constitutional in the sense of a material constitution does not have a crystal-clear answer. In an overarching (but also very broad) definition, this would include the legal foundation of the exercise of public powers, the regulation of inter-institutional relations, as well as the governance of the relations between the polity and its addressees (such as Member States and citizens) and the relation of the polity with other entities (for example external policy).[49] In general, constitutions include certain elements: the constitutional building blocks of a constitutional legal order. In this thesis, four of these constitutional building blocks constitute the framework of analysis. These constitutional features are the vertical division of powers, the existence of a common ideology (fundamental rights and democracy), the hierarchy of norms and judicial constitutional review. These elements are discussed in more detail in Section 2.4.1 of this chapter.

2.1.7 The rule of law in relation to constitutionalism

One of the connotations one may have with the concepts of constitutionalisation, constitutionalism and constitutions are their points of contact with the rule of law. The Court of Justice, moreover, also referred to the rule of law in relation to constitutionalism, as discussed in Section 2.2.1. The notion of the rule of law is therefore briefly addressed in the present section in order to outline the broader context of constitutionalisation and to clarify how these concepts are related.

The term rule of law is, commonly and traditionally, used in the meaning of 'governance by law' instead of 'governance by men' to guarantee protection to individuals against arbitrary use of public power. The rule of law limits the exercise of public powers in order to protect legal subjects from unlimited governmental powers. Sometimes reference is made to the rule of law meaning the opposite of anarchy. The rule of law is also defined as government under law (the government is sovereign within the framework of the law), and in a broader sense, as a framework of inherited values (such as the presumption of innocence).[50] The latter is an example of a more substantive theory on the rule of law and has much in common with the substantive concept of constitutionalism. As is the case with the notion of constitutions, the rule of law also has different meanings formally and substantively.
Whereas at one end of the spectrum the formal idea of the rule of law merely focuses on procedural aspects (predictability of the law, legal certainty, formal legality), at the other end of the spectrum, the most substantive approach to the rule of law tries to answer questions on the morality and justness of law. The thinnest, most formal, idea of the rule of law would, for example, allow slavery or the violation of human rights, as long as it were regulated by the law. For the purposes of this thesis, a substantive notion of the rule of law and of the elements of a constitution is adhered to. In this substantive notion, the

49 Van der Tang (1998), pp. 29-47.
50 Estaban (1999), p. 68. See also Tamanaha (2004), pp. 114-125.

rule of law refers to constitutional values such as judicial safeguards and the protection of fundamental rights.

Although the content of the rule of law is vague and depends on its interpretation in a formal or substantive way, the rule of law may be identified by its essential function. The central aim of the rule of law is that any exercise of public powers should be based on and bound by (written or unwritten) law. Such constitutional restriction can be achieved by the establishment of a constitution, which contains competences and restricts the public authorities' exercise of those competences, while at the same time safeguarding certain basic rights.

In the context of the European Union, the rule of law may be defined as a value that governs actions of the Union "by a general and fundamental principle, which is common to the Member States, and according to which the exercise of public power is subject to or regulated by a set of formal and substantive limitations."[51] One of the essential elements of the European rule of law would be access to justice and judicial review as an important constitutional limit to the exercise of public powers by the European Union institutions. The system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions is also linked to the Union as a community governed by the rule of law.[52] Moreover, the Court of Justice linked the rule of law to the protection of fundamental rights,[53] emphasising that the Union is "a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights."[54] In the context of the European Union, the rule of law has its own meaning and contains formal as well as substantive elements.[55] The rule of law is part of constitutionalism, i.e. the underlying ideology of a constitution, in a material sense. A constitution allocates and restricts the competences of public authorities; the rule of law is one of the safeguarding principles of this constitutional allocation of powers.

2.2 THE CONSTITUTIONALISATION OF THE TREATIES OF THE EUROPEAN UNION

As indicated, in this section the constitutionalisation of the European Union is elaborated on. In this discussion, first the constitutional developments in the European Union are addressed, in Section 2.2.1. The subsequent Section 2.2.2 discusses the objections against qualifying the Union as constitutional.

51 Pech (2009), p. 50.
52 Case 294/83, *Les Verts* [1986] ECR 1339 and C-402/05 P and C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-06351, par. 81.
53 Pech (2009).
54 C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, p. 38.
55 Pech (2009), p. 55.

2.2.1 Constitutional developments in Community and Union law

In the ground-breaking judgment *Van Gend & Loos*, the Court already held that the European Community is a new legal order, rather than an ordinary compound between Member States as contracting parties:

> "The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee."[56]

In *Costa E.N.E.L.*, the Court stressed that "by contrast with ordinary international treaties, the Treaty establishing the European Economic Community (EEC Treaty) has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."[57] The Court of Justice made a famous reference to the 'rule of law' and the 'constitutional charter' of the European Union in *Les Verts*.[58] In that particular case, the question was raised whether an action for annulment could be brought against an act of the European Parliament, whereas according to Article 173 EEC,[59] such actions were limited to acts of the European Commission and the Council of Ministers. The Court reinterpreted Article 173 EEC *inter alia* in the light of the rule of law and stressed that "the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[60] The Court relied on the rule of law in order to broaden the scope of judicial review in the Union's judicial system. Since the Treaty of Maastricht, references to the rule of law are included in the Treaty. According to Article 6(1) TEU, the European Union is founded on the value of *inter alia* the rule of law; such a reference is also made in the preamble of the Charter. One of the Copenhagen criteria also obliges new Member States to ensure that the rule of law is observed.[61]

56 Case 26/62, *Van Gend & Loos* [1963] ECR 1.
57 Case 6/64, *Costa E.N.E.L.* [1964] ECR 585.
58 Case 294/83, *Les Verts* [1986] ECR 1339.
59 Now Article 262 TEU.
60 Case 294/83, *Les Verts* [1986] ECR 1339, par. 23.
61 European Council in Copenhagen – 21-22 June 1993 – Conclusions of the Presidency, point 7 A (iii).

The Court repeated this constitutional qualification of the Community in subsequent case law.[62] Notably, the German Constitutional Court, the *Bundesverfassungsgericht (BVerfG*), has also made reference to the E(E)C Treaty as "die Verfassung dieser Gemeinschaft."[63] The development of direct effect and supremacy are famous examples of the transformation of the European Community towards a more constitutional legal order, in the sense that citizens are directly affected by Union law and are able to rely on or invoke European law before their national courts. The recognition of fundamental rights as principles of Union law (now codified in Article 6 TEU) is, moreover, an important factor in the process of constitutionalisation. Direct effect and supremacy enhance the access to judicial review for individuals, whereas at the same time, fundamental rights protection is developed as a general principle of Union law. Basically, the Court defines the legal order in constitutional terms, and based on this constitutional character, more constitutional safeguards have been activated. However, in addition to these declarations of the Court, other doctrines and developments can also be pointed out that reveal the constitutional character of the European Union. Arguments for the constitutional nature of European law are not only to be found in the case law of the Court, but are also included in the text of the Treaty itself. Good examples are the judicial procedures that go beyond the classic intergovernmental cooperation between states. One of these procedures is the right of individuals to challenge Union law before the Court of Justice,[64] although on strict conditions.

The judicial structure of the Union is unique compared to what is common in public international law. National courts have the obligation to refer questions to the Court on the validity of Union law. Such an obligation also exists for judicial questions on the interpretation of Union law, at least for the judicial tribunals of last instance, when necessary. This procedure reveals the constitutional role of the Court as the ultimate interpreter of EU law. It shows the significant role of the national courts in confirming this constitutional position of the Court.[65] The famous *Van Gend & Loos* case, for example, was decided following a preliminary reference by a Dutch administrative tribunal.
Moreover, the competence of the Commission to bring a case against a Member State before the Court is an example of a judicial procedure which is uncommon, although not unknown, in international law. Furthermore, voting by qualified majority in the Council and the role of the European Parliament in legislative procedures can be mentioned as features of the special constitutional nature of Union law.[66]

62 Case 294/83, *Les Verts* [1986] ECR 1339, par. 23, see also C-2/88, *Zwartveld* [1990] ECR I-04405, paras 15-16, Opinion 1/91, [1991] ECR I-06079, C-314/91, *Weber* [1993] I-01093, par. 8 and C-402/05 P and C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-06351, par. 281.

63 *BVerfG* 22, 293, 296 (1967).

64 Article 263 TFEU.

65 Mancini (1989), p. 597, and on the importance of the specific judicial procedures in the constitutionalisation of the EU see Zetterquist, (2008), pp. 121-143.

66 See also Piris (2000).

2.2.2 Arguments against the constitutional nature of the European Union

The development of the European Union has been labelled constitutional because the European Union has obtained features of national constitutions, because it is becoming more and more independent as a legal order, and because it addresses individuals as legal subjects of its autonomous legal order.[67] The debate on constitutionalisation of the European Union is complex, since it neither fits in perfectly with the models we know nor with international or national law systems.[68] Various questions and arguments have been put forward in the debate on whether and to what extent the European Union is constitutionalising, whether a European constitution already existed before the Treaty of Lisbon, and whether such a European constitution was or is needed. This debate is confusing for at least two simple reasons. The first reason is that authors express different views on what this process means exactly and the second is that the debate is blurred by a normative undertone (Do we want or need a European constitution?). The debate intensified in the aftermath of the Constitutional Treaty of the European Union, which was rejected both by the Netherlands and France and finally found its form in the present Treaties, amended by the Treaty of Lisbon.

2.2.2.1 The no-demos thesis

One of the dominant criticisms against defining the European Union as a constitutional legal order is the *no-demos thesis*. It claims in short that the presence of one homogeneous people with a democratically formed will is a precondition for the existence of a constitutional legal order. Is is claimed that the European Union could not have a constitution because of the lack of a European *demos* (or the lack of a collective identity of the people), thus a lack of a shared, democratically-formed will, and therefore a lack of legitimacy which should underlie a constitution.[69] In the European Union, the Treaties are legitimised by the allocation or transfer of competences by the Member States to the European Union rather than by such an act by a single European people. Therefore, according to criticism, the European Union cannot be qualified as a constitutional legal order, since it lacks a *demos* to support the constitution.

The *no-demos theory* is reflected in the judgment of the German Constitutional court, the *Bundesverfassungsgericht* (*BVerfG)*, on the compatibility of the ratification of the Maastricht Treaty with the German Constitution. The German Constitutional Court declared the ratification to be in conformity with the Constitution, but took the opportunity to make some statements on the future of the Union. It pointed out *inter alia* that further development of the Union would need a national democratic legitimacy, which would express the "spiritual, social and political" homogeneity of a people. At that

67 See the definition of Timmermans of the 'constitutionalisation' of the Treaties: "This process is one by which the legal system of the organisation acquires some fundamental characteristics and is going to respect a number of basic values, and in doing so, is making the system at the same time more independent from the contracting parties who brought it into being", Timmermans (2002), p. 2

68 Walker (2012), pp. 57-105.

69 Grimm (1995), pp. 282-302.

stage of European integration, the *BVerfG* found that such a democratic legitimacy was present due to the national parliament being the representative of the people of Germany.

Others have stressed the need of a common language in Europe to unite groups of people.[70] Moreover, in the more recent *Lissabon-Urteil*, the *BVerfG* emphasised that:

> "Not just from the point of view of the Basic Law does the participation of Germany not mean the transfer of the model of a federal state to the European level but an extension of the constitutional federal model by a supranational cooperative dimension. The Treaty of Lisbon also decided against the concept of a European federal Constitution in which the European Parliament would become the focus as the representative body of a new federal people constituted by it. A will aiming at founding a state cannot be ascertained. Measured against the standards of free and equal elections and the requirement of a viable majority rule, the European Union also does not correspond to the federal level in a federal state. Consequently, the Treaty of Lisbon does not alter the fact that the *Bundestag* as the representative body of the German people is the focal point of an intertwined democratic system."[71]

The *BVerfG* in that sense does not qualify the European citizens as a *demos*, and states that the German people constitute a *demos*, which is represented by the *Bundestag*, not by the European Parliament *per se*. The Constitutional Court therefore does not fear any potential danger from European citizenship overriding German constitutional citizenship. It holds that "the concept of the 'citizen of the Union' [...]" more strongly elaborated in Union law, is exclusively founded on treaty law. The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which could exercise self-determination as a legal entity giving itself a constitution."[72]

Indeed, the European Union was originally established as a cooperation between the contracting state parties. It was not intended to become a nation state. The lack of identity and *demos* on the European level is undeniable. However, there might be alternatives to legitimise the European project, by the fact, for instance, that the Member States are the most important part of the decision-making institutions of the EU.
Even though national constitutional concepts are important sources to evaluate the constitutional process of the European Union, they differ in nature. Constitutionalism in the context of the Union can be defined as the conferral and limitation of competences (limited government), while at the same time basic norms govern the relationship between the Union, its Member States and the individuals affected by the exercise of these competences. Moreover, there is a distinction between *an ideal* constitution (which should reflect the voice of the people) and the necessary preconditions for the *existence* of a constitution. Whereas the former concept raises questions regarding what ought

70 P. Kirchhof: "Die entwicklung einer kulturelen Einheit in Europa ist ausgeschlossen, weil in der Gemeinschaft … verscheidene nationale Sprachen gesprochen werden". P. Kirchhof, Der deutsche Staat im Prozess der europäischen Integration, in: J. Isensee und P. Kirchhof (ed.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, pp. 855-886.

71 *Bundesverfassungsgericht*, *Lissabon-Urteil*, 30 June 2009, par. 277.

72 *Bundesverfassungsgericht*, *Lissabon-Urteil*, 30 June 2009, par. 346.

to be found in a constitution, the latter question focuses on what is usually found in a constitution.

2.2.2.2 Citizenship, identity and alliance

In response to the *no-demos thesis*, thoughts on multiple *demoi* as an alternative way to examine European constitutionalism have been developed in academic writing. This idea of European *demoi* would, up to a certain extent, legitimise the exercise of sovereign powers by the Union. *Demoi* implies a twofold belongingness of individuals: an individual forms part of a national *demos*, a people, but at the same time also belongs to a European people. In this sense, a person would (probably) first of all be Dutch or German, but at the same time may also be qualified as a citizen of the Union.[73] The identity of the people may be visualised in circles of attachment to the different parts of the legal order (regional, national and European). The first circle would relate to the closest identity, whereas the largest circle refers to the most 'minimal' identity (for example in three circles: Dutch citizenship (national identity, which might also be divided into regional and national citizenship), European citizenship and world citizenship). As Advocate General Maduro expressed in his Opinion in *Rottmann*:

> "That is the miracle of Union citizenship: it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States)."[74]

The idea of *demoi* fits the theory of multi-level and composite constitutionalism in the European Union, discussed below in Section 2.3.1. The legal orders of the Member States interact and are part of the European Union. In the same sense the citizens, the demos, could also be qualified as a multi-level form of 'a people'; as a pluralistic form of political membership:[75] *demoi*.[76] Therefore different forms of demos, *demoi*, can be distinguished related to each level of governance.[77]

2.2.2.3 Just an international organisation?

Another critical voice in the constitutional debate has argued that the European Union is nothing more than an international organisation. The Union is, in this view, an international organisation, with certain special features: "a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms."[78] This view is strengthened by the *Maastricht-Urteil* of the *BVerfG*, which warned the Court of Justice that the

73 Weiler (1995), pp. 252-253, see also Weiler (2005), pp. 344-348, for three different versions of European *demoi*.
74 C-135/08, *Rottmann* [2010] ECR I-01449, par. 23.
75 Besson & Utzinger (2008), p. 186.
76 See also Chapter 5, Section 5.3.1.4.
77 Kumm (1999), pp. 372-373.
78 De Witte (1999), p. 210. See also De Witte (2012), pp. 19-57.

Member States remain the *Herren der Verträge*,[79] the masters of the Treaty. In other words, the Member States remain the captains of the ship and are able to determine the direction (and also the abolition) of the Union. In this view, the Union legal order only exists by the grace of its masters (the Member States). Academics adhering to this notion point out that the Union has evolved from basic international-law concepts, such as the *pacta sunt servanda* principle, which obligates the contracting state parties to give primacy to international norms over their national law.[80]

The European Union was established, undeniably, by an international treaty, the Treaty of Rome, in 1957. Nevertheless, this does not necessarily mean that the European Union has not developed from an international organisation towards a constitutional legal order. The Union simply cannot be defined in familiar, traditional terms. It is neither a nation state nor an ordinary international organisation; it cannot be categorised, at least not without adjustment as part of the existing classic concepts. Nevertheless, the European Union was born of the structure of an international organisation, but has acquired more features that belong to a state, such as the establishment of citizenship.
Moreover, if one were to define the Union as an ordinary international organisation this would not necessarily mean that it does not or cannot have a constitution. Constitutions may be concluded in a treaty. The German *Reichsverfassung* of 1871, for example, was originally established by a series of treaties.[81] The establishment of a constitution by states as representatives of the citizens is not uncommon.[82] Thus, the fact that the European Union is not a (federal) state does not rule out the existence of a European constitution. According to the Court, "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law."[83]

The question remains whether the views on the nature of the Union really are so very different: the international organisation with features usually belonging to federal states or the Union as a not-yet federal state. As Maduro has stressed:

> "Formalist international lawyers may argue that a Treaty will remain a Treaty no matter how close its operation and effects resemble those of a Constitution and how deeply rooted it will be recognised and applied in national legal orders. But this will be a debate about words."[84]

The answer to the question of whether the Union has a constitution or not is not a completely objective assessment: it is influenced by the notion one has of a constitution

79 In paragraph 55 of the judgment: "Germany is one of the 'Masters of the Treaty' which have established their adherence to the Union treaty concluded for an 'unlimited period' with the intention of long-term membership, but could ultimately revoke that adherence by a contrary act." Brunner v. the European Union Treaty (1994) CMLR 57.
80 For an overview of this constitutional versus international organisation see Weiler and Haltern (1996).
81 Schilling (1996), pp. 49-50, Prakke and Kortmann (1998), p. 111.
82 Pernice (2011), p. 93.
83 Opinion 1/91, [1991] ECR I-06079, p. 21.
84 Maduro (1998), p. 8.

and its preconditions. The consequences of labelling the Treaties (or Treaty) as the constitution or referring to the Union as a constitutional legal order should not be overestimated.[85] The process behind these terms is most fascinating and it is therefore important to understand the debate without having to decide whether the Union is a constitutional legal order or a legal order in progress. The underlying assumption of this thesis is that the European Union may be called constitutional because it has acquired certain elements that are usually included in a constitution. The focus of this thesis lies in the process of constitutionalisation, i.e. the sense of the Union's legal order acquiring such constitutional elements.

2.3 CONSTITUTIONALISATION OF THE EUROPEAN UNION IN THIS THESIS

In this thesis, constitutionalism is defined as the ideology underlying constitutions, such as the regulation of public powers and the protection of basic rights of individuals in order to prevent unlimited and arbitrary use of public powers. From this perspective, the values and elements of a constitution are part of the constitutional ideology. In the specific context of the constitutionalisation of the European Union, and of this thesis, the term is used to specify the process of "constitution hardening",[86] meaning that a legal order obtains more characteristics that belong to a constitution. Constitutionalisation is defined, in this thesis, as a process in which the European Union acquires more solid constitutional 'building blocks' that are also found in constitutional legal arrangements. Those substantive elements of a constitution are taken as the prism to examine the impact of European citizenship. These constitutional features are inspired by what Joseph Raz distinguishes as the main characteristics of a 'thick', or substantive, constitution.[87]

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This process of 'constitution hardening', as a process in which the European Union obtains certain constitutional elements, may be compared with how a road sometimes comes into being. Imagine a field, which an increasing number of cars needs to cross because at the end of the field lies a certain important destination. After a while, the first tracks of those cars will become the first signs of the existence of a path. More cars will follow the trail, *inter alia* because there are tracks to follow, and the field will become more recognisable as a road, until it is eventually tarmacked and no one would ever have any doubt about it being a road. The same kind of process may be perceived in constitution-building in the European Union. The European Union was not born as a constitutional legal order: it has developed into a body that can be called constitutional due to having obtained more characteristics that traditionally belong to a constitutional legal order. The European Union has no tarmac yet, but certain constitutional tracks are certainly visible. By acquiring more features that are usually found in a constitution, other constitutional features are also strengthened at the same time. European citizenship is one of these constitutional values, which might also trigger other constitutional processes. From this perspective, Union citizenship creates a constitutional relationship between the

85 Craig (2001), pp. 134-135.
86 Tsagourias (2007), p. 1.
87 Raz (2001), pp. 152-193.

nationals of the Member States and the Union. This relationship may enhance certain constitutional rights, such as the protection of fundamental rights and democracy, and case law regarding these rights.

2.3.1 Multi-level and composite constitutionalism in the European context

As observed above, the European Union is not easily caught in constitutional concepts, which are traditionally developed in the traditional nation state. The European Union may rather be qualified as a special legal order, as having a *sui generis* character. But what does this *sui generis* nature mean for the constitutionalisation of the European Union and what does it mean exactly, other than being a special kind of legal order?

One of the ways to define the Union, which is neither a federal state or super state, nor an international organisation, is as a legal system composed of Member States and the Union in a multi-layered legal order. In this thesis, the European Union is regarded in terms of this theory. From the beginning of this century, the European Union has been placed in the context of multi-level constitutional pluralism as a legal theory. In this theory, the system of the European Union and its Member States together are identified as a multi-level constitutional legal order. Ingolf Pernice launched the term 'multi-level constitutionalism' in 1999, arguing that the European Union already has "a constitution made up of the constitutions of the Member States bound together by a complementary body consisting of the European Treaties, although formally separate and belonging to the different levels of government, the institutions of the Community and those of the Member States are closely interlinked, dependent on each other."[88] The thesis of multi-level governance is founded on the idea of multiple layers of governance, in which "authority and policy-making influence are shared across multiple levels of government – sub-national, national and supranational."[89] In this model, decision-making competences are shared at the different levels, based on interconnection between the levels. The theory of multi-level governance or a multi-level legal system describes the local, regional, national and European levels as different systems which do not cover all possible matters of public concern "but are complementary to each-other and bound together by provisions regarding the attribution of the respective powers and responsibilities, the participation and representation of one in the functioning of other, and rules of conflict which make sure that, at whatever level decisions are taken, the system produces for each case only one legal solution."[90] The legal construction of the European Union has, in reaction to multi-level constitutionalism, been defined as a composite constitutional legal order.[91] The basic idea is that the legal orders of the Member States and the Union should not be defined as separate levels, but should be regarded as one legal order that is composed of national and European legal norms.
Leonard Besselink argues in this context that "the relation between the EU and national constitutions should not be viewed as a conglomerate of autonomous, more

88 Pernice (1999), p. 707.
89 Marks, Hooghe and Blank (1996), p. 341.
90 Pernice (2002), p. 515.
91 Besselink (2007).

or less detached systems, which relate to each other as different 'levels'."[92] In his view, the European constitutional legal order should rather be defined as "a set of mutually interdependent and communicating constitutions within an overarching composite constitutional order which renders these constitutions coherent."[93] The European Union has also been defined in terms of constitutional pluralism in the sense that "there is a plurality of constitutional sources (both European and national) which have fed the EU constitutional framework and its general principles of law."[94] Although these theories differ on various points, the basic overlap is essential for the purposes of this thesis: the European Union and its Member States are not separate legal orders, but are interdependent and mutually influence each other. It is this perspective on the European Union, as a dynamic system of legal orders, national and European, which are mutually interdependent, that is used in the present thesis.

2.4 STRUCTURE, ANALYTICAL FRAMEWORK AND METHODOLOGY OF THE THESIS

2.4.1 Constitutionalisation in four constitutional elements

Raz identified the main features of a constitution, in the sense of a 'thick' constitution. His theory is used to identify the constitutional features that serve as the main components of the present analysis. As observed, the constitutionalisation of the European Union is defined in this thesis as a process in which these constitutional elements in the 'thick' sense of a constitution are enhanced by the introduction of European citizenship, by legislation and by case law on European citizenship.

The main elements in this thesis are the following. First, a constitution defines the powers of the main institutions or actors of the polity. In European Union law, this feature has been translated *inter alia* in the vertical division of powers, the division of competences between the Union and the Member States. Second, a constitution, generally, also includes certain common values that govern public life in the particular polity. These values are generally known and are based on general consent. Within the European Union, the protection of fundamental rights and democracy may be qualified as part of the common European ideology. A third characteristic of a constitution is the superiority of constitutional norms, meaning that any ordinary law is invalid or inapplicable if it does not comply with the constitution. In the Union, this constitutional superiority is especially recognised by the supremacy of Union law and its application over national laws, although supremacy of Union law has been the topic of judicial debate.[95] In the fourth place, in this 'thick' sense, constitutions have specific judicial procedures to give

92 Besselink (2007), p. 6.
93 Besselink (2008), p. 803.
94 Maduro (2007), p. 1. See also Kumm (1999), with a focus on the relationship between the different courts in the EU.
95 Discussed in more detail in Chapter 6.

effect to the superiority of the constitutional norms over ordinary laws and regulations.[96] Such judicial procedures may be detected in the Union as well.
These constitutional elements are the foundation of this thesis. The question is how European citizenship has contributed to the development of these constitutional elements in the European Union.

One could argue that citizenship itself is also a constitutional value. It is this assumption that underlies this thesis. The above-mentioned constitutional elements are included in a constitution in order to guarantee the sound exercise of public powers and to grant basic rights to citizens in order to protect them from arbitrary or overly intrusive use of public powers. In this sense, these constitutional elements are included in the constitution in order to establish and limit public power, and to safeguard the rights of citizens. European citizenship as such may be qualified as one of the constitutional building blocks: it is common for the concept of citizenship to be included in a constitution.[97] Citizenship, however, is different since the concept of citizenship is a constitutional element that transcends the other four constitutional elements, in the sense that the constitution as well as the constitutional features have a safeguarding function towards the citizens of a polity.

2.4.1.1 The division of powers

One of the unchallenged constitutional elements is the division of powers between the central and local authorities. The constitution allocates power to a public authority and limits these competences at the same time, in order to safeguard a proportionate exercise of public powers. The vertical division of powers, i.e. the division of competences among different levels of a polity is to be found in federal states. In Germany, for instance, the *Länder* have the powers to legislate in areas that are not under the exclusive competence of the federation (Article 70 *Grundgesetz*). This constitutional element is the first feature used to analyse the impact of European citizenship on the constitutionalisation of the European Union.

On the European level, the vertical division of powers refers to the division of competences between the Member States and the European Union. In the European Union, this vertical division of competences is important for the question regarding who may act in a certain field and in what way. The exercise of competences by the

96 Raz (2001), pp. 152-193. He also distinguished three other elements of a constitution, which are the fact that constitutions are small, written documents that have to be amended by specific and special procedures. These features are disregarded in this thesis based on the assumption that these elements were less relevant in the purposes of this analysis. Although the question whether Union citizenship affected the procedures of amendments of the Treaties is an interesting one, due to the present framework and schedule, this element has been left out of the analytical framework.

97 Interestingly enough, in the Croatian Constitution, European citizenship has been included, qualifying European citizenship as part of the national constitutional identity. Article 146 provides: "Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union 'acquis communautaire' […] In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union."

institutions of the European Union is governed by the principle of conferral. According to this principle, "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein."[98] The competences that are not transferred to the European Union continue to belong to the Member States. This means that certain areas are regulated by the Member States. The scope of what belongs to EU law and what falls within the scope of national law is an important question in the context of the European Union. Certain national measures that fall under the competences of the Member States may also fall within the scope of Union law.
In Chapter 3 of this thesis the way that European citizenship has affected the vertical division of powers, and more specifically how it has affected the scope of Union law, is explored in detail.

2.4.1.2 Common ideology

In Chapter 4 and Chapter 5 of this thesis, the focus lies on the impact that European citizenship has on the strengthening of a common ideology in the Union. In a constitution, generally speaking, common values of the people are laid down. These common constitutional values consist of different norms that reflect the ideas of the citizens regarding the basic standards of their society. State constitutions may refer to values such as social justice, democracy and freedom.[99] Among the different features of a constitution, Raz distinguishes the existence of a "common ideology" as one of the constitutional building blocks in a 'thick' sense. He states that the provisions of the constitution "include principles of government (democracy, federalism, basic civil and political rights, etc.) that are generally held to express the common beliefs of the population about the way their society should be governed."[100] Raz also acknowledges that the constitutional building blocks are vague in their application and differ per constitution.

Within the context of the European Union, the Union has some declared common values in its Treaties that are derived from national constitutions, which in turn could be held to be an expression of the common values of the national population. The common values of the European Union and its Member States include fundamental rights and democracy. In Chapter 4, the relationship between European citizenship and fundamental rights is the central focus. Chapter 5 of this thesis analyses the link between European citizenship and democracy in the European Union.

98 Article 5(2) TEU.
99 See Gavison (2005), p. 97.
100 Raz (2001), pp. 153-154.

2.4.1.2.1 Fundamental rights

Fundamental rights are commonly part of common, constitutional values. Every modern constitution proclaims a kind of Bill of Rights.[101] With a substantive notion of a constitution, the protection of human or fundamental rights is an important guarantee for citizens that the exercise of public power is limited by those fundamental rights. Traditionally, two categories of fundamental rights protection may be distinguished. In the first place, the public authorities should refrain from interfering disproportionally or without justification with the basic, fundamental rights of the citizens. In the second place, public authorities may have the obligation to grant certain basic rights in a more active manner.

The EU Treaty states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[102] Fundamental rights that safeguard freedom, dignity and equality are therefore considered as common values of the Union in this thesis (also recognised in Article 6 TFEU). An important constitutional development in the last decade with regard to the protection of fundamental rights was the creation of a 'Bill of Rights', the Charter. The drafting and final adoption of the Charter did not only emphasise the on-going process of integration between the Member States and the European Union, but was also intended to provide Union citizens with visible fundamental rights as protected by the European Union. The preamble of the Charter therefore explicitly refers to the common values of the Union and the necessity to strengthen the protection of fundamental rights in light of changes in society, social progress, and scientific and technological developments, by making these rights more visible in a Charter. Such a Charter may enhance the common ideology because it marks the fundamental character of the values that are included in the Charter as the common values of the Union. The recognition of a common Bill of Rights has constitutional significance "in building a new political society, providing the possibility of common identification by all with a set of basic values."[103]

One of the theories often cited in the context of Union citizenship is the theory of the British sociologist Thomas Marshall.[104] His essay on citizenship and social class describes the threefold development of citizenship rights through the centuries. Marshall argued that the historical development of citizenship can be understood in terms of three different stages of citizenship rights, each stage of rights as a precondition for the further development of the concept of citizenship. Marshall distinguished how the concept of citizenship has developed in British society in civil, political and social rights of citizens. He argued, from the perspective of British social class hierarchy, that

101 See Gavison (2005), pp. 95-96.
102 Article 2 TEU.
103 McCrudden (2001), p. 21.
104 Barnard (2013)(a), pp. 433-435, Dougan and Spaventa (2005), O'Leary (2005), p. 54.

to obtain full citizenship, these three dimensions of citizenship should all be developed as preconditions. Although his theory has a particularly national perspective and a British background it is, generally, useful for the categorisation of citizens' rights in this thesis because it provides a broad framework to analyse the rights of citizens, instead of limiting this to a political or only civil dimension.
In the first period (roughly the 18th century), civil rights (and duties) were developed as part of the concept of citizenship. Marshall defines the civil element as rights that protect the individual freedom or liberty of a person, such as the freedom of speech, thought and faith, the right to own property and the right to justice. In the 19th century, political rights improved, first for property owners, and then they were extended to all male citizens and finally to women. This political element of citizenship contains the right to participate in the exercise of public power in active and passive form. In the 20th century, the social dimension of citizenship was developed. With regard to the social element of citizenship, Marshall refers to economic welfare rights, and also to the right to education and social services, such as pension rights. These social rights should guarantee the citizen the ability to "live the life of a civilised being according to the standards prevailing in the society."[105]

Marshall describes citizenship as a "status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[106] Therefore, within the aforementioned citizenship dimensions, equal treatment is the underlying fundamental value: these dimensions of citizenship are necessary to be able to acquire the status of equal members of the relevant community.[107] Thus, in order to participate equally in the public affairs of the community, citizens need certain standards of life, so that they at least have the possibility to participate. Civil rights should guarantee the freedom of the citizen, whereas political and social rights create a level of equality. Equal treatment therefore lies at the heart of citizenship. For this reason, the chapter on fundamental rights as a common constitutional value is structured into parts on equality of European Union citizens, on the social dimension of European citizenship rights, and on the civil dimension of European citizenship rights.

2.4.1.2.2 Democracy

The second value of the common ideology of the European Union, discussed in this thesis, is democracy. The core feature of democracy is participation of the people in the decision-making processes through their representatives. Democracy from this perspective has an important function in the legitimacy of the decision-making powers of public authorities (which nowadays represent the political preferences of the majority). This democratic legitimacy furthermore confers the ultimate power on citizens to

105 Marshall (1950, reprinted 1992), pp. 47-50.
106 Marshall (1950, reprinted 1992), p. 18, also Closa states that "Equality as legal status seems to be an agreed characteristic of citizenship" in Closa (1995), p. 490.
107 Shaw (1997), p. 1 of Part II Contemporary Citizenship Issues.

control the legislative authorities because (the majority of) the people can send the representatives home and elect others. Democracy also entails, in a much broader sense, the model of a polity according to certain democratic structures.

Democracy is one of the more disputed constitutional features. Some authors consider constitutionalism and constitutions to be restrictions on democracy. In their view, democracy is a way of self-governance by the people, which should not be limited by a legal constitutional document. A constitution limits this self-determination of the people by the attribution of powers to a public authority. The constitution would limit the exercise of public power in advance and therefore also limit the choice of the people. The people as a self-governing body have to comply with the constitution and are therefore limited in their democratic expression. In this view, constitutionalism and democracy cannot fully coexist. On the other hand, democracy and constitutionalism have the same function and are in line with each other. Democracy is a form of control on the authorities in charge of public powers. In the same sense, the constitution also is a safeguard against unlimited exercise of public power. Some even consider democracy as a necessary feature of a constitutional legal order.[108] There is a clear link between the two theoretical concepts, since a constitution sets out the conditions of democracy. The main argument is that "constitutional pre-commitments are necessary to make democracy work."[109] From this perspective, democracy has to be included in a constitution to make sure that democracy is guaranteed and that the conditions to exercise political rights are constituted in an equal manner. Moreover, democracy in this analysis is regarded as part of the common ideology of the European Union, not as a necessary precondition for constitutionalisation.

Although democracy is not an unchallenged element of a constitution, it certainly is one of the fundamental values that the Member States share. The way democracy is structured in the context of the European Union differs from the democratic structures in the nation states. Democracy, nevertheless, is undoubtedly part of the common constitutional values of both the Member States and the European Union. Article 2 TEU declares the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights as the common values of the Member States on which the Union is founded. Democracy as part of the common constitutional values is also evident in the criteria of accession to the Union (the Copenhagen criteria),[110] which demand that Member States ensure democratic government within their state. These criteria should ensure that all Member States are governed according to the principles of democracy. All Member States may be regarded as democratic states, and Union citizens may also elect the members of the European Parliament. On both levels, democracy is a foundational value – although there has been criticism on the model as such.

108 Zoethout (2003), pp. 55-58, Kortmann (1995), pp. 329-337. Kortmann mentions democracy as an element of the Dutch concept of *de Rechtsstaat*.

109 Closa (2005), p. 154.

110 These criteria were established in 1993 by the Council held in Copenhagen for the accession of the new Member States (therefore called the Copenhagen criteria), SN 180/1/93 REV 1, p. 13.

Equal treatment and participation are key elements of traditional citizenship. To be able to participate in the polity, one has to have influence on the decision-making and policy-making procedures. In that sense, democracy is an important common constitutional value in relation to European citizenship because democracy is one of the important principles by which individuals can have influence in the decision-making procedures in the Union. Since the Treaty of Lisbon, the EU Treaty has also included a title on democratic principles. Significantly, within this democratic title, European citizens and their equal treatment are addressed directly.[111] Moreover, Article 10 TEU explicitly links democracy in the European Union with European citizens. It states that the Union is founded on representative democracy and it expresses that every citizen has the right to participate in the democratic life of the Union. The political dimension of citizenship has been one of the most important rights of citizens from early on. The right to participate in public affairs has been conferred on those who were already qualified as citizens in ancient Greece. In Aristotle's tradition: "[C]itizens are all who share the civic life of ruling and being ruled."[112] In the Greek model of citizenship, political participation was the most important right for certain groups of persons who were qualified as citizens. This right to participate in public affairs was not only seen as a way to express how the community should be governed, but also as a way to advance the valuable personal attributes of the citizen: through participation in public affairs certain personal qualities could be discovered and developed, which otherwise would not have been revealed.[113] In the idea of Marshall, political participation ensures the equal membership of citizens in a polity.

In Chapter 5, the impact of European citizenship on democracy as a common constitutional value in the European Union is examined. The chapter addresses the two main aspects of democracy: political rights for European citizens and democracy as a principle governing the European Union as a legal order. The main focus will lie on the connection between democracy and political rights, and the role of European citizenship regarding those political rights in the European Union and its democratic structure.

2.4.1.3 Justiciability and hierarchy of norms

Raz connects the superiority of constitutional norms with what he calls the justiciability of the constitution. Constitutional norms are superior to non-constitutional provisions. Ordinary legislation has to comply with higher constitutional law. In order to ensure this supremacy, or superiority as Raz calls it, judicial bodies should test the constitutionality of lower legislation. This means that norms of lower ranking may have to be set aside, or even annulled or declared void. The same thought was expressed by Hans Kelsen in his idea of hierarchy of norms in a legal order: "The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ, other than the legislative body, is entrusted with the task of testing whether a law is constitutional,

111 Article 9 TEU.
112 Politics: 1252a16.
113 Lardy (1997), pp. 80-81.

and of annulling it if – according to the opinion of this organ – it is 'unconstitutional'."[114] Furthermore, a constitution usually provides for procedures to ensure the supremacy of the constitution. These two constitutional building blocks, 'justiciability' and 'constitutional primacy', and the influence European citizenship has on these two constitutional elements are explored in Chapter 6.

2.4.1.3.1 Judicial review in connection with European constitutionalisation

In the context of the European Union, the Court of Justice has been assigned the mandate to "ensure that in the interpretation and application of the Treaties the law is observed."[115] As the ultimate interpreter and guardian of the Treaties, it has been referred to as the "constitutional court" of the European Union.[116] As observed, in its task to ensure the application of the Treaty, the Court of Justice has famously referred to the Treaty as the constitutional charter.[117] It pointed out that "the Union is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions."[118] As argued before, this statement of the Court implies that the Court considers judicial review as one of the elements of the rule of law. It also implies that the Court considers itself a constitutional court of the Union.[119] The constitutional role of the Court of Justice has grown over the years through case law. The scope of European law has been interpreted by the Court in a broad way, meaning that its jurisdiction has also been widened.[120]

Due to the extension of the areas in which the European Union has competences, the jurisdiction of the Court of Justice has grown, which has led to a broader scope of judicial review on the European level. The inclusion of the Area of Freedom, Security and Justice within European Union law is just one example of a broader scope of judicial review on account of European law. The Area has extended the competences of the Union with regard to criminal proceedings and, importantly, the jurisdiction of the Court of Justice has also been broadened so as to include the review of those measures.

Judicial review is not only necessary to uphold the primacy of 'the constitutional charter', but it also serves to protect individuals, i.e. to guarantee legal remedies to solve possible conflicts between public authorities and citizens, and between citizens in a horizontal sense. Judicial review is part of the broader principle of effective judicial protection, which is one of the general principles of Union law.[121] Every individual should be able

114 Kelsen (1949), p. 157.
115 Article 9 TFEU.
116 Vesterdorf (2006), pp. 607-617, Knook (2009).
117 Famously in Case 294/83, *Les Verts* [1986] ECR 1339, par. 23.
118 C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-06351, par. 128.
119 Mancini (1989), pp. 595-614.
120 See on this development also Prechal et al. (2011).
121 See e.g. Case 222/84, *Johnston* [1986] ECR 01651, par. 18.

to rely on European law before a court. The principle of effective judicial protection is given effect by judicial procedures in European law, as well as by judicial procedures in national law. For individuals, direct access to the Court of Justice is provided by the action for annulment,[122] the action for failure to act[123] and an action for compensation for harm caused by the European institutions.[124] However, European citizens mostly have to claim their rights derived from European law before national courts. In national law, individuals may also invoke their rights derived from European law before a national court, if these rights have a direct effect. Even if the relevant European norms have no direct effect, the national courts have the obligation to interpret national law in the light of European law within certain limits. In that sense, the principle of effective judicial protection is partly covered by European law, but also to a very important extent ensured by national courts.[125] Since the Lisbon Treaty, this role of national courts is codified in Article 19 TEU. Paragraph 1 of that Article states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[126]

2.4.1.3.2 Constitutional primacy of Union law as constitutional element

With regard to the relation between Union law and national law, European law has primacy over national law. According to the case law of the Court of Justice, this primacy also entails prevalence over conflicting national *constitutional* norms, an opinion not always accepted unconditionally by national constitutional courts.

Although European law prevails over national law, national law that conflicts with European law is not declared invalid by the Court of Justice as a consequence. Contradictions between national law and European law are solved by the obligation for national courts (and administrative authorities) to set aside national law that conflicts with European law.[127] As a result, European norms prevail over national norms, at least within the limits of conferred competences. However, the validity of this national legislation is not at issue. The principle of primacy in European law has subsequently given rise to a certain hierarchy of legal norms in the Union internally and in the interaction between national and European law. In Chapter 6, the superiority of European law is discussed in terms of constitutional primacy of Union law. Constitutional primacy is the precedence of constitutional norms over ordinary legislation. The basic principle of this primacy is that every piece of legislation has to comply with the basic law, i.e. with the constitution. In a constitutional setting, every measure stems from the constitution. Rules of a lower tier derive their validity and legitimacy from rules of higher ranking, which they are bound to respect. In that same sense, in the European Union, European norms prevail over national norms, and over secondary legislation of the Union.

122 Article 263 TFEU.
123 Article 265 TFEU.
124 Articles 268 and 340 TFEU.
125 Jans et al. (2007), p. 241, C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, par. 40.
126 On the role of national courts in the European Union see Van Harten (2011), pp. 33-34.
127 Case 106/77, *Simmenthal Spa* [1978] ECR 00629.

The assumption underlying this part of the thesis is that the primary law provisions on European citizenship are of a constitutional nature, which leads to the question of whether this affects the hierarchy of norms in a constitutional sense (constitutional primacy).

2.4.2 Methodology and structure of the thesis

In this thesis, qualitative legal research is used to analyse European citizenship and its effect on the constitutionalisation of the European Union. As indicated above, in order to analyse the effects of European citizenship on the constitutionalisation of the European Union, four constitutional elements are defined, which serve as the prism to examine the role of European citizenship in the European Union and its effects on the structure and nature of the European Union. This research is structured along the lines of these constitutional elements, which form the analytical framework of this thesis. The four constitutional elements that structure the present analysis provide a comprehensive perspective on the constitutionalisation of the European Union. This does not necessarily mean that the chosen elements are exhaustive. In the present thesis, a traditional legal method of research has been used: analysing case law, legislation and policy documents with regard to Union citizenship.

The analysis in this thesis is largely based on European case law of the Court of Justice, including Opinions of Advocates General, since the Court has played a considerable role in the development of Union citizenship. Case law analysis therefore forms the core of this thesis. Throughout the chapters, the descriptions of cases are separated from the main body of text: they are marked by text indentations to improve readability. Where appropriate, national case law is cited and analysed. Moreover, European legislation is an important source of analysis. In addition, legal literature, particularly with regard to constitutionalisation and constitutional theories, is used as the foundation of this thesis. Furthermore, a large amount of academic literature on European citizenship, and case notes on the judgments of the Court, are used to sharpen the analysis. Additionally, policy documents of European Union institutions are part of the exploration of the effect of Union citizenship and are used in this thesis in various places. Case law and literature have been analysed until 1 August 2013. Cases decided after this date are not included in the analysis of this thesis. However, a few cases and developments until March 2014 will be mentioned when relevant.

As described above, in this thesis the starting point is a multilevel or composite legal order, with the legal order of the European Union and those of the Member States as interdependent legal orders. The focus of this thesis, however, is on the development of Union citizenship in the case law of the Court of Justice. Although examples of national case law will be used to illustrate how European citizenship affects the constitutionalisation of the European Union, the main source of case law is that of the Court of Justice.

Chapter 3 discusses the impact of European citizenship on the vertical division of powers. Chapter 4 analyses the link between Union citizenship and the protection

of fundamental rights. Chapter 5 examines the role of European citizenship within democracy as a fundamental value of the EU. Finally, Chapter 6 deals with the effect of European citizenship on the constitutional primacy of European law and on judicial review in the Union. Each chapter will present a brief introduction of the constitutional elements before analysing the impact of European citizenship case law and legislation on these constitutional features. Chapter 7, the final chapter, answers the main question of how European Union citizenship affects the constitutionalisation of the European Union.

"When we come to matters with a European dimension, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."

CHAPTER 3

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The effect of European citizenship on the vertical division of powers

3.1 INTRODUCTION: THE DIVISION OF POWERS AND EUROPEAN CITIZENSHIP

3.1.1 The vertical division of powers as constitutional feature

One of the undisputed elements of a constitution is the allocation of competences to a public authority. At the same time, these competences are divided between the different levels of governance, at least in a federally structured legal system. The constitution lays down principles of governance, of which the allocation and division of powers is one of the most important features. This governance of the polity is arranged *inter alia* by the conferral of certain competences on a public authority. Competences are not only allocated to and divided between the different public institutions of the polity, but are also limited by constitutional provisions. The exercise of certain competences is, for instance, allocated to a specific institution under specific circumstances.

Within the European Union, this division of powers is arranged in a federation-like vertical structure, dividing the competences between the Member States and the Union. The conferral and division of powers is one of the founding principles of Union law. Article 2 TEU expresses therefore that a Union is established "on which the Member States confer competences to attain objectives they have in common." In addition, the principle of sincere cooperation reflects the division of powers between the Member States and the Union: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."[2] The tasks to achieve the objectives of the European Union

1 *HP Bulmer Ltd v J. Bollinger SA*, [1974] par. 401, p. 418. In 1990 Denning wrote "No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave, bringing down our sea-walls and flowing inland over our fields and houses – to the dismay of all". Cited in: Storskrubb (2011).

2 Article 4(3) TEU.

are allocated and divided, with a vertical perspective, between the Union and the Member States. The powers conferred on the Union are also limited. As provided in Article 13(2) TEU, "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them."[3] In this provision, the horizontal division of powers, between the institutions, and the vertical division of powers ("conferred on it by the Treaty") are brought together and their connection is shown.

3.1.2 Aim and structure of the present chapter

In this part of the thesis the impact of European citizenship on the vertical division of powers is examined. This chapter is divided into four major sections. First, it discusses the basic framework of the allocation and division of competences between the Member States and the European Union in Section 3.2. The most important features of the current system are identified to analyse the effect of European citizenship on this division of competences. Section 3.3 discusses the scope of Union law in relation to the vertical division of powers.
Subsequently, the relation and the difference between what 'falls under the scope of Union law' and what belongs to the competences of the Union to act is examined in Section 3.3.5. This is necessary for the analysis of the case law on European citizenship, which is performed in Section 3.4. There, the main focus lies on the way European citizenship has extended the scope of European Union law. After an analysis of this extension of the scope of Union law, the discussion concentrates on the consequences of this expansion for the Member States' competences. Therefore Section 3.5 discusses the potential spill-over effect between the scope of Union law and the exercise of Union competences. Section 3.6 presents the relevant conclusions.
The focus of the analysis is the way in which the interpretation of the scope of Union law affects, and may potentially affect, the vertical division of (legislative) competences between the European Union and its Member States.

3.2 THE COMPETENCES OF THE EUROPEAN UNION AND THE SCOPE OF UNION LAW

3.2.1 The principles of conferral, subsidiarity, proportionality and pre-emption

Although the vertical division of powers originates from the early years of the Union, the categorisation of these competences is relatively new. The background of a more precisely defined allocation of competences was the extension of areas in which the EU may act, allocated by the Treaty of Maastricht. This Treaty extended the competences of the Union to *inter alia* the areas of education, culture, visa and migration.
The division of competences has been governed, from early on, by four guiding principles: the principle of attribution, the principle of subsidiarity, the principle of proportionality and the principle of pre-emption.

3 Article 13(2) TEU.

The principle of conferral demands that the Union may only act with regard to the competences that are conferred to its institutions. Based on the principle of conferral, secondary law should have a legal basis that can be traced back to a Treaty competence or to other secondary EU law that refers to such a Treaty provision. Also non-legislative instruments adopted by the Union will most likely have to be legitimised by the conferral of this power,[4] at least to the extent that these non-legislative instruments would result in independent legal effects in the national legal order.[5] The requirement of a legal basis is decisive for the question by whom and in what form this action may be taken. The legal bases are scattered throughout the Treaty, and may therefore be compared to islands of an archipelago.[6]

In general, four categories of competences can be distinguished: conferred, shared, complementary and residual competences. These categories are explicitly mentioned in the Treaty establishing a Constitution for Europe and the Lisbon Treaty,[7] but these categories were arguably already present in the old EC Treaty.[8] Until the Treaty of Lisbon no explicit catalogue of competences was included in the Treaty, contrary to constitutions in federal systems.

Competences are either conferred exclusively on the European Union or may be shared with the Member States. With regard to the shared competences, both legislatures, the Union as well as the Member States, may act. Some of these shared competences explicitly state that the Member States may adopt stricter norms than provided for in Union law: in the field of consumer protection,[9] environmental law[10] and social policy,[11] for example.[12] The fact that the Union has been allocated a certain competence may still leave the Member State with a discretion to legislate. The fact that the national as well as the Union legislature are both competent to legislate in a certain field of law requires that the exercise of these competences are geared to each other.

One of the main principles to regulate the shared competences is the principle of subsidiarity.[13] This principle is based on the assumption that to be effective, the exercise of public powers should be located at the lowest tier of government.[14] This principle is also emphasised in the preamble of the EU Treaty stating that "decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". It governs the exercise of Union competences in the sense that the Union may only

4 Von Bogdandy and Bast (2002), pp. 231-233. See also Senden (2004), pp. 295-320, who concludes that soft-law measures indeed have to be legitimised by a conferred competence, although in some cases this conferred competence may be interpreted as an implied power.

5 C-57/95, *French Republic* [1997] ECR I-01627. In this case a communication of the Commission was annulled by the CJEU, because it produced legal obligations for the Member States, although the Commission 'hid' these obligations inside a communication.

6 Weatherill (2009)(b), who borrowed the metaphor from Lamberto Dini, CONV 123/02 19 June 2002, p. 6.

7 Articles 2-6 TFEU.

8 In this respect see Van Ooik (2007), pp. 13-40.

9 Article 169 TFEU.

10 Article 93 TFEU.

11 Article 153 TFEU.

12 Robert Schütze also mentions Article 13 EC, visa, asylum and migration policy, employment policy, social policy, trans-European networks, industrial policy, research and technological development and environment as complementary competences. Schütze (2006), pp. 167-184.

13 Article 5(2) TEU.

14 Dashwood (2004), pp. 366-367.

exercise conferred competences when Member States are unable to adequately achieve the same goal. The principle has a twofold function: on the one hand it empowers further European integration, when the Member States cannot fully achieve these aims. On the other hand, the principle of subsidiarity functions as a constitutional safeguard to the national autonomy, where the Member States remain the first actors to legislate in a particular area.

Proportionality plays a role in the division of powers in several ways.[15] The principle of proportionality is not only attached to the review of EU measures in the context of the exercise of shared competences, but also governs the exercise of exclusive competences.[16] In the context of shared competences, the Member States as well as the EU may take legal action. However, when the Union has exercised such shared competence, the Member States should refrain from taking action. The exercise of the Union of such shared competence has a pre-emptive effect. Nevertheless, as long as the particular matter is not regulated by the EU, the Member States are free to take action in that area.

Besides the exclusive and shared powers, the Union has been conferred residual competence to act, provided for by Article 352 TFEU. This confers the power to take action in the course of the operation of the common market, if such action were necessary in order to be able to achieve those aims. Article 352 TFEU served as a legal basis for at least 700 Union acts, in 2005.[17] It constituted, for example, the legal basis for environmental legislation, when the specific legal basis to legislate on those issues had not yet been included in the Treaty. The scope of this 'flexibility clause', however, is not unlimited, as the Court's opinion on accession to the European Convention of Human Rights has revealed. The Court considered that Article 352 TFEU[18] could not serve as a legal basis to accede to the Convention.[19] Article 352 TFEU can be seen as a gap filler, which allows the EU legislature to compensate for the lack of competences when it seems necessary to achieve the objectives of the Treaties, within the limits of Article 352 TFEU.

3.2.2 Complementary and negative competences

According to Article 5(2) and Article 6 TFEU, the Union may take action to support, coordinate or supplement the actions of the Member States in seven specific areas (human health, industry, culture, tourism, education, civil protection and administrative cooperation).[20] In these areas, the European Union only acts "by supporting and supplementing" the action of Member States. The specific provisions define the allocated competence of the Union to act, while at the same time harmonisation of these areas is explicitly excluded. Education is one example.[21] Other complementary fields are

15 Article 5(4) TFEU.
16 Tridimas (2007), p. 176.
17 According to Goucha Soares (2005), p. 605.
18 At that time Article 308 EC.
19 Opinion 2/94 [1996] ECR I-01759, par. 35: "Such a modification of the system for the protection of human rights in the community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235" (Article 352 TFEU).
20 This list seems to be exhaustive. Compare: Schütze (2012), p. 168.
21 Article 165 TFEU.

culture,[22] public healthcare,[23] industry,[24] tourism,[25] civil protection[26] and administrative cooperation.[27]
The exclusion of harmonisation in these areas does not mean that there is no legal effect on these areas by Union law. The Union may adopt measures such as guidelines or recommendations that may also produce legal effects in the Member States. National courts may be obliged by the Court to interpret national law in that particular area according to those guidelines or to take such instruments into account.[28] With regard to these areas, the Member States remain competent at regulating a given field when the Union has exercised a complementary competence. The Union's action does not replace national action, but complements national legislation and organisation of systems.

The explicit exclusion of harmonisation in certain areas has been referred to as 'negative competences' of the Union in the sense that the European Union should refrain from adopting harmonising measures in the particular area of law.[29] One of these 'negative competences' is Article 165(4) TFEU. This Article provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt incentive measures, with regard to education, explicitly excluding any harmonisation of the laws and regulations of the Member States from the action. Article 114 TFEU, which forms the legal basis to adopt measures in order to achieve the objectives of the internal market, still applies to the 'negative competence areas.'[30] This means that "harmonization necessary for the internal market also includes the competence to completely harmonize national rules limiting the basic freedoms, including those justified on the basis of the public good."[31]

Articles 114 TFEU and 352 TFEU are, both, horizontally applicable, and cut through the vertical division of powers. Although the application of these horizontal legal bases to legislate is not unlimited, the prohibition of harmonisation in the complementary fields of law does not restrict the Union from adopting legislation in these areas. In the light of European citizenship, tension may arise in the areas in which the Union has been given complementary competences. On the one hand, European citizenship was created as a rights-formulated concept, but on the other hand, limits were placed on the exercise of Union competences in areas that traditionally belong to the Member States, such as education, culture and healthcare. These areas are most important for citizens. Since citizenship in its core meaning requires a certain solidarity with the members of the particular community (Member State or European Union), the areas in which this solidarity is expressed are precisely the areas in which tension may arise. Education is

22 Article 167 TFEU.
23 Article 168 TFEU.
24 Article 173 TFEU.
25 Article 195 TFEU.
26 Article 196 TFEU.
27 Article 197 TFEU.
28 C-322/88, *Grimaldi* [1989] ECR 4407, par. 18.
29 Von Bogdandy and Bast (2002).
30 See also De Vries (2006), pp. 260-297.
31 Von Bogdandy and Bast (2002), p. 245.

such an example of social benefits, since Member States want to preserve certain benefits for their own nationals, whereas the European Union requires solidarity on the ground of European citizenship.[32]

3.2.3 Beyond legislative competences of the Union

In addition to the above-mentioned legislative competences, there are also other competences conferred on the Union. This is apparent from the wording of Article 13(2) TEU which states that "each institution shall *act* within the limits of the powers conferred upon it by this Treaty."[33] These acts are not necessarily limited to legislative acts, but may include the competence to adopt guidelines or the competence of the Court to decide on certain issues. Similarly, Article 2(5) TFEU refers in a broad sense to the Union's "competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."[34]
Indeed, "the reality of the scope of EC competence is that in some areas it is not legislative at all."[35] The competence to act is not limited to legislative competences, but can also be defined as "the authorisation the Treaty has given the institutions to do things. One of those acts, of those competences to do things may be certain institutional competences.[36]
Another example of such "institutional competence" is the competence of the European Commission to start an infringement procedure. The competences of the Union in the context of external relations may also be mentioned as competences beyond the classical legislative competences of the Union.[37]
Competences of the Union to act are therefore not *per se* legislative acts. The fact that the European Parliament has the competence to approve the draft budget of the Union is, in principle, also a competence that has been allocated by the Treaty to the European Parliament by Article 314 TFEU. The broader one defines the concept of conferred competences, the more it will overlap with the scope of Union law. From this perspective, the jurisdiction of the Court of Justice provided for in Article 19 TEU may also be defined as one of the allocated competences. At the same time, this Article divides the jurisdiction between the courts in the European Union, since the Court of Justice has been allocated the jurisdiction to interpret Union law and rule on the validity of Union law. Other cases are, inherently, attributed to the national courts. The competence to interpret Union law can also be qualified as a competence to act. The fact that the Court has the task to interpret Union law is crucial for the way in which the scope of Union law is determined.[38]

32 Discussed in Chapter 4, Section 4.4.2.
33 Italics HvE.
34 Article 2(5) TFEU.
35 Weatherill (2009), p. 24.
36 Dashwood (1996), p. 114.
37 Article 218 TFEU, for example, allocates the competence to negotiate and conclude agreements between the Union and third countries or international organisations.
38 Azoulai (2008), p. 1342.

3.3 THE SCOPE OF APPLICATION OF EU LAW IN RELATION TO THE VERTICAL DIVISION OF COMPETENCES

3.3.1 The relation between the competences and the scope of Union law

There is considerable overlap between what lies within the scope of Union law and what belongs to the Union competence to act. Whenever the Union has exercised its competence to act on a subject matter, this area falls within the material scope of Union law. This also means that Member States are obliged to guarantee the general principles of Union law when implementing Union legislation, since they are acting as 'agents' for the European Union.

When the Union is not allowed to act in a legislative manner, or when the Treaty is silent on a substantive field, national measures may still fall under the scope of Union law because there is a connection between the national measure or act and Union law. Whenever a national situation or a particular area comes within the scope of Union law, the exercise of national competences by the Member States is limited by Union law and its general principles of law, such as proportionality and fundamental rights. As stated by the Court in *Viking*: "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law."[39] This means that the scope of Union law is broader than what belongs to the scope of competences of the European Union to act.
As observed, if the Union has not exercised its competence, the scope of Union law is not activated, unless, of course, a link is made by the freedoms. The allocation of competences is, in that sense, to be qualified as the potential scope of Union law, which might be activated any time. Advocate General Sharpston proposed to extend the scope of Union law to those fields in which competence is allocated to the Union when this competence is not exercised yet. She argued:

> "The Member States have conferred competences upon the European Union that empower it to adopt measures that will take precedence over national law and that may be directly effective. As a corollary, once those powers have been granted the European Union should have both the competence and the responsibility to guarantee fundamental rights, independently of whether those powers have in fact been exercised."[40]

Moreover, the fact that national legislation has to comply with these limitations or requirements of Union law could have a potential spill-over effect, in the sense that harmonisation of certain nationally regulated areas may become necessary or desirable (in the light of legal certainty, for example). In order to analyse the influence of Union

39 C-438/05, *Viking* [2007] ECR I-10779, par. 40, see also well-established case law on this issue: e.g. C-120/95, *Decker* [1998] ECR I-01831, paras 22 and 23, C-158/96, *Kohll* [1998] ECR I-01931 paras 18 and 19, C-446/03, *Marks & Spencer* [2005] ECR I-10837, par. 29.
40 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 165.

citizenship on the division of powers, it is important to examine the relationship and difference between the scope of Union law and the competence of the Union because European citizenship did extend the scope of Union law in various ways, as will be discussed in Section 3.5.

3.3.2 The scope of application of Union law

Some situations do not fall under the competences of the Union, but are still subject to Union law, because these situations or areas fall within the scope of Union law. In these situations, a connection can be made with EU law. National law or acts of national authorities fall under the scope of EU law and are, consequently, subject to EU limitations and principles.

How the scope of European law should be defined is a topical question in European Union law, since it has consequences for the discretion and competences of the Member States. The scope of application of EU law is of significant importance for the division of competences and the question of whether the Court has jurisdiction over a certain issue. Whenever a national situation falls within the scope of application of European Union law, the general principles of European Union law are applicable to that situation. Moreover, the prohibition of discrimination on the ground of nationality is applicable only within the scope of Union law.[41] This means that even if Member States remain competent to legislate and regulate certain areas, the relevant issue might fall under the scope of EU law, which limits the competences of the Member States significantly. Because of its importance for the division of powers and the jurisdiction of the Court, the definition and limits of the scope of European law have gained much attention in academic writing.[42]
Up until now, the Court has not connected the scope of Union law with Article 352 TFEU or with the objectives of the Union. Article 352 TFEU only served as a legal basis for the legislative competences of the Union, but apart from these legislative acts, the provision seems too broad to be able to constitute a concrete link with Union law.[43] In the *Bosman* case, the Court referred to the objectives of the Treaty as the determining factor regarding the scope of the free movement of workers.[44] Here, the question arose as to whether sports could fall under the free movement provisions. According to the Court, whenever sports constitute an economic activity within the meaning of the objectives of the Union, such activity could fall under the scope of EU law. Hence, not only the provisions that allocate specific competences and those that regulate the free movement rules are important for the scope of Union law, but the objectives of the EU may also determine the scope of application. However, in the *Bosman* judgment, the free

41 Article 18 TFEU.
42 For instance, with regard to the scope of EU fundamental rights: Eeckhout (2002), pp. 945-994.
43 Although the Court of Justice has interpreted Article 6 EC in such a way that it would legitimise legislation under Article 36 and 37 EC on environmental issues within agricultural policy of the Union in C-428/07, *Horvath* [2009] ECR I-06355.
44 C-415/93, *Bosman* [1995] ECR I-04921, par. 3.

movement of workers[45] activated the scope of Union law, although this provision has been interpreted in the light of the objectives of the European Union. Hence, the Court used the objectives of the Union in its interpretation of the free movement of workers. It seems unlikely that the objectives are autonomously sufficient to trigger the scope of Union law, but they may affect the scope through such interpretation of another Treaty provision.

The fact that a national measure falls within the scope of Union law results in an obligation for the Member States to comply with fundamental rights, but also with the other general principles of Union law, such as the principle of proportionality or the prohibition of age discrimination. The scope of Union law does affect the Member States' competences 'to do things' by setting limits on the exercise of these competences when a link is established with Union law.[46]

3.3.3 The scope of EU law in the case law of the Court on general principles of Union law

The general principles of Union law only apply to situations that fall within the scope of European law. The question of whether or not a situation falls under the scope of Union law is therefore a central issue in the case law concerning the application of the general principles of Union law. This case law, therefore, gives insight into how to define the scope of Union law.

With regard to the scope of Union law in the context of fundamental rights, two regimes exist. First of all, the Court has acknowledged fundamental rights as general principles of Union law, since the judgment of the Court in *Stauder* in 1969.[47] The case law on fundamental rights within the framework of general principles of Union law has been significantly developed in subsequent case law.[48] In the meantime, the Charter was adopted and entered into force by the Treaty of Lisbon in December 2009. The Court's case law concerning fundamental rights is divided into case law with regard to the application of general principles of Union law and, more recently, the application of the Charter. The scope of application of the Charter is discussed in Section 3.3.4.

Basically, there are three different situations that trigger the scope of Union law, resulting in an obligation for Member States to respect fundamental rights on account of Union law.[49]

45 Article 45 TFEU.
46 Hublet (2009), p. 759.
47 The Court referred for the first time to "fundamental human rights enshrined in the general principles of Community law and protected by the court" in Case 29/68, *Stauder* [1969] ECR 419, par. 7. In subsequent case law fundamental rights have been applied as general principles of law by the Court.
48 See e.g. Lenaerts (2000), pp. 575-600.
49 If national measures do not have a link with Union law, fundamental rights on account of EU law are not applied. See C-309/96, *Annibaldi* [1997] ECR I-07493, par. 13.

The first way in which a national measure comes within the scope of Union law is when a certain area is regulated by Union law. As a result, this area is brought under the scope of EU law, but only as far as this particular subject is regulated by the Union.[50]
Hence, the competences allocated to the Union can be included in the scope of Union law, at least when the Union has exercised its competence to act, the scope of Union law is triggered. It is more problematic when the European Union has not exercised its competence in a certain area (yet), but does have the competence to do so. In these situations, the Member States remain competent to act in general (in the context of shared competences). The scope of EU law is not triggered on the basis of the shared competence as such. The institutions of the Union are bound by the general principles of Union law whenever they act, since their acts fall within the scope of EU law. The other side of the coin is that the Member States have to comply with these principles whenever they transpose Union law into national law. In this situation, the Member States act as 'agents' of the Union transposing Union law. Even when Member States are left with some margin of discretion to execute or transpose Union law, the scope of Union law is triggered.[51] In the case of minimum harmonisation, national requirements that are stricter than the Directive required fall outside the scope of Union law.[52]

In the second place, the scope of application of Union law is triggered by the provisions on free movement. Hence, although Member States may exercise their competence to act in areas that are not transferred to the Union, national measures must observe the Treaty provisions on free movement. In its case law, the Court of Justice has held that although certain matters belong "within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Union law unless what is involved is an internal situation which has no link with Union law."[53] Such a sufficient link with EU law is constituted by an infringement of the Treaty provisions on free movement of goods, persons, capital and services. In the event that a Member State derogates from the provisions of free movement, the scope of Union law is activated. A particular national situation, in this case, falls within the scope of Union law and has to comply with the general principles of the Union. Such derogation could be placed within the Treaty exceptions or within the *rule of reason*.[54] The leading case in this respect is *ERT*[55] on exclusive rights in Greek radio and television broadcasting for one company.

50 C-2/92, *Bostock* [1994] ECR I-00955.

51 C-20/00 and C-64/00, *Booker Aquacultur* [2003] ECR I-07411. This was also the case with regard to third-pillar instruments, a distinction no longer made. When these framework decisions were implemented, the Member States also had to observe the free movement provisions because such a situation falls under the scope of Union law. According to the Court of Justice in *Wolzenburg*: "The Member States cannot, in the context of the implementation of a framework decision, infringe Union law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States." C-123/08, *Dominic Wolzenburg* [2009] ECR I-09621, par. 45.

52 C-2/97, *Borsana* [1998] ECR I-08597.

53 C-353/06, *Grunkin and Paul* [2008] ECR I-07639, par. 16, see also C-224/02, *Pusa* [2004] ECR I-05763, par. 22.

54 The rule of reason as legitimate interest to derogate from the four freedoms, as established in *Cassis de Dijon*: Case 120/78, *Rewe-Zentral* [1979] ECR 649.

55 C-260/89, *Elliniki Radiophonia Tiléorassi* [1991] ECR 2925.

> The Court of Justice considered that the exception regarding the free movement of services had to comply with the fundamental rights as general principles of Union law (in this case with Article 10 ECHR).[56] In Familiapress[57] also the reliance on the 'rule of reason' by a Member State, as exception to the free movement provisions, triggered the scope of Union law. In Kremzow the Court made it clear that situations that are not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons do not fall within the scope of Union law. Although "any deprivation of liberty may impede the person concerned from exercising his right to free movement (…) a purely hypothetical prospect of exercising that right does not establish a sufficient connection"[58] with Union law to justify its application.

The third, and less common, category is constituted by national measures that fall within the scope of Union law because there is *another* link with Union law.[59] Such a link with Union law may be present when a national measure falls under the exemption of the free movement of goods in the context of the Keck exemption, as was the case in *Karner*.[60]

> In this case two companies, engaged in the sale by auction of industrial goods and the purchase of the stock of insolvent companies, had a dispute on the way a certain auction was advertised. The question arose whether such advertisement was misleading and in violation of competition law in the sense that it gave the impression that the insolvency administrator was selling the insolvent company's assets, rather than another company. The national court referred a question to the Court of Justice asking whether national legislation which prohibits any reference to the fact that goods come from an insolvent estate would be contrary to the free movement of goods, where notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.
>
> According to the Court this requirement would not be covered by the prohibition of restrictions to the free movement of goods, since the requirement constituted a selling arrangement, which was applicable to all relevant traders operating within the national territory and affected them in the same manner, in law and in fact.[61] Consequently the situation of *Karner* did not come within the scope of Article 34 TFEU. However, the Court subsequently examined whether the national provision was in compliance with Article 10 ECHR, even though there was not any other connection with European law, other than Article 34 TFEU. Article 10 ECHR is part of the fundamental rights of the European Union, which are applied by the Court as general principles of Union law. In order to apply these general principles a situation has to fall within the scope of Union law.

This third category is somewhat controversial and the existence of this connection with Union law is not widely acknowledged. Such a category would entail national measures

56 Paras 42-43.
57 C-368/95, *Vereinigte Familiapress* [1997] ECR I-3689.
58 C-299/95, *Kremzow* [1997] ECR I-02629, par. 16
59 Opinion of Advocate General Sharpston in C-427/06, *Bartsch* [2008] ECR I-07245, par. 69, Prechal (2010), pp. 8-9, Dougan (2011) (a), pp. 219-245.
60 C-71/02, *Karner* [2004] ECR I-03025.
61 In the sense of the judgment in *Keck*. According to this judgment, measures that restrict the free movement of goods may be excluded from the scope of the prohibition when the measure is a selling arrangement (such as conditions on advertisements) which is applicable without discrimination to all traders in law and in effect. C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-06097.

that would neither be the result of implementation of EU law, nor restrict the free movement, but have another, as yet unclear, connection with Union law. More recent case law of the Court of Justice seems to support the assumption that an open category of situations coming within the scope of Union law exists, as will be discussed in the next section, Section 3.3.4.
It is far from clear whether such a third category of national measures that fall within the scope of Union law exists. On the contrary, it might be argued that there are only two situations in which national measures are covered by Union law: the 'agent' situation and the free movement connection with the scope of Union law. In this context, the case of *Karner* may be included in the second category of the scope of Union law (derogating from the freedoms). Although the Court ruled, in this specific case, that the national measure did not constitute a restriction of the free movement provisions, due to the fact that it fell under the exemption of the scope of free movement of goods, the Court also assessed whether Article 10 ECHR was violated. Although it is notable that the Court examined Article 10 ECHR, the situation still has a certain connection to free movement. In other words, perhaps the Court did not create a new category of situations that fall within the scope of Union law, but rather extended the two existing categories. With this perspective, the Court widened the two categories significantly. At the same time, it means that no unlimited, or at least undefined, third category of situations that fall under the scope of Union law exists. Up until now there has been no clarity on this issue.

3.3.4 The scope of Union law with regard to the Charter of Fundamental Rights

The entry into force of the Charter of Fundamental Rights in 2009 added a new dimension to the scope of Union law. The Charter has the same legal status as the Treaties. The scope of the Charter is not unlimited and may not exceed the scope of competences allocated in the Treaties.[62]

The scope of application of the Charter was explicitly limited by its drafters. According to the text of Article 51(1) of the Charter, the rights included in it are "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."[63] However, according to settled case law and the explanations accompanying the Charter,[64] its scope is determined in a wider sense. The explanations declare that the Charter "is only binding on the Member States when they act *in the scope of Union law.*"[65] This explanation seems to be broader than 'implementing' Union law as provided for in Article 51(1) of the Charter. Therefore the question is whether the scope of the Charter is also activated outside the pure 'agent situation', in which Member States implement

62 Article 6(1) TEU.
63 The text of the Charter was changed during the process. In a discussion document of May 2000, the scope of the Charter was defined as "The provisions of the Charter are addressed to the Member States exclusively within the scope of Union law." See also Kaila (2012), pp. 296-297.
64 Explanations relating to the Charter of Fundamental Rights, OJ, 14.12.2007, 2007/C 303/02.
65 Italics HvE.

EU law in national law. The Charter is applicable to situations in which Member States implement Union law according to the text of the Charter and the explanations. This also means that Member States need to comply with the Charter when they act within a discretion provided by EU law. The case of *N.S.*[66] is an example.

> The case of *N.S.* concerned the application of the Dublin Regulation to asylum seekers. According to the system of the Dublin regulation, a single Member State is responsible for examining an application for asylum. According to the regulation another Member State may examine the application, in which case that other Member State becomes responsible for the asylum seeker. According to the Court this discretion, to examine an application for asylum even if the relevant Member State is not responsible in the first place, is qualified as 'implementing Union law'. The Court held that "the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter."[67]

In *Iida* the Court held that "to determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it."[68] It seemed therefore that the Court held a narrow interpretation of "implementation" in the sense of Article 51(1) of the Charter. In the more recently decided case of *Fransson*[69] the Court seems to have adopted a broader interpretation of the scope of application of the Charter. This case posed questions concerning the scope of the Charter in the Area of Freedom, Security and Justice and the implementation of Union law. Here, the Court of Justice held that national law that aimed to achieve the goals of a Directive is qualified as implementing EU law. Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation.

> The case of *Fransson* concerned a Swedish fisherman that committed tax fraud. The Swedish tax authorities imposed a fine on Mr Fransson, while the public prosecutor started criminal proceedings against Mr Fransson. The question arose whether Article 50 of the Charter (the *ne bis in idem* principle) would allow imposing two penalties, one based on administrative law and the other based on criminal law. The first issue dealt with by the Court was the question of the scope of application of the Charter regarding this specific situation. The Court, firstly, pointed out that the penalties at stake were connected with the obligation to pay VAT (value added tax). The Court, secondly, stated that tax penalties, such as those at stake, "constitute implementation

66 C-411/10 and C-493/11, *N.S.* [2011] ECR I-13905.
67 C-411/10 and C-493/11, *N.S.* [2011] ECR I-13905, par. 69.
68 C-40/11, *Iida* [2012] ECR nyr, par. 79.
69 C-617/10, *Fransson* [2013] ECR nyr.

> of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter."[70] Even though the penalties as such are not regulated in EU law, since the fine at stake is "designed to penalise an infringement of that directive [2006/112][71] and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union."[72]

Even though the national provisions at stake, which were the legal basis for the fine, were not the result of implementation of the Directive, the Court held that the fact that these national provisions supported the effectiveness of the Directive on VAT was sufficient to trigger the scope of Union law in order to apply the Charter.
Remarkably, the Court of Justice explicitly referred to the explanations of the Charter for the interpretation of the scope of the Charter.[73] It seems, therefore, that the Court adheres to the broader explanation of the scope of the Charter, rather than the more limited interpretation of "implementation of Union law." This is in line with Article 52(7) of the Charter that stresses that the explanations are "drawn up as a way of providing guidance in the interpretation" of the Charter.[74] The Court also uses a broad interpretation of implementation of Union law.[75]

Up until now it is unclear whether the scope of the Charter applies to derogations from the freedoms. In academic literature there is a debate on whether or not the scope of the Charter extends to national measures that derogate from Union law.[76] Not all scholars are convinced that this is the case.[77] It seems that the Court regards any national measure that is 'covered' by Union law to fall within the scope of the Charter. This would imply that derogations from EU law would, indeed, fall within its scope.

With regard to the third category of national measures, the scope of application of the Charter is even more controversial. Nevertheless, in orders of the Court concerning the scope of the Charter, evidence may be found that the application of the Charter is broader than strict implementation of Union law.[78] In these recently decided orders, the

70 C-617/10, *Fransson* [2013] ECR nyr, par. 27.
71 Added HvE.
72 C-617/10, *Fransson* [2013] ECR nyr, par. 28.
73 C-617/10, *Fransson* [2013] ECR nyr, par. 20.
74 See also C-279/09, *DEB* [2010] ECR I-13849, par. 32.
75 See also Hancox (2013).
76 For a detailed overview see Eeckhout (2002), Knook (2005), Lenaerts (2012) (b), Sarmiento (2013).
77 The judgment in *Fransson*, however, arguably reveals that the Court adheres to the explanations of the Charter and holds a broad interpretation of 'implementation of Union law'. Additionally, the judgment in *Dereci* points in the direction of a broad interpretation of the scope of the Charter. See for an overview of the arguments Lenaerts (2012)(b), pp. 375-403, more specifically on pp. 383-386.
78 In *Estov*, the Court decided in its order that the reference from the Bulgarian court did not contain any information that showed that the national measure at stake (a decision of the Minister) "would constitute a measure implementing European Union law or would be connected in any other way with that law," meaning that "the jurisdiction of the Court to rule on the present reference for a preliminary ruling is not established." C-339/10, *Estov* [2010] ECR I-11465, par. 14. Also in the order of the Court in *Chartry*, the Court of Justice held that it was not competent to answer the preliminary questions, since the national legislation at issue was not implementing Union law, neither was there any other connection with the free

Court of Justice declared that it has no jurisdiction to answer the preliminary questions of the national courts on the application of the Charter, since it has no jurisdiction to decide cases outside the scope of Union law. The Court explained that these preliminary questions do not concern 'agent' situations and, significantly, that there is no 'other connection' with Union law in order to activate the application of the Charter.

The scope of the Charter at least includes a broad range of Member States' measures implementing Union law, including instances in which these measures are not strictly prescribed by a Directive or Regulation. However, whether the scope of the Charter also includes derogations from the freedoms and measures with another link with Union law, compared to the *Karner* case, has not yet become clear. Recent case law of the Court indicates that it is willing to interpret the scope of the Charter in the same sense as the fundamental rights in their capacity as general principles of law.

3.3.5 Different legal consequences of 'the scope' and the 'competences' of the Union

The division of powers between the Member States and the European Union is regulated by the strict division of competences to act, and by the scope of Union law versus the scope of national law. The consequences for areas of law that fall under the competences of the Union and those that fall under the scope of Union law are discussed below.

In *Watts*,[79] the Court of Justice defined the distinction in legal consequences for the national legal order between situations that fall under the scope of Union law and those that fall under the competences of the Union.

> In *Watts* the national referring court asked the Court of Justice whether Article 56 TFEU (and Regulation 1408/71) imposed an obligation for Member States to fund hospital treatment in other Member States without reference to budgetary constraints. It asked explicitly whether such an obligation would be compatible with Article 152(5) EC[80].[81]

The Court concluded that although Union action should respect the organisation of healthcare by the Member States, "that […] does not, however, exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC [now 56 TFEU], or Union measures adopted on the basis of other Treaty provisions […] to make adjustments to their national systems of social security. It does not follow that this undermines their sovereign powers in the field."[82]

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movement provisions. Therefore it seems that not only derogating from the free movement provisions is a sufficient connection with EU law, but also any other connection with the free movement provisions, which might explain the judgment in *Karner*. See also De Mol et al (2012), pp. 222-236.

79 C-372/04, *Watts* [2006] ECR I-04325.

80 Now Article 168(5) TFEU.

81 Article 152(5) EC: "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care." This limitation is now provided for in Article 168(7) TFEU.

82 C-372/04, *Watts* [2006] ECR I-04325, par. 147.

According to this paragraph, in both situations certain adjustments of national law by the Member States are required. Whereas the scope of Union law limits national competences, in the case of the exercise of a *Union* competence, national measures in the particular field are replaced by Union law. The scope of EU law is therefore broader than the scope of Union competences. National measures that fall within the ambit of Union law are not replaced by Union competences.[83] In fact, the four freedoms do limit the exercise of national competences without replacing these competences by Union legislation. The four freedoms act, basically, as a point of review and at the same time restructure the division of competences by their impact on areas that were believed to remain in the hands of the Member States.
In *Laval*, the Court also explored the distinction and relationship between the scope and competences of the Union. Here, the question arose whether collective action was covered by the scope of Union law, even though collective action is explicitly excluded from the competences of the Union in Article 168(5) TFEU. The Court considers that "even though, in the areas in which the Union does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Union law."[84]

The scope of Union law is flexible and may include any national measures that have a connection with Union law, either because the specific subject is harmonised by the European Union or because the national measure restricts the free movement rules. The difference between the scope of the Treaty and the competence of the Union to act seems to be related to the intensity with which Union law interferes with national law. When the Union regulates a certain area with 'hard-core' legislation, the principle of pre-emption stops the Member States from acting in that field. When an area comes within the scope of the Treaty, the exercise of competences by Member States is limited, but not replaced by Union norms. This is the case for regulations and decisions, but also for directives. The margin of discretion left to the Member States by a directive falls within the scope of Union law.[85] As such, whereas Union competences give the floor to the Union to 'do things', whenever a situation or (part of an) area comes within the ambit of Union law, the Member States are still allowed to 'do things', but only within the limits of Union law.

3.4 HOW DOES EUROPEAN CITIZENSHIP AFFECT THE VERTICAL DIVISION OF POWERS?

After the more general elaboration on the allocation of competences and the scope of Union law, in the following sections the effect of European citizenship on the scope of EU law is explored. As described, the scope of Union law is triggered by the exercise of a Union competence by the European Union or when a certain field of law falls within the scope of EU law, based on one of the free movement provisions. The analysis regarding the effect of European citizenship on the scope of Union law starts with Article 18 TFEU.

83 Azoulai (2008), p. 1342.
84 C-341/05, *Laval* [2007] ECR I-11767, par. 87.
85 C-20/00 and C-64/00, *Booker Aquacultur* [2003] ECR I-07411.

Article 18 TFEU has played a significant role in the effect of European citizenship on the vertical division of powers, since it was used by the Court to extend the scope of Union law. The connection between the prohibition of discrimination on grounds of nationality and Union citizenship was a trigger for the development of what is now well-established case law of the Court. In this sense, Article 18 TFEU, together with EU citizenship, has affected the scope of Union law, as will be discussed below.

Article 18 TFEU prohibits discrimination based on nationality, "within the scope of application" of the Treaty and "without prejudice to any other special provisions." In order to determine the effects on the division of powers, Article 18 TFEU is the starting point of this exploration because it is due to this prohibition that the equal treatment of Union citizens really became a lively concept. In order to apply Article 18 TFEU to a particular situation, such a situation or measure has to fall within the scope of Union law. It is exactly within this perspective that European citizenship opened doors that were believed to be closed before.

3.4.1 The scope and nature of Article 18 TFEU

Article 18 TFEU constitutes the general prohibition of discrimination on the ground of nationality. The provision sets the boundaries of the application in the text of the provision itself, stating that it is applicable "within the scope of application of this Treaty and without prejudice to any special provisions."[86] According to the Court, the phrase "without prejudice to any specific provisions" in Article 18 TFEU "refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations."[87] The Court held that the four economic freedoms are such specific provisions that they apply before Article 18 TFEU applies. Since the four (classic) freedoms prohibit discrimination on grounds of nationality, Article 18 TFEU does not apply in any of the situations in which the specific freedom provisions can be invoked.[88] At the same time, Article 18 TFEU is only applicable within the scope of application of the Treaties (which includes all Union law that is derived from the Treaties). This means that another provision of EU law is needed in order to establish a connection with Union law to activate the scope of Union law.
Article 18 TFEU does not specify who may rely on the prohibition, nor does it specify to which substantive areas it applies. At first sight it seems that the scope of Article 18 TFEU would be rather limited, because the prohibition often works as a kind of safety net. In addition, the two ('within' and 'without') limitations of the prohibition appear to limit its application significantly. Most of the time, a situation will fall within another economic freedom if there is discrimination on the grounds of nationality. If a national measure discriminates on the ground of nationality, it is usually prohibited by one of the four economic freedoms. However, from its early case law, the Court has interpreted Article

86 Article 18 TFEU.
87 Case 186/87, *Cowan* [1989] ECR 00195, par. 14.
88 See for example Case 186/87, *Cowan* [1989] ECR 00195, par. 17.

18 TFEU broadly. Moreover, the introduction of European citizenship had a huge impact on the application of the prohibition on discrimination on the ground of nationality.

> The prohibition of discrimination on the grounds of nationality is, nowadays, based on the case law of the Court codified in Directive 2004/38 (Article 24). This Article prohibits direct and indirect discrimination on the grounds of nationality, except for specific derogations that are mentioned in paragraph 2. According to Article 24(2), Member States may derogate from the obligation of equal treatment with regard to social assistance (1) in the first three months of residence, or (2) in the period in which jobseekers of other Member States reside and (3) prior to acquisition of the right of permanent residence, allowing the Member States not to grant maintenance aid for studies, including vocational training, consisting of student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. The Court has held that "Since Article 24(2) is a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, it must be interpreted narrowly."[89] Thus although derogations of Article 18 TFEU are now codified in secondary law, these derogations are narrow in nature.

3.4.1.1 Early case law on Article 18 TFEU

A study of the case law of the Court, before the introduction of European citizenship, reveals two approaches to determining the scope of Union law within the meaning of Article 18 TFEU: a 'competence approach' and an 'internal market approach'[90] As long as there is a competence or a link with the internal market, the scope of Union law is triggered, in the context of Article 18 TFEU. In this early case law on Article 18 TFEU, the decisive question was, and still is, how far the scope of Union law reached and what fell under the prohibition of discrimination on the grounds of nationality.

Education is one of the areas that did not fall under the competences of the European Union, but in case law the question whether it would nevertheless fall under the scope of Union law was topical for years. One of the early cases on Article 18 TFEU that dealt with this question was decided in July 1983. In this case, *Forcheri*,[91] the Court of Justice held that although the access to education was not part of the Union's competences, this did not necessarily mean that this area fell outside the scope of Union law.[92] This conclusion was based on Article 128 EEC,[93] providing the competence to contribute to the improvement of vocational training, but also explicitly excluding harmonisation in this area by the Union. The same reasoning is found in *Gravier*[94] on the payment of fees for vocational training. The Court concluded with reference to Article 128 EEC[95] and

89 C-75/11, *European Commission v Republic of Austria* [2012] ECR nyr, par. 54.
90 This point is inspired by Ackermann (1998), p. 790.
91 Case 152/82, *Forcheri* [1983] ECR 2323.
92 Case 152/82, *Forcheri* [1983] ECR 2323, par. 17.
93 Now Article 150(4) EC.
94 Case 293/83, *Gravier* [1985] ECR 00593.
95 Now Article 166 TFEU.

Regulation 1612/69[96] that the requirements for access to vocational training fell within the scope of Union law. In *Lair*,[97] the Court made a distinction between the access to education, and the directly related conditions, and the granting of allowances for the maintenance of students. The Court argued that "in the present stage of development of Union law" study grants fell outside the material scope because these funds were a "matter of educational policy, which is not as such included in the spheres entrusted to the Union institutions", referring to Article 128 EEC.[98] Moreover, the Court added, it is also "a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty."[99] Hence, in the early case law of the Court on the scope of Article 18 TFEU, a competence-based determination of the scope of Union law can be detected. The Court explicitly refers to a Union competence determining the scope of Union law.

In addition, a link with the internal market may also constitute a connection with the scope of Union law in the context of Article 18 TFEU. Three cases can be compared in this respect, which considered the same requirement: a civil provision that required foreign claimants to secure a sum for the costs of legal proceedings before bringing a case before the national court.[100] Such a provision is obviously discriminatory on grounds of nationality, but the crucial question was whether civil procedure requirements fell within the (material) scope of Union law. In *Data Delecta*[101] and *Hayes,*[102] the Court found that the national civil provision fell within the scope of Union law. Furthermore, the requirement was considered discriminatory on the grounds of nationality because it could be supposed to have an (indirect) effect on the trade in goods and services between the Member States. Additionally, the Court stressed that it was not necessary to connect the national measure with the specific Treaty provisions on free movement. In *Phil Collins,*[103] the Court also pointed out that copyright and related rights were included within the Union's scope of application because of their potential effect on the internal market, in this case the free movement of goods and services and competition distortions.[104]
Although in *Saldanha* the same kind of national requirement was at stake as in *Data Delecta* and *Hayes*, the Court of Justice concluded there that the situation fell within the

96 Regulation 1612/68 provided for the right to education for family of workers. Note that as a student, *Gravier* did not fall under the personal scope of this regulation.
97 Case 39/86, *Lair* [1988] ECR 3161.
98 Case 39/86, *Lair* [1988] ECR 3161, par. 15.
99 Case 39/86, *Lair* [1988] ECR 3161, par. 15.
100 C-43/95, *Data Delecta Aktiebolag* [1996] ECR I-04661, C-323/95, *Hayes* [1997] ECR I-01711 and C-122/96, *Saldanha* [1997] ECR I-05325.
101 C-43/95, *Data Delecta Aktiebolag* [1996] ECR I-04661.
102 C-323/95, *Hayes* [1997] ECR I-01711.
103 C-92/92 and C-326/92, *Phil Collins* [1993] ECR I-05145.
104 The same argument can be found in *Phil Collins*, C-92/92 and C-326/92, *Phil Collins* [1993] ECR I-05145, paras 22-28 and in C-398/92, *Mund & Fester* [1994] ECR I-00467, par. 11, where the Court argued that a national provision on civil procedure fell within the scope of Union law based on Article 293 EC and the Brussels Convention. According to the Court, the purpose of the possibility of negotiations on civil procedures is to facilitate the internal market.

scope of Article 18 TFEU on the basis of Article 44(2)(g) EC[105] and not based on the indirect effect on the internal market. Since Article 44(2)(g) confers the competence on the Council and the Commission to coordinate safeguards in the field of company law, the protection of stakeholders fell within the material scope of Union law according to the Court.
A notable difference between the first two cases and the case of *Saldanha* is that Mr Saldanha as a shareholder brought a case to the national court to prevent a company from selling shares without the approval of shareholders, whereas in *Hayes* and *Data Delecta*, the foreign claimants were parties to a commercial agreement. Consequently, the connection with interstate trade was more obvious in *Hayes* and *Data Delecta*, but as the Court pointed out in *Saldanha*, such a connection is not necessary for a matter to be considered as falling within the scope of application.[106]

In general, before the introduction of Union citizenship, the scope of Union law was triggered in the sense of application of Article 18 TFEU by two different approaches: when interstate trade was affected in some way (even indirectly)[107] or when some competence to act on a certain issue existed within the Treaty or in secondary Union law.

3.4.1.2 A citizenship interpretation of Article 18 TFEU

The introduction of European citizenship in the EC Treaty by the Treaty of Maastricht has triggered the case law of Article 18 TFEU further. According to Article 20 TFEU "every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." Attached to the status of European citizenship are the rights and duties conferred on Union citizens by the Treaties.
One of the most important rights of Union citizens is included in Article 21 TFEU. This provision grants Union citizens the right to move and reside freely within the territory of the Member States. This right to non-economic free movement has been crucial in the case law of the Court of Justice on the application of Article 18 TFEU.

In its case law, the Court has used European citizenship in conjunction with Article 18 TFEU in order to "put flesh on the bones"[108] of European citizenship. The impact of European citizenship on the application of Article 18 TFEU is discussed below, in terms of the personal scope and the material scope of Article 18 TFEU.

105 Now Article 50 TFEU.
106 See the comment of Ackermann on these cases in Ackermann (1998), pp. 783-799 and Rossi (2000), p. 203.
107 See also *Cowan* as an example of the broad interpretation of the effect on the internal market as a receiver of services, Case 186/87, *Cowan* [1989] ECR 00195 and C-172/98, *Commission of the European Communities v Kingdom of Belgium* [1999] ECR I-03999, par. 12.
108 These terms are from O'Leary (1999), pp. 68-79.

3.4.1.3 Personal scope of Article 18 TFEU

It is undisputed that European citizens fall within the personal scope of Union law for the application of Article 18 TFEU. Since all nationals of the Member States have the status of European citizens, the personal scope is determined significantly by the Member States' nationality laws.

The Court is consistent in its approach to the personal scope of Union law when applying Article 18 TFEU. The case of *Martínez Sala*[109] is the starting point of this analysis of European citizenship case law.

> Martínez Sala was a Spanish national who had been living in Germany for more than twenty years. The child-raising allowance she requested was refused, because she did not have the German nationality or a residence permit – although she was lawfully residing – which constituted discrimination based on her nationality. The next question was whether she could rely on Article 18 TFEU, in other words, did her situation fall within the scope of application of the EC Treaty?

According to the Court, *Martínez Sala* fell within the personal scope because she was "a national of a Member State lawfully residing in the territory of another Member State."[110] The same test was performed in the cases of *Grzelczyk*,[111] *Trojani*,[112] *Garcia Avello*,[113] *Bidar*[114] and *Förster*.[115] The fact that a national of another Member State is resident in the territory of another Member State is sufficient to activate the personal scope of Article 18 TFEU. The reasons for this migration are not crucial. The sole fact that a national of another Member State is a lawful resident is sufficient.[116]

Until the case of *Vatsouras and Koupatantze,*[117] the question whether third-country nationals could also invoke Article 18 TFEU was unanswered. Some academics argued that Article 18 TFEU was applicable to third-country nationals residing within the European Union, since the title on visa and migration was transferred to the first pillar and, therefore, matters of visa and migration fell within the scope of the EC Treaty. Others held the opinion that third-country nationals could only rely on Article 18 TFEU in very specific situations where Union law granted them specific rights.[118]

> Early case law already seemed to imply that third-country nationals are excluded from the personal scope of Article 18 TFEU. In *Saldanha*, the Court stressed "that the mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member

109 C-85/96, *Martínez Sala* [1998] ECR I-02691.
110 C-85/96, *Martínez Sala* [1998] ECR I-02691, par. 61.
111 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 32.
112 C-456/02, *Trojani* [2004] ECR I-07573, par. 43.
113 C-148/02, *Garcia Avello* [2003] ECR I-11613, par.27.
114 C-209/03, *Bidar* [2005] ECR I-02119, par. 32.
115 C-158/07, *Förster* [2008] ECR I-08507, par. 43.
116 C-158/07, *Förster* [2008] ECR I-08507.
117 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585.
118 Holoubek (2009), pp. 350-351, Epiney (2007), p. 613. See also Boeles (2005), pp. 500–513.

> State, to rely on […] Article 6" [Article 18 TFEU].[119] In *Vatsouras and Koupatantze*, a German social benefit granted to, among others, jobseekers was at issue. Initially a jobseekers allowance was granted to these two Greek nationals, but the benefit was later withdrawn, because neither *Vatsouras* nor *Koupatantze* were qualified as workers (any longer). In addition to the question of whether this withdrawal was in compliance with Articles 18 and 56 TFEU, the German *Sozialgericht* asked whether exclusion of nationals of Member States from receiving social assistance benefits, which was granted to nationals of third countries, was in compliance with Article 18 TFEU.

In these joined cases, the Court concluded, for the first time, that the prohibition laid down in Article 18 TFEU "concerns situations coming within the scope of Union law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries."[120] It would seem that the discussion on the personal scope of Article 18 TFEU has come to an end by this statement of the Court. Nevertheless, one should keep in mind that the Court of Justice was asked to give an answer to the opposite question: Can Union citizens claim social benefits that are equal to those granted to third-country nationals? The issue in *Vatsouras* was that Union citizens were disadvantaged compared with a specific group of third-country nationals.

3.4.1.4 Migration as a precondition for the ratione personae?

The question is whether one should consider lawful residence as an extra criterion to come within the personal scope of Article 18 TFEU. Or is it enough for someone to have the nationality of a Member State and therefore also have the status of a European citizen? Is migration a precondition for the personal scope?

The above-mentioned cases have in common the fact that the citizens at stake claimed equal treatment from their host state, instead of from the Member State of origin. This explains why the Court insisted on lawful residence as a criterion. In the case law on Union citizens that claim equal treatment by their own Member State, it is even clearer that it is sufficient to have the nationality of one of the Member States to trigger the personal scope.

> In *D'Hoop,*[121] for example, Nathalie D'Hoop claimed equal treatment with regard to a tide-over allowance, i.e. a social benefit for persons who have completed their education in Belgium. Because she studied in France, this allowance was refused. As a Union citizen, she claimed equal treatment with regard to that tide-over allowance. In this case the Court of Justice argued that based on her Belgian nationality *D'Hoop* was a European citizen, according to Article 20 TFEU, and therefore she fell within the personal scope of Union law.[122]

119 C-122/96, *Saldanha* [1997] ECR I-05325, par. 15.
120 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585, par. 52.
121 C-224/98, *D'Hoop* [2002] ECR I-06191.
122 C-224/98, *D'Hoop* [2002] ECR I-06191, paras 27-28.

> In *Schempp,*[123] the Court did not seem to regard migration as a precondition in order to come within the personal scope of Article 18 TFEU. Here, the fact that the former spouse of Egon Schempp had migrated to another Member State caused a disadvantage with regard to his income tax, because he could not deduct the maintenance he paid. *Schempp* himself did not move, but was only affected in a negative sense by the exercise of free movement of his former spouse. The Court concluded that "Article 17(2) EC attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right to rely on Article 12 EC in all situations falling within the material scope of Union law".[124]

In order to come within the personal scope, a Union citizen does not have to migrate. Nationality of one of the Member States is the key to this personal scope of European citizenship. In fact, the personal scope of Article 18 TFEU is very much dependent on legislation on nationality of the Member States. In his Opinion in *Rottmann*,[125] Advocate General Maduro stressed that the conferral of nationality and also the withdrawal of that nationality in principle belong to the competence of the Member States because they imply a certain mutual loyalty between the Member State and the citizen. Member States cannot be refused the right to withdraw the nationality if the Union citizen received this nationality based on providing false information.

> Janko Rottmann, who originally had the Austrian nationality, acquired the status of Union citizenship with the accession of Austria to the Union in 1995. In that same year Mr Rottmann migrated to Munich, Germany. Three years later, he applied for German nationality, which was granted a year later, in 1999. According to the Austrian nationality regulations, *Rottmann* lost his Austrian nationality at the moment that he acquired the German nationality.
> During the naturalisation process, *Rottmann* failed, however, to mention that the Criminal Court of Graz (Austria) had opened legal proceedings against him, on account of suspected serious fraud on an occupational basis in the exercise of his profession. The Austrian authorities informed the city of Munich that a warrant for Rottmann's arrest had been issued in Graz and furthermore that *Rottmann* had been questioned before the criminal court in 1995 as an accused person. The *Freistaat Bayern* decided to withdraw Rottmann's German nationality with retroactive effect, due to Rottmann's failure to mention these criminal proceedings in Austria. The result of the withdrawal of German nationality was that *Rottmann* became stateless, since he had lost his Austrian nationality as a result of receiving the German nationality. As *Rottmann* no longer held the nationality of one of the Member States, he also lost his status as European citizen. This loss of status meant that *Rottmann* could no longer enjoy the substantive rights conferred on Union citizens, such as the right to free movement or to vote for municipal elections in other Member States.

In *Rottmann*, the Court decided differently from what the Advocate General had advised. The Court held:

> "It is clear that the situation of a citizen of the Union who […] is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and

123 C-403/03, *Schempp* [2005] ECR I-06421.
124 C-403/03, *Schempp* [2005] ECR I-06421, par. 17.
125 C-135/08, *Rottmann* [2010] ECR I-01449.

> placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [Article 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law."[126]

This also means that the competence of the Member States to withdraw nationality may be subject to limitations of European law. The crucial point of the judgment is that for the first time the Court ruled very clearly that the exercise of the Member State's competence to regulate the conditions of their nationality falls within the scope of Union law, a ruling which also has certain consequences for the application and judicial review of nationality regulations.[127]

With regard to the personal scope of Union law, in the context of Article 18 TFEU, this scope is triggered by the fact that a national has the nationality of one of the Member States and has therefore been granted the status of European citizenship. The Member States are in fact the main gatekeepers of the personal scope of Union law, although their discretion is not unlimited. Additionally, the fact that the regulation of nationality laws by Member States is affected by European citizenship, in principle, has consequences for the division of powers between the Member States and the Union, also with regard to the material scope.

3.4.1.5 'Lawful' residence and the scope of Union law

As observed, the Court has held that a Union citizen should be lawfully resident in order to be entitled to invoke Article 18 TFEU. In *Martínez Sala*, the Court already stressed that Article 18 TFEU applies to a Union citizen lawfully resident on the territory of another Member State. The Court has repeated this criterion of lawful residence in subsequent judgments.[128] By formulating the scope of Article 18 TFEU in terms of 'lawful residence', the Court avoids the issue of the right to *access* to a Member State. Similarly, Advocate General La Pergola stated in his Opinion on the case of *Martínez Sala* "We should […] remember that the Court is being asked not to determine whether Mrs Martínez Sala is entitled in Community law to reside in Germany but, more specifically, whether while residing in that country she is entitled to German child-raising allowance on the same conditions as German nationals."[129]

Hence, when a Union citizen is granted access to another Member State and resides there lawfully, it is irrelevant whether this right to residence is granted on the basis of Union law or national law. The 'resident' Union citizen should be treated equally compared to the nationals of the host Member State. In other words, once a Union citizen has entered

126 C-135/08, *Rottmann* [2010] ECR I-01449, par. 42.
127 See Davies, 'The entirely conventional supremacy of Union citizenship and rights' (EDU forum) <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.
128 *Inter alia* in C-209/03, *Bidar* [2005] ECR I-02119, par. 32, C-158/07, *Förster* [2008] ECR I-08507, par. 36.
129 C-85/96, *Martínez Sala* [1998] ECR I-02691, par. 16.

the Member States according to its lawful possibilities, the scope of Union law becomes applicable.

> An example is the case of *Trojani*,[130] a French national, who resided in a Belgium Salvation Army hostel, where he worked for his lodging and for pocket money in a socio-occupational reintegration programme. He did not satisfy the conditions for lawful residence based on the residence directives, inter alia because he did not have sufficient means. The fact that he was granted a residence permit by national law was nevertheless sufficient to trigger the application of Article 18 in conjunction with 21 TFEU. The Court of Justice held that "a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit."[131]

In order to fall within the ambit of Union law, lawful residence seems to be necessary. In parallel cases in the area of economic free movement, questions on illegal activities and the scope of Union law have been issues of case law. The cases *Happy family*[132] and *Coffeeshop "Siberië"*[133] made clear that activities such as the exploration and distribution of soft drugs within the Union do not fall within the ambit of Union law. The fact that there was no economic market in these illegal activities seemed to be of crucial consideration. In these cases, the question was whether the unlawful activity could be subject to the value-added tax directive, and therefore subject to secondary Union law; the question of whether illegal activities are also precluded from the free movement provisions had to be answered by the Court. In *Josemans*,[134] the Court made it clear that illegal activities, i.e. activities that are criminal offences in all Member States, do not fall under the scope of application of the free movement provisions.

> In *Josemans*, the Dutch toleration policy regarding coffee shops that sell cannabis was discussed. The question arose as to whether these coffee shops may only grant access to persons who were residents of the Netherlands and require a membership card based on residence according to Union law. The Court held that: "as narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, a coffee-shop proprietor cannot rely on the freedoms of movement or the principle of non-discrimination, in so far as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings."[135]
> Although the Court found that the sale of food and non-alcoholic drinks in these coffee shops did fall under the scope of freedom to provide services, the fact that the trade in cannabis was illegal, although tolerated, was decisive to conclude that the coffee shop owner could not invoke EU law with regard to the trade in cannabis.

It seems unlikely that Union citizens that reside illegally could benefit from free movement and equal treatment in the host Member State. Nevertheless, in the more recent cases

130 C-456/02, *Trojani* [2004] ECR I-07573.
131 C-456/02, *Trojani* [2004] ECR I-07573, par. 43.
132 Case 289/86, *Happy Family* [1988] ECR 03655.
133 C-158/98, *Coffeeshop "Siberië"* [1999] ECR I-03971.
134 C-137/09, *Josemans* [2010] ECR I-13019.
135 C-137/09, *Josemans* [2010] ECR I-13019, par. 42.

that have been decided on the basis of Article 21 TFEU autonomously, the Court made some statements on the access to a Member State.[136] The case of *Metock* suggests that illegal access to a Member State does not automatically preclude the applicability of the free movement of persons.[137] In *Jipa*, the Court explicitly stated the following:

> "[T]he right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin. As the Court has already had occasion to state, the fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State."[138]

In another case, the Court held that "it is clear from the Court's case-law that that right of freedom of movement includes both the right for citizens of the Union to enter a Member State other than the one of origin and the right to leave the State of origin."[139] Both judgments were decided within the specific context of the relevant cases, concerning a national measure that prohibited a national of a Member State from leaving his Member State of origin. In this specific situation, the Court did not have to decide on the *access* to a Member State, but on restrictions to *leave* a Member State. However, since the Court made this quite general statement, based upon the effectiveness of the fundamental freedom to move and reside for Union citizens, it seems that Article 21 TFEU also affects measures regarding the *access* to a host Member State – although justifications may be accepted, obviously. These judgments fall within the context of restrictions on the free movement.

3.4.2 The trigger of the material scope of Union law by European citizenship

A more complex question than the personal scope of citizenship provisions is when or how the material scope of Article 18 TFEU is triggered by certain claims of European citizens.[140]

From the case law of the Court of Justice, it is clear that the right to free movement and residence of Article 21 TFEU is the core element in bringing a situation within the material scope of Union law. The Court of Justice concludes in many cases that the material scope "include[s] those [situations] involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States."[141] In other words, the sole exercise of free movement rights by Union citizens triggers the material scope of the Treaty.

136 See further on in Chapter 3, Section 3.4.3.
137 C-127/08, *Metock* [2008] ECR I-06241, par. 99.
138 C-33/07, *Jipa* [2008] ECR I-05157, par. 18.
139 C-249/11, *Hristo Byankov* [2012] ECR nyr, par. 31.
140 Borgmann-Prebil (2008), p. 328.
141 See *Bidar*, par. 33; the same phrase is found in C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 33, C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 24, C-224/98, *D'Hoop* [2002] ECR I-06191, par. 29, C-224/02, *Pusa*

An exploration of the case law on citizenship in conjunction with Article 18 TFEU reveals that the Court initially did not solely rely on Article 21 TFEU to determine the material scope, but connected free movement with another Treaty provision. For the application of Article 18 TFEU, it seemed to be required that the benefit at stake (or claim of another kind) fell within the material scope of Union law. For instance, in *Martínez Sala*, the Court of Justice concluded that a child-raising allowance (based on Regulations 1408/71 and 1612/68) fell within the material scope of European law.

> In *Grzelczyk*, a student with French nationality requested a *minimex* (a minimum social allowance) in Belgium after three years of studying. In the first three years of his education, Grzelczyk was able to work and provide for his own cost of living. The allowance for which he then applied was refused and he therefore turned to Article 18 TFEU to claim the allowance on the same conditions as Belgian nationals. The Court of Justice found first of all that the *minimex* was a social benefit which fell within the material scope of Union law (based on Regulation 1612/68).[142] That Regulation was limited in scope to workers, and thus was not for persons such as *Grzelczyk* who were not economically active persons (anymore). Furthermore, the Court also mentioned that since its decision in *Brown*, the scope of Union law had been changed by the introduction of the title on education and Union citizenship to the Treaty. The Court of Justice concluded that *Grzelczyk* had a right to equal treatment with regard to the *minimex* because Articles 18 and 21 TFEU preclude the exclusion of Union citizens from the benefit outside the scope of Regulation 1612/68. The Court of Justice seemed to decide on Articles 18 and 21 TFEU, but also used other Treaty provisions in its decision.
>
> In *Trojani,*[143] the Court held, similarly, that "a social assistance benefit such as the minimex falls within the scope of the Treaty" and referred to the case of *Grzelczyk*.[144] After this statement, the Court continued with its conclusion: "[O]nce it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC [18 TFEU] in order to be granted a social assistance benefit such as the minimex."[145]
>
> In *D'Hoop*, the material scope of Union law was triggered by Article 21 TFEU. The Court, however, also referred in this regard to Article 3[146] and 149 EC.[147] According to the Court, the exercise of the right to free movement by Nathalie D'Hoop brought her situation within the scope of Union law. It continued stating that obstacles to free movement should be removed and "that consideration is particularly important in the field of education. The objectives set for the activities of the Community include […]

[2004] ECR I-05763, par. 17, C-520/04, *Turpeinen* [2006] ECR I-10685, par. 19, C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-06849, par. 87, C-158/07, *Förster* [2008] ECR I-08507, par. 37.

142 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 27.

143 C-456/02, *Trojani* [2004] ECR I-07573.

144 C-456/02, *Trojani* [2004] ECR I-07573, par. 42.

145 C-456/02, *Trojani* [2004] ECR I-07573, par. 46.

146 Article 3 EC has been partly removed in the Treaty of Lisbon. It read "the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: […] (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States."

147 Now Article 165 TFEU. C-224/98, *D'Hoop* [2002] ECR I-06191, paras 29-32.

> a contribution to education and training of quality. That contribution must […] be aimed, inter alia, at encouraging mobility of students and teachers."[148]

Article 149 EC was used as a supporting argument in *Bidar*.[149] Here, the Court had to explain why study grants would now fall under the material scope because in earlier case law these maintenance grants were excluded. The Court reasoned, creatively, that because Directive 2004/38 provides the possibility to limit such benefits to certain groups of citizens, these grants are governed by Union law, and thus fall within the scope *ratione materiae*. Article 24(2) of the Directive specifically excludes equal treatment with regard to allowances to students to cover the cost of maintenance. According to the reasoning of the Court:

> "[I]n that the Community legislature […] providing that a Member State may in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families restrict the grant of maintenance aid in the form of grants or loans in respect of students who have not acquired a right of permanent residence, it took the view that the grant of such aid is a matter which, in accordance with Article 24(1), now falls within the scope of the Treaty."[150]

It therefore seems that the Court found a supporting competence or provision of Union law necessary, even in an *a contrario* reasoning.

However, other case law indicates that in order to come within the material scope in the sense of Article 18 TFEU, the sole exercise of the right to move and reside freely as granted by Article 21 TFEU is sufficient. The Court examined whether there is a competence in the Treaty to serve as an argument supporting its decision. However, such competence provisions are not crucial for the scope of Union law. This is illustrated by the case of *Garcia Avello*,[151] a judgment issued between those in *Martínez Sala* and *Bidar*.

> In *Garcia Avello*, the Court had to decide whether national rules on surnames fall within the scope of Union law. This case was rather sensitive because of the consequences for the civil code governing the conferral of names. The case *Konstantinidis*[152] had already made it clear that the spelling of names could be contrary to Union law when this (potentially) constituted a restriction to the exercise of a profession (Article 49 TFEU) related to the internal market. The case of *Garcia Avello* was, however, not related to economic free movement, nor was a complementary, or any other, competence provision relevant.

The Court of Justice concluded straightforwardly that the "freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC"[153] falls within the material scope of Union law. This means that although "the rules governing a person's

148 C-224/98, *D'Hoop* [2002] ECR I-06191, par. 32.
149 C-209/03, *Bidar* [2005] ECR I-02119, par. 33.
150 C-209/03, *Bidar* [2005] ECR I-02119, par. 43.
151 C-148/02, *Garcia Avello* [2003] ECR I-11613.
152 C-168/91, *Konstantinidis* [1993] ECR I-01191.
153 C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 24.

surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Union law."[154]

The fact that a certain measure restricts the economic exercise of one profession in another Member State is not decisive, but the pure fact that a citizen must be treated equally compared to the nationals of the host Member State is. These cases illustrate the far-reaching consequences of Article 21 TFEU in the broadening of the scope of Union law to certain aspects which were as such originally left to the Member States. Hence, the key element of all these cases is the sole exercise of the right of free movement (or legal as in *Martínez Sala* or *Trojani*) of Article 21 TFEU; there is no need for an empowering competence in the Treaty in that particular field for it to come within the material scope of Union law. Whenever the Court can find additional and supporting arguments it will take those Treaty provisions into account, but this does not mean that such provisions are decisive for the examination (or limitation) of the scope of Union law.[155]

3.4.3 Towards a restriction approach in citizenship cases

A new line has emerged in the Court's citizenship case law since 2002. In this line of case law, the Court applies Article 21 TFEU as an independent source of rights, instead of using Article 18 TFEU in conjunction with Articles 20 and 21 TFEU as a foundation of its decisions. The Court shifted its case law from a discrimination model (prohibiting national measures that discriminate on the ground of nationality) towards a restriction model (prohibiting national measures that restrict the free movement of Union citizens). Conceptually, this shift makes a significant difference. Whereas Member States initially only had to remove discriminating measures, nowadays any national measure that restricts the free movement of Union citizens is also prohibited, unless, of course, it is justified. This trend in case law was also developed, earlier, in the context of the market freedoms, in which a market-access test was applied by the Court, in addition to a discrimination test.[156]

The roots of this trend are found in *Pusa*.[157] Advocate General Jacobs argued in his Opinion to this case that "discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 [21 TFEU] to apply. In particular, it is not necessary to establish that, for example, a measure adversely affects nationals of other Member States more than those of the Member State imposing the measure"[158] and that "such freedom cannot be assured unless all measures of any kind which impose an unjustified burden on those exercising it are also abolished."[159]

154 C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 25.
155 See also Kantitz and Steinberg (2003), pp. 1013-1036, especially on pp. 1018-1024. In *Elsen*, the citizenship provisions were applied together with the economic free movement provisions in order to conclude that the periods devoted to child-rearing completed in another Member State should be taken into account in the calculation on the old-age pensions, C-135/99, *Elsen* [2000] ECR I-10409.
156 Barnard (2013)(b), p. 463.
157 C-224/02, *Pusa* [2004] ECR I-05763.
158 C-224/02, *Pusa* [2004] ECR I-05763, par. 18.
159 C-224/02, *Pusa* [2004] ECR I-05763, par. 21.

> *Pusa*, a national of Finland, moved to Spain, where he received an invalidity pension in a Finnish bank account. On this bank account, an attachment was placed for the recovery of Mr Pusa's debt. The part of his pension subject to attachment was calculated on the basis of his gross pension, because the national regulations on this subject precluded taking the net income into consideration. Therefore the fact that *Pusa* had migrated to Spain placed him at a disadvantage because the calculation did not take the tax he paid in Spain into account. The Court followed the suggestion of Advocate General Jacobs to apply Article 21 TFEU outside the scope of discrimination, but on the basis of the obstacle caused by the national measure, which hindered Mr Pusa's movement. The Court decided the case on Article 21 TFEU as an autonomous provision, not on a combination of Article 18 and 21 TFEU.

In *De Cuyper,*[160] the Court of Justice used a restriction assessment and concluded that the requirement of actual residence placed "at a disadvantage certain of its nationals simply because they have exercised their freedom […] conferred by Article 21 TFEU on every citizen of the Union."[161] These restrictions on the free movement may be justified by reasons of public interest when the national measure is independent of the nationality of persons and proportional to its aim. Subsequent case law confirmed the restriction approach of the Court of Justice. The judgments in *Tas-Hagen & Tas*,[162] *Schwarz*,[163] *Morgan and Bucher*[164] and *Nerkowska*[165] are exemplary in this respect. In these judgments, the Court of Justice used terms such as "disadvantage" and "restriction of the free movement" rather than discrimination on the grounds of nationality. The application of Article 21 TFEU has moved into the direction of the other 'classical' economic Treaty freedoms. National measures are examined through the prism of a restriction assessment. Consequently, the scope of application of Article 21 TFEU has been extended to situations which are beyond discrimination on grounds of nationality.

As observed before, it does not matter what kind of competence is present on the Union level; even without any competence whatsoever, the scope of Union law can be triggered by the application of Articles 20 and 21 TFEU. The sole fact that a Union citizen has used the right to move and reside freely (or is affected by another Union citizen's use of this right) brings a situation within the scope of Union law for the purposes of Article 18 TFEU. Similarly, for the autonomous application of Article 21 TFEU, no supporting competence is needed. This means that any area of national law may potentially fall within the scope of European law, as long as the measure at issue can be qualified as a restriction of the free movement. In the above-mentioned case law, the national measures would not be affected by requirements of Union law without the application of Article 21 TFEU. National measures in areas such as direct taxation or a national grant for war

160 C-406/04, *De Cuyper* [2006] ECR I-06947.
161 C-406/04, *De Cuyper* [2006] ECR I-06947, par. 39.
162 On a benefit for civilian war victims C-192/05, *Tas-Hagen and Tas* [2006] ECR I-10451, par. 31.
163 On tax relief for the costs of private schools, C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-06849, par. 93.
164 On a training grant for students, C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161, par. 25.
165 On disability pensions granted to civilian victims of war or repression C-499/06, *Nerkowska* [2008] ECR I-03993, par. 32.

victims are thus brought within the scope of Union law by the application of Article 21 TFEU as a fifth freedom.[166]

> In *Grunkin and Paul*, two German nationals living in Denmark gave their son, pursuant to Danish law, the surname Grunkin-Paul. Their son had been born in Denmark and had resided there since then. However, like his parents, he had the German nationality. The German registry office refused to recognise the surname given to him in Denmark. The authorities argued that a person's surname should be determined by the law of the state of nationality and that German law does not allow a child to bear a double-barrelled surname composed of the surnames of both the father and the mother. The Court found in this case that the German rules were incompatible with Article 21 TFEU, since they would cause "serious inconvenience" to the son, who was already 10 years old at that time. The different rules would lead to confusion as to his identity, especially with regard to official documents, such as diplomas and attestations. Since his passport was issued by the Member State of his nationality, the name entered in his passport would be different from the surname given to him in Denmark and entered on his birth certificate. Although the Court accepted that certain interests may justify the principle that a Member State may determine the surnames of its nationals, none of those grounds was found to be sufficiently important to justify the inconvenience caused to the child.
>
> Along the same lines, the title of Ms Sayn-Wittgenstein was at issue. In *Sayn-Wittgenstein*,[167] the nobility title of *Fürstin* added to the name of an Austrian national adopted by a German father, who had the title of *Fürst*, was the issue of debate. According to Austrian law, and the decision of the constitutional court, Austrian nationals could not include a nobility title in their name because of the constitutional value of equality between citizens. Foreign nobility titles also fall under that prohibition. The Court found that the Austrian refusal to acknowledge the title *Fürstin* constituted a restriction in the sense of Article 21 TFEU because the discrepancy in entries in different documents could result in doubts as to Ms Sayn-Wittgenstein's identity. Such doubts and the necessity to dispel those doubts hindered the exercise of her right to free movement. This was especially true since she would have different documents with different names from the German and the Austrian authorities. Ms Sayn-Wittgenstein's passport had been issued by the Member State of her nationality, so that in her official passport her name would be spelled differently compared to various other documents in Germany, such as her driving licence. In the end, the Court held that Austria's constitutional national identity had to be respected, concluding that the restriction for Ms Sayn-Wittgenstein was justified.[168]

Since not only national measures that discriminate on the ground of nationality fall within the ambit of Union law, but also any national measure that constitutes a restriction of the free movement rights of Union citizens, the scope of EU law has been extended considerably. In cases such as *D'Hoop*, but also in *Grunkin and Paul*, assessment of the case using a discrimination model would have had another outcome.[169] In this sense, the Court is lenient, giving the advantage to the individual, by broadening the scope of

166 Editorial (2008).
167 C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693.
168 See on this case Besselink (2012).
169 Barnard (2010), p. 451.

protection. Even though Member States may invoke justifications for a restriction of the free movement of Union citizens, in principle, such a measure still falls within the scope of Union law.

3.4.4 Indirect substantive rights for third-country nationals

While Article 18 TFEU is not applicable to third-country nationals in comparison with European citizens, third-country nationals may nevertheless derive substantive rights from European citizens' right to free movement and equal treatment indirectly.

> The case of the Chinese Ms Chen,[170] whose right to reside in the United Kingdom was based on the Irish nationality of her baby, was one of the first significant cases in this respect. Ms Chen, who had the Chinese nationality, entered the UK when she was six months pregnant of her second child. She delivered her baby in Belfast. According to the Irish Nationality and Citizenship Act of 1956, the baby was given the Irish nationality. As a consequence the baby had the Irish nationality and therefore the status of being a Union citizen, residing in another Member State (the UK). The Court held that the Chinese Ms Chen had a derived right to reside in the UK, since she was the primary carer of her baby Catherina, who had the right to reside in the UK as a Union citizen. The Court ruled that a refusal of the right to reside in the UK to Ms Chen "would deprive the child's right of residence of any useful effect".[171]
>
> The case of *Metock* is also exemplary for the scope of rights of third-country nationals.[172] In this case, the Court of Justice went back on its earlier judgment in *Akrich*,[173] in which it was of the opinion that a spouse of a Union citizen with the nationality of a third country should have had prior legal residence in the Member State of origin in order to benefit from the free movement right of a Union worker. In *Metock*, the Court of Justice shifted away from this reasoning and found that the free movement of third-country nationals married to a European citizen may not be restricted because the Union citizen might be discouraged to use his rights under Article 21 TFEU. The Court held that "the refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State."[174] The Irish requirement that third-country nationals who migrate with a Union citizen should have been legally residing in another Member State prior to the access to the second Member State was

170 C-200/02, *Chen* [2004] ECR I-09925.

171 C-200/02, *Chen* [2004] ECR I-09925, par. 45.

172 See for example the case of *Metock*, paras 63 and 64, and *Carpenter* for the indirect effect of free movement of persons for third-country nationals. In *Awoyemi* the Court is quite clear on the personal scope of free movement of persons: C-230/97, *Criminal proceedings against Ibiyinka Awoyemi* [1998] ECR I-06781, par. 29, for material scope of free movement: "national of a non-member country […] may not effectively rely on the rules governing the free movement of persons which, in accordance with settled case law, apply only to a national of a Member State of the Community who seeks to establish himself in the territory of another Member State or to a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by Community law."

173 C-109/01, *Akrich* [2003] ECR I-09607.

174 C-109/01, *Akrich* [2003] ECR I-09607, par. 66, in the same sense, with regard to the question whether the EU citizen should found a family before settling in another Member State, see par. 89.

> therefore incompatible with Article 21 TFEU.[175] This extension of indirect rights for third-country nationals related to free movement of Union citizens is already found in the case law on economic free movement. In *Carpenter*, the Court of Justice found that the Philippine spouse of Mr Carpenter could not be expelled from the UK because this would restrict or hinder him from providing services in the sense of Article 56 TFEU.[176]

In more recent case law of the Court on European citizenship, third-country nationals have been granted a derived right to reside in a Member State under certain circumstances, even when the family had not exercised its free movement rights. This line of case law, which started with the judgments in the cases of *Rottmann* and *Ruiz Zambrano*, is discussed in more detail in Section 3.4.5. Concerning the scope of Union law and third-country nationals, there has been an effect on the position and entitlements of third-country nationals, based on the status and rights of European citizens. Although third-country nationals do not fall under the personal scope of Articles 20, 21 or 18 TFEU, based upon European citizenship the rights and entitlements of third-country nationals have been extended by the Court.

3.4.5 Article 20 TFEU as a new route into the 'Promised Land'

Since 2011, a new line of case law of the Court has extended the scope of European law on the right for Union citizens to reside in the European Union, independently from their right to *move* to other Member States. This new line of case law means that even if a Union citizen has not exercised the right to move as provided in Article 21 TFEU, he or she could invoke Article 20 TFEU before a national court. This new line of case law was established by the case of *Ruiz Zambrano*.[177] This case, decided in March 2011, resulted in a significant extension of the scope of European Union law, under the influence of European citizenship.

> Gerardo Ruiz Zambrano, a Colombian national, came to Belgium with his spouse, Moreno López, and their son on a visa issued by the Belgian embassy in Bogotá. The couple Ruiz Zambrano applied for asylum in Belgium because of the violence shown by private militants, violent assaults on Zambrano's brother, and the kidnapping of their three-year-old son for one week. The Belgian authorities refused their requests in September 2000. Nevertheless, in light of the on-going civil war in Colombia and in accordance with the principle of *non-refoulement*, they were not actually deported. The Ruiz Zambrano family therefore stayed in Belgium. Despite not having been granted a work permit, Mr Ruiz Zambrano found a job in 2001. In 2003 and 2005, Mr Ruiz Zambrano's wife gave birth to two children: Diego and Jessica. Since Colombia grants nationality based on *ius soli*, the children did not (automatically) acquire the Colombian nationality. The Belgian law on nationality provides that if a child born in Belgium were to become stateless, it shall be granted the Belgian nationality. Nevertheless, Diego and Jessica could have obtained Colombian nationality if *Ruiz Zambrano* had

175 C-127/08, *Metock* [2008] ECR I-06241, paras 58-64.

176 C-60/00, *Carpenter* [2002] ECR I-06279. To be precise, the Court found that Article 8 ECHR had to be respected because the deportation of Ms Carpenter was considered a restriction on her husband's right to provide services.

177 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177.

> registered them as such at the Colombian diplomatic or consular authorities. Since *Ruiz Zambrano* had not registered his children, they acquired the Belgian nationality. It was not surprising that after the birth of Diego and Jessica, Ruiz Zambrano lodged a request (for the third time) for a residence permit, based on the fact that his children were Belgian nationals. Subsequently, *Ruiz Zambrano* was offered a residence registration card periodically. Meanwhile, due to a temporary suspension of his employment, *Ruiz Zambrano* applied for social benefits, which was unsuccessful, as he did not possess a work permit. Although Ruiz Zambrano's unemployment was only of short duration, his application for social benefits led to an investigation by the Belgium labour authorities, which resulted in the dismissal of Ruiz Zambrano by his employer. Being unemployed once again, he applied for social benefits.

The essential question in *Ruiz Zambrano* was whether the father, Gerardo Ruiz Zambrano, had a derived right of residence as a third-country national in Belgium, in order to facilitate the residence of his children who had the Belgian nationality. Although it was expected that this would constitute a wholly internal situation, the Court of Justice decided otherwise. According to the Court, a link with European law could be established by the fact that the children had the nationality of one of the Member States of the European Union and that they were therefore citizens of the Union. The link with European Union law was not triggered by the exercise of free *movement*, but solely by Article 20 TFEU. The Court of Justice ruled that under the particular circumstances the *Ruiz Zambrano* children would indeed be deprived of their (future) enjoyment of rights as European citizens if they had to move back to Colombia with their parents. The Court referred to Article 20 TFEU, which "confers the status of citizen of the Union on every person holding the nationality of a Member State", and held, without hesitation or extensive argumentation, that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States […]. Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[178]

The first cautious steps toward this statement in Ruiz Zambrano may be found in *Rottmann*, where the Court held that:

> "It is clear that the situation of a citizen of the Union who […] is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [Article 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law."[179]

Article 20 TFEU apparently has its own autonomous meaning within the context of European citizenship and provides a new route to the achievement of a fundamental status of European citizens.[180]

178 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, paras 41-42.
179 C-135/08, *Rottmann* [2010] ECR I-01449, par. 51.
180 Van Eijken and De Vries (2011), pp. 704-721.

After this case, questions arose on what is to be understood as the "genuine enjoyment of the substance of the rights" granted to Union citizens. Since the substantive part of the judgment consisted of only seven paragraphs, the judgment was not thoroughly reasoned by the Court and left many questions unanswered.[181]

The decision in *Ruiz Zambrano* widened the scope of Union law with Article 20 TFEU, which has an impact on the competence of Member States to regulate their migration and nationality policies. Besides the effects for the division of powers with regard to national migration policies and legislation, the protection of fundamental rights in European context might also be extended by Article 20 TFEU and its interpretation by the Court. In this respect, the question arose whether Article 20 TFEU could constitute a link with the scope of European Union law for the application of the Charter. Although the Court did not address the issue of the protection of fundamental rights, its judgment could have had important ramifications for the scope of application of fundamental rights in the Union and thus for the scope of application of EU law in general. As elaborated on in Sections 3.3.3 and 3.3.4 of this chapter, the protection of fundamental rights is activated in those situations that are covered by the concept of 'falling within the scope of Union law.' A broad interpretation of Article 20 TFEU could easily trigger the application of fundamental rights. The main rule in *Ruiz Zambrano* is that whenever the substance of citizens' rights, which constitutes the core of European citizenship, is at risk, Article 20 TFEU can be invoked. Arguably, the enjoyment of – at least certain – fundamental rights could be qualified as crucial for the enjoyment of European citizenship rights.[182] After *Ruiz Zambrano*, the question was raised of whether family reunification would fall under the "substance of rights" of European citizens.[183] However, the Court, observing the division of powers, did not include the right to family reunification within the scope of Article 20 TFEU.[184]

In *Dereci*,[185] the Court rejected a direct connection between Article 20 TFEU and fundamental rights protection (the right to family life). It held that "the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole."[186] Nevertheless, the Court did not explicitly state that such a situation would be limited to dependent children. In fact, up until now, any national measure that would result in the migration of a Union citizen to a country outside the European Union could violate Article 20 TFEU. There are many question marks with respect to this recently introduced line of case law, so it is difficult to draw the outer boundaries of the scope of Article 20 TFEU precisely. The scope of Article 20

181 See also Chapter 6, Section 6.3.2.1, Nic Shuibhne (2011).

182 See also Azoulai, 'A comment on the Ruiz Zambrano judgment: a genuine European integration on EUDOCitizenship': http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration.

183 Van Eijken and De Vries (2011), pp. 704-721 and Wiesbrock (2011), p. 870.

184 Van Elsuwege (2011), p. 322, Lenaerts (2012) (a).

185 C-256/11, *Dereci and Others* [2011] ECR I-11315.

186 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 66.

TFEU seems to be determined by the impact of the national measure involved, which may differ in each situation.[187] The scope of application of Article 20 TFEU is a highly topical and important question considering the division of powers. According to the new line of case law, third-country nationals can have a derived right to reside in the European Union, which obviously interferes with the migration laws of the Member States and therefore affects the division of powers.

In November 2012, the case of *Iida*[188] was decided on by the Court of Justice. This case is yet another preliminary reference to the scope and implications of Article 20 TFEU with regard to national competences to regulate the right of residence on their territory.

> *Iida* concerned the case of Yoshikazu Iida, a Japanese national who was married to a German national. The couple had a daughter with the German, American and Japanese nationalities (having been born in the USA). The couple moved to Germany, where Mr Iida was granted a residence permit as the foreign spouse of a German national on the basis of German law. He worked full time under an unlimited employment contract in Germany. His spouse migrated to Austria to work there and although the couple did not officially divorce, they started living separately. The daughter of the couple resided with her mother in Austria. She had, nevertheless, a very good relationship with her father and visited him on a regular basis. He requested a residence permit in Germany as a family member of a Union citizen, since German law provides that family members of European Union citizens entitled to free movement are granted a residence permit. His application was rejected by the German authorities because under European Union law he was not entitled to such a status. Iida also applied for a long-term residence status permit, but withdrew this application later.
>
> For this situation, the Court of Justice first assessed whether secondary European legislation would be applicable to the situation of Iida. The Court concluded, however, that Directive 2004/38 was not applicable, since Mr Iida followed his spouse to another Member State. Neither was, according to the Court, Directive 2003/109 applicable, since Mr Iida withdrew his application for a long-term residence status. Subsequently, the Court held that Mr Iida could not rely on Article 21 TFEU, since he never exercised the right to reside in another Member State to join his family. Moreover, Mr Iida had a right to reside in Germany on the basis of German law, which was likely to be extended and he could even have applied for long-term residence according to Directive 2003/109.
>
> The Court concluded that there was, under the circumstances, no link with European Union law, since Mr Iida did not satisfy the conditions of Directive 2004/38, nor did he request a residence permit within the context of Directive 2003/109. Although the Advocate General argued that, noting the restriction of the free movement of the daughter, Iida's case might trigger the scope of European Union law, the Court found that a "purely hypothetical prospect of exercising the right of freedom of movement"[189] did not constitute a sufficient link with European Union law in order to trigger the scope of the Charter.

187 Elsuwege (2012), p. 189.
188 C-40/11, *Iida* [2012] ECR nyr.
189 C-40/11, *Iida* [2012] ECR nyr, par. 77.

At the present stage of case law the Court of Justice holds a strict interpretation of the scope of Article 20 TFEU. Only in circumstances in which the status and rights of the Union citizen are in danger, i.e. are *de facto* deprived, could Article 20 TFEU be relied on. The circumstances of *Iida* were not very likely to tempt the Court to extend the scope of Article 20 TFEU: Iida's daughter was not dependent on him for her residence in Germany or Austria. Moreover, Mr Iida was not threatened with having to leave Germany or the European Union at all. Even if he had had no right of residence in Germany (which was not the case), he would have had a right to reside in Austria with his family, based on European Union law. According to the Opinion of Advocate General Trstenjak, Article 21 TFEU could have triggered the scope of the Charter. She stated that:

> "[I]t is not possible to dismiss out of hand the possibility that the father's insecure future residence in Germany may potentially deter his minor daughter from further exercising her right of free movement as a Union citizen, and consequently may constitute a restriction of that freedom, even though it does not amount to interference with the substance of the rights conferred by Union-citizen status."[190]

Her proposal would extend the scope of Article 21 TFEU considerably. However, at present the Court is quite cautious not to extend its jurisdiction and not to extend the scope of Article 20 TFEU to non-acceptable proportions.

With regard to the question of the effect of Union citizenship on the division of powers between the European Union and the Member States, this new line of case law did extend the scope of Union law. The decision of the Court of Justice in *Rottmann* and the subsequent case law in *Ruiz Zambrano* extended the Court's jurisdiction, or at least significantly activated an existing competence of the Court to interpret Article 20 TFEU. Article 20 TFEU has been granted, implicitly, direct effect, which triggers different cases on the national level, due to which new preliminary references are to be expected. In the same sense, European law has been extended to situations that deprive Union citizens of their status as a Union citizen *de jure* or *de facto*. This implies that Union citizens may invoke their status as European citizens against national measures having such effects. For the division of powers, this implies that the Member States' discretion to act within their own competences, such as the regulation of nationality rules, is limited not only by Article 21 TFEU, but also by Article 20 TFEU. However, the Court of Justice has also showed cautiousness not to overstep its competences and broaden the scope of Union law too far. At the same time, this case law means that the scope of EU law and the effect of Article 20 TFEU on national policy areas remain unclear. Each and every case needs to be examined by national courts in order to decide whether a particular measure in particular circumstances would infringe upon Article 20 TFEU and therefore fall within the scope of Union law.[191]

190 C-40/11, *Iida* [2012] ECR nyr, par. 76.
191 See also Chapter 6, Sections 6.3.2 and 6.3.3.

3.4.6 The influence of Union citizenship on the application of economic freedoms

The relationship between European citizenship and the four economic freedoms is a fluid one. Back in 1989, the Court of Justice already held that a natural person as a recipient of services could claim equal treatment with a Member State's own nationals with regard to financial compensation for assault.[192] The case of *Bickel and Franz*,[193] concerning language in criminal proceedings, demonstrates that the free movement of services and non-economic free movement are intertwined.[194] The case was finally decided on Article 56 TFEU (the freedom to receive services), but the Court also referred to Article 21 TFEU as an alternative to grant equal treatment in criminal proceedings. Additionally, the case of *Bosman*, decided in the context of free movement of workers, shows early traces of Union citizenship in its judgment.[195] In these early cases, the Court showed a 'market citizen' approach, which evolved into a more constitutional form of citizenship.[196] The qualification of being a recipient of service in another Member State and that of being a Union citizen without an economic link are not strictly divided. From the case law of the Court, it becomes clear that the Court prefers to decide cases based on the economic freedoms to making decisions solely on Union citizenship.

> In *Schwarz,*[197] for instance, the Court of Justice first of all examined whether the case could be solved based on the free movement of services, and subsequently came to the conclusion that if the privately financed school were to fall outside the qualification of an economic service, the tax measure would constitute an obstacle to the free movement of Union citizens.[198] The case of *Schwarz* serves as an example where the Court first examined whether education could qualify as a service within the meaning of Article 56 TFEU. The Court only then proceeded to consider whether tax relief for education received in German private schools only could be regarded as a restriction on the free movement of Union citizens.
>
> In *Josemans*,[199] this preference of the Court is also apparent. The Court ruled that a measure that prevented non-nationals from having access to Dutch 'coffee shops' (selling soft drugs) did not fall under the scope of application of the freedom to provide services, since trade in soft drugs is prohibited in all Member States. The Court continued by stating that "the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services."[200] In *Van Putten*, with regard to taxes regarding the registration of cars, the Court held that "since the cases in the

192 Case 186/87, *Cowan* [1989] ECR 00195.
193 C-274/96, *Bickel and Franz* [1998] ECR I-07637.
194 Nic Shuibhne (2009), p. 171.
195 The Court referred to Community citizens in an economic context, as market citizens. See C-415/93, *Bosman* [1995] ECR I-04921, par. 94.
196 See also Barnard (2013) (b), pp. 505-519.
197 C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-06849.
198 For example in C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-06849. The Court first examines whether the case could be solved on the free movement of services, and subsequently comes to the conclusion that if the privately financed school were to fall outside the qualification of an economic service, the tax measure would constitute an obstacle to the free movement of Union citizens.
199 C-137/09, *Josemans* [2010] ECR I-13019.
200 C-137/09, *Josemans* [2010] ECR I-13019, par. 53.

> main proceedings fall within the scope of Article 56 EC [63 TFEU], it is not necessary to rule on the interpretation of Article 18 EC [21 TFEU]."[201]

Hence, it may be argued that although the Court has increasingly adopted a human approach to free movement rights, the market aspect of citizenship continues to be very relevant.[202] Article 56 TFEU was not applicable in *Josemans*, yet the Court refused to assess the Dutch measure in light of the Treaty provisions on citizenship, although the Dutch Court had explicitly asked the Court to do so. The case was of a highly political nature, but nonetheless, the Court could have decided that the refusal to allow non-Dutch residents to have access to Dutch coffee shops fell under the prohibition of Articles 18 and 21 TFEU, while still being able to conclude that the residence criterion was objectively justified for reasons of public security and public order.[203]

European citizenship has affected the economic freedoms considerably, however. The effect of European citizenship in terms of broadening the scope of application of Union law can be revealed in what has been called a 'citizenship interpretation' of the economic free movement provisions.[204] One of the examples of such citizenship-constituent interpretation is found in *Collins*.[205]

> Brian Collins was a national of the USA, but also had the Irish nationality, although he had never lived in Ireland. He went to the UK as a student for just a couple of months and later worked there for a very short period in part-time jobs. Seventeen years later, he requested a social benefit for jobseekers in the UK as he was looking for a job. The question arose of whether Collins, as a European citizen with the Irish nationality, lawfully residing in the UK, could claim equal treatment with regard to a jobseekers allowance. The Court dealt with the case as if Collins was a jobseeker who was on the territory of the UK for the first time to find a job, as a jobseeker still falling under the protection and status of Article 45 TFEU.

Although in earlier case law the Court of Justice concluded that social and tax advantages did not fall under the scope of Article 45(2) TFEU, in light of the introduction of European citizenship by the Treaty of Maastricht, the Court found that social benefits facilitating access to the labour market in a Member State could not be excluded from the scope of Article 45(2) TFEU any longer.[206] The effect of European citizenship on the free movement of workers is evident, since it is explicitly referred to by the Court.[207]
This line of reasoning was later confirmed by the Court of Justice in *Ioannidis*.[208] Directive 2004/38 came into force after the decision in *Collins* and *Ioannidis*. In this Directive, the Union legislator has excluded equal treatment with regard to social benefits for students prior to their permanent residence, or for persons that are not workers or self-

201 C-578/10 to C-580/10, *Van Putten, Mook and Frank* [2012] ECR nyr, par. 55. Brackets added HvE.
202 Nic Shuibhne (2010), pp. 1597-1628.
203 Van Eijken & Van Harten (2011), pp. 105-113.
204 Barnard (2013)(b), p. 475.
205 C-138/02, *Collins* [2004] ECR I-02703.
206 C-138/02, *Collins* [2004] ECR I-02703, par. 63.
207 Currie (2009), p. 379.
208 C-258/04, *Ioannidis* [2005] ECR I-08275.

employed persons (Article 24(2) of Directive 2004/38). The question remained how the Court of Justice would deal with cases such as *Collins* in the future because the broad interpretation in these cases seemed to sit uncomfortably with the exclusion in Article 24 of the Residence Directive.[209] In *Vatsouras*,[210] the Court, nevertheless, again applied a citizenship interpretation of social benefits for jobseekers. The Court made a distinction between social benefits as meant in the derogation of Article 24(2) of the Residence Directive and social benefits that would fall under the scope of free movement of workers because of its aim and nature. The Court held that "the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 39(2) EC [45 TFEU]"[211] and that the social benefit at stake (a social benefit to facilitate the access to the labour market) did not fall under the definition of "social benefit" provided in Article 24(2) of the Directive. In other words, the Court held a narrow interpretation of the exemption concerning equal treatment with regard to social benefits to the advantage of the unemployed jobseekers from another Member State.
In addition, the case of *De Cuyper*[212] shows the effect of Union citizenship and the intertwined relationship between European citizenship and economic free movement. In this case, a residence requirement for job seekers was at stake. The Court of Justice first relied on Regulation 1408/71 to conclude that the benefit at stake fell within the scope of Union law. Regulation 1408/71 only provides for the migration of an allowance for the unemployed in two specific situations, which were not applicable to the situation of *De Cuyper*. The Court of Justice concluded that Article 21 TFEU in principle[213] precludes such a residence requirement because it constitutes a disadvantage to nationals who use their right to move and reside freely in another Member State. Hence, the Court of Justice extended the scope of Regulation 1408/71 in order to guarantee free movement to Union citizens. The judgment in *Vatsouras*[214] confirms the Court's willingness to interpret Union legislation in a 'citizen friendly' way. This means that the Court interprets the scope of protection as widely as possible, within its constitutional limits. It also means that derogations from the equal treatment of Union citizens of Article 24(2) of 2004/38 have to be interpreted narrowly.[215]

Significantly, European citizenship also seems to have a restricting effect on the scope of economic free movement. As will be discussed in Chapter 4, the Court of Justice has introduced a 'real link' in its case law with regard to European citizens and social rights, in the sense that European citizens may need to have a real or sufficient link with a host Member State in order to claim equal treatment with regard to social rights.[216] This condition of a real link has been developed in order to prevent non-economically active

209 Barnard(2013) (b), p. 293. See, for a critical note on *Collins*, Hailbronner (2005), pp. 1263-1264.
210 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585.
211 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585, par. 44.
212 C-406/04, *De Cuyper* [2006] ECR I-06947.
213 In this case the Court of Justice accepted the justification of the Belgian authorities stating the need for effective control and monitoring of the conditions under which unemployed persons received the allowance.
214 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585.
215 C-75/11, *European Commission v Republic of Austria* [2012] ECR nyr, paras 55 and 56.
216 Chapter 4, Section 4.4.2.2.

Union citizens from becoming an unreasonable burden on the public means of a host Member State. The requirement of a 'real link' with the society of a host Member State now seems to have been transferred to the case law on free movement of workers, therefore restricting the scope of free movement of workers. In these cases, the Court applied the real-link principle to cases concerning frontier workers.[217] Previously, the unequal treatment of workers from other Member States could not be justified on grounds of integration of the worker at stake, whereas currently refusal of social benefits to workers of other Member States may be justified on the basis of the real-link assessment.[218]

> The case of *Geven*[219] is an example of the spill-over effect of the real-link test in cases on the free movement of workers. In this case, Ms Geven, a Dutch national, who was residing in the Netherlands and working in Germany, was refused a child-raising allowance by the German authorities, since she had no residence in Germany and worked fewer than 15 hours in Germany. The question was raised of whether this requirement would be in compliance with Article 7(2) of Regulation No. 1612/68, providing that workers from other Member States should enjoy equal benefits in the same way as the nationals of the host Member State. The Court found that German legislation was acceptable in requiring a "sufficiently close connection with German society, without reserving that allowance exclusively to persons who reside in Germany."[220] In *Hartmann*, moreover, the Court used the expression "real link" as well.[221] In *Hendrix*, the Court took the "economic and social links"[222] to host Member States into account in the justification of the refusal of social benefits for young disabled persons (the *Wajong* benefit) for Mr Hendrix.

Hence, even though the impact of European citizenship seems to have broadened the scope of the other four freedoms, there are some indications that in particular circumstances European citizenship restricts the scope of free movement. It seems that the particular situation of the three cases described above, which all concerned frontier workers, might have been decisive. One of the main characteristics of frontier workers is that they contribute economically to another Member State than the Member State they reside in. This specific nature may therefore be a reason for the Court to apply a stricter norm than it usually does in its case law on the free movement of workers.

3.5 A SPILL-OVER EFFECT: FROM NEGATIVE TO POSITIVE INTEGRATION

As explored above, certain areas that fall within the competences of the Member States are affected by the case law on European citizenship in various ways. Sometimes even when there is no Union competence at all (e.g. direct taxation) or when harmonisation of national laws is explicitly excluded (e.g. education). As observed in the first part of this chapter, the scope of Union law is triggered by the free movement provisions or by any competence provision in the Treaty. Any national measure that affects free movement,

217 Currie (2009), pp. 381-382.
218 See on this development also O'Brien (2008) (a).
219 C-213/05, *Geven* [2005] ECR I-06347.
220 C-213/05, *Geven* [2005] ECR I-06347, par. 28.
221 C-212/05, *Hartmann* [2007] ECR I-06303, par. 33.
222 C-287/05, *Hendrix* [2007] ECR I-06909, par. 57.

either the economic free movement, or the non-economic free movement, has to comply with the limits of Union law. Consequently, national regulations must not cause unjustified restrictions on free movement rights. Whenever a certain field is actually brought within the ambit of Union law, a potential spill-over effect may be stimulated.
This spill-over effect, the relation and distinction between the scope and the competences of the Union, can be illustrated by the development of public health on the European agenda. As observed above, Article 168 TFEU lays down a complementary competence for the Union with regard to public health. It provided (at that time in Article 152(1) EC) that: "Union action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health." Paragraph 4 points out that the Council may adopt "incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States." Although public health is therefore a field in which the Member States still have the sole competence to legislate, this area has been brought under the ambit of Union law in two ways. In the first place, certain healthcare activities are qualified as economic services under the free movement provisions. The cases *Geraets-Smits* and *Peerbooms*[223] are illustrative of the way that the Court of Justice qualified healthcare services within the scope of the economic freedoms and therefore within the ambit of EU law. In the second place, harmonising measures could be adopted within the area of public health, based on the aim of the internal market, for which Article 114 TFEU provides the legal basis. Public health objectives might be (indirectly) regulated by harmonisation based on Article 114 TFEU, when it serves the aim of establishment and function of the internal market. Article 114 TFEU does not provide for a general legal basis to act, but may be used to eliminate distortions of competition and to abolish obstacles of the exercise of free movement within the internal market. Thus, as a consequence of the case law on medical services, the Commission proposed a Directive on cross-border healthcare. According to the preamble of the proposal, health ministers and stakeholders had requested the Commission to explore how legal certainty in cross-border healthcare could be improved. The need for legal certainty is clear in light of the abovementioned case law of the Court on healthcare as an economic activity. The Directive was adopted in March 2011.[224] According to its preamble:

> "Article 114 TFEU is the appropriate legal basis since the majority of the provisions of this Directive aim to improve the functioning of the internal market and the free movement of goods, persons and services. Given that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, Union legislation has to rely on this legal basis even when public health protection is a decisive factor in the choices made. In this respect, Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health is to be guaranteed taking account in particular of any new development based on scientific facts."[225]

223 C-157/99, *Geraets-Smits and Peerbooms* [2001] ECR I-05473.
224 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, pp. 45–65.
225 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, pp. 45–65, preamble par. 2.

The case law on the legal basis of the Tobacco Advertising Directive is famous with respect to how public health may be affected by harmonisation measures that aim to support the internal market.[226]

> This Directive banned the advertising and sponsoring of tobacco products in order to remove distortions of competition in other tobacco-related products, such as the trade in magazines containing advertisements for tobacco products. Germany contested the validity of the Directive. According to Germany, the Directive aimed at the harmonisation of healthcare, rather than at achieving the objectives of the internal market, based on which the Directive was adopted.[227] The Court considered that the fact that harmonisation of healthcare is prohibited in Article 168 TFEU does not preclude that harmonisation based on another legal basis may affect healthcare. Such an effect must not, however, result in circumvention of the express exclusion of harmonisation.[228] Furthermore, Article 114 TFEU may only serve as a legal basis when the distortion of competition which the measure purports to eliminate is "appreciable." When such appreciability is successfully argued, the sectoral exclusion of harmonisation will be "set aside" and the aim of the internal market will prevail.[229]

The explicit exclusions of harmonisation in certain areas do not limit the exercise of the competence to legislate in the context of the internal market, unless the distortions are not 'appreciable' and the sectoral prohibition of harmonisation is circumvented. The reason for this tension, between the functional approach of the internal market and the sectoral exclusion of Union legislation, is the silence of the Treaty about the hierarchy between the internal market and the fields that should be governed by the Member States only. The fact that the definition of a service, or the scope of the free movement of goods, is not precisely described within the Treaty has triggered this even more. Neither Article 168 TFEU nor other 'negative competences' preclude the application of the free movement provisions in those fields. Any national measure potentially falls under the scope of Union law by application of the free movement provisions and Article 114 TFEU. To use the words of Davies: "There are no ideological or categorical limits to the potential ambit of Union action aimed at creating an internal market, provided that such

226 C-376/98, *Germany v European Parliament and Council of the European Union* [2000] ECR I-08419 and C-380/03, *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573.

227 Article 114 TFEU.

228 C-376/98, *Germany v European Parliament and Council of the European Union* [2000] ECR I-08419, par. 78. In the Tobacco Advertisement Judgment II, the Court of Justice concludes that the exclusion of harmonisation in Article 152(4) EC does not prevent legislation from being adopted with Article 95 EC as its legal basis (par. 95).

229 See also C-491/01, *Tobacco Investments* [2002] ECR I-11453, par. 90: "With particular regard to the express exclusion of any harmonisation of the laws and regulations of the Member States designed to protect and improve human health laid down in the first indent... of Article 152(4) EC, the Court has held that other articles of the Treaty may not be used as a legal basis in order to circumvent that exclusion (the tobacco advertising judgment, paragraph 79). The Court has, however, stated that, provided that the conditions for recourse to Articles 100a, 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and 66 of the EC Treaty (now Article 55 EC) as a legal basis are fulfilled, the Union legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made."

action genuinely serves its goals. If non-market aspects of society have to be harmonized to make the Union safe and fair for market actors, so be it."[230]

A logical 'suspect' with respect to such a spill-over effect in the area of European citizenship is Article 21 TFEU. Article 21(2) TFEU provides that the Council may adopt Union legislation, if Union action proves necessary to facilitate the exercise of free movement of Union citizens and the Treaty does not provide the necessary competence to take Union measures. This potential legal basis is enhanced by the Treaty of Lisbon. Article 21(3) TFEU provides a legal basis to adopt Union legislation concerning social security and social protection. Union legislation based on Article 21(3) TFEU had to be adopted by a special legislative procedure, adopted by unanimity by the Council, whereas legislation adopted on the legal basis of Article 21(2) TFEU is governed by the ordinary legislative procedure. The Member States' competences included the areas of social security and protection, probably in the light of the discussed case law of the Court of Justice on Union citizenship and the consequences for the national social systems.[231]

While a considerable part of domestic regulations and legislation is potentially restricted by the free movement of Union citizens, it is likely that legislative gaps will increase because national measures that discriminate against Union citizens must be set aside. Moreover, national measures that restrict the free movement or that detract from the effective enjoyment of the status of European citizenship have to yield to the provisions on European citizenship. From this perspective, Advocate General Sharpston emphasised in her Opinion the need for legislation in the field of free movement of students in *Bressol*.[232] The fact that in recent case law any unjustified restriction of free movement is also covered by Article 21 TFEU affects the national regulatory autonomy even more.[233] This means that Member States have to explain why a certain measure is objectively justified, which shifts the 'burden of proof' to the Member States. Member States have to justify any restriction on the free movement of Union citizens with an objective aim.

Another, more practical, consequence could be that the national legislature is strongly encouraged to perform a pre-legislative check on compliance with Union law. Under the threat of an infringement procedure (or proceedings before national courts), the national legislature has the pressure to check a draft act for potential incompliance with restrictions of free movement of Union citizens or the right to residence (Article 20 TFEU) before adopting the act. Such a pre-legislative check could also take place in areas that are preserved for the Member States, such as direct taxation, since these areas are not excluded from the scope of Union law. In this sense, the case law of the Court of Justice may lead to a kind of 'voluntary' and minimal harmonisation of national systems.

230 Davies (2008), p. 228.

231 This extension of competences in the area of social security was already included in the Constitutional Treaty of 2004 (Article III-125 (2) CTEU). Why the Member States broadened the scope to social security and protection is not clear from the statements (at least, those from the Netherlands and Belgium during the IGC). Also see http://www.grondweteuropa.nl/9326000/1f/j9vvgn5o5i819wf/vgt8mdb5ynya.

232 C-73/08, *Bressol* [2010] ECR I-02735.

233 On the restriction approach in general: Barnard (2013)(b), pp. 433-435.

3.6 CONCLUSION: HOW DOES UNION CITIZENSHIP AFFECT THE VERTICAL DIVISION OF POWERS IN THE EUROPEAN UNION?

The exploration of case law in this chapter revealed that the scope of Union law has been affected by European citizenship. As observed, the scope of Union law is of importance for the vertical division of powers, since any national area that falls under the scope of EU law can potentially be limited by EU law. Although Member States remain allowed to act and legislate in a certain area, as soon as such a measure falls within the scope of Union law, the Member States are held to respect the boundaries of Union law, such as the general principles of Union law and non-discrimination on the grounds of nationality.

The scope of Union law has been significantly affected by the case law of the Court of Justice in the area of European citizenship, by different techniques used by the Court.[234] In the first place, the Court extended the scope of Article 18 TFEU linking European citizenship to the prohibition of non-discrimination on the grounds of nationality, since any European citizen who is lawfully resident on the territory of a Member States other than that of his or her nationality falls within the personal scope of Article 18 TFEU. This means that the scope of individuals that can rely on Article 18 TEU has been increased. As has been explored in this chapter, Article 18 TFEU only applied in those situations in which a connection with another provision of EU law was present. Since European citizenship was introduced, and especially the right to move and reside freely (Article 21 TFEU), Union citizenship has triggered the scope of application of Article 18 TFEU, where such a connection did not exist previously.
Although the personal scope is dependent on the nationality rules in the Member States, even legislation concerning nationality can be limited by European Union law, if national measures create negative consequences for Union citizenship. At least, Member States have to make sure that the withdrawal of nationality is proportionate and complies with the general principles of Union law. In the second place, the material scope of Union law has been widened, since the exercise of free movement rights by a Union citizen is sufficient as such to connect a particular situation to EU law. In reaction to this case law, several Member States amended their nationality laws, not to comply with Union law, *per se*, but in order to avoid a connection with the scope of Union law, based on Article 20 TFEU. During the proceedings in *Ruiz Zambrano*, the relevant Belgian law was revised, so that situations such as that occurring in *Ruiz Zambrano* would be prevented in the future. According to the new law, persons born in Belgium who would potentially become stateless do not acquire the Belgian nationality if, following an administrative procedure or registration, the baby could obtain the nationality of their country of origin.[235] Similarly, the nationality laws of Ireland were revised after the Court's judgment in *Chen*, in order to limit the possibilities for non-Irish nationals to acquire the Irish nationality.

234 Jacobs (2007), pp. 591-610.
235 On 28 December 2006 an exception to Article 10 of the Nationality Act was added (Article 380).

Up until now, it seemed that third-country nationals did not fall within the personal scope of Union law for the application of Article 18 TFEU.[236] This does not, however, preclude that the scope of Union law is affected by European citizenship in relation with the substantive rights of third-country nationals. As pointed out, the rights of free movement and access to Member States of a third-country national are broadened by the right to free movement of European citizens. This means that Member States have to allow the residence of third-country nationals, based on the free movement of Union citizens and subject to conditions, on account of Union law. In *Metock*, the Court held that a Union citizen should be able to be accompanied by a family member with the nationality of a third country whenever the Union citizen resides in another Member State. In a more recent line of case law, a derived right to reside in the Union for third-country nationals has to be granted even when the Union citizen, being a family member, has not exercised their free movement rights. In this sense, the material scope of European Union law has been extended to a derived right to reside in the territory of a particular Member State for family members of Union citizens. These judgments and their effect on the scope of Union law have a noticeable impact on Member States' migration policies and their competence to withdraw the nationality of their nationals. The scope of Article 20 TFEU as interpreted by the Court is constitutional in nature, since Union citizens may invoke their status as such against any national measure that would constitute an actual risk to the effectiveness of Union citizenship. The Court held a strict interpretation of Article 20 TFEU, so the scope of Article 20 TFEU has, up until now, been limited to those situations in which a Union citizen is *de facto* obliged to leave the European Union. Case law, obviously, has extended the scope of Union law to cover these situations. Subsequently, this new line of case law has an impact in terms of the division of powers. No cross-border dimension is necessary for Union citizens in order to challenge national measures before a national court (Article 20 TFEU). For the division of powers between the European Union and its Member States, this case law has certainly affected the competences of the Member States to act.

In the third place, the autonomous application of Article 21 TFEU is noticeable in the broadening of the scope of European Union law in the context of Union citizenship. Outside the scope of discrimination on the grounds of nationality, the provisions of European citizenship may be invoked against any national measure that restricts the free movement of these European citizens.

Finally, in the fourth place, European citizenship has affected the scope of the four freedoms. In the case law of the Court of Justice, a widening of the free movement of workers can be clearly detected. The cases of *Collins* and *Ioannidis* are important examples in which the Court interpreted the scope of Article 45 TFEU in the light of Union citizenship in a 'European citizenship consistent interpretation.' The scope of the economic free movement rights is broadened by this interpretation of the Court. Within

236 In agreements with third countries, equal treatment for third-country nationals may be provided for in a limited sense. This particular situation would fall under the scope of Union law, based on the competence of the EU to conclude agreements, and not because of the application of Article 18 TFEU.

the possibilities of secondary law, the Court interprets the rights of workers broadly, so as to protect them as much as possible. In these cases the Court explicitly referred to European citizenship to legitimise such broad interpretation. Nevertheless, the case law on European citizenship also seems to produce restrictions on the economic free movement rights, in the sense that frontier workers may be confronted with a 'real link' requirement.

The different ways in which the scope of Union law is activated in the context of European citizenship do not constitute watertight compartments, but show overlap and are used in different cases. Since discrimination on the grounds of nationality may obviously also be qualified as a restriction on free movement, one might think that the Court would prefer to apply Article 21 TFEU. However, the Court of Justice applies Article 18 TFEU in situations that could be solved by the application of Article 21 TFEU. Article 18 TFEU in conjunction with Article 21 TFEU and Article 20 TFEU provides at least three separate judicial points of connection with the scope of Union law. Moreover, the 'citizenship-consistent interpretation' of the economic freedoms in the Treaty is significant in the context of the scope of EU law with respect to Union citizenship.

The widening of the scope of Union law due to the application of European citizenship and its effectiveness has consequences for the vertical division of powers. As revealed in this chapter, most competences that concern issues that are sensitive in nature for the Member States are the competences affected by European citizenship. One may think of education, social security, nationality legislation and migration law. These areas of law are important for European citizens whenever they move and reside in another Member State or are of importance when residing in the Member State of origin. This means that the right to move freely in the territory of another Member State and the right to equal treatment with regard to nationality affects the competences of the Member States. Although the Member States remain competent to regulate these areas of law, the exercise of this competence is limited by European law, specifically by the provisions on European citizenship and non-discrimination. In the new line of case law that started with *Rottmann* and *Ruiz Zambrano*, the scope of Union law has been extended even further. Article 20 TFEU may now be invoked in situations in which no cross-border dimension is present.

Even though the Court explicitly stated on several occasions that "citizenship of the Union, established by Article 17 EC, is not […] intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law", the scope of European law has been broadened in various ways by the case law of the Court.[237] This extension of the ambit of Union law is not surprising: as a consequence of the introduction of a constitutional concept such as European citizenship in European Union law, it comes as no shock that the scope of Union law is affected. Every time the Court decides that a certain national measure would infringe upon the provisions of free

237 C-192/05, *Tas-Hagen and Tas* [2006] ECR I-10451, par. 28, C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 26, C-64/96 and C-65/96, *Uecker and Jacque* [1997] ECR I-03171, par. 23.

movement, and more recently the genuine enjoyment of European citizenship rights, a matter is brought within the scope of Union law.[238] Subsequently, the vertical division of powers is affected by this broadened ambit of EU law. This effect is perceptible in the way Member States have to take European Union law into account as a limitation to the exercise of their competences. Even in those areas in which the European Union has no competences allocated by the Treaty, Member States have to make sure that the exercise of their competences is 'European-citizenship proof.' Articles 20 and 21 TFEU, as incorporated into the Treaty of Maastricht, allocated the competence to empower European citizenship to the European Union. Moreover, the European Union has been allocated a legal basis to introduce legislation in order to facilitate the free movement of Union citizens, similar to the way the internal market has been set up.

238 Dougan (2009), p. 175.

"Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system."[1]

CHAPTER 4

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The effect of European citizenship on common ideology: the protection of fundamental rights linked to European citizenship

4.1 INTRODUCTION: FUNDAMENTAL RIGHTS AND EUROPEAN CITIZENSHIP

4.1.1 Constitutionalisation and fundamental rights

As described in the second chapter, this research is founded on four constitutional elements.[2] The constitutionalisation of the European Union and the role of Union citizenship in that process are examined through the prism of these constitutional elements, questioning whether European citizenship has had an impact on these constitutional elements. The existence of a common ideology is one of the elements analysed in this thesis.

Fundamental rights can be qualified as part of the common ideology of both the Union and its Member States.[3] According to the common phrase of the Court of Justice, "Union citizenship is destined to be the fundamental status of nationals of the Member States."[4] The question may be asked what kind of fundamental rights are attached to such a fundamental status. In the context of the constitutionalisation of the European Union, the question is posed whether European citizenship and fundamental rights are connected or have a potential link. The connection between European citizenship and fundamental rights has been an issue in academic literature. In this debate, the call to link fundamental rights protection with Union citizenship has been expressed. The lack of such connection has been the subject of academic debate since the early days of

1 De Witte (1991), p. 7.
2 Chapter 2, Section 2.4: the division of powers, the existence of a common ideology (existing of fundamental rights, and democracy and political rights), justiciability and the hierarchy of norms.
3 Chapter 2, Section 2.4.1.2.1.
4 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31.

Union citizenship.[5] One of the main arguments in this debate is that for a comprehensive concept of European citizenship, a link with fundamental rights would be necessary. Such a connection between Union citizenship and fundamental rights protection has been advocated by academics and Advocates General. As Advocate General Colomer stressed in his Opinion to the case *Petersen*:

> "[T]he concept of citizenship, which entails a *legal status for individuals*, means that the Member States must pay *particular attention to individual legal situations*. The fundamental rights play a vital role in the performance of that task. As an integral part of the status of citizenship, the fundamental rights strengthen the legal position of the individual by introducing a decisive aspect for the purposes of substantive justice in the case concerned. Holding their fundamental rights as prerogatives of freedom, citizens of the Union afford their claims greater legitimacy."[6]

In the same sense, Sharpston argued in her Opinion in *Ruiz Zambrano* that the destined fundamental status of European citizenship "sits ill with the notion that fundamental rights protection is partial and fragmented."[7] She therefore pleads for a link between European citizenship and the protection of fundamental rights: "In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship."[8] According to her, to create a meaningful idea of European citizenship, the protection of fundamental rights should not be dependent on whether a European citizen has exercised his or her right to free movement. Since citizenship is connected to a constitutional status expressing the relation between the citizen and the state, this call for a link between Union citizenship and fundamental rights protection is understandable.

The present chapter, however, does not analyse whether there ought to be a connection, but what European citizenship has meant for the protection of fundamental rights. The discussion will focus on the contribution of European citizenship to the protection of fundamental rights in the European Union.

4.1.2 Universality of fundamental rights and European citizenship

In a chapter dealing with the connection between European citizenship and the protection of fundamental rights, questions may arise concerning the universality of fundamental rights. Therefore attention is briefly given to this issue in this section. Tension arises when linking citizenship and fundamental rights: tension between inclusion versus exclusion of individuals. Since citizenship is a status that includes those defined as citizens as equal members of the community, individuals that are not included as citizens are excluded from the scope of protection attached to this status. In the link between citizenship

5 In the early days of EU citizenship O'Leary noted the lack of a link between Union citizenship and fundamental rights. O'Leary (1996), p. 292, O'Keeffe and Bavasso (1998). More recently: Von Bogdandy et al. (2012), pp. 489-519.

6 Opinion of Advocate General Colomer in C-228/07, *Petersen* [2008] ECR I-06989, par. 27.

7 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 70.

8 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 70.

and fundamental rights, this issue of inclusion versus exclusion sits uneasily with the universality of fundamental rights protection.
The protection of fundamental rights is not only of importance in the context of European citizenship, since fundamental rights should be protected irrespective of the status of citizenship. The protection of fundamental rights does not depend on the nationality and status of an individual, since fundamental rights need to be universally guaranteed to individuals. There might be a fear that a connection between Union citizenship and fundamental rights would exclude the protection of fundamental rights for those who are not qualified as Union citizens.[9] However, most of the fundamental rights are universally guaranteed, even if such a connection were made. A connection between European citizenship and fundamental rights does not necessarily mean that the fundamental rights of third-country nationals would be threatened. On the contrary, certain fundamental rights may even be strengthened for third-country nationals based upon fundamental rights protection of Union citizens. In this respect, the derived right to reside in the European Union for third-country nationals based on Articles 21(1) and 20 TFEU can be mentioned.[10] Moreover, fundamental rights are granted to third-country nationals when they reside within the Union or are affected by Union law. The Charter and fundamental rights protection, in this sense, are not limited to Union citizens only. The right to freedom of speech[11] is addressed to "everyone", but also the right to good administration[12] is addressed to "every person." Hence, even though the Charter has a specific title on citizenship rights, most of the rights mentioned in the Charter are universally defined.

For the aim of this research, this debate on the inclusion versus the exclusion of citizens and non-Union citizens is not of major, but of partial interest. Although in the broader context the issue of inclusion versus exclusion of individuals in the scope of protection of fundamental rights might be important in terms of constitutionalisation, for the present aim of this thesis, it is not a key issue. Since this thesis deals with the question of the role of Union citizenship in the process of constitutionalisation, only the impact of Union citizenship on the protection of fundamental rights is relevant in the present analysis. For the purposes of this research, the connection between *European citizenship* and fundamental rights is looked at from the prism of constitutionalisation of the Union: How is European citizenship linked to the protection of fundamental rights by the European Union and how does this contribute to the constitutionalisation of the Union? Attention is paid to fundamental rights for third-country nationals if these rights are granted on account of Union citizenship, and if there is therefore an impact of Union citizenship on the fundamental rights protection.

9 O'Leary (1996), pp. 291-293.
10 C-127/08, *Metock* [2008] ECR I-06241and C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, dealt with in Chapter 3. These cases will be discussed further in Section 4.3.2 of the present chapter.
11 Article 10 of the Charter.
12 Article 41 of the Charter.

4.1.3 Aim and structure of the present chapter

As indicated in the analytical framework, this part of the research is structured along the lines of the different categories of citizenship rights.[13] First of all, the link between European citizenship and equality as a fundamental – overarching – right is discussed. Subsequently, the link between European citizenship and civil rights is examined. Finally, the connection between Union citizenship and social rights is analysed.

The core of citizenship is participation in and equal membership of a certain community. The basic element of citizenship, traditionally, is legal equality with regard to the rights and duties of those individuals that belong to and are members of that particular polity.[14] Equal treatment is therefore at the heart of citizenship.
In the context of Union citizenship the right not to be discriminated against on the grounds of nationality is important because the citizens of the Union are the nationals of the different Member States, who have to be treated as equal members of the European polity. The prohibition of discrimination on the grounds of nationality is therefore the first subject of analysis in this chapter.
In addition to the overarching right to equal treatment, citizenship rights in general also contain civil, social and political rights in order to allow inclusion and participation of European citizens in the Union. This division in citizens' rights is inspired by Marshall's well-known essay on (British) citizenship. In his view, the civil element of citizenship contains rights to protect the individual freedom and liberty of a person (e.g. the freedom of speech, thought and faith, the right to own property and the right to justice). The political element of citizenship covers the right to participate in the exercise of political power (active and passive participation). In the third place, there is a social dimension of citizens' rights. These social rights guarantee the citizen to "live the life of a civilised being according to the standards prevailing in the society."[15] Besides social economic benefits, services such as the right to have access to drinking water may also be included in this category. In this sense the right to education is also referred to by Marshall as a social right.

Below, the connection between Union citizenship and equal treatment is first discussed, in Section 4.2. Second, the link between European citizenship and civil rights is examined in Section 4.3. Third, social rights and the connection with Union citizenship are elaborated on in Section 4.4. Conclusions are drawn in Section 4.5. The political dimension of citizenship rights is dealt with in Chapter 5, in which the connection between European citizenship and democracy as a common ideology is analysed.

13 This categorisation is inspired by Thomas Marshall. Marshall (1950), see also Chapter 2, Section 2.4.1.
14 Closa (1995), p. 490.
15 Marshall (1950), p. 8.

4.2 EQUALITY LINKED TO EUROPEAN CITIZENSHIP

4.2.1 Equal treatment as a key element of citizenship

In general, the basic element of citizenship, in addition to the civil, social and political dimension, is the equal treatment of citizens. Equal treatment is defined as equal treatment of equal situations and persons, whereas at the same time it requires that unequal situations and persons are treated unequally in proportion to their disparities (unequal treatment may, however, be justified).[16]

As observed above, citizenship is the ultimate expression of the equal status of members within a certain community. The cornerstone of this notion of (national) citizenship is equality with regard to the rights and duties of those individuals that belong to and are members of that particular polity.[17] Ever since the early expressions of citizenship, equality has been a core right for citizens: in Aristotle's concept of citizenship, equality – of those who are "qualified" as citizens – was one of the main components, at least with regard to political rights. According to his idea of citizenship, "citizens are all who share the civic life of ruling and being ruled."[18] This notion of citizenship is based on political participation, i.e. on an equal share in governance. Nowadays this old Greek model is translated into electoral rights (both active and passive) on equal footing for all citizens. Equality is not an isolated right. As is discussed below, the right to equal treatment is intertwined with the social and civil (and political) rights of citizens. Equality in this sense is an overarching right and is therefore also part of the examination of the civil and social rights discussed here.

4.2.2 Equality in different sources of law

Principles of equal treatment and non-discrimination can be found in different sources of law, which are the starting point of the analysis. Within the European legal space, three important sources of equality rights can be mentioned: the European Convention on Human Rights as part of the general principles of Union law,[19] the national constitutional provisions and Union law. In almost all Member States, equal treatment or a prohibition of discrimination is provided for in the constitution. Although the relevant legal status (i.e. enforcement of the prohibition) as well as the way equality is further implemented in national laws differ, the principle of equal treatment as such can be regarded as widely observed in the Member States. Already in 1977 the Court affirmed that the prohibition of discrimination is "one of the fundamental principles of Community law."[20] Equal

16 Jans et al. (2007), p. 126.

17 Closa (1995), p. 490. Only insofar as the individuals living in the relevant society are considered to be citizens. Marshall (1950), pp. 18-19, linked the equal treatment of full members of a society to the inequality of social classes.

18 Politics: 1252a16.

19 Article 6(3) TEU provides that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

20 Cases 117/76 and 16/77, *Ruckdeschel & Co*. [1977] ECR 01753, par. 7.

treatment is, in the context of Union law, considered a general principle.[21] Besides non-discrimination as a general principle of Union law, the equality principle is further elaborated on in various specific provisions, such as the free movement provisions, but also in specific European secondary legislation.[22]

Article 18 TFEU prohibits discrimination on the grounds of nationality, which has been of major importance for the case law on European citizenship.[23] Discrimination on other grounds, such as discrimination on the grounds of gender, age or race, is also prohibited in Union law.[24] Based on Article 19 TEU as a legal basis, directives to combat discrimination on various grounds have been adopted. In the Lisbon Treaty, equality of citizens is expressed in Article 9 TEU, which states: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies." This provision is not addressed to the Member States, but implies that the law of the European Union and actions of its institutions will be applied in such a way that equality is respected. In addition, the Charter includes equality in different provisions. Title III of the Charter, which is specifically named "Equality", *inter alia* includes equality before the law,[25] equal treatment on grounds of nationality[26] and equality between men and women.[27] Moreover, other sources may also serve as a source for equality in Union law. The fundamental rights provided for in the ECHR are considered part of the general principles of Union law.[28] The same holds true for the constitutional traditions common to the Member States, to which equality also belongs.

The test of equal treatment is twofold: sometimes it requires that situations or persons be treated differently (because their situation is different), and sometimes it requires that advantageous measures for own nationals should be also be available to others. Nevertheless, unequal treatment might be justified by overriding public interests of a Member State, at least when the aim of the measure is objectively and proportionally achieved.

4.2.3 Equal treatment and European citizenship

In the context of Union citizenship, the right to equal treatment on the grounds of nationality has been crucial to guarantee the free movement of European citizens in the

21 Thus in *Defrenne* the Court of Justice concluded that the principle of non-discrimination on the ground of gender was one of the general principles of Community law at the time. Case 149/77, *Defrenne* [1978] ECR 01365, par. 26-28.

22 For instance, the Employment Equality Directive 2000/78/EC or Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

23 In Chapter 3, Section 3.4.1, this case law is explored in more detail.

24 Articles 157 and 19 TFEU, and Articles 20 and 21 of the Charter.

25 Article 20 of the Charter.

26 Article 21 of the Charter.

27 Article 23 of the Charter.

28 Article 6(3) TEU.

European Union. Since the group of Union citizens consists of different nationalities, the prohibition of discrimination on the grounds of nationality is of major importance in order to create equal membership. Close to the definition of equality in traditional legal philosophy, the Court held that "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations."[29]

Discrimination on the grounds of nationality has been prohibited since the early days of the European Union. For the establishment of an internal market without frontiers and free movement of goods, persons, capital and services, the prohibition was essential. Non-discrimination has been, and still is, important as a counterpart to the tendency of Member States to be protective towards their own economy and to advantage their own nationals and companies over those of the other Member States. By the creation of European citizenship, this equal treatment has been brought beyond the internal market and has become a tool of "citizen empowerment."[30] Nationals that have not contributed to the economy of the Member State also have to be treated on an equal footing.[31] Most of the Union citizens' rights are based on equality. The right of European citizens to vote and stand as a candidate for European and municipal elections in another Member State is based on equality.[32] Moreover, the protection granted by diplomatic or consular authorities is equal: Union citizens have the right to diplomatic protection in third countries by any Member State on the same conditions as the nationals of that State.[33]

In addition to the prohibition of discrimination on the grounds of nationality, other grounds of discrimination are also prohibited by Union law. According to Article 19 TEU, Union legislation may be adopted to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. There are different Union directives on discrimination, for example Directive 2004/113 that implements the principle of equal treatment of men and women in access to goods and services, or Directive 2000/78/EC on equal treatment in employment and occupation.[34] Moreover, the Charter clearly states that "Any discrimination based on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."[35] The prohibition of age discrimination has been recognised by the Court as a general principle of Union law.[36] As observed, since the Treaty of Lisbon, Article 9 TEU explicitly connects equality and European citizenship.

29 C-542/09, *European Commission v Kingdom of the Netherlands* [2012] ECR nyr, par. 41.
30 Tridimas (2007), p. 60.
31 Although a Member State may justify unequal treatment, for instance regarding social benefits.
32 Article 22 TFEU.
33 Article 23 TFEU.
34 Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L373/37, 21.12.2004, pp. 294-300 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2/12/2000, pp. 16-22.
35 Article 21 Charter.
36 C-144/04, *Mangold* [2005] ECR I-09981, C-555/07, *Kücükdeveci* [2010] ECR I-00365.

Although other grounds of discrimination are also prohibited and guaranteed by secondary legislation, no clear link has (yet) been established between European citizenship and discrimination on other grounds. In the development of Union citizenship, the denationalisation of Member States' measures was of major importance. The abolishment of the borders in the context of free movement of European citizens implied that discrimination on grounds of nationality should be banished. Since the Treaty of Lisbon, the prohibition of discrimination on grounds of nationality has been moved from the title on "principles" to the title on "non-discrimination and citizenship of the Union". This change might mark a closer link between citizenship rights and non-discrimination in general as a shift in the way citizens are seen within the European Union. As observed, citizenship was linked to the internal market in the early days. In that case law, European citizens were qualified as recipients of services or consumers of goods, for example, which is a connection that has become less important in more recent case law. However, the Court developed its case law based on the familiar concepts of equality and free movement.[37]

Discrimination on the grounds of nationality is prohibited in the Treaty in several provisions. Prohibition of discrimination on the grounds of nationality is, obviously, essential to create a Union without borders, and an internal market in which the free movement of goods, services capital and persons is guaranteed. Article 18 TFEU lays down the general prohibition of such discrimination. This article provides that any discrimination on the grounds of nationality is prohibited "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein."[38] Before the introduction of European citizenship, the non-discrimination provision of Article 18 TFEU was already included in the Treaty and applied by the Court of Justice. The prohibition was, however, mostly absorbed into the more specific non-discrimination provisions, for example, within the prohibition of hindering the free movement of workers (in which the discrimination of workers based on their nationality is also contained).

The scope of Community law was extended by the introduction of Union citizenship, as has been analysed in the previous chapter on the effect of European citizenship on the division of powers.[39] Article 18 TFEU had a key role in this line of case law.

4.2.3.1 Court-driven equality

Ever since *Martínez Sala*[40] in 1998, the Court of Justice has linked Union citizenship to non-discrimination on the grounds of nationality. In that case, the Court of Justice applied Article 12 EC [Article 18 TFEU] in conjunction with Article 17 EC [Article 20 TFEU] to solve the unequal treatment of Martínez Sala compared to the conditions for

37 Barnard (2013)(a), p. 510. On the (initial) market-based approach of the Court see also Nic Shuibhne (2010), pp. 1597-1628.
38 Article 18 TFEU.
39 Chapter 3, Section 3.4.1.
40 C-85/96, *Martínez Sala* [1998] ECR I-02691.

own nationals to receive a child-raising allowance. The Court concluded that "Article 8(2) of the Treaty [Article 20(2) TFEU] attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 Article [18 TFEU] of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty."[41] The Court held that every European citizen lawfully resident on the territory of another Member State may rely on the prohibition of discrimination on the grounds of nationality, within the material scope of Union law.
The judgment in *Martínez Sala* sparked the further development of equal treatment rights of European citizens. It was the start of extensive case law on Union citizenship and non-discrimination on the grounds of nationality.[42] As Advocate General Jacobs expressed in his Opinion in *Bickel and Franz,* decided a few months after *Martínez Sala*, "freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship."[43]

In *Martínez Sala*, *Bickel and Franz* and *Grzelczyk,* the Court connected European citizenship to equality as a fundamental right.[44] In these cases, it linked the status of European citizenship to equal treatment on the grounds of nationality. Nevertheless, in order to rely on the prohibition of discrimination on the grounds of nationality, the situation at hand has to fall within the material scope of Union law. Since the Court of Justice applied Article 18 TFEU in conjunction with Article 21 TFEU, it became clear that any national measure that (potentially) discriminated against migrant Union citizens compared to the own nationals of that Member State would not be accepted by the Court of Justice, unless a legitimate justification were brought forward.[45]

This combined approach of the Court with regard to non-discrimination and Union citizenship applies to any measure that discriminates against Union citizens on the grounds of nationality, not only to residence-related benefits (such as housing), but to any subject that potentially affects their daily life in another Member State. The prohibition of discrimination was applied by the Court of Justice to national measures concerning several social benefits (such as a child-raising allowance,[46] student assistance[47] and subsistence allowances[48]), but also to a centralised register with personal data for the purpose of crime fighting,[49] and to the issue of an annual toll disc, which was free of charge for disabled persons.[50] As a result, any national measure that affects the free movement

41 C-85/96, *Martínez Sala* [1998] ECR I-02691, par. 62. Brackets added HvE.
42 See in more detail Chapter 3, Section 3.4.1.
43 Opinion of Advocate General Jacobs C-274/96, *Bickel and Franz* [1998] ECR I-07637, par. 24.
44 Sharpston (2012), pp. 245-271.
45 See also Chapter 3, Section 3.4.3.
46 C-85/96, *Martínez Sala* [1998] ECR I-02691.
47 C-209/03, *Bidar* [2005] ECR I-02119 and C-158/07, *Förster* [2008] ECR I-08507.
48 C-456/02, *Trojani* [2004] ECR I-07573 and C-184/99, *Grzelczyk* [2001] ECR I-06193.
49 C-524/06, *Huber* [2008] ECR I-09705.
50 C-103/08, *Gottwald* [2009] ECR I-09117. In *Gottwald*, this discrimination on the grounds of nationality was justified in the end, so the Court of Justice concluded that the national measure at stake constituted non-compliance with Article 12 EC (Article 18 TFEU).

or residence of a Union citizen negatively falls under the prohibition of Article 18 in conjunction with Article 21 TFEU.[51]

In the case law on EU citizenship and non-discrimination based on nationality, there are basically two approaches. In the first place, European citizens have the right to equal treatment in a host Member State. In line with *Martínez Sala*, every Union citizen who is lawfully resident on the territory of a Member State other than that of his/her nationality may rely on the prohibition of discrimination on the grounds of nationality.[52] EU citizens should be able to move freely without (potential) obstacles to Member States other than the Member State of their nationality. Residence requirements in social security legislation may therefore be prohibited by Article 21 TFEU, since such measures would preserve social benefits for Member States' own nationals indirectly. This also means that the Member State of origin must not prohibit a national from leaving its territory, at least without grounds of justification.[53]

In the second place, Member States are not allowed to discriminate against their own nationals when these nationals have exercised their right to free movement and are residing or have resided in another Member State. This means that residence requirements are in principle prohibited because such requirements would create a disadvantage for nationals of a Member State who return to their Member State of nationality.

> The *D'Hoop* case[54] is an example of the right to equal treatment for Union citizens who have exercised their right to move and reside in another Member State. Ms D'Hoop was disadvantaged with regard to a tide-over allowance because she had studied for a period in a Member State other than that of her nationality. The fact that a Union citizen has used his or her right to move to another Member State must not lead to discrimination compared to the citizens that have not migrated. As the Court emphasised: "[I] nequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move."[55]
>
> The *Turpeinen* case[56] may also serve as an example of the right to equal treatment for migrant Union citizens in the context of their home Member State. In this case, the inequality was perceived as an obstacle to the exercise of free movement as provided for in Article 21 TFEU.

The Court of Justice used two tools to create a more substantive form of European citizenship through non-discrimination. Firstly, the Court applied equality rights to break down territorial restrictions and nationality-based conditions for social benefits in the host Member State. Secondly, the Court has qualified territorial limitations of a

51 See also the analysis of the extension of the material scope of Community (Union) Law by the case law on Union citizenships in Chapter 3.
52 For a more detailed elaboration on this case law, see Chapter 3, Section 3.4.1 and further.
53 C-33/07, *Jipa* [2008] ECR I-05157, par. 18, and C-249/11, *Hristo Byankov* [2012] ECR nyr, par. 31.
54 C-224/98, *D'Hoop* [2002] ECR I-06191.
55 C-224/98, *D'Hoop* [2002] ECR I-06191, par. 35.
56 C-520/04, *Turpeinen* [2006] ECR I-10685.

Member State with regard to its own nationals as a barrier to free movement of Union citizens.[57]

The right to equal treatment in combination with free movement of Union citizens is not unlimited because the right to move and reside freely is subject to the limitations and conditions in the Treaty and to secondary legislation. However, these limitations and conditions regarding free movement are interpreted strictly by the Court.

4.2.3.2 Equal treatment and reverse discrimination

European law is only applicable whenever a national case or situation comes within the scope of Union law, i.e. whenever there is a sufficient connection to Union law. When all the relevant aspects of a case are related to one Member State, the scope of Union law is not activated. A connection with Union law is made, most obviously, when a certain field of law is harmonised or regulated by Union law. Whenever Member States implement European law into national law, these national measures fall within the scope of European law.
Secondly, a situation falls within the scope of Union law by the application of one of the freedoms. A cross-border dimension can therefore bring a situation within the ambit of Union law. One actually needs to cross a border within the European Union to activate the protection of Union law.[58] A purely hypothetical prospect of exercising the right to free movement does not constitute a sufficient link with Union law.[59] Subsequently, national measures applied in a wholly internal situation do not have to comply with the principles and freedoms of Union law. This phenomenon of reverse discrimination leads, paradoxically, to a distinction between static nationals of Member States and those who have exercised their right to move freely of Article 21 TFEU.[60]
Reverse discrimination has been recognised and accepted in the context of the internal market. Whereas most Member States would not disadvantage their own products and producers, reverse discrimination did not seem to be too problematic. However, reverse discrimination has been criticised in particular in the light of European citizenship.[61] Although in the early days reverse discrimination took place in internal market situations, since the introduction of Union citizenship, this cross-border criterion seems to sit uncomfortably with the concept of European citizenship.[62] The fact that the relevant rights are reserved for a small group of individuals that has sufficient means and the abilities to move to another Member State has been challenged.

Up until now, the Court of Justice has upheld its statement that reverse discrimination is not to be governed by Union law and that the Court has no jurisdiction to rule on situations that are considered purely internal. The Court has repeatedly emphasised that

57 Dougan (2008), p. 726.
58 Nic Shuibhne (2002), p. 749.
59 C-299/95, *Kremzow* [1997] ECR I-02629, par. 16.
60 On this issue see also Editorial Comment (2008), pp. 1-11 and Nic Shuibhne (2002).
61 Tryfonidou (2008), pp. 43-67.
62 O'Leary (1996), pp. 276-278.

"Citizenship of the Union […] is not intended to extend the scope *ratione materiae* of the Treaty to internal situations which have no link with Community law."[63] This means that "any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State."[64] According to the Court, "any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community [Union] law."[65]

The effects of this "reverse discrimination" become visible when one compares the cases of *Metock*[66] and *McCarthy*.[67,68]

> The *Metock* case concerned nationals from the UK, Germany and Poland who were living in Ireland with their spouses, having the nationality of a third country. The application for a residence card for the third-country nationals was refused because they had no prior legal residence in another Member State. This condition was in accordance with the earlier case of *Akrich*,[69] in which the Court of Justice had concluded that such prior legal residence in another Member State may be required. The Court of Justice in *Metock* breaks the *Akrich* line of reasoning and points out that this particular group of third-country nationals married to Union citizens must not be refused on that condition. Based on Directive 2004/38, restrictions on the free movement of family members of Union citizens should be interpreted very restrictively. The key argument of the Court was that European citizens should not be hindered in their family life when they use their citizenship right to free movement.
>
> The *McCarthy* case concerned a British national living in the UK (although she had also acquired an Italian passport) and who requested a residence card for her Jamaican spouse. Since she had not moved within the European Union, her situation did not fall under the scope of Article 21 TFEU or Directive 2004/38. Therefore, the decisive difference with the cases in *Metock* was the exercise of free movement. Would McCarthy in the future reside in another Member State, she could have her spouse with her on the basis of Article 21 TFEU.

In some judgments the Court shows a lenient attitude with regard to the existence of a cross-border link with Union law. One of those cases is *Chen*,[70] concerning a Chinese national who travelled with her Irish daughter from Northern Ireland (which is formally

63 See *inter alia* C-499/06, *Nerkowska* [2008] ECR I-03993, par. 25, C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 26, C-192/05, *Tas-Hagen and Tas* [2006] ECR I-10451, par. 23.
64 C-64/96 and C-65/96, *Uecker and Jacque* [1997] ECR I-03171, par. 23.
65 C-127/08, *Metock* [2008] ECR I-06241, par. 78., brackets added HvE.
66 C-127/08, *Metock* [2008] ECR I-06241.
67 C-434/09, *McCarthy* [2011] ECR I-03375.
68 See also Van Elsuwege (2011), pp. 308-224, who notes the strange consequences of reverse discrimination with regard to family reunification, even though this case law is in compliance with the current system of EU law and the division of powers.
69 C-109/01, *Akrich* [2003] ECR I-09607.
70 C-200/02, *Chen* [2004] ECR I-09925.

part of the UK) to the UK.[71] As such, even though baby Catherina moved within the UK, and held the nationality of Ireland, she could rely on Article 21 TFEU.

Moreover, *Garcia Avello* is an example of a case in which the cross-border dimension was not obviously present.[72]

> The case concerned the two children of Spanish parents, who had been born in Belgium, but had the dual Belgian/Spanish nationality. They fell within the scope of Article 18 TFEU because they were, as European citizens, lawfully residing in another Member State. Although the children did not actually exercise their right to free movement, their parents had at least used *their* rights as Union citizens by moving to another Member State. The Court stated that the case did have a link with European law since it concerned "the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State."[73] It seems therefore that the sole fact that the children had another nationality than the Member State they resided in was sufficient to establish a cross-border link with Union law. In another case, *Schempp*, the citizen who was disadvantaged by a national measure was not the citizen who had actually moved. According to the Court, "since the exercise by Mr Schempp's former spouse of a right conferred by the Community legal order had an effect on his right to deduct in his Member State of residence, such a situation cannot be regarded as an internal situation with no connection with Community law."[74]

Although the Court seems to have a generous interpretation of the cross-border dimension, it still accepts "reverse discrimination", which means that certain Union citizens may not be able to rely on the prohibition of discrimination because their situation is regarded as a wholly internal situation. In this sense, the Court emphasised in *McCarthy* that "the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement."[75]

Reverse discrimination and the fact that a small group of the Union does benefit from the status of Union citizenship creates a gap between citizens who have migrated and those who have not exercised that right. In *Ruiz Zambrano*, Advocate General Sharpston questioned whether the application of Article 18 TFEU could solve the issue of reverse discrimination. One of the reasons for her suggestion to the Court was the fact that current case law of the Court is rather generous in interpreting the requirement of cross-border elements, which creates legal uncertainty and incoherency. Sharpston proposed to the Court that "Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national

71 The *Chen* case was decided on Article 21 TFEU instead of Article 18 TFEU. Nevertheless, the case shows the lenient approach of the Court to a free movement dimension.

72 In *McCarthy*, the Court refers to *Garcia Avello* as a case regarding the 'effectiveness of EU citizenship' (as developed in the judgment in *Ruiz Zambrano*), which is quite remarkable, since this case was decided in the context of Article 18 TFEU. See also: Van Elsuwege (2011), p. 316. However, the test of 'serious inconvenience' in *Garcia Avello* performed by the Court does have similarities with the test of *Ruiz Zambrano* ('the genuine enjoyment of the substance of rights' of Union citizens).

73 C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 27.

74 C-403/03, *Schempp* [2005] ECR I-06421, par. 25.

75 C-434/09, *McCarthy* [2011] ECR I-03375, par. 41.

law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law."[76] Only with regard to European citizenship and the interaction between national and European law, the Union citizen should be protected by the prohibition on non-discrimination. However, the Court has not accepted her explicit invitation to make such a turn in case law (yet).

4.3 LINKING EUROPEAN CITIZENSHIP AND FUNDAMENTAL CIVIL RIGHTS

Besides the overarching right to equal treatment, civil rights are traditionally an important part of the rights of citizens. This section now presents an analysis of the connection between civil rights and European citizenship in order to examine whether European citizenship contributed to constitutionalisation of the Union in the sense that Union citizenship has had an impact on the protection of fundamental civil rights in the European Union.

4.3.1 What are civil rights?

From the perspective of international human rights, civil rights are the first generation of human rights. Civil rights are undisputedly defined as rights that are granted to individuals; which are inalienable and legally enforceable; and which protect individuals from state interference and abuse of power by the government.[77]

From an international law perspective, the Convention on Civil and Political Rights of the United Nations is an important source of law. In this Convention, ratified by almost all states, the civil rights *inter alia* include the freedom from torture, the right to life, freedom of thought and religion, the right to freedom and security, and equality before the law. The rights do not only oblige the state to refrain from interfering unnecessarily in the life of citizens, but may also require the state to act in a positive way to grant security and equality to its citizens. At least this last category of rights has to be guaranteed by the state due to a *due diligence* obligation to prevent private actors from violating civil rights.

From a legal philosophy point of view, civil rights are seen as overarching and as including social and political rights as well as equal treatment. The Stanford Encyclopaedia of Philosophy states: "It seems neater and cleaner simply to think of civil rights as the general category of basic rights needed for free and equal citizenship. Yet, it remains a matter of contention which claims are properly conceived as belonging to the category of civil rights."[78]

76 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 144.

77 Definition used in *Akehurst's Modern Introduction to International Law*, Malanczuk (1997).

78 Stanford Encyclopaedia of Philosophy: "Civil rights are the basic legal rights a person must possess in order to have such a status. They are the rights that constitute free and equal citizenship and include personal, political, and economic rights." However, the encyclopaedia also makes a distinction between civil and political rights.

Hence, civil rights are those rights that give the individual the opportunity to live his or her life without any unnecessary impact on personal freedoms, and also guarantee protection from a central level against interference with personal freedoms by other individuals. Two dimensions of civil rights can be revealed: the 'private autonomy' and the 'public autonomy' of individuals. The first refers to the freedom of citizens to arrange their life as they find it meaningful, without unwanted restrictions to this freedom to decide about their own way of living. The second dimension is aimed at the freedom to express ideas and participate in the public area. This dimension of civil rights requires that *inter alia* the freedom of speech, freedom of thought and the freedom to vote are safeguarded.[79]

4.3.2 Civil rights and Union citizenship

At first glance the concepts of citizenship and civil rights seem to be closely connected, since citizenship is the legal reflection and codification of equal membership of a polity. Members of a certain community are, in a traditional sense, granted civil rights in order to be able to enjoy their status of being a citizen.

The rights that can be qualified as European civil rights can be found in the Charter. These rights are the right to life (Article 2) and to the integrity of the person (Article 3); the freedom of conscience and religion (Article 10); the freedom of expression and information (Article 11) and thought; the freedom of assembly and of association (Article 12); but also the right to respect of family life (Article 7); the right to protection of privacy (Article 8); and the right to liberty and security (Article 6). Under the title of justice, moreover, civil rights can be found, such as the right to a fair trial (Article 47), and the presumption of innocence and right of defence (Article 48). These rights mentioned in the Charter are not addressed to Union citizens specifically, but are mostly formulated as universal rights, as is addressed in Section 4.1.2 of this chapter.

However, as observed, the scope of application of Union law is decisive for the applicability of fundamental rights on account of EU law. This means that the limits set by Article 51(1) of the Charter are essential to the application or invocation of fundamental rights in a Union context. Moreover, the scope of Union law is also decisive for the application of fundamental rights as part of the general principles of Union law.
The protection of civil rights can also be linked to European citizenship in an indirect way. One of the possibilities to connect civil rights to Union citizenship is by linking it to the free movement of European citizens. Such an approach is seen in *Carpenter*,[80] where the right to family life had to be taken into account in the decision of whether to deport a family member because the deportation would negatively influence the free movement of a Union citizen providing services. This particular case was decided in the context of free movement of services, not of European citizenship as such. The case, however, shows a potential connection between free movement and fundamental rights protection.

79 See on this distinction Altman (2013).
80 C-60/00, *Carpenter* [2002] ECR I-06279.

> The *Carpenter* case concerned a British national with a Filipino spouse residing in the UK. The British authorities ordered the deportation of Ms Carpenter, who married Mr Carpenter while she had a residence permit as a tourist. Since Mr Carpenter had a company selling advertisement space for magazines, he travelled to other Member States for his company. The Court held that the situation of Mr Carpenter fell within the ambit of the freedom to provide services, based upon his business activities in other Member States. The Court held that the deportation of Ms Carpenter would be "detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom."[81] Framed within the freedom to provide services, the right to reside and the right to family life were brought into the ambit of Union law.

Whenever Member States derogate from one of the freedoms, the general principles of Union law are applicable, including the fundamental rights. Since Mr Carpenter was restricted in his free movement, the situation came within the scope of Union law. Subsequently, the general principles of Union law applied and the right to family life needed to be respected.

Another link between fundamental rights and free movement can be made, qualifying potential violations of fundamental rights as a restriction of free movement. This argumentation is more controversial: the fact that fundamental rights are violated leads to a restriction of the free movement.[82] A Union citizen may, in principle, be prevented from moving to a Member State, if in that particular Member State fundamental rights are violated. If a Union citizen were to be confronted with extreme punishment, e.g. physical punishment, one might argue that these provisions of criminal law prevent a Union citizen from moving and residing freely in the territory of another Member State.[83] Advocate General Maduro made such a connection between the free movement of Union citizens and the application of fundamental rights. He advocated that "serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would, in my view, qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order."[84] Up until now, the Court, however, has not connected the violation of fundamental rights to the restriction of the free movement of Union citizens in this sense.

Moreover, arguments have been put forward in academic literature to link fundamental rights protection and EU citizenship, irrespective of free movement, in very specific situations in which the essence of fundamental rights protection is violated by a Member

81 C-60/00, *Carpenter* [2002] ECR I-06279, par. 39.

82 Spaventa argued that the decision in Carpenter was founded on the case law on European citizenship and proposed or expected that this trend of case law could have been developed further. Spaventa (2004), pp. 743-773.

83 See also Muir and Van der Mei (2013), p. 129.

84 C-380/05, *Centro Europa* [2008] ECR I-00349, paras 20-22.

State.[85] Article 2 TEU would provide for such a connection in this argument.[86] According to Article 2 TEU the Union is founded on values respecting *inter alia* human rights. A violation of human rights might therefore be qualified as undermining the values of the European Union and in such situations the European Union, as is argued by these authors, may be competent to act. As long as the Member States do not infringe the EU value of respecting human rights the Union is not competent to act, outside the scope of Union law. However, when human rights are systematically neglected by a Member State, the scope of EU fundamental rights might be applicable. For such specific situations a connection between EU citizenship and fundamental rights is proposed by the authors. One may argue that disrespecting human rights is against the essence of the rights of EU citizens.[87] Based on this idea a Union citizen may be able to invoke his or her status as a European citizen against a 'serious and persistent' violation of human rights, even if the EU citizen at stake has no other link, such as the exercise of free movement rights, with EU law. As will be discussed in Section 4.5 below, the case law of the Court, at least up until now, does not support this connection between Article 20 TFEU and Article 2 TEU.

4.3.2.1 The right to move within the European Union

As has been observed, European citizenship has evolved within familiar concepts in the Union: by the application of non-discrimination on the grounds of nationality and by the application of the right to free movement. The Court of Justice holds a broad interpretation of the right to move within the European Union, extending this right also to rights of family reunification, social benefits and the right to move without obstacles or 'serious inconveniences.'

This right for Union citizens to move may be distinguished as a civil right, i.e. as a fundamental freedom of Union citizens. The right for European citizens to move within the European Union first developed within the internal market. Since the Court of Justice interpreted the economic freedoms in a generous way, recipients of services were also included in the scope of Union law.[88] In this sense, the free movement of persons was extended to those nationals that are not qualified as workers or self-employed persons and are not *per se* economically active. In 1993, three directives that enhanced the free movement of persons in the European Union were adopted. These directives codified the right to reside in other Member States in European Union legislation. The beneficiaries of these directives were students, retired persons and those nationals who had sufficient means. By the formal introduction of European citizenship in the Treaty

85 Von Bogdandy et al. (2012).

86 Article 7 TEU provides that after establishing that a Member State violates the values of Article 2 TEU, the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of this Member State in the Council. However, up until now Article 7 TEU has not been used against any of the Member States. To connect Article 2 TEU with the application of fundamental rights and EU citizenship may therefore be regarded as an instrument more appropriate to counteract systematic violation of human rights by Member States.

87 See Van Eijken and De Vries (2011), Von Bogdandy et al. (2012).

88 Case 186/87, *Cowan* [1989] ECR 00195.

of Maastricht, the free movement of Union citizens was one of the major primary rights of Union citizens (Article 21(1) TFEU). The Charter includes the freedom of movement in Article 45.

The right to free movement is now codified in Directive 2004/38, which replaced the three older directives on the free movement of persons and is broader in scope. The Directive guarantees to Union citizens, who migrate within the European Union, the right to enter and exit Member States without visas or equivalent formalities.[89] In this sense, Member States are not allowed to restrict the free movement of their nationals to leave their Member State without a legitimate justification.[90] This right to exit and enter may be seen as the minimum requirement to exercise the free movement rights: when the exit or entry to Member States is restricted, the effectiveness of the right to free movement is lost.

Articles 27 and 28 of the Directive provide for specific grounds of refusal of access and measures of expulsion, which are both a breach not only of the right to residence, but also of the right to free movement. According to the structure of Directive 2004/38, the higher the degree of integration in a Member State, the narrower the grounds of expulsion become, based on a model of integration. Article 29 constitutes a specific ground for derogation from the freedom of movement of Union citizens: when public health is at risk. The Court has been quite strict in interpreting the derogations from the freedom to move for Union citizens.[91]

4.3.2.2 The right to reside in the European Union

The right to reside in another Member State, which is strongly connected to the free movement of Union citizens, is regulated by Directive 2004/38. The right to reside for migrated Union citizens in another Member State is based on stages of integration.
In the first three months, any European citizen may reside on the territory of another Member State, without any conditions or restrictions.[92] After these three months, a Union citizen has to comply with additional conditions. The European citizen must not become a burden on the finances in the host Member State and has to have comprehensive healthcare insurance and sufficient means after the three months of residence in the host Member State.[93] The right to reside in another Member State, however, must not be refused automatically when a European citizen applies for social benefits,[94] neither is the condition to have a comprehensive healthcare insurance applied by the Court strictly.[95] After five years of residence, the right to permanent residence is granted to

89 Articles 4 and 5 of the Directive. However, a Union citizen has the obligation to present an identity card or a passport upon entry into the territory of a Member State; C-378/97, *Wijsenbeek* [1999] ECR I-06207.
90 C-33/07, *Jipa* [2008] ECR I-05157 and C-249/11, *Hristo Byankov* [2012] ECR nyr.
91 However, in specific circumstances this might be different. See C-364/10, *Hungary v Slovak Republic* [2012] ECR nyr. on the refusal of access to a Member State for the head of another Member State.
92 Article 6 of Directive 2004/38.
93 Articles 7 and 14 of Directive 2004/38.
94 C-456/02, *Trojani* [2004] ECR I-07573.
95 C-413/99, *Baumbast* [2002] ECR I-07091.

Union citizens in the host Member State.[96] The expulsion of Union citizens is regulated, as observed, along the same reasoning: the degree of integration (by length of residence) is decisive for the question if and on what grounds a Union citizen from another Member State may be expelled.
The right to reside in the territory of another Member State has been interpreted in favour of Union citizens by the Court. The Court has held a broad concept of residence and mostly interprets the derogations from this right narrowly.

Whether European citizens have a right to reside in the European Union and in their own Member State based on Article 20 TFEU was the essential issue in *Ruiz Zambrano*. After *Ruiz Zambrano*, many questions were raised about the consequences.[97] As discussed in Chapter 3, the scope of Article 20 TFEU, in the sense of the substance of the rights of Union citizens, has been interpreted restrictively by the Court. After *Ruiz Zambrano*, it became clear in subsequent judgments, that the Court of Justice did not adopt a very broad interpretation of the criterion of being deprived from the substance of the rights conferred to EU citizens, but that its interpretation is that only national measures that force a Union citizen to reside outside the European Union would qualify as infringing Article 20 TFEU.[98] One of the questions after *Ruiz Zambrano* was on which conditions the right to reside in the European Union was granted by Article 20 TFEU. The judgment in *Dereci*[99] offered more clarification. In this judgment, the right to reside in the European Union was explicitly recognised as a Union citizens' right by the Court. The Court also ruled that

> "the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole."[100]

What may be concluded from the *Ruiz Zambrano* and *Dereci* cases is that European citizens have the right to reside on the territory of the European Union, based on their status as Union citizens as such, based on Article 20 TFEU. In other words, to be more precise, they have the right not to be forced to leave the territory of the European Union.[101] From this perspective, the right to reside on the territory of the Union is nothing more than a reflection of the duty of Member States not to force Union citizens to live outside the European Union.

96 Article 16 of Directive 2004/38.
97 Nic Shuibhne (2011), pp. 161-162.
98 In that sense, decided after 1 August 2013, see also C-86/12, *Alokpa* [2013] ECR nyr. par. 32, in which the Court held that there "are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in *practice to leave the territory of the European Union*". Italics HvE.
99 C-256/11, *Dereci and Others* [2011] ECR I-11315.
100 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 66.
101 Nic Shuibhne (2012), p. 366.

In terms of substantive civil rights, the right not to be forced to leave the territory may be very narrowly defined. However, in terms of constitutional consequences, this right might prove to be significant. The Court made no statements on the right to reside in the Member State of nationality, but leaves the responsibility to grant the right of residence to the Member States. If a Union citizen can stay in a particular Member State with the family members on whom he or she is dependent, the right to reside within the European Union is guaranteed. This Member State is not necessarily the Member State of nationality. Compare in the same sense the judgment in *Rottmann*, where the Court also gave two Member States the shared responsibility to guarantee that Mr Rottmann's nationality would not be lightly withdrawn.

> Since Rottmann was deprived of his status as a Union citizen, because the nationality of two Member States were withdrawn (German and Austrian), the measure had to be reviewed in the light of the principle of proportionality. The Court, however, left the responsibility for the rights of Mr Rottmann up to the Member States as a shared responsibility. Whether Austria should give back the Austrian nationality or Germany should reverse the withdrawal of the German nationality was not decided on by the Court.[102]

The right not to be forced to leave the European Union may be attached to certain other material rights, which will be discussed below. The right to reside in the European Union is a shared responsibility and can be reviewed as a minimum standard in order to be able to enjoy the rights as a Union citizen. In this sense, the right to reside in the Union is, for example, decisive in order to enjoy the right to free movement.

As observed in more detail in Chapter 3 on the effect of European citizenship on the division of powers, the Court is cautious not to overstep its competences, thus interpreting the scope of Article 20 TFEU as including the right to family life and family reunification.[103] The Court, at least, has not interpreted these fundamental rights as part of the essential rights for Union citizens.[104] The question is whether European citizenship has affected the right to family life and family reunification.

4.3.2.3 The right to family life and family reunification and European citizenship

Another civil dimension of citizenship rights may be found in the right to family life and family reunification in the European context. Based on European citizens' right to free movement, the Court of Justice has ruled on the right to family reunification as being ancillary to the right to migrate to another Member State. Examples of such cases are *Chen* and *Metock*, in which, after establishing a cross-border link, the Court held that a derived residence right had to be granted to the third-country national as a family member of the Union citizen.

102 C-135/08, *Rottmann* [2010] ECR I-01449, par. 62.
103 Chapter 3, Section 3.4.4.
104 Van Elsuwege and Kochonov (2011), pp. 443-466.

> In *Metock*, the Court held that in order to guarantee that a Union citizen can reside on the territory of another Member State, his or her spouse with the nationality of a third country should be able to have the right to reside in that Member State. The Court even stated that "it makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State."[105] The right to family reunification in this case is linked to the right to free movement of Union citizens within the European Union. As observed, compared with *McCarthy,*[106] the right to free movement is decisive. The *McCarthy* case included no cross-border dimension and therefore McCarthy could not rely on Article 21 TFEU regarding the application for a residence card for her Jamaican spouse.
>
> The case of Ms Chen concerned a Chinese national who moved from China to the UK. She travelled, with premeditation, to Northern Ireland in order to give birth to her daughter, Catherina. According to the laws that were in force at the time, Catherina acquired the Irish nationality by birth. When Ms Chen migrated to the UK, she had a right to residence in the UK, being the primary carer of a Union citizen with the Irish nationality. According to the Court, the refusal of a residence right to Ms Chen "would deprive the child's right of residence of any useful effect."[107]

The right to family life is recognised by the Court as a precondition to the right to move to and reside in another Member State. The Court emphasised here that "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed."[108] In Directive 2004/38, the right to family reunification is codified in Article 3(1). The Directive is applicable to Union citizens in a Member State other than that of their nationality, so it only benefits Union citizens that have exercised their right to free movement.

In the more recent cases on Article 20 TFEU and the right of Union citizens not to be forced to leave the European Union, a link can be made with family life and family reunification. As observed, ever since the judgment in *Ruiz Zambrano*, Union citizens may invoke their status as Union citizens against any national measure that would deprive them of the genuine enjoyment of the substance of their rights as Union citizens. It might be argued that the right to family life and the right to family reunification are important, essential rights for Union citizens in order to genuinely enjoy their European citizenship. However, the Court narrowly interpreted Article 20 TFEU in the cases that followed *Ruiz Zambrano*. As cited in *Dereci*, the Court ruled that

> "the mere fact that it might appear desirable to a national of a Member State […] in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him

105 C-127/08, *Metock* [2008] ECR I-06241, par. 92.
106 C-434/09, *McCarthy* [2011] ECR I-03375.
107 C-200/02, *Chen* [2004] ECR I-09925, par. 45.
108 C-127/08, *Metock* [2008] ECR I-06241, par. 62.

> in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."[109]

The Court held that the right to family life as such is not included *per se* in the scope of the essential rights of Union citizens.[110] Nevertheless, it is plausible that under certain circumstances a Union citizen may *de facto* be deprived of his Union citizens' rights if one of his or her parents would be obliged to leave the European Union.[111] In this sense, the infringement of a Member State on the family life of a Union citizen may constitute an infringement of Article 20 TFEU, if the national measure at stake would force the European citizen to leave the European Union.

> *L. and O.* concerned third-country nationals married to another third-country national residing in Finland with their Finnish children, who were from previous marriages with a Finnish national. After both L. and O. divorced their Finnish spouses, they had the custody over their children. In both cases, the second spouse with the nationality of a third country (Ghana and Algeria) did not have sufficient means, and their application for a residence permit to reside with their family in Finland was therefore refused. The question was asked to the Court whether on the basis of European citizenship (of the child with Finnish nationality) a residence permit had to be granted for reasons of family reunification.
>
> The Court held that "it is for the referring court to establish whether the refusal of the applications for residence permits submitted on the basis of family reunification in circumstances such as those at issue in the main proceedings entails, for the Union citizens concerned, a denial of the genuine enjoyment of the substance of the rights conferred by their status."[112] The Court also held that the scope of Article 20 TFEU was not confined to cases in which a blood relation exists between the Union citizen and the third-country national. However, what was crucial in the assessment of the Court was the "dependency" of the Union citizen on the third-country national. The main question was whether the Union citizen is dependent on the third-country national to the extent that the Union citizens would be forced to leave the European Union, if the third-country national were refused residence in the Union.

The Court stressed in the cases of *L. and O.* that Directive 2003/86[113] had to be interpreted in light of the Charter and the fundamental right to family life and respect for the interests of the child. Therefore, the Directive would be applicable to the situation of the couples, even though the families were family members of a Union citizen (According to Article 3 of the Directive, Directive 2003/86 is not applicable to family members of Union citizens). The Court left the final decision up to the national court, which had two options to grant family reunification: by the application of Article 20 TFEU – but only in specific circumstances – or by the application of the Directive in the light of the fundamental rights as provided for in the Charter. The Court also confirmed

109 C-434/09, *McCarthy* [2011] ECR I-03375, par. 68. See in the same sense C-87/12, *Ymeraga* [2013] ECR nyr.
110 Lenaerts (2012)(c).
111 Van Eijken and De Vries (2012), p. 214.
112 C-356/11 and C-357/11, *O. and S. and L.* [2012] ECR nyr, par. 49.
113 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 03.10.2003, pp. 12-18.

that circumstances in which Article 20 TFEU are infringed and can be invoked are exceptional. It stated, moreover, that the scope of Article 20 TFEU is not so strict that a blood relationship between the third-country national for whom a right of residence is sought and the Union citizen who is a minor is necessary.

The case law on Article 20 TFEU may not only provide a possible, although rare, connection with family reunification. Its interpretation by the Court may also lead to bizarre situations regarding the respect for family life. The case law may lead to a situation in which a Union citizen has the choice to live with his whole family together on the territory of a Member State, on the basis of Article 21(1) TFEU, in which case the family has to migrate to another Member State. Alternatively, the Union citizen has to reside, in certain circumstances, in the European Union with one parent.[114] In another scenario, the Union citizen could choose to live outside the European Union with the whole family. These situations occur in families that include children and one parent with the nationality of one of the Member States, and one parent with the nationality of a third country. In these circumstances, a national court may conclude (and the Dutch courts did so) that the Union citizen is not deprived of the essence of European citizenship when he or she could reside with one parent on the territory of the European Union.[115] It seems paradoxical that a Union citizen may only enjoy his or her essential rights as a Union citizen when he or she resides in the European Union with one parent, while the parent with the nationality of a third country is residing outside the European Union.

4.3.2.4 European citizenship and the application of the Charter

Arguments have been put forward that Article 20 TFEU in itself may constitute a link with the scope of application with the Charter and the scope of Union law in order to "activate" the right to family life.[116] In this reasoning, the essence of European citizenship rights includes a right to family life, or other rights expressed in the Charter.[117] Up until now, such a link certainly has not been made by the Court of Justice. In this sense, the Court referred in *Dereci* to the protection of fundamental rights by the ECHR.[118] Indeed, outside the scope of Union law, Union citizens are protected by national and international law provisions.

However, the case law of the Court regarding the scope of the Charter is not very clear.[119] In *Dereci*, the Court repeated that the Member States have to comply with the

114 See for an analysis of the Dutch case law in the first months after *Ruiz Zambrano* on this issue Van Eijken (2012), pp. 41-48. Also Chapter 6, Section 6.3.2.1.

115 In this light Advocate General Bot makes a distinction between the measures imposed by a Member State that force a Union citizen to leave the Member State, and the EU, and the free choice of one of the parents to live outside the European Union with the entire family. Opinion in joined cases C-356/11 and C-357/11, *O. and S. and L.* [2012] ECR nyr, par. 42.

116 On the scope of application of the Charter, see Chapter 3, Section 3.3.4.

117 Van den Brink (2012), Van Eijken and De Vries (2011), Hailbronner and Thym (2011).

118 C-434/09, *McCarthy* [2011] ECR I-03375, par. 72.

119 Also on this point Sarmiento (2013).

Charter whenever "they are implementing European Union law."[120] Subsequently, the Court stated that it is therefore up to the national court to assess whether the situation at stake in *Dereci* was "covered by European Union law."[121] The Court made no clear distinction between "covered by" and "implementing" European Union law, which does not increase the clarity on the link between European citizenship and the Charter in the sense of Article 20 TFEU. In the same sense, the Court used both the terms "governed by European Union law" as well as "implementing" in the judgment in *Iida*.[122] The Court held that with regard to

> "the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it."[123]

As observed above, *Fransson* indicated that the Court holds a broad interpretation of implementing EU law. In this judgment, the Court ruled that "[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."[124] For the connection between the Charter and EU citizenship this might have consequences.

Since Article 20 TFEU provides a connection with the scope of European Union law, Article 20 TFEU might potentially be able to trigger the scope of the Charter. The activation of the Charter by the application of Article 20 TFEU may extend the scope of protection of family rights. In the event that Article 20 TFEU were violated, the scope of the Charter would be activated as well. On the ground of Article 20 TFEU, the family member of a Union citizen may have a derived right to reside in the European Union in order to guarantee the Union citizen a right to family life. Article 20 TFEU in combination with the Charter may constitute a broader protection of the right to family reunification. In view of the fact that in *L. and O.* the scope of protection of the Directive was widened with a reference to fundamental rights protection, Article 20 TFEU may also be interpreted more broadly in light of the Charter. Such interpretation could result in a broader scope of protection, e.g. to widen Article 20 TFEU to include family members on whom the Union citizen is not dependent, thereby widening the right to family reunification for EU citizens. Even though Article 20 TFEU as such would not necessarily mean that two parents need to be present in the territory of the Union to facilitate the residence of a dependent Union citizen, in the light of fundamental rights protection this might be evaluated differently by the Court. At the time of writing, however, there are no signs that the Court is to broaden its interpretation of Article 20 TFEU.

120 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 71.
121 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 72.
122 Compare paras 80 and 81 of C-40/11, *Iida* [2012] ECR nyr.
123 C-40/11, *Iida* [2012] ECR nyr., par. 79.
124 C-617/10, *Fransson* [2013] ECR nyr., par. 71.

> In *Ymeraga*,[125] the Court held that neither secondary legislation nor Article 20 TFEU had been violated and that therefore "the Luxembourg authorities' refusal to grant Mr Kreshnik Ymeraga's family members a right of residence as family members of a Union citizen is not a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter." *A contrario*, whenever Article 20 TFEU is violated, the Charter is applicable, which might have potential consequences for the connection between European citizenship and family reunification.

Hence, European citizenship and family reunification rights are connected in the case law of the Court, up to a certain extent. However, this connection is weak and it has been interpreted narrowly, up until now. The link between free movement of EU citizens as guaranteed by Article 21 TFEU and the scope of the right to family life is easier to make.

4.3.2.5 Protective civil rights

The civil rights are not only rights that require the state not to violate the liberty of citizens. An obligation for the state to more actively protect its citizens may be included in the civil rights of citizens as well. These protective rights require that the state protect its citizens from certain interferences by others. Some of these protective and security rights that have the aim to protect the citizens from external threats may be qualified as civil rights.

This protective role of the nation state is found in the philosophy on state arrangements. In light of the theory of Locke and Hobbes and their idea of a social contract for example, the state is obliged to serve the citizen with safety and security. This idea of protective civil rights corresponds with the international *due diligence* obligation to protect individuals from violations of civil rights by others than the state, as it is found in international human rights instruments. The UN Convention on Civil and Political Rights (ICCPR) provides in Article 9 that "[e]veryone has the right to liberty and security of person." This does not only mean that the state should refrain from action in a negative sense, but also obliges the states to prevent other individuals from violating liberty and security rights. The right to privacy is similarly interpreted in international law.[126]

In the European legislative framework, a similar principle is found in Article 6 of the Charter, which has the exact words of the above-cited Article 9 of the ICCPR: "Everyone has the right to liberty and security of person." Although Article 6 of the Charter refers to the situations in which the state does interfere with the liberty rights – detention for example – it might be interpreted in a broader sense that Member States are obliged to

125 C-87/12, *Ymeraga* [2013] ECR nyr, par. 43.

126 Human Rights Committee General comment No. 16: "In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."

secure citizens from external threats. One of the manifestations of this civil protective right in connection with European citizenship may be found in the Area of Freedom, Security and Justice (the AFSJ or Area).

4.3.2.5.1 Security and safety as rights for Union citizens in the Area of Freedom, Security and Justice

The AFSJ might be one of the areas that could potentially prove to be of added value to Union citizens.[127] It at least serves to establish a new connection between the European Union and the Union citizens in the criminal pillar of the Area.[128] The aim of the creation of AFSJ was to provide citizens with a high level of safety by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters, and by preventing and combating racism and xenophobia.[129]

The creation of the AFSJ has enhanced the protective side of civil rights on account of Union law, highlighting the European Union as a polity protective of its citizens.[130] The Area has been linked explicitly to the protection of European citizens. According to Article 3(2) TEU, the Union "shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

The scope of the AFSJ concerns matters that belong to the constitutional heart of a state, governing the relation between the public authorities and the individual. The aim of criminal law in a national setting is *inter alia* the protection of its citizens, and therefore it could be regarded as a derivative function of the protective role of a polity. As the *BverfG* held: "As regards the task of creating, securing and enforcing a well-ordered social existence by protecting the elementary values of community life on the basis of a legal order, criminal law is an indispensable element to secure indestructibility of this legal order."[131] This constitutional relevance is even more strengthened by the abolishment of the third pillar since the Treaty of Lisbon. Decision making concerning police and judicial cooperation in criminal matters is now governed by the ordinary legislative procedure.[132] Before the Treaty of Lisbon, unanimity was required.

127 Editorial Comment (2008), pp. 3-4.

128 The Area also entails measures concerning asylum and immigration policies and judicial cooperation in civil matters. Although not analysed in this thesis, European citizenship might indeed have an impact on these policy fields as well.

129 Pre-Lisbon Article 29 TEU, now found in Article 3 TFEU.

130 Shaw (2008), p. 107.

131 In the *Lissabon-Urteil*, of June 2009 on the ratification of the Lisbon Treaty: because criminal matters and justice are characteristic of the national state, the *BverfG* held that the competences in this area should be interpreted narrowly, with regard to the ratification of the Lisbon Treaty, paragraphs par. 55. The English translation of the *Lissabon-Urteil* can be found on: http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html.

132 Articles 82, 83, 84 and 87 (1) and (2) and 88 TFEU.

The Lisbon Treaty explicitly establishes the Union's competence to adopt directives in the field of criminal cooperation. Although this competence is limited to particularly serious crime with a *cross-border dimension* according to Article 83 TFEU, it is a significant step in the process of constitutionalisation and does affect Union citizens, irrespective of the exercise of free movement rights. The new legal area adds a new interesting dimension to the idea of civil rights in the European Union, in the sense that the Union increasingly fulfils the role of a *protective* community that safeguards its citizens from certain 'external' threats, such as terrorism and criminal activities.

In the same year that the AFSJ was created, the European Council adopted the first programme on how to achieve the goals of the AFSJ, in Tampere (the 'Tampere Programme'). In 2004, the 'Hague Programme' was adopted and in late 2009 the 'Stockholm Programme' was agreed on. These programmes provide the first foundations for legal actions by the institutions. In the conclusion of the Council of Tampere the following is stated: "[T]he challenge of the Amsterdam Treaty is now to ensure that freedom, which *includes* the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives."[133] This seems to be the first step to a broader definition of security rights, beyond – but including – the exercise of free movement. In the Hague Programme, the European Council also "underlines the need further to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European Area for Justice will play in this respect."[134] The programme underlines that "access to justice" and "mutual recognition" are important themes to achieve this. The Stockholm Programme,[135] which is the roadmap for the development of the AFSJ from 2010 to 2014, refers to the "citizen" – in a broad sense – and to "people". The programme uses both these two terms to refer to the individual who needs to be guaranteed a safe legal space to live in.

The two relatively new concepts in European law, the AFSJ and European citizenship, do not only exist as parallel and independent developments, but mutually influence and strengthen each other. The need for an AFSJ can be traced back to the fact that the creation of free movement of persons, both economically active and economically non-active, led to a need for security and safety guarantees. With the abolishment of borders, criminals and criminal activities could also easily travel in the Union. Therefore, this cross-border criminality needed to be controlled by cross-border cooperation within the European Union.[136] At the same time, the Area refers to Union citizens as its beneficiaries. Hence, European citizenship and the free movement of Union citizens spawned the need for protection by Union criminal-law instruments. The Area was founded with the aim to guarantee a safe area for Union citizens to move and reside, therefore strengthening the idea of Union citizenship. Moreover, the fact that the Area provided for easier procedures

133 Conclusions of the European Council of Tampere. 15 and 16 October 1999, p. 2.
134 http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf, p. 26.
135 The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, pp. 1-38.
136 Herlin-Karnell (2012), p. 211.

and material conditions to combat criminal activities meant that the fundamental rights of those who were negatively affected by the Area needed to be ensured.

> In the decision of *Advocaten voor de Wereld*[137] for instance, the fact that the framework Decision lowered the criteria to surrender a person to another Member State after this Member State has issued a European Arrest Warrant was held valid by the Court. However, the Court also stated that the fundamental rights of the surrendered person should be guaranteed.[138]

The creation of the AFSJ does not only protect citizens, but also affects them in a negative sense. The measures adopted within the AFSJ may restrict the freedom and liberties of the citizens because the criminal procedures are based on easier exchange between authorities, mutual trust and mutual recognition. According to Article 67(3) TEU the European Union shall "endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws." Security therefore has two sides: it serves the protection of the general population of the EU, but at the same time, measures in the AFSJ may affect individuals in a negative way. In this sense, security and freedom may collide. One of these conflicts may lie in the collision of the right of protection against terrorism and the right to privacy of citizens (codified in Article 8 of the Charter).[139] In the AFSJ, measures have been established in order to surrender an EU national to other Member States more easily, which decreases the rights of the EU citizens being surrendered. Mutual recognition results in better security overall, but for the suspected or convicted EU citizen at stake, mutual recognition may not be beneficiary. Hence mutual recognition and mutual trust should be balanced.[140] The more actively the Union creates a framework to combat criminal activities, the more necessary guarantees of fundamental rights on account of the European Union will become, at least in order to safeguard the rights of suspected and convicted EU citizens. This relationship between fundamental rights, citizenship and the AFSJ has received more emphasis by the creation of a new portfolio by the President of the Commission in 2010 that is explicitly dedicated to Justice, Fundamental Rights and Citizenship. As the commissioner of this portfolio stated: "This is a strong sign of the new Commission's determination to create a strong Europe of justice for our citizens."[141]

137 C-303/05, *Advocaten voor de Wereld* [2007] ECR I-03633.

138 C-303/05, *Advocaten voor de Wereld* [2007] ECR I-03633, par. 53.

139 As emphasised in the Stockholm Programme of the Council of the European Union: "The Union must address the necessity for increased exchange of personal data whilst ensuring the utmost respect for the protection of privacy", in section 2.5, p. 18. A concrete example is the Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

140 On the AFSJ, fundamental rights and EU citizenship, see also Prechal (2006)(b), pp. 25-29,

141 Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, Speech at the European Law Academy, Trier 12 March 2010.

4.3.2.5.2 An Area of Freedom, Security and Justice 'offered' to Union citizens: concrete rights?

An analysis of the legislative instruments within justice and police cooperation reveals that although the citizen is brought to the fore as beneficiary of the AFSJ, the citizen as such is not referred to very often in the content of the relevant secondary legislation. The primary Treaty provisions on the AFSJ include no references to the citizens of the Union, except for Article 3(2) TEU.

In secondary legislation European citizens are often not specifically addressed. The Framework decision on the standing of victims in criminal proceedings[142] is an example of procedural guarantees for Union citizens. Although the Framework decision has a broad personal scope referring to "a natural person who has suffered harm […] by acts or omission that are in violation of the criminal law of the Member States", the majority of these victims are the citizens of the Union.[143] Based on this Framework decision, the Member States *inter alia* have to make sure that victims have a suitable level of safety and protection of their privacy.[144] Other instruments also seem to refer in a broad way to everyone resident in the Union, the suspect or accused person,[145] or "persons subject to criminal proceedings"[146] as entailing a kind of citizenship,[147] based upon residence and not nationality.

Other instruments are largely addressed to the national authorities and the Member States, such as the European Evidence Warrant. In this Framework decision only a reference to "any interested party" in a provision on legal remedies is included, in Article 18.[148] This might have been an opportunity to confirm a strong constitutional connection between Union citizenship and the AFSJ, as well as between the AFSJ and fundamental rights. Such a reference in the Treaty to the relation between these three concepts could have made the AFSJ more visible as an area offered to the citizens of the Union and the importance of the respect of relevant specific fundamental rights of the Charter. These concepts are now scattered around the Treaty.[149]

This lack of reference in the operational provisions can nevertheless be explained by the way that the AFSJ is 'offered' to the citizens of the Union. It has at least two different mechanisms to achieve the aims of the AFSJ. First, the enhanced cooperation between authorities in criminal law, such as the European Arrest Warrant (EAW) and the European Evidence Warrant (EEW), which are based on the mutual recognition of

142 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L82/1, 22.03.2001.

143 Article 1(a) of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L82/1, 22.03.2001.

144 Article 8 of Decision 2001/220/JHA.

145 In the proposal on the right to interpretation and translation in criminal proceedings for example.

146 Framework Decision 2009/299/JHA fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, Article 1.

147 Denizenship grants the rights based on legal permanent residence instead of a certain legal status such as that based on nationality, see Walker (2008).

148 Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

149 Monar (2009), pp. 579-580.

the decisions of authorities of other Member States and mutual trust in each other's systems.[150] Hence, the lack of the European citizen as addressee in the legislation lies in the nature of the AFSJ: it is aimed at security and safety, achieved by further cooperation between the Member States. The second way to provide safety and security is by the more 'purely' protective rights, such as the Framework decision on the standing of victims in criminal proceedings,[151] but also the guarantees of criminal law, such as the *ne bis in idem principle*.[152]

Mutual trust in the judicial systems of other Member States may be conditional for Union citizens to actually use their free movement rights. This is true not only in the sense that the execution of surrender proceedings in the context of the EAW is important, but also the faith in the system in the host Member State as such.[153] Similarly, the European Commission in its proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime[154] referred to the EU Citizens' Report of 2010,[155] in which the obstacles to free movement of European citizens are assessed. According to the Commission's explanation of the proposal of the directive on protecting victims, "[s]trengthening victims' rights, together with the strengthening of procedural rights of suspects or accused persons in criminal proceedings reflects this approach [to dismantle obstacles for migrating European citizens to move]."[156] In the adopted directive, however, no explicit reference is made to European citizens as beneficiaries of the minimum standards.[157]

4.3.2.5.3 Where European citizenship and the AFSJ come together: tensions and challenges

The free movement of Union citizens gives rise to interesting questions regarding the protective and safety rights of Union citizens. The free movement of persons triggered new issues regarding fundamental rights. On the one hand the free movement of persons needs to be ensured and on the other hand 'static' Union citizens, i.e. those who continue to reside in their own Member State, need to be ensured protection against criminal

150 Or Council Decision 2009/934/JHA on the exchange of information with Europol, Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States (which refers to citizens in its preamble legitimising the aim) or the setting up of Eurojust, which has been established to facilitate interaction between the judicial authorities.

151 Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings or the proposal for a Directive on the rights to interpretation and to translation in criminal proceedings.

152 See Vervaele (2004), pp. 795-812.

153 See the Impact Assessment of par. 74 which states that a new instrument with broad procedural rights "would mean that EU citizens could be sure that they would have the same rights in other Member States in criminal proceedings as they do in their own Member State (if it was adopted and implemented in all Member States)."

154 Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, 2011 (COM) 275, p. 2.

155 EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights – COM(2010) 603.

156 Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, 2011 (COM) 275, p. 2., text between brackets added HvE.

157 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

activities as well. At the same time, Union citizens that have committed a crime must not be expelled leniently because the right to free movement and residence in another Member State is also one of the fundamental civil rights of Union citizens. In the AFSJ, the right to movement and residence in another Member State may enhance the judicial protection of Union citizens. In this sense, the Court argued that the principle of *ne bis en idem* should be interpreted to also apply to decisions definitively discontinuing prosecutions in a Member State, since the aim of the principle within the Area is that "no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement."[158]

Some recent cases at the Court of Justice have brought forward challenges regarding the balance between the rights of EU citizens and the aim of the AFSJ. On the one hand the free movement of Union citizens has to be guaranteed. On the other hand, the AFSJ requires mutual recognition of decisions that impede the freedom of EU citizens by another Member State.[159]
One issue of the AFSJ arising in relation to European citizenship is the question of the standards of protection against surrender following the EAW versus the fundamental right of Union citizens to reside in a Member State other than that of their nationality. In several cases, the execution of the European Arrest Warrant has led to questions relating to the freedom to reside of Union citizens. According to the European Arrest Warrant Framework Decision,[160] Member States have the option to refuse to execute the arrest warrant when the requested person "is staying in, or is a national or a resident of the executing Member State and that State itself undertakes to execute that sentence."[161]

From this perspective, the question rose in *Wolzenburg*[162] as to whether the Netherlands could set the possession of a residence permit for an indefinite time as a precondition to a request not to execute the European Arrest Warrant. However, since European citizenship requires free movement and residence for Union citizens in other Member States, the exclusion of non-nationals from this option of refusal to execute an arrest warrant would sit uncomfortably with the idea of integration. As Advocate General Bot argued:

> "[S]ince a Union citizen now has, in every Member State, largely the same rights as those of that State's nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that, if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence there, unless its execution in his own State is likely to increase his chances of reintegration."[163]

158 C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-01345, par. 38.
159 Herlin-Karnell (2012), p. 215. Peers (2013), pp. 536-537.
160 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
161 Article 4(6) European Arrest Warrant Framework Decision.
162 C-123/08, *Wolzenburg* [2009] ECR I-09621.
163 Opinion in C-123/08, *Wolzenburg* [2009] ECR I-09621, par. 142.

> *Wolzenburg*, a German national residing in the Netherlands, was convicted by two German courts for importing marihuana into Germany. The German authorities therefore requested the Dutch authorities to surrender him to Germany. Since *Wolzenburg* had exercised his right to move to and reside in another Member State, on the basis of Article 21 TFEU, his situation fell within the scope of Union law. He could therefore invoke the prohibition of discrimination on ground of nationality against the Dutch law providing that Dutch nationals and non-nationals with a residence permit of indefinite duration will not be surrendered, insofar as they may be prosecuted in the Netherlands for the offences on which the European Arrest Warrant is based and insofar as they can be expected not to forfeit their right of residence in the Netherlands as a result of any sentence or measure which may be imposed on them after surrender.
>
> According to the Court, the Member States have a margin of appreciation with regard to the optional ground for refusal to execute the warrant. However, the distinction between nationals and residents may only be made in order to ensure that the requested person has sufficiently integrated in the Member State of execution. The Court of Justice held in this respect that the additional requirement of having a residence permit for an indefinite duration was, in principle, not in conformity with EU law, referring to the fact that an EU citizen has the right to permanent residence after five years in a host Member State, based on Directive 2004/38 (Article 16). The Court ruled, however, that Member States distinguish between EU citizens who have and those who have not sufficiently integrated in the host society, by laying down a precondition of five years' residence. Whenever a Union citizen has exercised their free movement rights (or: falls within the scope of Union law because he or she is subject to EU legislation) the principle of non-discrimination applies, ensuring that a Member State does not treat its own nationals more favourably than non-national Union citizens. Nevertheless, as a justification, Member States may derogate from this equal treatment when a Union citizen has not sufficiently integrated or has no real link with the host Member State.

Similarly, the Court ruled in *Lopes Da Silva Jorge*[164] that a Member State may not automatically exclude non-nationals from the possibility to refuse to surrender a person against whom a EAW is issued. Member States need to take into account the degree of integration of the Union citizen with the nationality of another Member State.

> Lopes Da Silva Jorge, a Portuguese national, resided in France, when a European Arrest Warrant was issued by the Portuguese authorities. According to French law, the possibility of the French authorities to refuse to surrender a person is limited to French nationals only. The Court of Justice, however, held that "in so far as that person demonstrates a degree of integration in the society of that Member State comparable to that of a national thereof, the executing judicial authority must be able to assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced within the territory of the executing Member State."[165]

In the aforementioned cases, the right to residence of EU citizens in the host Member State is in conflict with the EAW being issued. At least under certain circumstances, a European citizen may not be deprived of his right to residence by the surrender to

164 C-42/11, *Lopes Da Silva Jorge* [2012] ECR nyr.
165 C-42/11, *Lopes Da Silva Jorge* [2012] ECR nyr, par. 51.

another Member State and should be treated as a quasi-national, after a certain period of residency. The case law reveals, however, that a difference remains between national EU citizens and non-national EU citizens, even if the latter EU citizens have integrated in the host society.

With regard to fundamental rights and mutual recognition, *Melloni*[166] shows that the Framework Decision does not leave much discretion for the application of national constitutional norms derogating from the obligation to surrender a non-national.[167] The Court held that the exhaustive exceptions to executing the arrest warrant by the authorities of the executing Member State are not in conflict with fundamental rights.

> In *Melloni* the executing Member State made the execution of a European Arrest Warrant conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State. According to the Court, the four exceptions to surrendering a person, as provided for in the EAW (Article 4 of the Framework Decision 2002/584) did not violate the rights to effective judicial remedy and to a fair trial, or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter, and neither does Article 53 of the Charter give ground to diverge from the grounds to refuse to surrender a person.

Tensions between national constitutional norms, protecting fundamental rights, and the principle of mutual recognition occur in the AFSJ, as *Melloni* reveals. In this sense the AFSJ shows a double-sided picture: by harmonising procedures of surrender by mutual recognition certain fundamental rights cannot be guaranteed by Member States, simply because the Directive has harmonised the grounds for refusal to surrender EU citizens. What happened in fact is that by harmonising the standards of surrendering EU citizens the minimum protection, the options to refuse, became the maximum level of protection. Whereas before the harmonisation of the EAW, Melloni would not have been surrendered because of the Spanish constitutional principle, nowadays, since the Framework Decision has entered into force, the grounds of refusal to surrender are limited to those allowed by Union law. According to the Court of Justice a different interpretation "would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution."[168]
At the same time, certain fundamental rights are enhanced by the measures in the AFSJ: rights of victims, but also procedural rights for EU citizens subject to criminal proceedings.

Other tensions at the crossroads where European citizenship, the right to reside and the aim of the AFSJ come together have been raised before the Court in its case law. One of these challenges is to balance the interests of Union citizens as suspects or convicted

166 C-399/11, *Melloni* [2013] ECR nyr.
167 See also De Boer (2013), who argues that supremacy is the sole criterion in the interpretation of the level of protection, p. 1093.
168 C-399/11, *Melloni* [2013] ECR nyr., par. 58.

persons, and those of citizens that have not exercised their right to migrate and have also been offered a safe area to live in.

> The *Tsakouridis*[169] case may be mentioned as an example of the tension between these two groups of Union citizens. Mr Tsakouridis, a Greek national who resided most of the year in Germany, but at certain times returned to Greece to sell pancakes, was arrested in Greece after the German authorities ordered a EAW against him for dealing in narcotics. Mr Tsakouridis was convicted and sentenced. Subsequently, the German authorities refused Mr Tsakouridis the access and residence in Germany based on the protection of public security. According to Directive 2004/38, Union citizens that are lawfully resident in another Member State may only be expelled under the strict conditions of Article 28 of the Directive. Article 28 distinguishes between those European citizens that have resided for more than 10 years in the host Member State and those European citizens that have resided in that Member State for a shorter amount of time, but have the right to permanent residence (after five years). Paragraph 1 of Article 28 of 2004/38 explicitly obliges the Member States to take into account "considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin" in deciding on the expulsion of a Union citizen. After five years of residence an expulsion measure may only be taken for Union citizens on the ground of serious grounds of public policy and public security. After ten years of residence a Union citizen residing in another Member State may only be expulsed for reasons of imperative grounds of public security. The question arose of whether the periods of absence in Germany (while he was working at his pancake stall in Greece) would lead to a lesser degree of protection against expulsion.

The case of *Tsakouridis* is an example of a clash of two aims: to protect the right to reside of Union citizens, based on a certain level of protection according to the degree of integration, versus the aim of public security as a legitimate aim of a Member State.

In a recent judgment, the aim of protection of the population against individuals that could harm society and public security versus the free movement of Union citizens issue was explored further by the Court.

> P.I., born in Italy, but residing in Germany since 1987, was convicted for sexual offences with an eight-year-old girl. The German authorities decided that P.I. had lost his right to enter and reside in Germany on "imperative grounds of public security", as provided for in Article 28(3) of the Directive. The Court affirmed that "Directive 2004/38 must be interpreted as meaning that the fight against crime […] is capable of being covered by the concept of 'imperative grounds of public security', which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years."[170]
>
> The Court held that sexual offences with minors is a particularly serious crime with a cross-border connection in which the Union has the competence to take action. The Court also considered that the right to free movement of Union citizens may not be

169 C-145/09, *Tsakouridis* [2010] ECR I-11979.
170 C-348/09, *P.I.* [2012] ECR nyr, par. 15.

> restricted lightly, and that the derogation as mentioned in Article 28 of the Directive should be interpreted narrowly. The Court concludes that the sexual exploitation of children may constitute "a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine."[171]

What can be detected from these judgments is that in some situations the population of the host Member States needs to be protected against the moving (criminal) EU citizen. Under certain circumstances this protection of a collective group of Union citizens prevails over the freedom to move and reside of one individual Union citizen. When a residing EU citizen from another Member State would constitute 'a threat to the calm and physical security of the population', the right to reside of that person may be restricted by the host Member State. In *P.I.*, the Court of Justice seems to lower the threshold of "imperative grounds of public security" to also include criminal activities that were believed to fall under "public policy."[172]

The balance between the free movement of Union citizens and the public security of those citizens that have not moved, but are confronted with criminal European citizens from other Member States, is a challenging issue. The paradox is that in *P.I.*, the degree of protection offered to Union citizens residing for more than 10 years is levelled down. After all, why should P.I. leave German territory after having resided in Germany since 1987? Moreover, the question may be asked whether and why it would be desirable to expel a criminal EU citizen to the Member State of origin. Since Member States are, on account of international law obligations, prohibited from expelling their own nationals, it seems difficult to understand why an EU citizen, as destined to be an equal member of the population of the Union, is or can be expelled from a host Member State. It is in this context that a balance needs to be found between the protection of national interests and the development of European citizenship as a real citizenship of the Union.

From the perspective of the European citizenship of P.I., such expulsion from the German territory is a violation of his right to move and to reside in the European Union. On the other hand, one may also qualify the decision of the Court as empowering European citizenship: the Court protected the 'static' German European citizens and, at the same time, upheld the 'duty' for migrant European citizens to respect the values of the common European space.[173]

171 C-348/09, *P.I.* [2012] ECR nyr, par. 33.

172 See on this issue Azoulai and Coutts (2013), p. 559. According to the Commission's report on the implementation of Directive 2004/38: "Member States remain competent to define and modify the notions of public policy and public security. However, implementation may not trivialise the difference between the scope of Articles 28(2) and Article 28(3), or extend the concept of public security to measures that should be covered by public policy." Report on the application of Directive 2004/38/EC, COM (2008) 840, p. 8.

173 Azoulai and Coutts (2013), pp. 553-570.

These cases regarding the AFSJ touch upon the notion of residence and European citizenship and security rights in a challenging way.[174] The AFSJ demands an area without borders, and requires the mutual trust and recognition of the decisions of the authorities in criminal cases of other Member States. It seems that the Court of Justice gives supremacy to the mutual recognition in the AFSJ and does not approach exceptions to this mutual recognition leniently.[175] On the one hand, one may wonder whether a Union citizen should be denied the right to residence in a host Member State in which the Union citizen has integrated. The fact that a Union citizen can be surrendered to his or her Member State of origin, even if that Union citizen has a limited link with that society, because his family members live in the host Member State, may be questionable. The Advocate General in *Wolzenburg* argued that "execution of the custodial sentence or detention order should disrupt the detainee's connections with his family and his social and professional environment as little as possible."[176] On the other hand, the Member States may also want to protect their nationals against incoming Union citizens that pose a threat to the population in that Member State.

The case of ZZ.[177] is illustrative of the tension between fundamental rights and the Area.

> In this case, Mr ZZ. was refused a residence right in the UK because of security reasons. Article 30(2) of Directive 2004/38 and Article 47 of the Charter would allow the secrecy of information on the decision to refuse residence to Mr ZZ. According to Article 30(2) of Directive 2004/38, information on the decision to refuse residence for reasons of public security may be held confidential, if the disclosure of those facts are contrary to the state's security, whereas Article 47 of the Charter ensures the right to an effective remedy and fair trial.
>
> Mr ZZ. was an Algerian and French national, residing legally in the UK with his British spouse and their eight children. After a visit to Algeria, Mr ZZ. was refused access to the UK since he was said to constitute a danger to public security. His right to residence was cancelled and his right to reside in the territory of the UK was withdrawn. Against this latter decision he could not appeal. He did, however, appeal against his denied access to the UK. In a judgment which was confidential, the Special Immigration Appeals Commission (SIAC) decided that it was satisfied that the personal conduct of ZZ. represented a genuine, present and sufficiently serious threat which affected the public security, and outweighed his right to enjoy family life in the UK. In the preliminary reference, the question arose as to whether the decision not to disclose to ZZ. the essence of the grounds which constituted the basis of the decision of refusing entry was in accordance with Article 47 of the Charter (effective remedy and fair trial). According to Article 30(2) of Directive 2004/38, information on the decision to refuse residence for reasons of public security may be held confidential, if the disclosure of these facts are contrary to the state's security.

174 On this point also Kochenov and Pirker (2013), Muir and Van der Mei (2013), pp. 132-134.
175 C-399/11, *Melloni* [2013] ECR nyr. Compare the Opinion of Sharpton in *Radu* and the judgment of the Court in *Radu*, C-396/11, *Radu* [2013] ECR nyr.
176 Opinion in C-123/08, *Wolzenburg* [2009] ECR I-09621, p. 66.
177 C-300/11, *ZZ.* [2013] ECR nyr.

> The Court of Justice ruled that the Directive has to be read in the light of the Charter provisions. In this sense, Article 30 and 30(2) need to be interpreted strictly and may not erode the right to effective remedies and a fair trial. The Court, moreover, held that a national court should ensure that the essential information on which the decision refusing residence was founded was revealed. The national court should determine which information can be shared with the person concerned and which information should be kept secret for reasons of public security.

In this judgment, the struggle between ensuring fundamental rights for an individual Union citizen and refusing residence in order to protect the other individuals in the host Member State is, again, clearly present. Advocate General Bot emphasised in his Opinion regarding *ZZ.* that Member States need to offer a space where free movement is guaranteed, while at the same time, Member States need to offer an area of security and justice to citizens of the Union:

> "While Member States may not unduly restrict the exercise of the right of free movement of Union citizens, conversely the constraints on those States in terms of respect for the rights of the defence and effective judicial protection must not be such that they discourage those States from taking measures to guarantee public security. It should be borne in mind in this regard that whilst, as is stated in Article 3(2) TEU, the Union is to offer its citizens an area in which the free movement of persons is ensured, it must also guarantee an area of security in which the prevention and combating of crime are ensured."[178]

Hence, even though the Union citizen is 'offered' an Area of Freedom, Security and Justice, the impact of the measures in the Area are not only for the benefit of Union citizens. In the first place, the specific measures cover all individuals, irrespective of their status as Union citizens. Second, measures in the Area negatively affect the right to reside in a Member State, as the above-discussed cases have shown. However, in a way, European citizenship does play an important role in the Area, by triggering questions on the protection of fundamental rights. The measures adopted, such as the EAW, need to ensure the protection of fundamental rights and raise new questions on the civil rights not only of the general population but also of the individual EU citizen. Hence, certain procedural safeguards and the right to privacy for instance need to be ensured at EU level, because of the concept of mutual recognition in criminal matters. Moreover, European citizenship, and more specifically the right to move and reside freely in other Member States may conflict with the right to security and safety of the population in a Member State, triggering challenging questions in which civil rights need to be weighed.

4.3.3 Safety and security in third countries: Diplomatic protection of Union citizens

The diplomatic protection of Union citizens may also be regarded as an important civil protective right. The diplomatic protection of Union citizens is based on the two familiar principles in the Union citizenship landscape: free movement (being in a third country)

178 C-300/11, *ZZ.* [2013] ECR nyr, Opinion of Advocate General Bot, par. 80. The Court did not explicitly mention Union citizens as beneficiaries of the Area, unfortunately.

and equal treatment (with regard to nationals of a certain Member State). Article 23 TFEU provides that every Union citizen has the right to diplomatic protection in a third country where his or her Member State is not present on the same conditions as the nationals of the Member State's embassy.[179]

In December 2005, Decision 95/553/EC[180] was adopted by the representatives of the Member States (meeting within the Council) after long debate. One of the points of discussion seems to have been the division of the costs of assistance: Article 6(4) of the Decision ensures that the Member State of nationality has to reimburse the costs of assistance to the Member State proving diplomatic protection. In November 2006, the European Commission launched a public consultation on the state of affairs with regard to the diplomatic protection of Union citizens of Article 23 TFEU by the publication of a Green Paper.[181] One of the problems with the effectiveness of the right to diplomatic protection is the lack of awareness of Union citizens of their rights based on Union law in a third country. Moreover, the fact that some Member States did not implement this right in national law provisions presumably did not enhance the awareness of their nationals. Another problem is that some third countries have a large number of consulates or embassies of Member States (, whereas in some other countries only a few diplomatic offices are present.[182] Following the Green Paper, the Commission published an Action Plan for 2007-2009.[183] Most measures in the Action Plan are promotional activities, such as distributing posters and a recommendation to the Member States to print Article 23 TFEU in the passports of their nationals. Moreover, the Commission states that the establishment of a "common office" of the European Union together with Member States could be successful in terms of costs and effectiveness. "This system would constitute a step towards increased protection of EU citizens in need […] it would complement the "Lead State" framework."[184] In the meantime, the Treaty of Lisbon was ratified and entered into force, which provided a legal basis for such a European Common Office under the flag of external relations. After the Treaty of Lisbon entered into force, a European Union External Action Service (EEAS) was introduced, which "shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States."[185] In January 2011 the EEAS was established by decision of the Council.[186] The EEAS represents the Member States of the Union as a whole in its external relations in promoting common European interests, but will not take over the position of the national embassy *per se*.

179 See also Article 46 of the Charter.

180 At the time of writing, a proposal to repeal and replace Decision 95/553/EC is still pending. Proposal for a Council Directive on consular protection for citizens of the Union abroad, COM (2011) 881 final.

181 COM (2006) 712 final, Green Paper on diplomatic and consular protection of Union citizens in third countries.

182 France, Italy and Germany.

183 Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009, COM(2007) 767 final.

184 Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009, COM(2007) 767 final, p. 9.

185 Article 27(3) TEU.

186 Council Decision 2010/475/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 03.08.2010, L 201/30.

What is important is that the EEAS is more governmental in nature. Two thirds of its officers come from the European Union institutions and one third from the Member States. It is composed of mixed diplomats from the European Union and the Member States, and is monitored by the European Parliament. The diplomatic post will provide all relevant information to the diplomatic services of the Member States and, where possible and upon request, support the Member States in their diplomatic relations and in their role of providing consular protection to Union citizens.[187] Although the emphasis lies on the external relations of the European Union, and certainly not on the protection of citizens of the Union, the EEAS constitutes a framework in which the diplomatic protection of Union citizens around the world can be strengthened. This development in the future will be greatly dependent on the choice of the Member States, whereas diplomatic protection of own nationals remains a sensitive state prerogative.
The protection of citizens abroad is typically a function of the state, since protecting its citizens is a constitutional function. In this sense, the fact that Union citizens are now protected in third countries by other Member States as well, on account of Union law, is noteworthy in the process of constitutionalisation. Moreover, the EEAS could even enhance this protection of Union citizens in third countries.

4.4 SOCIAL RIGHTS LINKED TO EUROPEAN CITIZENSHIP

In addition to equality, and the civil and political[188] dimensions of citizens' rights, citizenship can be connected to social rights, which give individuals the opportunity to have a minimum of social benefits to be able to live their life in the community. Whereas the essence of citizenship may be defined as "constitutional arrangements made for participation of a defined category of individuals in the life of the State",[189] social rights are connected to this full participation in the welfare state.[190] In a welfare system, social rights are granted to citizens based on a certain degree of solidarity between the members of that particular community.
This inclusion implies mutual solidarity between the members because some social benefits cannot be established on individual action alone.[191] Nationality and territoriality are commonly used as yardsticks to measure the degree of belonging to a particular community. By territorial requirements, the place of consumption of welfare might also be restricted to the home state that pays for the individual.[192]

The way national welfare systems distribute social rights to their citizens differs per state and can be divided into a more liberal model, a more conservative model and a social democratic model. In the liberal welfare state, the emphasis of social rights lies on social rights as a 'safety net', whereas in more conservative social models, the focus

187 Article 5 (9) and (10) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 03.08.2010, L 201/30.
188 Dealt with in a separate chapter on democracy.
189 Evans (1991), pp. 198-199.
190 Closa (1992), pp. 1138-1139.
191 Neergaard (2009), p. 2.
192 Van der Mei (2003), pp. 3-6.

of granting social benefits is on the contribution in the labour market. In the last model, the social democratic model, the emphasis lies on the individuals as holders of rights to social rights. The transnational dimension of the European Union in the context of social citizenship makes this even more complex to analyse.[193] The basic idea of social citizenship provides that social rights are connected to citizenship based on the idea of a social contract – solidarity – between the state and the citizenry.
Solidarity is not only found in national law sources, but can be detected in different places in primary and secondary legislation of the Union. It is used in various objectives of the European Union, e.g. the promotion of social and territorial cohesion, solidarity among Member States, peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples (Articles 3(3) and 3(5) TEU). The Charter includes a title on solidarity, which covers different social and economic rights (such as the prohibition on child labour, and fair and just working conditions, but also the protection of the environment and healthcare).

4.4.1 European citizenship and social rights

In the Charter, the following principle is declared in Article 34: "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices." To recall the definition of Marshall, social rights in the sense of citizenship should give citizens the opportunity to live their life in the society according to the standards of that society. Although Article 34 of the Charter is not construed as an enforceable right, the principle as such has effects on policy and interpretation of other rights.

> The Charter makes an explicit distinction between *rights* and *principles*, driven by the fear of Member States that individuals would be allowed to claim certain 'rights.' Therefore certain provisions are explicitly qualified as principles instead of rights. These principles however "may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially recognisable only in the interpretation of such acts and in the ruling on their legality."[194]

Although solidarity on the one hand is used to exclude effects of Union law on certain national areas (in competition law for example),[195] solidarity on the other hand breaks down the protective walls around the national welfare systems (by territorial requirements as a condition for social benefits).

> In *Cowan*,[196] for example, the French government tried (unsuccessfully) to convince the Court that preserving victim compensation for own nationals (or holders of a

193 Roche (2002), pp. 76-77.
194 Explanation with Article 52 of the Charter.
195 C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband* [2004] ECR I-02493, paras 53-57.
196 Case 186/87, *Cowan* [1989] ECR 00195.

residence permit) was justified because it showed a degree of solidarity towards their own nationals.

Whereas the "destined fundamental status" of Union citizenship implies a basic level of rights, the distribution of welfare and social rights is traditionally preserved for the members of the society that have contributed to that society by paying tax, but also through non-financial contributions, such as loyalty and obedience of the law.[197] To deal with this contradiction, of Union citizenship as destined fundamental status on the one hand and the exclusive nature of national welfare systems on the other, the Court of Justice has introduced a 'real link' requirement in its case law on social benefits for Union migrants. Solidarity between Union citizens in a European context has different levels depending on the degree of integration or real link with the society of the Member State at stake.[198]

Usually social rights and solidarity are based on nationality in order to examine a citizen's degree of belonging to the community at stake. European citizenship extended the personal scope of social rights to persons across the European Union that have moved from one Member State to another and reside there lawfully. The traditional requirements of nationality are replaced by residence requirements, so in the European Union, residence is the new nationality[199] in order to measure the degree of belonging to the society. Such developments did not only arise in the context of non-economic free movement and residence rights, but were already present in the economic free movement of workers and self-employed persons.

4.4.1.1 The broader European socio-economic context

In the context of the European Union, social rights have been developed within the aim of economic integration, such as equal pay for equal work and the improvement of work conditions. This is quite logical, considering the economic mandate of the European Community, which has changed over the years towards a more social dimension. Still, the foundations of this social policy rest on economic integration rather than the creation of a social Europe *pur sang*.[200] However, from the early days, the Court has held a very lenient and social interpretation of its economic mandate. It held, for example, a very broad interpretation of the qualification of 'worker' and extended the personal scope also to jobseekers with regard to certain social benefits. Jobseekers could, prior to the introduction of Union citizenship, claim social benefits to allow the access of employment, although this was limited and jobseekers were not eligible for social assistance.[201] The Court of Justice ruled that the right to work in another Member State

197 Davies (2005), p. 48, Kadelbach (2006), p. 483.
198 Barnard (2005), pp. 157-181.
199 Davies (2005), pp. 41-56.
200 Lenaerts and Foubert (2001), pp. 267-296.
201 Borgmann-Prebil (2008), p. 134. Union citizenship also extended the nature of social benefits that might be claimed by jobseekers as is seen in *Collins*, where the Court of Justice held that a jobseekers allowance could not be excluded from the scope of Article 45 EC in light of the introduction of Union citizenship.

would become an illusionary right if this were preserved for persons that had found a job in another Member State before residing there.[202]

Even before the official introduction of European citizenship in 1993, the Court of Justice granted social rights to individuals in the context of the internal market. In 1989, for instance, the Court ruled that tourists as recipients of services should be treated equally to a Member State's own nationals with regard to a compensation following an assault.[203] The Court used arguments that are linked (although weakly) to the internal market and to the contribution of the individual to the host Member State (reception of and payment for services). The Court of Justice pushed the boundaries of economic free movement, transforming these provisions into an early form of Union citizenship.[204] Economically active Union citizens already had access to various social benefits and welfare rights in host Member States. This share of welfare is based, however, on the assumption that economically active persons contribute (financially) to the establishment and function of the internal market. The free movement of European citizens that are not economically active has a different foundation because of the absence of a contribution-based notion of solidarity.[205] Although European citizens such as students may contribute to the society due to the fact that they are consumers of food, have accommodation and need to buy books, the economic link that a self-employed worker has is lacking.

4.4.2 Social rights for Union citizens based on free movement and equal treatment

The Court of Justice granted social rights to European citizens through the application of two tools that were already developed in the sphere of the internal market: free movement and equal treatment. This resulted in two different situations in which social rights are granted: the entitlement of Union citizens to social benefits from their original Member State and access to social rights of the host Member State in which they (lawfully) reside. Although the creation of social policies and social security has not been transferred in terms of legislative powers to the Union, it is well-established in case law that the Member States have to comply with the 'fundamental' free movement provisions. Member States may justify restrictions on free movement with an objective justification that is applied in a proportionate way. This reasoning was also applied in case law on non-economic free movement. Furthermore, the Court of Justice held an extensive interpretation of what kind of social benefits may be applied for by non-economic active citizens, which widened the social rights for Union citizens even more.[206]

In the first place, Union citizens have a right to be treated equally on grounds of nationality compared with the nationals of the host Member State once they reside in

202 C-292-89, *Antonissen* [1991] ECR I-00745.
203 Case 186/87, *Cowan* [1989] ECR 00195.
204 Mancini (2000), pp. 10-11.
205 Dougan and Spaventa (2003), pp. 699-712.
206 O'Leary (2008), pp. 3-4.

another Member State.[207] This approach is found in *Martínez Sala*, *Grzelczyk*, *Bidar* and *Förster*, just to mention a few cases.

In the second scenario, the Member State of nationality has to grant social benefits based on a kind of continued solidarity, despite the fact that the national at stake has migrated to another Member State. *D'Hoop* and *Pusa* may serve as examples here.

> In *Pusa*, the Court of Justice concluded that "national legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move."[208] As a consequence, the Finnish income tax system could not be applied without taking the tax already paid in another Member State into account, when calculating the attachable part of the pension. Member States may, however, require proof that the Union citizen has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he or she resides.

These two approaches of the Court of Justice have been and still are essential in order to create a more social dimension of European citizenship. There are two reasons for this. First, since the Union has no competence to harmonise national social security, these approaches are instruments for the Court of Justice in order to create a meaningful citizenship.[209] The lack of such harmonisation competences results in the application of the so-called assimilation model, which grants equal treatment based on free movement to persons that have integrated in the host society, without direct interference with the substantive social choices of the Member States.[210]

In the second place, there is, besides a lack of harmonisation competence to divide welfare in the Union, a lack of own social security funds at the Union level to grant to the citizens of the Union. Therefore, the social rights for Union citizens have to come from the national level, although they are granted on account of European law. The distribution of social rights through the application of equal access to those social rights is based upon a model of integration. This also means that Member States may be obliged to grant equal access to certain social rights, even to nationals that reside in another Member State.

4.4.2.1 Solidarity and reasonable burden

Solidarity is one of the basic concepts that the Court developed in its case law on European citizenship to legitimise the far-reaching effects of its case law on national

207 Borgmann- Prebil (2008), p. 333.
208 C-224/02, *Pusa* [2004] ECR I-05763, par. 20.
209 Verschueren (2007), p. 312.
210 Dougan and Spaventa (2005), p. 189.

welfare systems.[211] Since social security resources are absent at the European level, the Court of Justice used solidarity to direct Union citizens to national social benefits.[212] Cross-border access to social benefits is therefore 'de-nationalised', in the sense that residence requirements, instead of nationality, are regarded as the only proper or realistic assessment, according to the case law, to allow access to social welfare.[213]

In *Grzelczyk*, the Court of Justice held that the fact that a Union citizen does not have sufficient means in the sense of the old residence Directive did not justify an automatic withdrawal of his residence permit (or a refusal to renew) because free movement of citizens is based on a "certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary."[214] Interestingly enough, the Court relied on the preamble of the old residence Directives, which explicitly stated that free movers may not become an unreasonable burden on the social assistance system of the host Member State. The Court of Justice turned this explicit exclusion into a more positive reading, accepting that a reasonable burden (whatever that might be is still unclear) on the social welfare system would be allowed.

> In *Grzelczyk*, the preliminary questions considered the relation between the right to equal treatment granted by the application of Article 12 EC (now Article 18 TFEU) in conjunction with Article 18 EC (now Article 21 TFEU), and the exclusions and restrictions set by secondary law. For students, the right to reside in Belgium as a French national was based on the Student Directive that explicitly excluded entitlement to a maintenance grant for students. The Court *inter alia* held that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."[215] Because Mr Grzelczyk had used his right to move to Belgium and reside there, his situation fell under the scope of Community law and therefore the prohibition of discrimination based on nationality applied. The fact that student assistance was precluded in the Student Directive was circumvented by the Court; because Mr Grzelczyk applied for a minimex and not for student assistance, the exclusion of the Student Directive did not preclude granting this specific social benefit.

So even as a student, Mr Grzelczyk had to be accepted as a reasonable burden on the state finances. The fact that he had studied in Belgium for the first three years without any request for social benefits was crucial for this argumentation. It is likely that the Court would have seen him as an unreasonable burden if he had applied for social assistance in the first years of his education. Moreover, Mr Grzelczyk had been economically active in the first years of his study. Furthermore, the Court demonstrated that in light of social

211 In light of the economic crisis in Europe, solidarity between Member States has recently also become a challenging issue financially.
212 De Waele (2009), p. 295.
213 Van der Mei (2005), pp. 203-211.
214 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 44.
215 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31.

solidarity, it would not accept the general exclusion of groups (students) from all social benefits.

From this perspective, the European Union seems to absorb the spirit of national solidarity and create its own concept,[216] accepting that the nationals of another Member State should be able to benefit from social security in other Member States, unless the share of social benefits would cause such an "unreasonable burden" on the national social system. Reasonable burdens on state finances are accepted, according to the standard case law of the Court. This case law has two sides. On the one hand, it means that Member States are obliged by European law to take a certain degree of financial responsibility for nationals of other Member States, even if these citizens have not paid taxes or contributed otherwise to their economy. On the other hand, the Member States' fears of social tourism are prevented because unreasonable financial consequences of this mutual solidarity do not have to be accepted. Hence, the transnational form of solidarity is not unlimited and should not result in the erosion of welfare on a national level.

4.4.2.2 'Real link' as a tool to balance solidarity between migrants and nationals

One of the issues with regard to social rights and European citizenship is that non-migrating European citizens, i.e. those who stay in their Member State of origin, have to share welfare with migrating European citizens from other Member States. This might lead to tension and even to an erosion of European citizenship, since European citizenship may be perceived as a threat by these non-migrating Union citizens. Solidarity has its limits. In order to balance the equality of European citizens, the solidarity with European citizens from other Member States and the protection of welfare for own nationals, the Court introduced a 'real link' requirement within its case law on social benefits for Union migrants. This 'real link' criterion means that whenever a real link between the Union citizen and a Member State exists, access to social benefits should be equally allowed. This real-link criterion is a tool to weigh the degree of integration in the society and to weigh the degree of solidarity that is required of a Member State.[217]

This instrument to balance justifications of a restriction on access to social benefits can be found in two different lines of case law. In the first place, Union citizens may claim equal treatment of their home Member State compared to the rights of non-migrant citizens of that state. A Union citizen of a particular Member State who has moved to another Member State and returns to reside in that Member State may not be treated unequally compared to those who have always stayed in their Member State of origin. The longer a Union citizen resides outside the Member State of origin, the weaker the link with this Member State will become. The citizen will integrate in the host Member State. When a real link is established with the host Member State, the receiving Member State has to grant equal social opportunities compared with its own nationals, based on

216 Somek (2007), p. 7.
217 Currie (2009), p. 376 and O'Brien (2008) (b).

the concept of solidarity.[218] In this sense, the real link distributes obligations based on solidarity between the Member States. The longer a Union citizen stays in a Member State, the more social rights have to be granted. The proportionality test is used by the Court to assess the degree of integration or the real link with a Member State.

In *D'Hoop,*[219] the Member State of origin had to grant a tide-over allowance to Nathalie D'Hoop although she had studied in another Member State.

> According to Belgian law, such a tide-over allowance was only granted to nationals who had completed their education in Belgium. The Court found that this was *prima facie* a breach of the free movement of Union citizens. It held that since "a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement."[220] According to the Court, the Belgian legislation put Union citizens that had resided in other Member States at a disadvantage by linking the granting of tide-over allowances to the condition of having obtained the required diploma in Belgium.
>
> The Belgian government justified the national condition with the aim of facilitating for young people the transition from education to the employment market. The Court held that the real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market may be required by a Member State. However, such a criterion may not be too general and too exclusive, so that the real link is not considered in the assessment.

In *Morgan and Bucher,*[221] the real-link test was applied in relation with Union citizens who migrated to another Member State and were negatively affected as a result of their free movement, compared with the nationals of that Member State who continued to reside in the Member State of origin. As long as there is a social benefit for own nationals, such benefits should not be precluded in a general way. The real link between the citizens and the Member State should be taken into account.

> In *Morgan and Bucher*, a German regulation on student allowances was the issue of discussion. German nationals who wanted to study in another Member State were entitled to receive German student assistance, if they had their permanent residence in Germany and had attended a German education or training establishment for a period of at least one year, which was continued in another Member State. Morgan and Bucher both started a study programme in another Member State (the Netherlands) that was not available in Germany (*ergo* therapy and genetics) and therefore could never fulfil the requirements of the first-year stage of education in Germany. The Court found that such a first-stage condition constituted a restriction of the free movement of Union

218 Dougan (2009), p. 160.
219 C-224/98, *D'Hoop* [2002] ECR I-06191.
220 C-224/98, *D'Hoop* [2002] ECR I-06191, par. 30.
221 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161. See also C-523/11 and 538/11, *Prinz and Seeberger* [2013] ECR, nyr.

citizens because the requirement was liable to discourage European citizens from leaving Germany in order to pursue studies in another Member State. One of the justifications brought forward was the prevention of an unreasonable burden on the financial means of the Member State of origin, which could lead to a general reduction of study grants. The Court accepted this as a legitimate aim, but found that the justification failed in the assessment of proportionality. The Court of Justice found that the first-stage condition of one year was too general and too exclusive, whereas it did not take into account the degree of integration (or real link with Germany) of Morgan and Bucher, who were raised in Germany and completed their primary studies there.

Whenever social benefits are granted to a Member State's own nationals, such benefits should be equally accessible for nationals who have migrated to another Member State, as long as a real link between the home Member State and the citizen is still intact. The genuine or real link with the Member State of origin is assessed according to the principle of proportionality, as is seen in *Morgan and Bucher*. A general exclusion of nationals that have exercised their rights under Article 21 TFEU from social benefits would not be proportional. A national measure that takes into account the degree of integration in the host Member State may constitute a justified restriction on the free movement of Union citizens and may be accepted by the Court. Member States are not obliged to unconditionally open up their welfare systems. However, the conditions that Member States include must not lead to discrimination on the grounds of nationality.

The Court of Justice held in *Tas-Hagen and Tas*[222] that a Dutch allowance for civilian war victims might be limited to persons that have a particular connection with the Member State and population at the time, but this limitation has to meet the requirements of the proportionality test. The Dutch condition of being resident in the Netherlands at the time of application for the allowance disadvantages citizens that have migrated to another Member State. Such a requirement does not reflect a proportional weight of solidarity versus social tourism according to the Court of Justice because the residence requirement does not reflect the degree of connection or real link with the Dutch society at the time of the war.

The Court of Justice uses the proportionality test as a flexible tool in order to achieve a balance between the individuals' social rights and the interests of the Member States in protecting their welfare systems against persons that are not connected to their society. Hence, in Morgan and Bucher, the Court took into account the fact that the students at stake had grown up in Germany to measure the proportionality of the measure that was preserved for persons with a real link with the German society.

Furthermore, Union law does not oblige Member States to guarantee social benefits for persons who leave for another Member State. The case of *Morgan and Bucher* was *prima facie* the result of the generous German allowance, which is also for German nationals studying in another Member State. This means that in certain situations, Union citizens find themselves in a kind of no man's land with regard to social benefits, when they have not been resident for a sufficient period of time to be qualified as having integrated

222 C-192/05, *Tas-Hagen and Tas* [2006] ECR I-10451, see especially paras 34-40.

well enough in the host Member State and the home Member State does not support migration of social benefits.[223]

In *Bidar*, a French citizen who requested equal treatment with regard to student assistance (for maintenance costs) in the UK, this 'real link' test was also performed.

> The UK argued before the Court of Justice that the exclusion of student allowances (for maintenance) would be justified because the grant of such allowances would cause an unreasonable burden on the state finances. The Court accepted this argument, and concluded that "in the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State."[224] Such a certain degree of integration (equivalent to a real link) could be measured by the period of residence.

After the judgment in *Bidar*, the new Residence Directive 2004/38 entered into force. The Directive codifies the idea of levels of solidarity in conjunction with the degree of integration. Article 24(1) of Directive 2004/38 codifies that Union citizens that reside in another Member State have a right to equal treatment with the nationals of the host Member State, subject to secondary law and specific provisions. Paragraph 2 of Article 24 provides an exemption to this right to equal treatment for access to social assistance during the first three months of residence or during an extended residence period with the aim of seeking a job. Also excluded is the entitlement to equal treatment for maintenance aid for studies for persons other than workers or the self-employed, before a right of permanent residence is acquired (Article 16 of Directive 2004/38).

Following *Bidar*, the residence period to show a sufficient degree of integration (real link), for students, is set at five years by the Union legislature. A pressing question was whether the Court of Justice would apply this five-year residence period. In *Bidar*, the Court of Justice applied Articles 18 and 21 TFEU instead of the old Residence Directive that did exclude maintenance for students. In this sense, the Court seemed to allow the general right to move and reside of Article 21 TFEU to prevail above the specific conditions and terms laid down in the Directives. Nevertheless, *Bidar* did not enter the UK in order to study there, but he resided in the UK based on a general right of residence. From this perspective, it would not be fair for him to lose his equality rights at the time that he wanted to pursue a study programme. The factual background of *Bidar* might therefore be decisive for the reasoning of the Court.
In the Residence Directive, the condition of 'real link' or sufficient integration in the host state is codified in periods of residence. In the first three months of residence, the right to equal treatment with regard to access of social benefits is explicitly excluded (Article 24(2) of 2004/38). As mentioned above, the same holds true for students with regard to student assistance for the first five years of residence. The closer the bond between the citizen and the host Member State, the more extensively equal treatment with regard

223 Verschueren (2007), pp. 344-345.
224 C-209/03, *Bidar* [2005] ECR I-02119, par. 57.

to social welfare rights will be based on the degree of integration as a criterion for solidarity.[225] Some Union citizens will not be considered as sufficiently integrated to be entitled to social benefits before they have acquired the status of permanent residence in a host Member State.[226] This question led to *Förster*, in which this five-year residence clause had been accepted by the Court of Justice as proof of the existence of a real link (or sufficient degree of integration).[227] In the cases *Morgan and Bucher*[228] and *Prinz*,[229] the Court assessed whether the students at stake had sufficiently integrated in the society in order to have a right to equal social benefits.

> Although in *Morgan and Bucher* the Court acknowledged that students may not become an unreasonable burden and that Member States may require a link with their society, it found that a requirement that at least one year of higher education had to be completed by students as a precondition for receiving student allowances for vocational training was too general and exclusive. Similarly, in *Prinz*, the Court held that a three-year residence requirement was not appropriate to prove the real link with the society of the Member State.

Even though the judgment in *Prinz* is less strict than the judgment in *Förster*, it seems that *Förster* is not overruled, since there is a significant difference between these two cases. The exclusion of equal treatment of Article 24(2) of the Directive seems to be limited to students who request social benefits in a *host* Member State. Students who claim equal student allowances from their own Member State do not have to comply with the five-year residence criterion, but may prove to have integrated sufficiently on the basis of their specific circumstances.[230] The real link requirement was introduced in order to prevent Union citizens from becoming an unreasonable burden on the finances of a host Member State. In this sense, the threshold of becoming such an unreasonable burden on the public finances should be lower in cases of own nationals, since a certain degree of solidarity and a link may be presumed between a national and its Member State of nationality.

The real-link case law shows a multilevel approach of social rights triggered by European citizenship. Equal access is granted to Union citizens, on account of Union law, to social rights according to the national welfare system. The Member States still regulate the conditions of these entitlements, which must not lead to discrimination on grounds of nationality. Moreover, Member States may assess whether a Union citizen has a sufficient, a real, link with their society, as a condition for them to be granted equal access.[231] European citizenship affected the notion of social rights in the European

225 Dougan (2009), p. 158.
226 Article 16 of 2004/38.
227 C-158/07, *Förster* [2008] ECR I-08507.
228 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.
229 C-523/11 and 538/11, *Prinz and Seeberger* [2013] ECR, nyr.
230 See also Advocate General Sharpston in C-523/11 and 538/11, *Prinz and Seeberger* [2013] ECR, nyr,. par. 33.
231 See also Pennings (2012), arguing that "the approach of the Court of Justice has been consistent in letting the national systems of Member States remain intact by 'merely' interpreting the provisions in view of the promotion of free movement rules", p. 332.

Union considerably, by granting equal access and removing territorial barriers in the distribution of welfare rights.

4.4.3 Social rights for non-migrants: services of general economic interest

As observed earlier, the majority of the European population does not exercise its free movement rights.[232] Services of general economic interest may, however, have a subtle link to European citizenship, irrespective of whether these Union citizens have exercised their right to free movement.

This connection between services of general economic interest and EU citizenship was created by a shift that took place within the competition policy of the European Union. In addition to goals such as consumers' choice and overall wealth, a more constitutional argument can also be brought forward: by stimulating competition, goods and services are allocated in an equal manner to those who value them the most. As such, competition law is based on the assumption of efficiencies, which would mean that citizens can equally choose certain goods for certain prices.[233] On the other hand, values of competition law may infringe upon the equality of citizens because citizens do not come to the market as equals in terms of money and possibilities. In other words, some people have less trouble paying for certain goods than others, and certain services or goods should not be under the rules of market efficiency because these services (or goods) have a social objective. However, counterbalances are also incorporated in competition law.[234] In more recent documents and provisions, the access to services of general economic interest is increasingly referred to as a right of citizens of the Union, irrespective of the fact of whether these citizens have exercised their right to move and reside within the Union.[235] The access to certain public services seems to shift from an economic goal to a more constitutional aim.[236] In the sense of rights of citizens, Marshall distinguished this accent on access to public services as a clear category of social rights. He mentioned *inter alia* education and healthcare, but other public services may also be thought of.

The Treaty of Amsterdam introduced Article 14 TFEU, which balances solidarity and social coherence on the one hand, and market–based considerations on the other.[237] The European Council emphasised at the meeting in 2002 on the economic, social and environmental situation in the Union: "The integration of European networks and the opening of utility markets should take full account of the importance of quality public services. In this regard, the European Council underlines the importance for citizens, and for territorial and social cohesion, of access to services of general economic interest."[238]

232 In 2009, 11.7 million citizens of the total of 500 million Union citizens resided permanently in another Member State: http://ec.europa.eu/justice/citizen/files/com_2010_602_en.pdf, p. 11.
233 Prosser (2005)(b), p. 28.
234 Prosser (2005), p. 544.
235 Prechal (2008), pp. 69-73.
236 Krajewski (2008), pp. 379-381.
237 Ross (2000), p. 34.
238 Presidency Conclusions Barcelona European Council 15 and 16 March 2002, par. 42.

Another support for socio-economic rights of Union citizens is found in the Charter, which provides in Article 36: "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union."[239] In the explanations annexed to the Charter, the limitation of this provision is clearly stated: "It merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law."[240] Principles may, however, be capable of affecting legislation in an indirect way.

Moreover, Article 14 TFEU refers to services of general economic interest for its role in social and territorial cohesion within the European Union. The concept of services of general economic interest has been developed as counterpart to the liberalisation of the market. Certain activities with a general interest should not be subject to the competition rules and Treaty provisions on free-market conditions, such as postal services, because these activities could not be performed on a commercial basis.[241] The exclusion of certain activities is stated in a negative sense: all activities fall under the competition rules and Treaty provisions, "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[242] From a negative perspective – "certain services should not be subject to competition" – the language has also shifted to a more positive meaning – "certain services are important for everyone." The Commission concluded, for instance, straightforwardly, that "for the citizens of the Union, this access (to affordable high-quality services of general interest)[243] is an essential component of European citizenship and necessary in order to allow them to enjoy their fundamental rights."[244] Although the interpretation of Article 14 TFEU does not interfere in any way with the competences of the Member States in particular fields (Article 2 of the Protocol), one can imagine that the Member States have to adjust their national systems in order to create this quality of and accessibility to these services for their nationals and persons resident on their territory.

This 'citizens approach' with regard to services of general economic interest is underlined by Protocol No. 26 with regard to services of general economic interest, attached to the Lisbon Treaty, which emphasises that services of general economic interest should include "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."[245] The ambition of these services is therefore not only aimed at *accessibility*, but should guarantee the citizens of the Union a kind of quality standard which should at the same time be affordable, so everyone is able to benefit.

239 See also Ross (2007), pp. 1057-1080.
240 Explanation on Article 36 – Access to services of general economic interest.
241 Article 106(2) TFEU.
242 Article 106(2) TFEU.
243 Added HvE.
244 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – White Paper on services of general interest, COM (2004) 374, p. 4.
245 Article 1, Protocol (No. 26) on services of general interest.

So far, these rights are stated within Union policy documents and are not clearly used as a foundation for European legislation, but the European Commission acknowledged in its Communication on the social agenda[246] that Union legislation may offer a solution to strengthen the framework of the well-being of "Europeans" by strengthening their rights as citizens, consumers and workers in many areas. One of the examples of legislative action to improve well-being of "Europeans" can be found in the field of electricity. Directive 2009/72/EC[247] obliges Member States to guarantee "household customers"[248] the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, and transparent prices (Article 3(3)). Another example is found with regard to postal services: Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of a specified quality at all points in their territory at affordable prices for all users (Article 3 of Directive 97/67/EC[249]). In the preamble of this Postal Directive, the expectations of the European citizen as a user of postal services are explicitly mentioned (along with the aim of the internal market). These two examples are considered universal services, which have been defined as services of general economic interest.[250]

Another reference to the citizen as the recipient of certain services is mentioned in Article 170 TFEU. This provision states that *inter alia* in order to enable the citizens of the European Union to benefit from an area without frontiers, the Union shall contribute to the establishment and development of trans-European Networks in the fields of transport, telecommunications and energy infrastructure. The aim of the internal market is mentioned, so the reference is still intimately connected to the internal economic market, but it shows the willingness to look beyond the purely economic interest and take into account citizens' concerns. In the field of transport, energy and telecommunication, guidelines are adopted to enhance the infrastructure of these networks. The idea behind these networks is that the internal market is strengthened when certain 'goods', such as electricity, and services, such as transport, can move smoothly between the Member States while at the same time the citizens can benefit more easily from these services.

The idea of the European citizen can be important in the development of new policies and may enhance the internal market by adding a more social dimension. This is especially important because services of general economic interest belong to the provisions of the Treaty that have 'general application.' This means that the European Union and the

246 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Renewed social agenda: Opportunities, access and solidarity in 21st century Europe {SEC(2008) 2156} {SEC(2008) 2157} {SEC(2008) 2178} {SEC(2008) 2184}, p. 15.

247 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC Text with EEA relevance.

248 'Household customer' means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities according to the Directive's definitions.

249 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.

250 See T-289/03, *BUPA, BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* [2008] ECR II-81, par. 186.

Member States should take services of general economic interest into account in their actions in order to enable those services providers to fulfil their missions.[251]

The aim of creating a single electronic communication market, which is stimulated by the Union e.g. through liberalisation and competition, also refers to the European citizens as recipients of access to communication services and not only economic aims. The report on the progress of a single market for electronic communication starts by stating: "Whilst the current EU regulatory framework has brought benefits to European citizens in terms of innovative and increasingly affordable electronic communications services some serious obstacles still need to be overcome."[252]

Other effects of the role of the European citizen in legitimising European policies can be mentioned. Union citizenship may also affect the interpretation of certain economically oriented rules, such as competition rules, because the national authorities also have to take the individual access into account in their balancing of interests (market versus individual in affordable universal services).[253] In May 2010, Monti reported in the assignment of the president of the European Commission Barroso "A new strategy for the single market: at the service of Europe's economy and society", in which he pleas for a more citizen-directed and consumer-oriented approach within the Single Market.[254]

Under the flag of "connecting Union citizens to the Union", individual considerations have to be taken into account by national authorities and courts with regard to the internal market and competition rules, which also serve the non-migrant citizen. Nevertheless, European citizenship is naturally not the only reason for certain policies: it strengthens and legitimises the exercise of existing competences or soft-law policies, such as those connected to the internal market (access to internet services for example), or it serves as derogation from the competition rules. It provides a more balanced way of looking at competition law, as well as other economic aims. In this sense, the "Europeans" are mostly consumers of electronic communication services, access to water resources or transport services. Some have argued that the market citizen or consumer citizen[255] is up-and-coming in European law, a reference to the citizens' rights connected to the economic recipient of services. The line between citizens as consumers and citizen who have access to certain services as a social right cannot be drawn very clearly: European citizens accessing certain economic services can naturally be qualified as consumers. In the broad sense of citizenship, individuals are both. Whereas a consumer has to be given equal access to services as a recipient of economic services, a citizen who consumes non-economic services (such as education paid for by public finances) also has to be granted

251 Article 14 TFEU.

252 15th Progress Report on the Single European Electronic Communications Market – 2009 of 25 May 2010.

253 Prosser (2005)(b), p. 32. According to the Court of Justice in the *T-Mobile* case, competition law is designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such. Services of general economic interest, however, provide for a derogation from competition rules, so considerations regarding individual access to services may ensure an escape from the rules of competition law.

254 http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf.

255 Szyskczak (2009), pp. 279-307.

equal access to these services based on his or her citizenship.[256] What is defined as a service of general economic interest is up to the Member States and is not regulated in Union law. Within the definitions of services of general economic interest, the national competition authorities that decide on the competition rules and determine services of general economic interest as derogation may take the 'citizen' into account as the party who might benefit from access to those services.

European citizenship has affected the idea of general services of economic interest in the sense that the interpretation of these services also takes EU citizenship into account. These services can be qualified as socio-economic rights for EU citizens, and from this perspective EU citizenship plays a role in defining these socio-economic rights. Obviously, this impact is subtle, as observed above, since the concept of services of general economic interest has mainly been developed within the sphere of competition law rather than in the context of Union citizenship. In the sense of constitutionalisation, the impact of EU citizenship on socio-economic rights is marginal, but the idea of European citizenship provides for a link with certain policies that were believed to be connected primarily with market citizenship. In the future, the influence of European citizens as recipients of welfare and social and economic services may grow, enhancing these socio-economic rights.

4.5 CONCLUSION: EUROPEAN CITIZENSHIP LINKED TO FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION

The connection, or possible connection, between European citizenship and fundamental rights has been an issue of debate for a long time, where up until now, the two concepts have not been clearly connected. Nevertheless, some links can be revealed in the legislation and the case law on Union citizenship.

In the first place, European citizenship has proved to have added significant value to the prohibition of discrimination on the grounds of nationality. Ever since the Court of Justice linked non-discrimination on the grounds of nationality to European citizenship, in the sense that the personal scope and material scope of Article 18 TFEU have been extended, this connection has been developed in case law. Discrimination on the grounds of nationality has been translated in case law in two mechanisms. In the first place, European citizenship broadened the prohibition of Article 18 TFEU, since Articles 20 and 21 TFEU served as vehicles to activate the scope of application of Article 18 TFEU. Second, the Court has held that unequal treatment of nationals that have exercised their free movement rights compared to nationals that have not moved constitutes an obstacle of the free movement of Union citizens. In this sense, the unequal treatment criterion is read within the context of the free movement rights of Union citizens. European

256 In the field of education, the Court of Justice acknowledged the difference between education as an economic service (private schools) and education as a public good. The first concept might be handled with the application of the free movement of services (as recipients of services); the latter falls within the scope of the free movement of Union citizens, C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-06849.

citizenship has been placed in the scope of Article 18 TFEU and at the same time, equality rights of Union citizens have been placed within the context of free movement.

This is not the whole story: reverse discrimination, until now, has been accepted under Union law. This means that those Union citizens that have not exercised their free movement rights are sometimes disadvantaged compared to those Union citizens that fall under the scope of Article 21 TFEU. Neither is there a connection between Union citizenship and discrimination on other grounds, such as age, religion and gender. This does not mean that 'static' Union citizens have no protection against discrimination. The directives on discrimination on the other grounds of discrimination affect their position in the Member States, through national law, although this is not specifically linked to Union citizenship.

The second category analysed is the civil rights dimension of European citizenship rights. Obvious rights in this context are the right to move and reside freely on the territory of the Member States. On certain conditions, these rights to move and reside may trigger other civil citizenship rights, such as family reunification. Moreover, the Area of Freedom, Security and Justice has added more protective-oriented civil citizenship rights to European citizenship. The establishment of the AFSJ is, from the perspective of the constitutionalisation of the European Union, a major step because it provides the Union with functions and prerogatives that are essential for the modern nation state and affect the position of the individuals of the Member States.[257]

Although the Area is dedicated to European citizens as a secure legal space to reside in, in the specific legislation the connection to European citizenship is limited. Instead, European citizenship is used in the AFSJ as a legitimising factor, which supports profound integration and cooperation in criminal law and police matters. In the AFSJ, new challenges arise in the balancing of interests of EU citizens and their right to reside in a host Member State versus the public security in that particular Member State. A balance needs to be struck between individuals' fundamental rights and the fundamental right to safety and security of the general population, as collective fundamental rights. The discretion of Member States to decide to protect their own nationals is affected by the residence rights of Union citizens from other Member States. In some situations, the right to reside in a Member State prevails over the protection of the population of that Member State against criminal Union citizens. At the same time, Union citizens may be expelled in order to protect the population. These interests of Union citizens have to be balanced and will probably lead to new cases and new legislation.
Another protective civil right that can be connected to Union citizenship is the right to diplomatic protection in third countries. This protection is based upon equality and free movement and is therefore of limited relevance for all European citizens. Nonetheless, in constitutional terms, the protection of Union citizens in third countries on account of Union law is significant, since such protection is a state prerogative. Based upon the rights for European citizens, this scope of protection is also extended to non-nationals.

257 Monar (2009), p. 255.

The third category of citizenship rights is social rights. Social rights and European citizenship were connected in the first judgment on European citizenship by the Court, in *Martínez Sala*. In that case, equal treatment with regard to entitlement to child-raising benefits had to be granted to a Spanish national in Germany. The Court established a European notion of solidarity in its case law on European citizenship and social rights. Member States need to grant certain equal social rights to Union citizens based on this financial solidarity. The notion of solidarity is not without restraints, however. The degree of integration of a Union citizen is a factor to be taken into account. The longer a Union citizen resides on the territory of another Member State, the most likely it is that this Union citizen has sufficiently integrated. The 'real link' between the Union citizen and the host Member State is therefore decisive in many cases. Similar to the other citizenship rights, social rights to Union citizens are, mostly, distributed by equality and free movement.

Social rights are granted on the basis of a twofold mechanism: as a condition to use the right to free movement and by application of equal treatment to social benefits. This granting of social benefits is based on Union solidarity, which is founded on the assumption that citizens of another Member State may constitute reasonable burdens on the state finances of the host Member State. This solidarity ends when a citizen is an unreasonable burden, which can be measured by the degree of integration within the host society or the society the citizen has left. The level of integration in a host Member State can be tested by the period of residence, whereas the 'real link' with the home Member State can be assessed by past residence (as in *Morgan and Bucher*).
Union citizenship did affect the distribution of welfare in the European Union through the more traditional internal market models used in economic freedoms because it constitutes a new, non-economic link to social benefits. Before the introduction of European citizenship (and especially the extensive reading of the Court of Justice with regard to equal treatment and social benefits), the Community was already changing from an economic perspective to a more social dimension.

One of the common issues is the fact that fundamental rights of European citizens are, mostly, granted on the basis of a free movement connection with Union law. As a result, the protection of fundamental rights does not have a comprehensive and coherent connection with European citizenship. Although there are connections to be revealed, the system of the vertical division of powers acts as a restraint on the protection of fundamental rights, outside the scope of implementation and free movement. In this sense, the division of powers in the European Union (as discussed in Chapter 3) is decisive for the connection that can be drawn between fundamental rights and Union citizenship. The Charter explicitly restricts the scope of application of its rights (social and civil rights) to Union measures or national measures whenever these national measures fall within the scope of Union law: by implementing Union law or derogating from the free movement rights. From this perspective, the influence of European citizenship on fundamental rights protection has been most apparent in the free movement rights of Union citizens. Since European citizenship extended the free movement rights to include those European citizens that are not economically active,

the scope of application of these rights has been extended significantly. However, for a large part of European citizens that do not *per se* establish a cross-border connection with Union law, the protection of fundamental rights on account of Union law may be limited. This fragmented protection should, nonetheless, not be dramatised, since 'static' European citizens are protected in a multi-level context by their national laws or by the ECHR. However, in some situations one may argue that the Union should be able to intervene when fundamental rights are at risk. When the essence of human rights is at stake, even if the situation is limited to one Member State, such interference might be desirable. As the case law of the Court stands today, there is no connection with EU law if a Member State systematically disregards fundamental rights of its own nationals. This current situation is in line with the vertical division of powers: Member States are obliged to apply fundamental rights protection on account of EU law only within the scope of Union law. Outside this scope, national constitutions and the ECHR are the main sources of fundamental rights. This idea fits into the multi-level constitutional legal order: a legal order consisting not only of EU norms, but a legal order in which these sources of fundamental rights protection interact and exist alongside each other. In this sense the national constitutional identity, which includes national constitutions, is explicitly part of the legal order of the European Union (Article 4(2) TEU). Nevertheless, up until now the Court has not decided to connect EU citizenship with the protection of fundamental rights through Article 2 TEU, as Bogdandy et al. have proposed. In the light of the vertical division of powers the reluctance of the Court to make this connection is understandable. Moreover, one may wonder whether it would be up to the Court to interpret EU citizenship so extensively, as also including the essential fundamental rights in a purely internal situation, or whether the EU legislature should deal with this issue. Up until now, it seems that the case law of the Court does not support such a connection between Article 2 TEU and the substance of the rights of EU citizens. The Commission might since have taken the first steps to develop such connection: in March 2014 the European Commission presented an initiative to safeguard the respect for the rule of law in Member States on the basis of Article 2 TEU, as a pre-Article 7 procedure.[258] This mechanism is based on action by the European Commission, who may start an examination and issue a recommendation to a Member State when there is indication of a systematic threat to the rule of law by that Member State. Although this procedure is not specifically connected to EU citizenship, one of the reasons for the proposal is that the "confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into 'an area of freedom, security and justice without internal frontiers.'"[259]

In terms of constitutionalisation and the effect of European citizenship on the protection of fundamental rights, certain effects may be pointed out. As a common thread, the case law of the Court reveals a certain notion of protection and solidarity of Union citizens. This solidarity and protection is largely connected with the degree of integration: the

258 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014)158 final.

259 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014)158 final, p. 2.

right to residence and grounds for expulsion or surrender of a Union citizen are based upon this degree of integration. Entitlements to social rights are also opened to non-nationals, based on a sufficient link with the host Member State. At the same time, the Member State of origin may be obliged to extend the social and civil protection to nationals that are no longer residents.

In the case law of the Court, a 'humanisation' of decisions may be revealed: the Court takes individuals as human beings and their personal circumstances into consideration.[260] This trend is apparent in the analysed case law: within the limits of the division of powers, the Court does enhance the citizenship rights. Not only the Court, but also the European legislature shows itself to be a guardian of citizens, even though European citizenship is often used purely rhetorically in certain areas, such as in the AFSJ. The AFSJ shows how fundamental rights of EU citizens may clash and give rise to new challenges in the field of European criminal law. The right to residence, and the right to family life of migrating EU citizens on the one hand, and the rights to safety and security of the general population of EU citizens on the other hand is one of these challenges, which are likely to foster new questions on how to balance these fundamental rights. EU citizenship affects this field of EU law by bringing these issues to the fore.

European citizenship considerably contributes to a solidarity notion in the European Union. The basis for residence rights and protection from expulsion from the territory of another Member State is the solidarity of a Member State with those Union citizens that have integrated in their community. Moreover, in the area of social rights, the effect of solidarity may result in the denationalisation of social welfare. At the same time, based on a notion of solidarity and the protection of nationals of a Member State, Member States may justify the expulsion of a non-national or refuse social benefits. European citizenship poses interesting questions on the way Member States interact with their nationals and residents on their territory.

In a more indirect manner, European citizenship may be used, and is used, to legitimise the interpretation or exercise of certain competences or policies in order to protect the citizen, even if these citizens are not specifically addressed in legislation. In this sense, the protection of fundamental rights in the European Union is individualising. The personal circumstances of a Union citizen may have to be taken into consideration, such as the question of whether the effectiveness of the residence in the European Union (Article 20 TEU) is lost when a family has to split up. Questions on the grounds of expulsion have to be considered within the context of the threat versus the personal circumstances of a Union citizen. From this perspective, fundamental rights protection is fostered by European citizenship, at least in the sense that more questions and issues are raised in the context of European citizenship.

260 See in more detail Chapter 6, Section 6.3.3.

"The election of the Members of the Assembly by direct universal suffrage is an event of outstanding importance for the future of the European Communities and a vivid demonstration of the ideals of democracy shared by the people within them."[1]

CHAPTER 5

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The effect of European citizenship on the common ideology in the European Union: democracy and political rights

5.1 INTRODUCTION: CITIZENSHIP, POLITICAL RIGHTS AND DEMOCRACY IN THE EUROPEAN UNION

As discussed in the previous chapter, one of the main features of a constitution is that it lays down principles of government expressing the common ideology of the population, such as democracy, federalism, basic civil rights and political rights.[2] Therefore, the existence of a common ideology may indicate the constitutional nature of the legal order. In the context of this thesis, democracy and political rights are both regarded as constitutional values that are shared among the Member States and the European Union as the 'common ideology', which is one of the elements of the constitutionalisation of the European Union.[3]

In the previous chapter, the connection between European citizenship and the protection of fundamental rights has been examined. The present chapter focuses on democracy in relation with European citizenship. Moreover, this chapter examines political rights as part of citizens' fundamental rights. Democracy and political rights are closely connected and are merged into the analysis in this chapter. The analysis is therefore twofold: it addresses the connection of European citizenship with democracy, and the connection of European citizenship with political rights, as part of fundamental rights. The main issue dealt with in this chapter is the impact of Union citizenship on democracy and political rights as part of the constitutionalisation of the European Union.

1 Declaration on democracy of the European Council, 7 and 8 April 1978 in Copenhagen, http://aei.pitt.edu/1440/01/Copenhagen_1978.pdf.

2 Raz (2001), p. 153.

3 See in more detail Chapter 2, Section 2.4.1.3.

5.1.1 Aim and structure of the present chapter

In the first part of this chapter, democracy in the European Union is discussed more generally, in order to set the background and broader context of this study. Then, the connection between European citizenship and democracy is analysed. First of all, this chapter describes two constitutional building blocks, democracy and political rights, and their connection. After a more general discussion on political rights and democracy in Section 5.2, criticism of democracy in the European Union is debated in Section 5.3. Section 5.4 deals with European citizenship in connection with democracy and political rights. In Sections 5.4.1 to 5.4.3, the impact of European citizenship on electoral rights is analysed. In the subsequent sections, the link between European citizenship, and the right to submit a complaint to the European Ombudsman and the right to petition to the European Parliament are discussed in Sections 5.4.4 and 5.4.5. Section 5.4.6 focuses on the most recently introduced right of the EU citizens' initiative.[4] In Section 5.4.7. the role of civil society and democratic principles are discussed. Finally, a conclusion is drawn in Section 5.5.

5.2 POLITICAL RIGHTS AND DEMOCRACY AS PART OF THE COMMON CONSTITUTIONAL IDEOLOGY

5.2.1 Political participation as part of citizens' rights

Political rights can be defined as those rights "that protect the liberty to participate in politics through actions such as communicating, assembling, protesting, voting, and serving in public office."[5] As observed in the analytical framework and the previous chapter, citizenship rights can be categorised into civil, social and political rights.[6] In the previous chapter, the *social and civil* dimension of citizenship rights in the context of European citizenship was examined. In this chapter, the *political* dimension of citizens' rights is discussed.

Political rights and citizenship are naturally related. Political rights give citizens the opportunity to participate in politics, i.e. to participate in the way the polity is governed. One of the evident categories of rights that support this political participation of citizens is that of electoral rights. Electoral rights, i.e. the right to vote as well as the right to stand as a candidate, are citizens' rights *par excellence*, since they entitle citizens to participate in the policy making of the polity they live in. In the first place, these electoral rights of citizens constitute a mechanism for the representation of citizens and their demands. Second, these rights regulate and ensure citizens' participation in the election of the 'rulers.' Third, the political responsibility of decision-making bodies towards citizens is regulated by electoral rights because they give citizens the opportunity to vote away their rulers. Finally, electoral rights legitimise the decision-making powers because these

4 Article 11 TFEU.
5 James (2013).
6 Chapter 2, Section 2.4.1.2.1 and Chapter 4, Section 4.1.3.

powers are derived from the rights of the citizens to govern their life.[7] Political rights are broader than just electoral rights. For the purposes of this study, those rights that include citizens of the Union into the public arena of the European Union, giving them the possibility to influence or react to decisions or actions that affect their daily lives, are regarded as political rights.

5.2.2 Democracy as part of the constitutional common ideology of the European Union

The second element in this chapter is democracy, as a constitutional value within the European Union. In various places in the Treaty, democracy is articulated as a common value, as part of a common European ideology. Since the Lisbon Treaty entered into force, the importance of democracy as a constitutional value within the Union has been emphasised. This increase is visible in the fact that democratic principles are now incorporated in the Treaty under a separate title. In the preamble of the TEU, the Member States emphasise "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." The Treaty proclaims, moreover, that "the functioning of the Union shall be founded on representative democracy" and that "every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."[8]

Two noteworthy changes were introduced by the Treaty of Lisbon. First of all, in the wording of the new title on democracy (Title II of the TEU) citizens are explicitly referred to. Whereas the EC Treaty used the term representation of "the peoples of the States brought together in the Community", the Treaty now explicitly refers to the "democratic representation of *the citizens*."[9] Article 9 TEU expresses a European principle of equality of citizens. This provision is included in the title on democratic principles, which creates another, at least textual, link between citizenship of the Union and democracy.
Secondly, in addition to *representative* democracy, forms of *participatory* democracy are included in the Treaty. The Union is now founded on representative and participatory democracy. European citizens are represented by the European Parliament and by the European Council (Article 10(2) TEU). Article 11 TEU incorporates various mechanisms for participatory democracy.[10] According to Article 11 TEU, the institutions shall ensure active participation by citizens and representative associations, and the Commission shall carry out public consultations and maintain the dialogue with civil society. The most vital new mechanism for direct democracy is the citizens' initiative.[11]

7 Closa Montero (2007), p. 1039. However, as Montero argues in this article, these mechanisms are somewhat disappointing at the Union level.
8 Article 10 TEU.
9 Compare Article 10 TEU with Article 189 TEC.
10 Although Article 10 TEU only refers to representative democracy, it might be argued that the new mechanisms of Article 11 TEU constitute a participatory form of democracy. In the Constitution Treaty, Article 11 TEU was entitled 'The principle of participatory democracy'. In the final version of Article 11 in the TEU this title has been removed.
11 Article 11(4) TEU. The citizens' initiative is discussed in more detail in Section 5.4.6.

5.2.3 Connection between political rights and democracy

In order to include individuals in the European Union, political participation is encouraged. European citizenship was seen as one of the possible answers to address issues related to a lack of democratic legitimacy of the European Union. Moreover, in order to promote a more democratic and accountable Union, the European Parliament has been elected directly since 1975, to legitimise the exercise of public power.[12] Even back in 1978, the Council stated: "Although the elections to the European Parliament by direct universal suffrage certainly represent the most obvious evidence of the Europe of the citizen, further efforts have been made to make the reality of the construction of Europe felt in the daily life of individuals."[13]

The right to political participation may be qualified as one of the important fundamental rights of Union citizens, especially since citizens of the Union are affected by the law of the European Union in their daily life. Competences that were previously exercised by the national legislature have in certain areas been transferred to the European Union legislature, which creates new challenges to involve individuals in the decision-making process.
Democracy is broader than political rights of citizens and also includes, *inter alia*, open decision-making, accountability of institutions and certain processes in order to ensure that public powers are not exercised in an arbitrary manner. Democracy may be defined as a political system of governance, creating mechanisms that ensure the responsiveness of the public power towards citizens. In this sense, the democratic safeguards need to ensure that public authorities take into account citizens' interests in their policies, and comply with principles of accountability and transparency.[14] The yellow and orange card procedure that provides for the possibility for national parliaments to review proposals for European legislation with regard to subsidiarity and proportionality is an example of a democratic safeguard that enhances democracy in the Union. At the same time, this procedure is not connected, as such, to citizenship as a political right. Nevertheless, the procedure supports democratic decision making. In this sense, democracy can be defined as structures and mechanisms that enhance the participation of the citizens in decision making, including principles such as transparency within the decision-making procedures. Political rights are those rights that enhance democratic structures by providing rights to citizens to participate in the public sphere. Democracy and political rights meet each other at the crossroads of citizens' rights and democratic legitimacy.

12 O'Leary (1996), p. 23.
13 Report by the Ministers of Foreign Affairs to the European Council on European Union, 1978 Bull. 1/79.
14 Chryssochoou (2000), p. 28.

5.3 DEMOCRACY IN THE EUROPEAN UNION

5.3.1 Criticism of democracy in the European Union

Before turning to the analysis of the link between European citizenship and democracy in the European Union, attention is now paid to the criticism of democracy in the European Union, in order to outline the broader context of the analysis. In academic literature, the so-called 'democratic deficit' of the Union has been a topical theme since the beginning of the European project.[15] On various occasions, this discussion has flared up. One of the important 'democratic crises' was the rejection of the European constitution in 2005 in the French and Dutch referenda. At that time, the discussion on the legitimacy and accountability of the European Union by and towards the people affected by its legal order became highly relevant (again). In order to understand the contribution of European citizenship to democracy as a common constitutional value, the concept as such needs to be discussed. This broader context also reveals the difficulty of democracy as a proclaimed common constitutional value of the European Union.

5.3.1.1 The relationship between democracy, legitimacy and accountability

Academic debates are usually critical where the democratic legitimacy of the European legal order is concerned. In general, legitimacy can be defined as the "moral ground for obedience to power."[16] This means that rules made by the public authorities are obeyed by citizens, or, if these rules are not obeyed, this conduct is considered to be a violation by the majority (social legitimacy).[17] Legitimacy in the European Union is often discussed in terms of 'input' and 'output' legitimacy, meaning that the obedience to the public power is grounded in the manner in which the public authorities rule; in the way the interests of the citizens are reflected (the output); and in the consent given by the people by exercising electoral rights (input).[18] Output legitimacy focuses on the benefits for society of the decisions of the public authorities. Input legitimacy concerns the way in which people are able to influence the decision-making process. The common aim of these two concepts is that the will of the people should legitimise any public power exercised. The third manifestation of legitimacy is called 'throughput legitimacy', which focuses on the process of decision making, rather than the quality of the result, such as decision-making procedures. Accountability falls under this category, in the sense that the authorities can be held responsible for the output, as well as for transparency and openness to civil society.[19]

One of the problems with the democratic legitimacy of the European Union is that input legitimacy is not sufficiently established to legitimise the exercise of public powers.

15 Verhoeven (2002), p. 57.
16 Curtin (2008), p. 135.
17 Legitimacy can be categorised as formal legitimacy – the fact that the Treaties are based on the transferral of powers to the EU – and social legitimacy, where the legal order and its competences are grounded on a social consent of the people. See e.g. Bovens et al. (2010), pp. 11-13.
18 Lenaerts and Cambien (2009), p. 185, including references in footnotes 1 and 2.
19 Smidt (2010).

Instead, the focus has been on the 'output legitimacy' in terms of quality of laws and efficiency. This focus is also apparent in the White Paper on European governance of the Commission, in which efficiency and effectiveness are promoted in order to enhance public participation.[20]

In the context of Union law, accountability may be defined in terms of responsibility and clarity. It is defined in the White Paper on European governance as meaning that "each of the EU Institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level."[21]

5.3.1.2 The democratic deficit: criticism of the Union's model of democracy

The term 'democratic deficit' covers different meanings and has various manifestations. One of the aspects of the lack of democracy is the fact that the legislature of the Union is too far away from the individuals affected by Union acts. Substantive matters which used to be regulated on the level of the nation state have been transferred to 'Brussels.' However, 'Brussels', for most citizens, is not a visible or concrete power ("Why are those people over there making decisions which affect me over here?").[22]
A second concern diagnosed using the term 'democratic deficit' is the issue of the dominance of the executive public power over the Union's decision-making procedures. In these decision-making procedures, institutional balance is achieved in the Union by a triangular separation of powers between the Commission, the Council (as representative of the Member States) and the European Parliament (as representative of the people). Although the European Parliament is elected directly by the European citizens, the most powerful position in legislative procedures is allocated to the Council of Ministers. This transfer of powers from national parliaments to the executive is not compensated on a Union level by the power conferred to the European Parliament.[23] Since the Lisbon Treaty, the European Parliament now has more competences in the legislative process. An example of this increased influence is the restructuring of the co-decision procedure, which is now labelled 'ordinary legislative procedure.' Moreover, the role of national parliaments has been strengthened.[24]
Another issue dealt with using the term 'democratic deficit' is qualified majority voting in the Council, since Member States that represent their citizens could simply be overruled in the Council.[25] Other issues gathered under 'democratic deficit' are the lack of transparency in decision making and weakening of national judicial control over the constitutional provisions.[26] In 2006, the European Council declared: "Providing citizens with first hand insight into EU activities is a pre-requisite for increasing their trust and

20 Curtin (2008), p. 135.
21 European Governance: A White Paper, COM (2001) 428 final, p. 10.
22 Craig (1999), p. 23.
23 Piris (1994), p. 456.
24 Piris (2010), p. 125; for an overview of the role of national parliaments, see pp. 122-132.
25 Maduro (2003), p. 90.
26 Craig (1999), p. 24.

confidence in the European Union. […] In particular, all Council deliberations under the co-decision procedure shall now be public."[27] The Lisbon Treaty explicitly states that the Council and the European Parliament meet in public when acting in a legislative capacity and must ensure that the documents relating to decision-making procedures are published, which has been done since the adoption of the Treaty.[28] The Union, moreover, struggles with a more practical democratic 'gap', i.e. the fact that Union citizens are not aware of their influence on the decision-making procedures. However, although the MEPs are elected through the national political parties, citizens of the Member States identify with a certain party based on its national programme and achievements, not, or at least not only, based on its views on European integration.[29] Once elected, the MEPs form political groups that are not necessarily the citizens' choice. The elected member of the European Parliament will have to work on internal political compromises with other political groups within the Parliament.

5.3.1.3 Views on European democracy from a national constitutional perspective

The German Constitutional Court (*BverfG)* has addressed the democratic deficit debate at important constitutional moments in Union history: at the ratification of the Maastricht Treaty establishing the Union and at the ratification of the Lisbon Treaty.[30] At the ratification of the Maastricht Treaty, the *BverfG* pointed out that a lack of legitimacy underlying democracy could become problematic. It held, however, that the peoples of the Union were represented by the European Parliament. Therefore it held that the Treaty of Maastricht was not unconstitutional.

At the ratification of the Lisbon Treaty, the *BverfG* sent out a new warning.[31] Complaints of the *Bundestag*, the *Bundesrat* and certain German individuals on the constitutionality of the Ratification Act led to the *Lissabon-Urteil.* The complainants argued, *inter alia*, that the Lisbon Treaty violated their rights under 38 of the Basic Law[32] as more competences were being transferred to the Union, encroaching upon the German constitutional political rights and democracy. Part of this argument is the lack of electoral equality: "Admittedly, the Treaty of Lisbon strongly upgrades the European Parliament's competences. This, however, can only legitimise the exercise of public authority by the European Union if electoral equality would be respected. Member States with a low number of inhabitants, however, are still granted a disproportionally large number of votes in comparison to Member States with a big population."[33] The *BverfG*, after a critical assessment of democracy in the Union,

27 Presidency Conclusions European Council, Brussels, 17 July 2006, p. 13, par. 35.
28 Article 15(2) and (3) TFEU.
29 Editorial Comment (2009), pp. 767-771, Cuesta Lopez (2010), pp. 123-138.
30 This is not limited to these two constitutional moments only, See for instance the Decision concerning the constitutionality of the European Stability Mechanism, *BVerfG*, 2 BvR 1390/12.
31 The English translation can be found on: http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html.
32 The Basic Law grants electoral rights: "Die Abgeordneten des Deutschen Bundestages werden in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt. Sie sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihrem Gewissen unterworfen."
33 *Lissabon-Urteil*, *BVerfG*, 2 BvE 2/08 , par. 104.

in reaction to both these arguments, held that the Lisbon Treaty is in compliance with the constitutional values of the German Constitution, that the majority voting in the Council is accepted, and that the transfer of competences does not undermine the democracy in Germany. The *BverfG* held:

> "As long as European competences are ordered according to the principle of conferral in cooperatively shaped decision-making procedures, and taking into account state responsibility for integration, and as long as an equal balance between the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state."[34]

The *BverfG* warned at the same time that the European Union should not exceed its competences. On the one hand, the German Constitution does express the aim of European integration, on the other hand, if this aim exceeds the limits of a *Staatenverbund*[35] and were to develop into a federal state, the democratic principle of the people of Germany would be at stake, and this would be unconstitutional, according to the *BverfG*.

Another reaction by a national constitutional court is that of the Czech Constitutional Court (*Ústavní soud*). The background of the decision of this Constitutional Court is a petition of a group of senators to review the constitutionality of the Lisbon Treaty, especially based on democratic values, and the principles of the rule of law and the sovereignty of the Czech Republic. With regard to democracy as a value of the Union, the petitioners claimed that the European Union is an international organisation of sovereign Member States, which cannot be based on representative democracy. The Constitutional Court firmly rejected this argument stating that "the democratic process on the Union and democratic levels mutually supplement and are dependent on each other" and that "the European Parliament is not the only exclusive source of democratic legitimacy for decisions adopted on the level of the European Union."[36]
The view of the Czech Constitutional Court is more lenient. What is interesting is the Court's view on the sovereignty of Member States: "[S]overeignty of the state is not an aim in and of itself, that is, in isolation but is a mean[s] for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands" and "the transfer of state competences [...] is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.."[37] The Czech Court obviously evaluates the rights of and responsibilities towards Union citizens as an additional layer of government; it does not

34 Paragraph 272 of the decision (English version). In German: "Solange die europäische Zuständigkeitsordnung nach dem Prinzip der begrenzten Einzelermächtigung in kooperativ ausgestalteten Entscheidungsverfahren unter Wahrung der staatlichen Integrationsverantwortung besteht und solange eine ausgewogene Balance der Unionszuständigkeiten und der staatlichen Zuständigkeiten erhalten bleibt, kann und muss die Demokratie der Europäischen Union nicht staatsanalog ausgestaltet sein."

35 This is stressed in various paragraphs of the decision, following the line of reasoning of the *Brünner* decision, but with a clear statement that the *Staatenverbund* cannot transform into a *Bundesstaat* in order to be acceptable for German constitutional law. Editorial comment (2009), p. 1024.

36 Pl. ÚS 29/09 Lisbon Treaty II of 3 November 2009, paras. 139-140.

37 Pl. ÚS 19/08 Lisbon Treaty I of 26 November 2008, par. 108.

emphasise the need for one demos, but rather speaks in terms of additional rights of citizens of the Union.[38]

5.3.1.4 No demos, no democracy?

As discussed in the analytical framework of this thesis,[39] the lack of a homogenous group of citizens in Europe has led to the question of whether the European Union could be called constitutional, since it would lack democratic legitimacy. The no-*demos* thesis assumes that the existence of a *demos* is a precondition for democracy. No *demos*, no *demo*cracy, is the argument: without a people, there is no expression of the will of the people by its representatives. Since democracy is the self-governance of the citizens, these citizens should be able to have a homogenous voice to express their will, or should be represented by people that express their will. A common identity and a common language are needed in order to create one *demos* that serves democracy as a legitimising foundation under public powers, according to these scholars.[40] Representative democracy departs from the idea that the majority of the people decides, implying that citizens need to accept that the majority of their fellow citizens may overrule their specific political view. In order to accept such a representative mechanism, a common identity or belonging needs to be present.[41]
In the Union, there is no common identity or common nationality that constitutes the people or *demos*, but Union citizenship is dependent on the nationality of a Member State. This means that a *demos* in the classical term of the word does not exist, but that the citizens of Europe can still be seen as *demoi*: different peoples of the Member States with one set of common values on the Union level, and a sharing of political and civil rights within the Union, rather than a common national identity that underlies the static idea of *demos*.[42] Rather than an identity based on common cultural values, the common identity is then limited to political and civil rights in Union law. These *demoi*, based on limited, common features, may underlie *demoi*cracy, which encapsulates the different *peoples*, rather than the people, that choose their representatives. Such *demoi*cracy constitutes a multilevel idea of democracy, taking into account the role of national parliaments and that of the European Parliament: "[T]he national parliaments, as representatives of the multiple European *demoi*, have been seen as fulfilling an ever more important role in European governance."[43]

5.3.2 Specific political rights for European citizens

It is in this broader context of the democratic deficit and the criticism regarding the lack of legitimacy of the European Union that European citizenship is presented as part of a solution. Therefore, the political rights of European citizens constituted one of the important pillars of citizenship of the European Union. Union citizens have been granted certain political rights in order to be able to participate in the political arena

38 Par. 155 of Lisbon II.
39 Chapter 2, Section 2.2.1.
40 See for an overview of the different opinions in this debate Harbo (2007), pp. 181-191.
41 Nicololaïdis (2004), p. 81.
42 Besson (2006), p. 190 and Pernice (2011), p. 96.
43 Cuesta Lopez (2010), p. 129.

of the European Union. In the context of Member States, electoral rights are, although limited, granted to European citizens based on their European citizenship status.
The most obvious political rights of Union citizens, in this perspective, are the electoral rights that are granted by the Treaty.[44] Moreover, as observed, the citizens' initiative introduced in Article 11(4) TEU creates a new and challenging political right for European citizens.

Another, more abstract, category of political rights is those rights that are connected with the accountability of institutions towards Union citizens. Such rights are reflected in the right of Union citizens to submit a complaint to the European Ombudsman about maladministration of the institutions of the Union.[45] Another example is the right to petition to the European Parliament, safeguarding political accountability.[46] These political rights are not so much founded on input democratic legitimacy, but are necessary for the 'throughput' and 'output' democratic legitimacy of the Union. These rights give the citizens of the Union the possibility to affect public affairs before and after decisions or actions are taken.

From the perspective of accountability, the access to documents can be categorised as a political citizens' right. This right to access to documents is not exclusively granted to Union citizens, but to any natural or legal person residing in or having its registered office in a Member State.[47] Under the title citizens' rights in the Charter, a right to good administration is conferred on European citizens.[48] This latter provision refers to Article 298 TFEU which provides that "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration."

5.4 THE CONNECTION BETWEEN EUROPEAN CITIZENSHIP, DEMOCRACY AND POLITICAL RIGHTS

5.4.1 Electoral rights regarding the European Parliament

As indicated before, the most obvious political participation rights for Union citizens are the electoral rights on the European and national (municipal) levels provided for in Article 22 TFEU.[49] Before these specific electoral rights for Union citizens were included in the Treaty, the election procedure of the European Parliament was regulated by Article 138 EEC and the Act of the Council of 1976.[50] Article 138 EEC provided a legal basis for the adoption of secondary legislation to establish a uniform election procedure for the

44 Article 22 TFEU, Articles 39 and 40 of the Charter.
45 The Court of Justice of the European Union is excluded from this list.
46 Article 24 TFEU, Article 43 of the Charter.
47 Article 41 of the Charter.
48 Article 42 of the Charter.
49 Article 40 of the Charter.
50 76/787/ECSC, Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ L 278, 8.10.1976, pp. 1–4.

European Parliament. The creation of a uniform procedure was not without obstacles. It took the European Parliament and Council 16 years just to reach an agreement establishing direct elections.[51]

Since the Treaty of Maastricht, the right to vote and stand as a candidate for the European elections in another Member State has been qualified as a European citizens' right. Article 22 TFEU provides that Union citizens have the right to vote and to stand as a candidate in elections for the European Parliament in a host Member State, on the same conditions as the nationals of that Member State. Two directives were adopted to implement the right to equal treatment in electoral procedures for European citizens who are residing in a Member State other than that of their nationality. The electoral rights of Union citizens for European Parliament elections are governed by Directive 93/109/EC[52] and the political participation in municipal elections by Directive 94/80/EC.[53] Directive 93/109/EC was adopted shortly after the entry into force of the Maastricht Treaty and regulates electoral rights for the European Parliament by European citizens in more detail.[54] These electoral rights are based on equality. Directive 93/109/EC is not meant to harmonise the electoral systems of the Member States, but affects them only in the sense that equal access to the elections of the European Parliament has to be guaranteed to Union residents with the nationality of other Member States. One example is that whenever a certain period of residency exists as a precondition to vote, this period of residence of Union citizens from other Member States is deemed to be fulfilled whenever a Union citizen has resided in another Member State for an equivalent period. Similarly, whenever a Union citizen's entitlement to vote is withdrawn according to a criminal-law or civil-law decision in the Member State of origin, he or she cannot vote in the Member State of residence either.

5.4.1.1 On the personal scope of electoral rights regarding the European Parliament

The personal scope of electoral rights of European citizens was the subject of discussion in two cases before the Court of Justice, decided on the same day. These cases form each other's mirror image: the first case concerned the inclusion of certain non-Union citizens in the right to vote and stand as a candidate for the European Parliament, while the second case concerned the exclusion of electoral rights for nationals (being Union

51 O'Leary (1996), p. 202.

52 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329, 30.12.1993, pp. 34–38.

53 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ L 368, 31.12.1994, pp. 38-47.

54 More recently a new Directive was adopted that amended 93/109/EC with regard to the requirement of an attestation from the competent administrative authorities of the home Member State certifying that the person concerned has not been deprived of the right to stand as a candidate in the home Member State or that no such disqualification is known to them. See Council Directive 2013/1/EU of 20 December 2012 amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L26, 26.1.2013, pp. 27-29.

citizens) in Aruba, which is part of the Overseas Countries of the Kingdom of the Netherlands.

In the first case, the UK was challenged before the Court by Spain because it granted electoral rights to non-Union citizens living in Gibraltar.[55]

> This case started at the ECtHR with a complaint by Ms Matthews, a British national living in Gibraltar.[56] Gibraltar is a so-called 'British Crown Colony' in which Union law, in principle, is applicable. Since the residents of Gibraltar did not have the right to vote in elections for the European Parliament because no elections were held, Ms Matthews lodged a complaint with the ECtHR. Although European law was applicable in Gibraltar, no elections for the European Parliament were organised for residents there. Ms Matthews based her complaint on Article 3 of the First Protocol of the ECHR, which obliges contracting parties to organise free elections that ensure the free expression of the people in choosing the legislature. The ECtHR held in the case of *Matthews* that the UK, being a party to the Convention, had an obligation to ensure that residents of Gibraltar could also vote in elections for the European Parliament as the population of Gibraltar was affected by Union law in the same way as it was by national legislation. Secondly, the European Parliament could be considered a 'legislature' in light of Article 3 of the Protocol, according to the ECtHR, because supranational bodies could also be qualified as legislatures in practical terms. After the judgment, the UK also organised elections for the European Parliament in Gibraltar, in which British nationals and Qualifying Commonwealth Citizens (QCC) could vote.

The inclusion of QCC in elections for the European Parliament led to an action by Spain before the Court of Justice. Spain argued before the Court of Justice that only Union citizens have a right to vote in European elections and therefore the new Act of the UK did not comply with, *inter alia*, Article 22 TFEU. The Court held, however, that neither the Act of 1976, nor Article 22 TFEU, nor Article 190 EC (now repealed as such), prevented the inclusion of non-Union citizens. It held that the UK could also include QCC in the elections of the European Parliament based on constitutional considerations. The Court explicitly stated that, at that stage of Union law, the definition of the persons entitled to vote and to stand as candidates in elections for the European Parliament fell within the competence of each Member State. Union law did not "preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory."[57]

The second important case on the scope of electoral rights regarding the European Parliament, on account of the European Union, dealt with exactly the opposite situation. In *Eman and Sevinger*,[58] the Dutch *Kieswet* (Elections Act) excluded European citizens from voting in elections for the European Parliament when living in the overseas

55 C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917.
56 ECHR, *Matthews v. The United Kingdom*, 1999-1, Application number 24833/94.
57 C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917, par. 78.
58 C-300/04, *Eman and Sevinger* [2006] ECR I-8055.

territories, except for those citizens who worked in a public service or who had been resident in the Netherlands for at least 10 years.

> Eman and Sevinger had been refused voter registration for the European Parliament elections because they lived in Aruba, one of the so-called overseas territories of the Netherlands, and did not comply with the additional conditions to be registered. These islands are formally part of the Kingdom of the Netherlands, but Union law does not apply in Aruba, except by association agreements. The argument in the *Matthews* case, that the population has to have the opportunity to choose its legislature, is therefore not applicable to the situation of the Dutch Antilles, according to the Court of Justice. Therefore, the measure is not in violation of Article 3 of the First Protocol of the ECHR, and neither is there any other legal basis that obliges the Netherlands to extend these electoral rights to Union citizens in Aruba. Nevertheless, the personal scope of electoral rights is subject to the principles of Union law. Therefore, the electoral arrangements with regard to the European Parliament have to comply with the prohibition on discrimination on the grounds of nationality. According to the Dutch Elections Act, persons with the Dutch nationality living in a third country were entitled to register as voters in the elections for the European Parliament. The Act, however, excluded persons with the Dutch nationality living in Aruba or the other overseas territories. As a consequence, Union citizens living in Aruba could not vote in elections for the European Parliament, whereas everyone with the Dutch nationality residing in a third county could vote in these elections. A Dutch national who transferred his residence from Aruba to a non-member country had the right to vote in the same way as a Dutch national transferring his residence from the Netherlands to a non-member country, while a Dutch national residing in Aruba did not have that right. Consequently, the Act made a distinction with regard to those Dutch nationals living in Aruba and the Antilles, and those living in the Netherlands or in another country. According to the Dutch government, this distinction was based on the link a national has with Dutch society.

The Court ruled that the Member States have the discretion to decide who falls within the personal scope of the electoral rights regarding the European Parliament. Nevertheless, this choice is subject to the principles of Union law, such as non-discrimination and proportionality. The Court was not convinced by the arguments of the Dutch government and ruled that the criteria chosen to govern the elections for the European Parliament must not result in different treatment of nationals who are in comparable situations without an objective justification, achieved according to the principle of proportionality. Article 22 TFEU only ensures a right to equal voting compared to the nationals of other Member States in municipal and European elections. The question in the above-described cases was not whether a Union citizen could rely on equal treatment in another Member State, but whether Member States could be obliged to organise elections in territories outside their country, such as Gibraltar and Aruba.[59]

The two above-discussed cases reveal the composite character of Union citizens' rights. The right to vote for the European Parliament is granted to Union citizens on account of Union law, but these rights have to be given effect by the Member States. The Member

59 See also the opinion of Advocate General Tizzano on this point in C-300/04, *Eman and Sevinger* [2006] ECR I-8055, par. 143.

States have discretionary power, to a certain extent, to grant these electoral rights. In these cases, an extra legal dimension of rights is added: that of international obligation due the fact that the Member States are obliged by the ECHR to organise free elections.[60] Hence, as observed by Besselink "National law determines who is an EU citizen, and hence who enjoys the EU rights pertaining to citizenship; however, this national law must live up to legal requirements set by EU law and the ECHR as determined by the ECtHR."[61] The Court of Justice explicitly takes the ECHR as well as the constitutional traditions of the Member States into account in its reasoning.[62] Notably, the Court referred to a particular constitutional tradition in *one* Member State, whereas it usually applies the test of the constitutional traditions common to the Member States as a legitimate reason to derogate from Union law.[63] The fact that the Court takes the single constitutional tradition of a Member State into account demonstrates the restraint of the Court in interfering with the electoral systems.[64]

This political dimension of citizenship rights, the right to vote in and the right to stand as a candidate in European elections, is therefore dependent on the choice of the Member States. It may extend these rights to persons with a special position in that Member State or decide to narrow the personal scope to own nationals in a strict sense. The exercise of this discretion, however, is not unlimited. It is bound by the general principles of Union law, since it falls within its scope. This implies that the Court has the jurisdiction to assess whether a national Elections Act complies with these principles.[65] This delicate balance between the constitutional choices of the Member States, the political rights for Union citizens and democracy as a constitutional value is a difficult one, which also has consequences for the strength of the political side of Union citizenship.

5.4.2 Electoral rights regarding the national elections of Member States

The right to equal entitlement to vote and to stand as a candidate in elections on account of Union law is limited to municipal and European elections. National elections are not included in the electoral rights of Union citizens. A Union citizen has no entitlement to vote in his or her own, or in a host, Member State on account of Union law. The Commission received several complaints on the lack of this political participation in national elections. In 2004, the Commission reported: "Recurrent petitions, parliamentary questions, and public correspondence reveal the concerns of many Union citizens regarding a gap in electoral rights at the present level of Community law: […] the right to participate in national or regional elections. The Member States do not grant

60 See also Besselink (2008), pp. 787-813.
61 Besselink (2008), p. 802.
62 C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917, paras. 79 and 96.
63 Article 6(3) TEU.
64 Claes (2007), pp. 216-221.
65 See also Shaw (2007) (a), p. 189, who states "It is clear from the Aruba case in particular that combining the organisation of Euro-wide elections to the European Parliament (…) with the personal status of citizen of the Union can result in quite substantial intrusions into the national electoral sovereignty of the Member States".

electoral rights at national or regional elections to nationals of other Member States residing in their territory."[66]

Most Member States grant electoral rights to their own nationals for a certain period of time after they have migrated to another Member State. For instance, German nationals remain entitled to vote for the *Bundestag* in Germany when they reside permanently in another country (also in third counties), but need to enrol themselves in the municipal register and have to have resided in Germany for at least three months after 1949. Swedish nationals automatically stay registered on the electoral roll for the first 10 years of residency abroad for all elections. After 10 years of non-residency in Sweden, these nationals need to register as voters if they want to exercise this right.[67] British national lose their voting rights in the UK after 15 years of non-residency in the UK.[68] As a consequence, a Union citizen may lose the right to vote in national parliamentary elections when exercising the right to move and reside in the territory of another Member State. In certain situations a Union citizen may not have the right to vote in his or her Member State of origin or in the host Member State. Neither international nor European law requires that the host Member State opens its national elections to immigrants. Hence, not only do Union citizens have no right to vote in national elections, what is worse is that there is a real possibility that they could lose their voting rights for national elections when exercising their free movement rights: disenfranchisement as a result of the exercise of free movement rights.[69]

It has been argued that the right to vote and stand as a candidate in national elections should be connected to the exercise of free movement. First, the Member States should be obliged to grant their own nationals expatriate voting rights. A second solution would go further and would require that the host Member States entitle nationals of other Member States to vote and stand as a candidate in national elections.[70]

> Recently in the UK, the case *Preston vs. The Lord President of the Council* was decided in which the High Court and the Court of Appeal ruled that the disenfranchisement of a British citizen, who had been residing in Madrid for more than 15 years, was not a restriction to his free movement. The case was not referred to the Court of Justice, which so far has not had the opportunity to decide on the issue of free movement of European citizens and the loss of electoral rights.[71]

66 Written question E-1301/02 by Michael Cashman (PSE) to the Commission on Voting Rights for EU citizens, OJ 92 E, 17.04.2003, pp. 44-45.

67 H. Bernitz, Access to Electoral Rights Sweden, June 2013, to be found on: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1322-Sweden-FRACIT.pdf.

68 L. Khadar, Access to Electoral Rights United Kingdom, June 2013, to be found on: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1310-UK-FRACIT.pdf.

69 See also with regard to rights for national elections and EU citizenship a detailed analysis of Shaw (2007) (a), pp. 189-208.

70 Kochenov (2009), pp. 197-223.

71 L. Khadar, Access to Electoral Rights United Kingdom, June 2013, to be found on: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1310-UK-FRACIT.pdf.

As discussed in Chapter 3, according to the case law of the Court of Justice, every restriction of the right to move and reside in another Member State would violate Article 21 TFEU, unless objectively justified. This trend could also be extended to political rights. In such reasoning a Union citizen should not lose electoral rights when using his or her right to free movement, because this would result in a restriction of or disadvantage regarding the exercise of the right to free movement. At the time of writing, no preliminary references on this issue had been made, although there is some national litigation.[72] Nevertheless, even if the Court of Justice were to extend its case law on free movement to expatriate voting, Member States may justify such a restriction with an appeal to their constitutional tradition or the solidarity with own nationals that still have a real link with their system. Equal granting of voting rights in national elections is even more sensitive than the equal division of social solidarity rights among Union citizens.[73] The justification to only include Union citizens with a real link can be invoked convincingly by Member States. At the same time, the 'real link' case law of the Court of Justice in the context of social rights and European citizenship might present a solution with regard to the entitlement to vote in national elections.[74] In this sense, a Union citizen should be able to vote in national elections of a host Member State whenever this European citizen has a real link with the society of this Member State. There are two options. First, national electoral rights could be granted after the EU citizen has formed a real link with the host society, taking into account a certain period of residency as well as the personal circumstances of the Union citizen. Second, when an EU citizen has a permanent residence right in the host society on the basis of Directive 2004/38, the right to participate in national elections could be established, after five years' continuous residence.[75] In this situation, voting rights could be granted based on the degree of integration in the society of the Member State. At the same time the Member State of origin should grant electoral rights for national elections for the period in which the European citizen does not have a sufficient link with the new host Member State yet. From this perspective, Union citizens may have to be resident for a certain period of time as a precondition to be entitled to vote in a host Member State. For example, a national would be able to vote in the national elections in the Member State of origin for five years, and after five years in the host Member State, on the basis of a sufficient degree of integration.[76]

However, such a system could lead to a fragmented landscape of electoral rights: some Union citizens with a real link could participate in national elections in a host Member State, while others – who are not sufficiently integrated – would be excluded from the right to vote or to stand as a candidate. Although the granting of electoral rights founded

72 EU Citizenship Report 2013, EU Citizens: Your Rights, Your Future, p. 22. *James Preston versus UK Government* is one example.

73 Nic Shuibhne (2010), p. 1623, who is in favour of the approach of Kochenov and argues that despite this sensitivity, the granting of political national rights to EU citizens is even more critical than social rights, for the long-term health of the EU as a polity. See also Shaw (2007) (b).

74 On the 'real link' requirement in the case law on social benefits see Chapter 4, Section 4.4.2.2.

75 Article 16(1) of Directive 2004/38.

76 Five years of residence has been accepted by the Court in cases concerning social benefits for students as appropriate to measure the degree of integration in the host Member State. Such criterion may be used similarly with regard to political rights. See in the same sense Article 24(2) of Directive 2004/38.

on sufficient integration instead of nationality would be appropriate, the solution is not perfect, since it would involve more legal uncertainty, including the question of when someone is sufficiently integrated to be entitled to vote and even stand as a candidate for national elections. Moreover, the idea that European citizens should be able to participate in the political sphere in the Member State in which they reside is not without objections. Since national elections not only concern current legislative choices that affect residing European citizens, but also future political choices for the next generation, the right to vote and stand as a candidate in national elections should not be handled lightly. In this sense, granting voting rights based on residence would not be desirable.[77]

Moreover, the fact remains that the right to participate in national elections as part of the electoral rights of Union citizens is not included in the Treaty. Although this means that it would not be prohibited to extend political rights to national elections,[78] it seems that the Member States *explicitly* left out the possibility to vote on the national level. The fact that the Treaty is silent on national elections does not support discretion for the Court of Justice to interpret these political rights in the context of free movement. In the first place, there is a clear lack of competence to grant such rights to Union citizens, especially since electoral rights on a municipal and European level are explicitly mentioned. In the second place, justifications for excluding nationals of other Member States from participating in national elections would obviously be present.

In the most recent EU citizenship report, the European Commission reported efforts taken by way of political dialogue with Member States in order to identify solutions to the loss of political rights by Union citizens who exercise their free movement rights (disenfranchisement).[79] One of the key actions announced by the Commission in May 2013 was proposing "constructive ways to enable citizens to fully participate in the democratic life of the EU by maintaining their right to vote in national elections in their country of origin."[80] These "constructive ways" do not necessarily need to be legislative, but if the Commission wishes to propose legislation to extend the national electoral rights, the question remains what legal basis could be used. Article 21(2) TFEU, the legal basis regarding free movement of Union citizens, might be used as a legal basis for such legislation. Still, the fact that Article 22 TFEU does not include electoral rights for national elections cannot be denied. Another option would be legislation adopted by the Council unanimously and, after consent of the European Parliament, provisions to strengthen or to add to the rights listed in Article 20(2).[81] In this situation, the specific European citizenship rights would be extended. However, it seems unlikely for the

77 Bauböck (2012), p. 3.

78 Kochenov (2009), p. 222.

79 EU Citizenship Report 2013, EU Citizens: Your Rights, Your Future, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, COM (2013) 269 final, p. 34.

80 EU Citizenship Report 2013, EU Citizens: Your Rights, Your Future, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, COM (2013) 269 final, p. 39.

81 Article 25 TFEU provides that the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen

Council to adopt such an extension of voting rights unanimously.[82] The Commission might have the support of the European citizens (or: the NGOs representing them) to broaden the political rights to national elections. Up until now, it seems that the action of the Commission is softer and focuses on political dialogue with Member States, rather than taking the initiative for legislation solving the electoral gaps of migrating Union citizens.
Notably, on 1 January 2013, a citizens' initiative based on Article 11(4) TFEU was registered, in which the Commission is called upon to enhance voting rights for Union citizens in national elections.[83] The initiative proposes to grant European citizens residing in another Member State the right to vote in all political elections in their country of residence, on the same conditions as the nationals of that particular State.[84] The Commission's action, however, is aimed at the Member State of origin, so that European citizens do not lose their right to vote in national elections of their Member State, when they reside in another Member State.

5.4.3 Electoral rights regarding municipal elections

Union citizens have the right to vote and to stand as a candidate in municipal elections in other Member States, on the same conditions as the citizens of the host Member State.[85] The underlying secondary legislation implementing this right is Directive 94/80/EC.[86] This Directive is based on principles similar to those of the Directive on electoral rights regarding the European Parliament.[87] Equal treatment of Union citizens, once they have exercised their right to free movement, is the core principle of the Directive and Article 22 TFEU. These electoral rights are granted according to the electoral system of the host Member State. The Directive interferes as little as possible with the national procedures for municipal elections. Nevertheless, the adoption of the Directive was not easy and its implementation took much effort because of national constitutional provisions that connected voting rights to nationality. The fundamental difference between suffrage for municipal elections and electoral rights regarding the European Parliament is that the direct elections for the European Parliament already fell within the scope of Union law, while the municipal elections still belonged to the sole competence of the Member States. This difference between Union citizens' electoral rights with regard to European elections and those with regard to municipal elections is significant.

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or to add to the rights listed in Article 20(2). This procedure could serve to add electoral rights regarding national elections to the rights listed in Article 20(2) TFEU.

82 Shaw (2007) (b), pp. 2559-2560.

83 See Chapter 5, Section 5.4.2.

84 The deadline for the collection of signatures was 28 January 2014. See http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000003/en.

85 Article 22 TFEU and Article 40 of the Charter.

86 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ L 368, 31.12.1994, pp. 38–47.

87 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329, 30.12.1993, pp. 34–38.

Greece, for instance, had to adapt the conditions for municipal elections in its national law because it only entitled persons with knowledge of the Greek language to vote.[88] In France, Germany and Luxembourg, no electoral rights were granted to non-nationals at all. In France this resulted in a decision of the *Conseil constitutionnel* that the French Constitution had to be amended in order to comply with Article 22 TFEU, at least as far as the municipal elections were concerned. The elections for the European Parliament were regarded as extraneous to the French state institutions and therefore did not interfere with French sovereignty.[89] The German Basic Law had to be revised in order to broaden the personal scope of electoral rights to non-nationals. In Spain, the right to stand as a candidate in municipal elections was preserved for Spanish nationals only. This constitutional provision was also modified before the ratification of the Maastricht Treaty.[90] Only three Member States, at that time, granted electoral rights to non-nationals: Denmark, Ireland and the Netherlands.[91]

Hence, in a political and constitutional sense, the suffrage in municipal elections turned out to be a sensitive topic in various Member States. In 1996, after the deadline for implementation had expired, the Commission initiated infringement procedures against 11 Member States: Belgium, Germany (Bremen), Greece, Spain, France, Italy, the Netherlands, Austria (seven *Länder*), Portugal, Finland (the Åland Islands) and Sweden. During these infringement procedures, the Member States fulfilled their obligations, except for Belgium, which was eventually brought before the Court of Justice. Belgium argued before the Court of Justice that the national implementation of the Directive had been delayed because the Constitution had to be revised before municipal electoral rights could be granted to non-nationals. The Court of Justice ruled, as is well-established in its case law: a Member State may not "plea provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive."[92]

Although national constitutional law had to be amended in order to comply with the Directive, the electoral rights are substantially grounded in national electoral systems and their conditions (the substantive part). This means that the Court accepted the Italian condition that a Union citizen has to reside in the region concerned at the time of eligibility for election to a regional assembly when nominees are put forward. This case concerned an apparent Italian national who invoked Article 22 TFEU (and the Charter and the ECHR) because she did not satisfy the residence requirement.[93] Although this particular situation was not covered by Union law, because it concerned an internal situation, this residence condition may also cause restrictions to nationals of other Member States. The case shows the cautious attitude of the Court of Justice towards too much interference with the electoral systems of the Member States.

88 Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections COM (2002) 260 final, p. 7. In other reports the Commission makes more enthusiastic statements with regard to the participation of Union citizens in elections in other Member States. See also Shaw (2007) (a), p. 191.

89 See on the development in France also O'Leary (1996), pp. 227-233.

90 Oliver (1996), pp. 473-498.

91 Closa (1992), p. 1149.

92 C-323/97, *Commission v Kingdom of Belgium* [1998] ECR I-04281, par. 8.

93 C-535/08, *Pignataro* [2009] ECR I-00050 (summary publication).

Another difficulty in the establishment of electoral rights in local elections was that the definition of 'municipal elections' is not the same in every Member State. The Directive therefore applies to the broad definition of "basic local government units", which "are elected by direct universal suffrage and are empowered to administer […] certain local affairs on their own responsibility."[94] A list of these basic local government units is annexed to the Directive. This definition also means that only directly elected positions in municipal government are subject to the right to vote and to stand as a candidate for Union citizens, which means that the head of the local government unit might be chosen in an indirect manner. In some Member States, the position of mayor is preserved for their own nationals, which is not regarded an infringement of the Directive because the mayor is not elected directly. France, for instance, had a problem with the right of Union citizens from other Member States standing as a candidate for the position of mayor because in France mayors have the power to elect the members of the Senate (in a college of grand electors).

The Directive also provides for derogations. If 20 per cent or more of the group of Union citizens who are entitled to vote in a Member State consists of nationals of other Member States, the Member State can impose residence requirements as a precondition to electoral rights. This derogation from equal voting rights in municipal elections has only been used by Luxembourg because a large percentage of non-national Union citizens reside in Luxembourg. Union citizens with the nationality of another Member State have to meet two preconditions in order to vote in Luxembourg. The right to vote is restricted to those Union citizens who have had their legal domicile in the territory of Luxembourg and have resided in its territory for at least five years before registration. The right to stand as a candidate in municipal elections is dependent on residency. Luxembourg requires non-national citizens of the Union to have resided there for at least five years prior to submitting their application.[95] Belgium has made another reservation. It requires a listed number of local governments to set a minimum residence period for voters, prior to the possibility to stand as a candidate in municipal elections. This derogation was specifically included in the Directive in view of the different language communities in Belgium. The fear was that the Directive would alter the linguistic minorities.[96] The Commission assesses every six years whether the reasons for the derogation are still valid and reports its findings to the European Parliament.[97]
Article 5 of the Directive provides for an exemption from the equality of political rights: the Member States may preserve the position of head of office for their own nationals

94 Article 2 of Directive 94/80/EC.
95 The Commission assessed the percentage of voters from another Member State in Luxembourg, which was 37.6 per cent in 2005. Report from the Commission to the European Parliament and to the Council on granting a derogation pursuant to Article 19(1) of the EC Treaty, presented under Article 12(4) of Directive 94/80/EC on the right to vote and stand as a candidate in municipal elections, COM(2005) 0382 final.
96 Lewis (1998), pp. 497-498.
97 In August 2005, the Commission reported for the second time: Report from the Commission to the European Parliament and to the Council on granting a derogation pursuant to Article 19(1) of the EC Treaty, presented under Article 12(4) of Directive 94/80/EC on the right to vote and stand as a candidate in municipal elections COM(2005)382 final.

only. In Hungary, for example, the position of mayor in any local government and the City of Budapest is preserved for Hungarian nationals only.[98]

The link between European citizenship and political rights in the context of municipal electoral rights is clear. There is an entitlement to vote and to stand as a candidate in municipal elections for European citizens in other Member States, directly on account of Union law. The European Union constitutes a political nexus between a Union citizen and the polity of another, host Member State.[99] National constitutions have been amended in order to guarantee this entitlement to equal access to electoral rights for Union citizens. Since European citizens are affected by municipal decisions in their daily life, they have the opportunity to influence the exercise of public power. This right, to influence and participate in the way the municipal sphere is governed, is independent from Union citizenship and is activated whenever a Union citizen resides in the territory of another Member State. In practice, the right to vote and stand as a candidate in municipal elections for Union citizens in another Member State is limited. The system of the Directive is based on the principle of equality, which means that Union citizens have the right to equal access to municipal elections, but do not have an entitlement to electoral rights as such. Moreover, derogations from the right to vote and stand as a candidate are explicitly allowed and are used by the Member States to exclude non-nationals from municipal elections.

The right to vote and to stand as a candidate in the municipal elections of a Member State on an equal footing with its own nationals reveals how the political rights of Union citizens interact, i.e. how the constitutional values of the Union and its Member States are knit together. On the one hand, the Member States had to revise their constitutions in order to comply with the European norm that Union citizens have the right to equal voting and to stand as a candidate in all Member States. On the other hand, European legislation is limited and respects the constitutional choices of the Member States. The Union citizen may thus vote on account of Union law within the legal system of a particular Member State, according to the conditions set for nationals of that Member State. In this sense the electoral rights for EU citizens in municipal elections contribute to the constitutionalisation of the European Union. Since EU citizenship strengthens municipal electoral rights, the Union enhances democratic links between non-national EU citizens and a host Member State. The right to vote and stand as a candidate in elections are part of the fundamental political rights of Union citizens. From the perspective of the European Union as a system consisting of the European Union and the constitutional structures of the Member States, such electoral rights granted by EU law but effectuated by Member States' legal orders contribute to a more democratic notion of EU citizenship. EU citizenship in turn affects the electoral systems of the Member States, which are part of the constitutional notion of the European Union. Political participation on municipal as well as on European level "could foster feelings of belonging on both the transnational and subnational level in other Member States than that of one's nationality,

98 Article 70(2) Hungarian Constitution.
99 Shaw (2007) (a), p. 48.

and thus further challenge national identity as the primary political identity."[100] In this sense the electoral rights add to the political component of EU citizenship and of democratic legitimation of legislation either on EU level or on local level, thereby enhancing democracy as part of the common ideology of the Union.

The whole system of voting rights in the European Union is complex and has a multilevel character. Taking into account the fact that the right to vote in elections for the European Parliament is also implemented in national constitutions, and incorporated in the system of 27 Member States (in the Netherlands, for instance, in Chapter Y of the *Kieswet*), this picture of mutual influence of the constitutional levels within the Union is significant. In the concept of a multi-layered Union, citizens are provided with electoral rights regarding the different parts of governance.

5.4.4 The right to submit complaints to the European Ombudsman

According to Article 24 TFEU,[101] European citizens have the right to submit a complaint to the European Ombudsman concerning the behaviour of one of the EU institutions. Not only European citizens may complain, but any natural or legal personality that resides in the territory of the Union.
In the context of constitutionalisation, the introduction of the European Ombudsman has been important, since this function is significant for the protection of citizens against the arbitrary exercise of public powers, protecting the 'right to be heard' and 'good administration.' In the first place, the European Ombudsman was established in order to enhance the concept of European citizenship. At the same time, the European Ombudsman has had an impact on the concept of European citizenship.

The right to submit a complaint to the Ombudsman may be defined as a political right. In the role of guardian of the citizens' rights, the Ombudsman receives complaints, investigates these complaints and reports on his or her findings. In this sense, the possibility to submit a complaint to the European Ombudsman supports the political participation of Union citizens. The function of the Ombudsman originates from Sweden, which established an *Ombudsmann* after the deposition of the King in 1809 in order to create supervisory agencies that would control and monitor the executive powers. Generally, the role of the Ombudsman is twofold: first as a form of redress for citizens, and second, to create more accountability for the executive powers.

The Ombudsman is well established in various countries, but has a different role according to the legal traditions in the relevant state. Some Ombudsmen can be defined, for instance, more as 'human rights watchdogs'; others have a mandate more focused on the administration of the government. In some countries, specific substantive areas are covered by the competence of the Ombudsman. In Sweden, the four Ombudsmen have mandates in specific areas, such as equal opportunities or the rights of children.

100 Besson & Utzinger (2008), p. 195.
101 Article 228 TFEU and Article 43 of the Charter.

In Greece, the post of Ombudsman is called Citizen's Advocate and is specified in five citizens' themes (such as health and social welfare, and quality of life).[102]

The European Ombudsman was recently established, compared to the other Union institutions, on the initiative of the Spanish and Danish delegation in the early 1990s. When the Spanish Minister Felipe Gonzalez proposed the concept of European citizenship in 1991, he emphasised the need for a mechanism to protect the special citizens' rights in Europe. In a memorandum following this Spanish proposal at the IGC in 1991, the Danish government argued that a European Ombudsman should be established at European level in order to strengthen the democratic basis of European cooperation. The European Ombudsman was created in order to enhance a "Citizens' Europe."[103]
Spain wanted to establish the European Ombudsman in order to create a direct link between the individual and the European Union, whereas Denmark wanted to enhance the democratic legitimacy of the European Union towards its own nationals. Both Member States regarded the European Ombudsman as a link between the European Union and individuals. Not all Member States were enthusiastic about the proposal for a European Ombudsman and the European Parliament was also sceptical: they feared that they would lose powers to the Ombudsman. The solution was a compromise. The European Parliament was given the right to control (to elect, but also to request the Court to dismiss the European Ombudsman[104]) the European Ombudsman, while at the same time the role of the European Parliament was strengthened by establishing the right to petition to the European Parliament.[105] Furthermore the role of the European Ombudsman is limited to Union institutions that produce 'maladministration', so the European Ombudsman would not become a 'pan-European Ombudsman' and Member States bodies would not be under the scope of scrutiny.[106] The institutions which might be subject to inquiry are, in principle, all institutions, bodies, offices or agencies of the European Union, with the exclusion of the Court of Justice acting in its judicial role.[107]

In the first annual report in 1995, Söderman, the first European Ombudsman, defined maladministration as when "a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law", which constitutes a quite broad scope of review.[108] The scope of those entitled to submit a complaint is also broadly defined in Article 24 TFEU. The right to turn to the European Ombudsman is open to Union citizens, as well as to any natural person residing in one of the Member States, or a legal person having its registered office in the Union. It is therefore not linked directly to Union citizenship, but is also granted based on residency in the European Union.

102 Heede (2000).
103 Magnette (2005), p. 106.
104 Article 228(1) and (2) TFEU.
105 Article 24 TFEU and Article 43 of the Charter.
106 Gregory and Giddings (2001), pp. 76-79.
107 Articles 24 and 228(1) TFEU.
108 European Ombudsman, Annual Report 1995, p. 17.

Until the spring of 2013, the European Ombudsman had dealt with more than 30,000 complaints, submitted by European citizens. Of this number, approximately 3,500 led to investigations of maladministration by European institutions. In the year 2012, 2,442 complaints were submitted to the European Ombudsman, of which 30 per cent were within the mandate of the European Ombudsman. 450 inquiries were opened on the basis of complaints. In addition, 15 inquiries were launched on the Ombudsman's own initiative.[109] European citizens seem to find their way to the European Ombudsman for complaints about the behaviour of the institutions. Most of the complaints concern the Commission.

Although the European Ombudsman's standard of review is limited to maladministration, the Ombudsman urged the Commission to inform the claimant, meaning that the Commission has to give reasons for the lack of legal action against a Member State. Two specific, and connected, areas may be mentioned in which the European Ombudsman has affected the way the European Union institutions maintain their relationship with individuals.

The first important achievement is the increasing transparency and the way the Commission informs a claimant in a procedure according to Article 258 TFEU. The second important achievement is the creation of a Code of Good Administrative Behaviour, which was adopted by the European Parliament in 2001.[110] The European Commission annexed a Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public to the Rules of Procedure of the Commission.[111] The Ombudsman drafted the text of the Code in order to lay down the principles with which the institutions of the European Union should comply in their relations with the public. In the Charter, the right to 'good administration' has been included as a Union citizens' right at the request of the Ombudsman.[112] It constitutes the right for everyone to have his or her affairs "handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."[113] The Code is intended to explain in more detail what the Charter's right to good administration means in practice. The Code is not binding law. However, the Charter has been given the same legal status as the Treaties, and has been binding and part of primary law since Lisbon.[114] The European Ombudsman explicitly refers to the Charter.[115]

109 European Ombudsman, Annual Report 2012, p. 18.

110 Minutes of the European Parliament's session from 3 to 6 September 2001, OJ C 72 E/ 331, 21.3.2002.

111 Rules of Procedure of the Commission, OJ L 308, 8.12.2000, pp. 26–34.

112 The Explanations relating to the Charter do not mention the European Ombudsman, however, but refer to the case law of the Court of Justice. The first step to acknowledging a general principle of good administration is found in the speech of Söderman in the Convention in 2000. Lanza (2008).

113 Article 41(1) of the Charter.

114 Decisions of the European Ombudsman are not binding, but individuals may invoke their right to good administration before the Court, when they fulfil the relevant conditions. At the same time, the European Ombudsman now has a stronger 'tool' addressing the EU institutions.

115 See e.g. Case 2635/2010/(MB)TN, in which the European Ombudsman refers explicitly to the Charter (Article 41) and the Code of Conduct with regard to the European Commission. http://www.ombudsman.europa.eu/en/cases/decision.faces/en/11890/html.bookmark.

In 2010, the European Ombudsman adopted a code including 'Public Service Principles',[116] concerning a code of conduct with regard to civil servants of the institutions.[117] With regard to the principle of transparency, the European Ombudsman made strong efforts in order to persuade the Commission to improve its communication with the public, and especially the communication with claimants about infringement procedures. In 1996 and 1997, the Ombudsman started three major investigations on the transparency of the Commission in its communication in infringement procedures, with regard to the access to documents and the recruitment of staff. He considered that the Commission should improve communication with individuals who reported infringements of Union law in a Member State. The Commission declared that it was willing to improve communication with the complainant, for example by informing the complainant at least within a year about the status of the procedure.[118]

Moreover, in the following years, the European Ombudsman remained concerned with the openness and transparency of the Union institutions regarding its citizens in a broad sense. As another result of the inquiries on transparency, Regulation 1049/2001[119] on the access to documents may be mentioned as evidentiary of clear indications of the opinion of the European Ombudsman on openness and transparency.[120] In 2009, 36 per cent of the complaints still concerned non-transparency and the lack of access to documents in Union institutions.

Two weaknesses of the European Ombudsman are that these decisions are not binding on the institutions and that the general public does not always know what the Office of the European Ombudsman could mean for them.[121] Nevertheless, although not legally binding, the investigations of the European Ombudsman strongly promote transparency and access to documents in Union actions, and monitor the way institutions deal with these principles. The decisions of the Ombudsman are respected by these institutions, or force them to present arguments if they decide otherwise. Since the Charter entered into force, access to documents and the right to good administration are included in Union law, which may enhance the role of the European Ombudsman as guardian of Union citizens' interests.

The European Ombudsman was established in order to protect the rights of the Union citizens and to make the Union more accountable at the same time (also to benefit

116 This code expresses the following principles: Commitment to the European Union and its citizens, Integrity, Objectivity, Respect for Others and Transparency. See http://www.ombudsman.europa.eu/showResource?resourceId=1340001538815_Public%20service%20principles_EN.pdf&type=pdf&download=true&lang=en.

117 Based on this Code of Public Service Principles, the European Ombudsman has started a case against the European Commission.

118 Decision in the own initiative inquiry 303/97/PD, mentioned in the annual report of 1997, p. 170, and Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law, COM(2002) 141 final.

119 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2011.

120 Leino (2004), pp. 333-367.

121 Cadeddu (2004), pp. 161-180; see for the critical notes on the role of the European Ombudsman, pp. 179-180.

citizens). The question remains of how to evaluate the role of the European Ombudsman in connection with Union citizens' rights and constitutionalisation of the European Union. Although the mandate of the European Ombudsman is rather limited in terms of scope of review and enforcement, its role should not be underestimated. Especially from the perspective of constitutionalisation of the Union, which is defined as the acquirement of constitutional features normally attached to a constitutional legal order, the European Ombudsman is a significant additional layer of scrutiny.

5.4.5 The right to petition to the European Parliament

As observed, the right to petition to the European Parliament was included in the Treaty of Maastricht in reaction to the Parliament's concerns that the European Ombudsman would have too much power. According to Article 24 TFEU,[122] every Union citizen has the right to address a petition to the European Parliament concerning a subject that falls within the activities of the Union (the material scope) and directly affects him or her (or the group in a collective action). Article 24 TFEU refers to the conditions of Article 227 TFEU, which also includes every legal and natural person who resides in the European Union or has a registered office in one of the Member States. The right to petition is therefore not an exclusive entitlement for Union citizens, but is granted to third-country nationals too.

Within the European Parliament, the Committee on Petitions investigates the petition submitted by an individual and will take further action, if the petition is admissible.

> An example is the petition of various individuals (*Bund für Umwelt und Naturschutz Deutschland* and some 97 co-signatories) in which they claimed that Germany failed to take account of Union law on air quality in German environmental legislation because the German authorities had granted a licence for the installation of a coal-fired power station. The committee in the European Parliament responsible for this case asked the Commission for assistance and information. The Commission had to give reasons as to why it did not consider the granting of this particular licence incompatible with the Directive on air pollution.[123] Another example is a petition in which a complaint was lodged against the 'Passenger Service Charge' in Malta. This departure tax had to be paid by anyone flying from Malta to other European Member States. The Commission found that this tax was discriminatory and decided to start an infringement procedure. Finally, the tax measure was withdrawn after local elections.[124]

In the years 2004, 2005 and 2006, approximately 1,000 petitions a year were submitted to the European Parliament. Of these petitions, around 600 were admissible, and between 150 and 200 petitions a year have been linked to or given rise to infringement

122 Article 227 TFEU and Article 44 of the Charter.
123 Petition 1708/2008.
124 Petition 415/2005 on the departure tax in Malta and Petition 419/2005 on the departure tax in Malta.

procedures.[125] In 2010, 1,655 petitions were submitted to the European Parliament. Of these petitions, 53 per cent was admissible.[126]

It seems that Union citizens use (although on a small scale) their right to petition to the European Parliament. Nevertheless, 1,000 petitions from 500 million Union citizens is not a significant number. The right to petition might, however, have an actual effect, since it is used as an instrument to indirectly have issues placed on the agenda of the European Commission. If the Commission does not start an infringement procedure, it is obliged to give reasons for this decision to the Union citizen who submitted the petition. In the institutional setting of the European Union, and especially with the high thresholds to stand before the Court as an individual, the right to petition to the European Parliament can be seen as a valuable instrument for the individuals affected by Union law to exert some pressure on the European Commission. It is not, however, earth-shattering in terms of practical effects.

5.4.6 The citizens' initiative

Another important political right of Union citizens is the right to submit an initiative for European legislation to the European Commission. As indicated, this right is relatively new in European law and creates a form of direct, participatory democracy.[127] Since the Treaty of Lisbon, European citizens are entitled to start a citizens' initiative concerning the need for legislation in a certain area. This procedure creates a direct connection between the Union legislature and European citizens. Rather than representative democracy, the citizens' initiative constitutes a form of direct democracy, which is based on bottom-up input, rather than on a top-down relationship. Nevertheless, the question can be posed whether the citizens' initiative actually enhances citizens' participation, or whether the citizens' initiative is a tool for NGOs and lobby groups to promote their interests.

A citizens' initiative must be supported by at least one million citizens from a significant number of Member States in order to request the Commission to submit a proposal in a certain field. The subject of the proposal should be in accordance with the procedures of decision making.[128] The drafting of the Regulation governing the citizens' initiative was not without obstacles. In March 2010, the European Commission adopted a proposal for a Regulation on the procedure of the citizens' initiative. At the end of 2010, the European Parliament adopted a legislative resolution with a view to the adoption of the Regulation on the citizens' initiative and reached an agreement with the Council on the Regulation of the citizens' initiative.[129] In the Commission proposal, the one million signatures

125 According to the Commission in its Fifth Citizens' Report COM(2008)85, p. 5.
126 See http://www.europarl.europa.eu/news/en/headlines/content/20110513STO19332/html/EP-received-1655-citizens'-petitions-in-2010.
127 The citizens' initiative was proposed in June 2003, see CONV 811/03 of June 2003.
128 Article 11(4) TEU and Article 24 TFEU.
129 European Parliament legislative resolution of 15 December 2010 on the proposal for a regulation of the European Parliament and of the Council on citizens' initiative (COM (2010)0119 – C7-0089/2010 – 2010/0074(COD).

should come from at least one third of the Member States. The European Parliament amended the proposal for a citizens' initiative, making the procedure easier to access. The threshold of the number of Member States was, for instance, lowered to one quarter. A minimum number of signatures is stipulated for each Member State, based on the number of its seats in the European Parliament.[130] Regulation 211/2011 was finally adopted in February 2011. According to the Regulation, an initiative may be started by a committee of citizens consisting of at least seven European citizens that reside in at least seven different Member States. After the initiative is registered, the Commission has three months to examine the request. The Commission is under the obligation to justify its decision.[131] The citizens have to be given the opportunity to present their proposal in a public hearing if the initiative complies with the procedural rules.[132] Within one year after the registration of an initiative, the one million signatures of citizens residing in at least seven Member States have to have been collected.

The first initiatives are now online and registered on a special website of the European Commission.[133]At the time of writing, no initiatives procedures had been closed, so it is still unclear how the European Commission will treat these initiatives in practice. The actual impact of the citizens' initiative is therefore still unknown and is much dependent on how the Commission and the other institutions will deal with submitted initiatives.[134] One specific citizens' initiative is of particular interest in the context of this thesis: the citizens' initiative 'Let me vote', in which the citizens of the Union urge the Commission to propose legislation in order to entitle European citizens to vote in national elections in other Member States, based on residency, not nationality.[135] As observed, the European Commission has mentioned the right to vote in national elections for European citizens as one of its key actions for the coming period. Although, obviously, the right to vote in national elections is not within the competences of the European Union, the initiative may gather enough support to place the issue on the agenda. Various other initiatives have been submitted; some have been registered and are open for signatures until the end of 2013 to mid-2014, others have been declared inadmissible.[136]

What does the citizens' initiative mean for the link between European citizenship, and political rights and democracy? Although one of the major points of criticism regarding the effectiveness of the citizens' initiative is that the Commission is not obliged to initiate legislation, there might be a more subtle effect. Usually the European Council sets the agenda for the long term, based on the initiatives presented by the European Commission. The Council of Ministers and the European Parliament may also request

130 Article 7 and Annex 1 of Regulation 211/2011.
131 Article 10(3) of Regulation 211/2011.
132 Article 11 of Regulation 211/2011.
133 See http://ec.europa.eu/citizens-initiative/public/welcome?lg=en.
134 Editorial (2008), Dougan (2003), pp. 929-940, Senden (2011) (a), pp. 773-774.
135 This initiative had not been submitted yet, at the time of writing.
136 For instance an initiative proposing a 30 km/h (20mph) EU-wide default speed limit for urban/residential areas and a proposal to suspend the 2009 Energy and Climate Package. Other initiatives have been declared inadmissible, e.g. an initiative that proposed that the Commission recommend singing the European Anthem in Esperanto.

the Commission to propose legislation.[137] The fact that European citizens may also propose for the Commission to take action is an extra incentive for the Commission to act in a certain area, especially since the Commission wants to "place the citizen in the heart of its activities."[138] Such a citizens' initiative may also enhance the political position of the European Commission to propose legislative actions regarding issues that are sensitive for the Member States. In co-decision-making, the European Parliament, as representative of the citizens of the Union, will not easily overrule a proposal of more than one million Union citizens. At the same time, this might create some tension. Should the Commission only choose to propose legislation initiated by the citizens' initiative in order to support its own agenda, the citizens' initiative would have less democratic power. Also, there is the fear that Union citizens will be disappointed, since certain proposals cannot be dealt with by the Commission because they exceed the scope of Union law or disregard the division of competences.[139] For Union citizens the rejection of proposals may then be disappointing, turning the initiative into a paper tiger: looking impressive at first glance, but turning out to be a weak instrument.

However, the future will show how the citizens' initiative is dealt with. In a positive sense, the initiative creates a bottom-up input in the decision-making process, and moreover, it might bring citizens of the Union together in a transnational form of democracy. Notably, the citizens' initiative creates a democratic European space in which the European citizens express their views without borders, creating European political spaces for European citizens on particular issues.[140] With the citizens' initiative, European citizens from different Member States cooperate in order to participate in the legislative process. This might create awareness, and strengthen the link between European citizenship and the democratic legitimacy of the European Union. The citizens' initiative may in a sense create a "European demos",[141] since the initiatives are based on a cooperation of citizens from at least seven different Member States.

5.4.7 Good governance and the role of civil society

After a serious political crisis in 1999, when the members of the Santer Commission were requested to resign because of fraud and mismanagement, accountability and governance of the European Commission became the topic of debate. In 2001, the Irish 'No' against the Treaty of Nice was another sign of the institutional crisis of the European Union. In the aftermath, the European Commission launched a White Paper on governance. In its introduction, the Commission emphasised: "[D]emocratic institutions and the representatives of the people, at both national and European level can and must try to connect Europe with its citizens."[142] The Commission therefore proposed various

137 Articles 241 and 255 TFEU.
138 According to its 2010 work programme.
139 For instance 'My Voice against Nuclear Power,' which was not registered because the proposed Treaty amendments are simply out of the scope of competences for the Commission.
140 Dougan (2011) (b), p. 1815.
141 Currie (2009), p. 390.
142 European Governance, A White Paper, COM(2001) 428 final, p. 3.

solutions in its White Paper in order to enhance "good governance" in the Union. The White Paper became subject to academic criticism because the Commission did not address the lack of accountability towards citizens, but focused on other institutions and openness as a solution to the lack of legitimacy.[143] In 2002 the Commission adopted a Communication on general principles and standards for the consultation of interested parties by the Commission.[144]

Inclusion of civil society in the decision-making process was one of the attempts to reconnect Europe to its citizens, according to the follow-up report on European governance published in 2003.[145] The Commission stressed that improvements were needed in bottom-up involvement in policy making in the European Union. The inclusion of civil society in the dialogue was mentioned as one of the ways to include people in the Member States at the European level of policy and decision making. However, although consultation should enhance legitimacy of EU policy and legislation, the Commission, referring to the viewpoint of the European Parliament, stated that "first and foremost, the decision-making process in the EU is legitimised by the elected representatives of the European peoples".[146]

Civil society is a method promoting input from the citizenry by independent groups that have a specific interest in a subject. Civil society in the language of the European Union is organised through 'stakeholders' that can be consulted on specific themes, mostly through the Internet.[147] Besides consultation through the Internet, the European Commission has various contacts with experts in the Member States through specific Networks and NGOs.[148] An example of the consultation of civil society is the consultation that was held concerning the citizens' initiative. A hearing of stakeholders was held in order to obtain input from stakeholders on the way the citizens' initiative had to be regulated. The consultation resulted in 160 replies from individuals, 133 responses by organisations and 36 replies from public authorities regarding the Green Paper.[149] Although the consultation of civil society enhances democracy, the citizens are individually represented by stakeholders. From this perspective, civil society is founded on representative democracy, rather than on direct, participatory democracy. The procedure lacks support and control of decisions of grassroots citizens in this sense.[150]

143 See for instance Kolher-Koch (2001).

144 Communication of the Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704 Final.

145 Report on European Governance (2003), see http://ec.europa.eu/governance/docs/comm_rapport_en.pdf.

146 Communication of the Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704 Final, p. 5.

147 See http://ec.europa.eu/yourvoice/consultations/index_en.htm for various topics on which the opinion of the public and organisations has been requested.

148 Obravdovic and Alsonso Vizcaino (2006), p. 1052.

149 On 25 February 2010 a stakeholder meeting was held on the citizens' initiative. See also Outcome of the public consultation on the Green Paper on a European Citizens' Initiative, SEC (2010)370.

150 Bouza García (2012), pp. 261 and 272.

Since the Treaty of Lisbon, consultation of civil society has been part of primary EU law. European democracy is founded on two types: *representative* democracy and a form of *participatory* democracy. The term participatory democracy was abolished in the Treaty of Lisbon, even though reference to participatory democracy was made in the Constitutional Treaty.[151] Article 11(1) TEU expresses that the EU institutions, by appropriate means, shall give citizens and representative associations the opportunity to make their views known in all areas of Union law. Article 11(2) TEU incorporates the dialogue between the institutions and civil society in the Treaty provisions.[152] Moreover, since the Treaty of Lisbon consultations have been held in order to enhance the political influence by Union citizens, according to Article 11(3) TEU. One of the problems of these new paragraphs is that it remains unclear which legal subjects are being referred to exactly. Whereas Article 11(1) refers to 'citizens and representative associations', Article 11(2) addresses 'representative associations and civil society' and Article 11(3) mentions 'parties concerned'. It is not clear whether and how these definitions are related or include overlap.[153]

At the time of writing, it is unclear how this legal codification of civil dialogue in the Treaty will develop in case law and perhaps also in legislative and policy documents of the European Union. The question remains whether the codification and inclusion of the consultation procedures will result in an actual right to political participation for EU citizens, and whether the new Article 11 TEU will result in real citizen empowerment. Therefore the citizens themselves, but also the Court and the European Ombudsman[154] may play an important role in ensuring that consultation of civil society is more than just window dressing.[155] Moreover, one may wonder how the representative and participatory democratic principles are related. It seems that the consultation procedure aims "to give interested parties a voice, but not a vote".[156] In this sense the consultation mechanisms of Article 11(2) and 11(3) TEU complement the representative democracy in the Union, but might be criticised as having no real form of citizens' empowerment.

Despite the scepticism regarding these new forms of participatory democratic mechanisms, the impact of these paragraphs could prove to be of added value to the political rights of Union citizens in the future. Although the role of civil society is not a purely legal mechanism, it is a fact that these various forms of consultation have now been incorporated into the Treaty and therefore constitutionalised. The participatory

151 See Article 1-47 of the Treaty establishing a Constitution for Europe.

152 According to Article 11(2) TEU: "The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."

153 Mendes (2011), p. 1852.

154 See for instance Decision 948/2004/OV of the European Ombudsman expressing his willingness to review the compliance of the European Commission with the principles of consultation, stating that "[t]he Ombudsman does not exclude the possibility of a future pro-active initiative based on the Commission's Communication on minimum standards for consultation".

155 Senden (2011)(b), pp. 38-40.

156 Communication of the Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704 Final, p. 5 and Alemanno (2014), forthcoming.

practices that existed before this legal incorporation now have a legal and formal status in the Treaty.[157] Consequently, consultations at the present state of EU law are qualified as legal obligations of the institutions and in particular of the European Commission. This might mean that cases may be brought to the Court by civil society because of not having been consulted, for instance.[158]

The impact in terms of the constitutionalisation of civil society and broad consultations by the institutions is difficult to assess accurately at the time of writing. The new principles on democracy may be criticised for being unclear in the definition of who are the relevant stakeholders, therefore having a rather rhetorical meaning.[159] However, at the same time the new democratic principles have planted a new legal seed, set to enhance political involvement from the bottom up. In this sense the new paragraphs, even if poorly drafted and without binding consequences, may serve as a *potential* legal basis for the Court of Justice to strengthen political European citizenship, in the same manner as it once put flesh on the bones of European citizenship by the free movement and non-discrimination on grounds of nationality as rights for EU citizens. Much will depend on how EU citizens, stakeholders, but also the Court and the European Ombudsman will deal with issues arising under the mechanisms provided for in Article 11 TEU.

5.5 CONCLUSION: THE CONNECTION OF EUROPEAN CITIZENSHIP WITH DEMOCRACY AND POLITICAL RIGHTS

Within the European Union, the lack of democratic structures has been criticised by many scholars in the past and present. In answer to this criticism of legitimacy and democracy, new democratic mechanisms have been introduced in the Treaties. European citizenship itself has also been seen as part of the solution. Nevertheless, the European Union still struggles with its democratic nature.

As observed in the introduction of this chapter, since the Lisbon Treaty, the link between European citizenship and democracy has been strengthened. Moreover, mechanisms and options for participatory democracy and a form of direct democracy have been included in the Treaty, serving as direct and new links between the nationals of the Member States and the European legislature. Citizenship and democracy are, naturally, interrelated: in a constitutional structure, citizens decide by whom, how and within which limits the polity is governed. In the European Union, this link was not there originally, since the Union never started as a constitutional legal order.

Since European citizenship was introduced, a number of specific political rights has been incorporated in the Treaty and the Charter. An examination of the important political rights of Union citizens reveals that the political space of Union citizens is fragmented. Their rights to vote, or otherwise participate in the public sphere, depend on the exercise of free movement and are based, mostly, on equality.

157 Mendes (2011), pp. 1875-1877.
158 Craig (2010), p. 70.
159 Mendes (2011), pp. 1851-1854.

Analysing the link between European citizenship on the one hand and democracy and political rights on the other hand reveals the various efforts to include European citizens in the decision-making process in the European Union. However, the link between citizenship of the European Union and political rights is far from coherent. The political rights are scattered, they are granted on the basis of equality compared to other nationals of a particular Member State, and discretion is left to the Member States to exclude nationals from political rights.

The most evident political rights for European citizens are the electoral rights. With regard to the European Parliament, European citizens have a clear right to vote and stand as a candidate in Member States other than that of their nationality. Although the Member States have the discretion to exclude or include persons regarding the European elections, national law governing elections for the European Parliament falls within the scope of Union law. Consequently, the principles of proportionality and non-discrimination must be obeyed by the Member States. The lack of electoral rights of Union citizens, on account of Union law, in national elections, is striking in the context of European citizenship linked to political rights. Even more striking is the fact that Union citizens may actually lose their voting rights whenever they exercise their free movement rights. Whether this electoral gap in Union citizenship rights will be solved in the future remains unclear. The Commission emphasises the efforts it will take in this particular area, supported by the citizens' initiative 'Let me vote.' Still, the clear omission of these national electoral rights from the Treaty has legal meaning too and the necessary legal basis may constitute a problem as well. In this respect, one could argue that national elections do not fall under the competences of the European Union.

The most significant effect of European citizenship on political rights in the European Union concerns the municipal electoral rights. Since Union citizens may vote and stand as a candidate on an equal footing with nationals of another Member State, it was necessary to grant non-nationals access to municipal elections. Consequently, several Member States had to revise their national constitutional provisions in order to prevent discrimination on the grounds of nationality.

It is in the context of electoral rights that the contribution of Union citizenship to democracy and political rights might be the most obvious. In a way, a European voting space is created. European citizens may vote in European elections in their own Member States, on the basis of national law. At the same time, Union citizens may vote in European elections in other Member States, on the basis of Union law and according to the rules of those particular Member States. The same interconnection is seen with regard to municipal elections. Hence, even though these electoral rights amount to *national* democratic legitimation, it is a fact that these political participation rights are granted by the European Union, because of an EU citizen right to participate in the political sphere in a host Member State. In this sense the Commission argued, as long ago as 1986, that "the creation of a People's Europe argues in favour of granting local voting rights".[160] In

160 Bull. EC Supp. 7/86, Voting Rights in local elections for Community nationals, October 1986.

a pluralistic view on the European Union, voting rights on the municipal level add to European political citizenship, granting the right to vote and stand as a candidate on the basis of EU citizenship and residency in a Member State, rather than preserving these rights to nationals only.

The political rights of Union citizens are fragmented because of the way in which the different legal systems (European Union and Member States) react to and influence each other. The way in which national electoral rights are governed is of major importance to the way Union citizens who migrate to another Member State can exercise their electoral rights. The interaction between the European Union and the national political rights makes the picture a dynamic and puzzled, but also a comprehensive, one. This can also be seen in the way other political rights are constructed. Some rights are directly addressed from the European Union to its citizens (the right to petition to the EP, the right to submit complaints to the Ombudsman, and the principles of good governance); other rights are rooted in the national systems on account of the European Union (municipal electoral rights); and some rights are granted in national law only (electoral rights regarding elections for national parliaments, and the national ombudsman). All these levels together create the political sphere, a European electoral space, where Union citizens, depending on their situation, live and are able to participate in the public arena.

Initially, European citizenship was seen as a solution to make the European Union more democratic. The right to vote and stand as a candidate for the European Parliament was introduced even before the formal introduction of European citizenship. At the same time, European citizenship itself affects the notion of democracy, since European citizens need to participate in the politics of the European Union in order to feel attached to the project. In order to involve the European citizen in Union decision making, various mechanisms have been introduced in the Treaties. Although not all of these mechanisms are purely legal entitlements, they have been incorporated in the Treaty as a legal instrument. In this light, consultations of citizens by the institutions of the Union, for instance, may become a legal obligation for the institutions. One of the most promising, but very uncertain, democratic links between the Union and its citizens is the citizens' initiative. The citizens' initiative may in the future give rise to a new political space for Union citizens.

On the one hand, the impact of European citizenship on democracy and political rights is not obvious. Problems and gaps remain and the democratic deficit has not been solved by means of European citizenship and the new political rights and democratic mechanisms. On the other hand, European citizenship has clearly contributed to the strengthening of democracy as the common ideology of the European Union. In terms of constitutionalisation, European citizenship has affected the notion of democracy in the European Union, exerting pressure on the masters of the Treaty and the institutions to include citizens of the Union as much as possible. The shift to participatory democracy as a second pillar of the democratic system of the European Union illustrates this. The fact that at the time of writing the European Commission, on the basis of European

citizenship rights, was trying to convince Member States to abolish disenfranchisement practices with regard to national elections may serve as an example.

Hence, although the political rights for European citizens are fragmented and democratic issues have not been solved by their introduction, there is mutual interaction between European citizenship and democracy, which affects democracy as part of the common ideology of the European Union.

"Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."[1]

CHAPTER 6

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The effect of European citizenship on the justiciability and constitutional primacy of Union law

6.1 EUROPEAN CITIZENSHIP IN THE EUROPEAN JUDICIAL CONTEXT

6.1.1 Constitutionalisation of the Union: primacy and justiciability of Union law

As indicated in the introduction, justiciability and the hierarchy of norms are labelled as constitutional elements in the analytical framework of this thesis.[2] Traditionally, constitutional provisions are characterised by their superiority to lower, 'ordinary' law. Provisions of a constitutional ranking have primacy over non-constitutional legislative norms. Consequently, legislation of a lower ranking has to comply with the constitution. In the event of conflict with these supreme norms, conflicting provisions should be declared inapplicable or invalid. Connected to this primacy, a constitution includes, generally, judicial procedures to test the compatibility of legislation with the constitutional norms and provides that conflicting norms of 'lower' law can be declared inapplicable or invalid.[3] Judicial constitutional review is therefore one of the essential characteristics of a constitution.[4]

In the law of the European Union, justiciability and primacy exist as well, although differently from the perception of Raz.[5] Judicial procedures ensure the uniform application and primacy of Union law. With regard to what Raz calls the 'superiority'

1 Stein (1981), p. 1.
2 Chapter 2, Section 2.4.1.3.
3 Raz (2001), p. 153. This does not *per se* hold true for every constitution. In the Netherlands for instance, Article 120 of the Constitution (*Grondwet)* states: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." The establishment of a Dutch Constitutional Court has been debated, but has not resulted in a change in the constitutional structure of the Netherlands: Kamerstukken II, 2001-2002 28331 (No. 2).
4 Van Gerven (2005), p. 110, in comparison with the US system.
5 Craig (2001), p. 129.

of the constitution, primacy of Union law could be considered a comparable concept. Constitutional primacy can be described as the effect that "by denominating an issue as 'constitutional' we recognise that it is taken off the agenda of normal politics."[6] This does not mean that such constitutional issue is unchangeable but it does mean that its review needs specific attention compared to ordinary issues. In the same sense primary EU law is subject to specific legislative procedures, which require amendments of the Treaties. European citizenship has been transformed from a concept laid down in specific EU Directives on free movement to a concept of primary EU law, thereby constitutionalising the concept.[7] However, primacy of EU law is not specifically a constitutional feature in Raz's interpretation, since, in principle, all EU law has primacy. Moreover, not every subject of primary EU law is constitutional in nature. Beyond the general principle of primacy, the question is whether the Court approaches European citizenship as a constitutional concept. In that sense, constitutional primacy is understood as the manner in which the Court deals with European citizenship, whether European citizenship has been interpreted as a constitutional norm, as a high and guiding norm of EU law. The focus in this chapter lies, therefore, specifically on how the Court has dealt with cases regarding European citizenship.

6.1.2 Aim and structure of the present chapter

The two constitutional elements are brought together in this chapter to analyse the relationship between Union citizenship and judicial procedures and the impact of European citizenship on the judicial review by the Court of Justice. In the first part of this Chapter, the focus lies on the judicial review of European citizenship in terms of judicial remedies and procedures. In the second part, which is closely connected to the first part, the approach of the Court to European citizenship is discussed.

To start with, the European judicial landscape is described in Section 6.2. The relationship between the courts and procedures in the European Union is discussed, in order to set the broader scene of judicial review in the Union. Section 6.3 examines the impact of European citizenship on this judicial review. Section 6.4 elaborates on the impact of European citizenship on the 'constitutional primacy' of European law, as revealed in the approach of the Court to Union citizenship. Finally, Section 6.5 presents conclusions regarding the relationship between European citizenship and judicial review and constitutional primacy.

6 Craig (2001), p. 126.
7 Shaw (2008), p. 105, who also points out the important role of the Court in this regard in the Court's early case law.

6.2 JUDICIAL REVIEW IN THE EUROPEAN LANDSCAPE

6.2.1 Cooperation between courts: the Court of Justice and national courts in a multilevel context

The judicial landscape of the European Union is structured by different courts: the Court of Justice,[8] the national constitutional courts and the national courts.[9]
As indicated in the introduction, the European Union may be qualified as a multilevel or a composite legal order.[10] In essence, the Union is considered, in this perspective, to be a system consisting of different levels or parts of public government instead of separate legal orders. National and European law are, in this sense, intertwined and they interact in one system.

The relationship between the Court and the national courts can be placed in such a pluralistic theory, taking into account the relationship between courts and their shared responsibilities of uniform application of Union law.[11] This pluralistic cooperation between the courts was already strikingly observed by John Temple Lang, back in 1997: "[E]very national court is now a Community law court. […] In fact, national courts probably more often apply and interpret Community law than the two Community courts do."[12] This nature of judicial protection in the European Union will be discussed below regarding two important themes that have shaped this judicial dialogue between the courts in the Union in an important way: direct effect and the preliminary procedure.

6.2.2 Direct effect and primacy of Union law: obligations for national courts

Due to the direct effect of Union law, individuals have the possibility to invoke or rely on Union law before a national court. Direct effect has been famously established in *Van Gend & Loos*, in which the Court of Justice stated that "according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing *direct effects* and creating *individual rights* which national courts must protect."[13] Union provisions, including primary law as well as secondary law, which are formulated unconditionally and sufficiently precisely, may be relied on or invoked before

8 The Court of Justice of the European Union consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004). In this analysis, the main focus lies on the case law of the Court of Justice.
9 The European Court of Human Rights may also be included in the courts of the European Union. However, the ECHR does not interpret Union law; notably, the provisions on European citizenship do not fall under its jurisdiction. Therefore, the role of the ECHR is not examined in this analysis.
10 Chapter 2, Section 2.3.1.
11 For an elaboration on this judicial pluralistic co-operation: Timmermans (2012), pp. 15-25.
12 Lang (1997), p. 3.
13 Case 26/62, *Van Gend & Loos* [1963] ECR 1. The Court of Justice answered a preliminary question of the Dutch administrative tribunal (the *Tariefcommissie*) concerning the direct application of Article 12 EEC, which prohibited customs duties on imports and exports, and charges having equivalent effect. This case is also an example of a multilevel judicial process: only because of these questions, did the Court of Justice have the opportunity to declare that Article 12 EEC had direct effect. Italics by HvE.

a national court by individuals.[14] Direct effect is not only qualified as "having rights", but also in a broader sense as the possibility to invoke or rely on a norm of Union law before a national court.[15] In other words, not only can individuals claim rights from Union law before the national court, they can also rely on European law as a standard of review.

Connected to a very early idea of citizenship of the Union, the Court relied on the fact that nationals of the Member States are affected by Union law and should have access to judicial review. Direct effect is, in this broader sense, defined as the obligation for a national court to apply Union law, either as a right, or as a standard of review.[16] In *Van Gend & Loos*, the Court of Justice did not explicitly discuss the primacy of Community law (at the time) over national law. The preliminary reference in this case came from the Netherlands, where primacy was not an issue of debate, since according to the Dutch Constitution treaties of a generally binding nature prevail over Dutch law.[17] Such a constitutional foundation of primacy was not common in other Member States, and it therefore did not take long before the Court also decided on primacy of Union law. The doctrine of primacy of European law was, as is well known, explicitly formulated for the first time in *Costa E.N.E.L.* as follows: "[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question."[18] In subsequent case law, this "principle of primacy"[19] was held to also apply to the constitutional provisions of the Member States: "[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure."[20]

National courts are obliged, in the light of loyal cooperation, to set aside national law that conflicts with European law and, when possible and necessary, apply the European norm. Without going into detail on their relationship,[21] direct effect and primacy are intertwined: without primacy, the consequences of direct effect would be less effective and without direct effect supreme norms could not be invoked or relied on before national courts.[22] When a conflict between national and European law arises before a national court, it "must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly

14 Prechal (2006) (a), p. 106.
15 De Witte (1999), pp. 187-188.
16 Prechal (2007), pp. 37-38.
17 Article 66 of the Dutch Constitution (now Article 94) gave international agreements precedence over national law, if the provisions of such agreements have a general binding effect, i.e. when they are directly applicable ('self-executing').
18 Case 6/64, *Costa v E.N.E.L.* [1964] ECR 00585.
19 Case 106/77, *Simmenthal SpA* [1978] ECR 629.
20 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 01125.
21 See for such detailed analysis Dougan (2007), pp. 931-963.
22 Nevertheless, national courts can also refer questions to the Court of Justice concerning the interpretation of European norms if these European provisions have no direct effect.

set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."[23] For the purpose of this research, both concepts are important for the relationship between the European citizen and the judicial bodies in the European Union. Due to direct effect, European citizens are able to invoke and rely on directly effective rights of Union law, which have primacy over national legal norms.

6.2.3 The preliminary reference procedure as a cornerstone of judicial cooperation

Within a constitutional context, provisions of the constitution need to be given effect by judicial procedures, which are usually provided for in the constitution itself. The same applies to the European Union, which has included judicial procedures in the Treaty to ensure that European law is applied effectively in the Member States and interpreted uniformly. Moreover, the preliminary reference procedure indirectly gives individuals the opportunity for judicial protection of their rights from European law, although it is up to the national court whether, within their obligations under Union law, to decide to refer to the Court of Justice.[24]

For the purposes of this research, two procedures are of major importance. In the first place, the preliminary reference procedure has had considerable impact on the development of European citizenship as such and its consequences in the Member States. Secondly, the infringement procedure may be mentioned, since the European Commission may start an infringement procedure against a Member State for non-compliance with the provisions on European citizenship. Although in the area of European citizenship the infringement procedure has been used, the majority of case law on European citizenship stems from preliminary questions of national courts. Moreover, the effect of European citizenship in this judicial procedure is most interesting for the purposes of this thesis. For both reasons the preliminary reference procedure will be discussed below in more detail.

The preliminary reference procedure is important regarding the case law on European citizenship, since the provisions of Union citizenship can be relied on before national courts, due to the direct effect of (certain) provisions on free movement and non-discrimination on grounds of nationality.[25] The national courts in these cases constitute an important connection between European law and its application in the national context for individuals, as a *juge du droit commun*.[26]
The relationship between the courts in the European Union is shaped by the division of jurisdiction between them. Since the Court of Justice is the ultimate interpreter of European law, national courts of last resort have to refer a question to the Court of Justice when they have doubts about the interpretation of a Union norm or when any court doubts the validity of Union law.[27] In questions of interpretation of Union law,

23 Case 106/77, *Simmenthal SpA* [1878] ECR 629, par. 21.
24 C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, par. 40.
25 Articles 18 and 21(1) TFEU.
26 Jans et al. (2007), p. 259.
27 Article 267 TFEU.

it remains up to the national court how to solve the conflict, for instance by setting aside national law or by declaring national law invalid. The Court of Justice does not assess national law, but only interprets the meaning and scope of European law. This is also seen in the language used by the Court, since it determines whether a provision of Union law "precludes" certain national measures or a certain situation. The Court does not, for instance, declare that a certain residence requirement is invalid considering the provisions on free movement; it rather declares that Article 21(1) TFEU precludes such requirements, without an objective justification. Moreover, it is the national court that finally decides on the legal conflict that has been submitted to it.

In interpretation matters, only the highest courts, i.e. courts or tribunals,[28] against whose decisions there is no judicial remedy under national law, are under the obligation to refer a question to Luxembourg. Courts against whose decisions appeal is possible may always initiate a reference procedure. The fact that a court at the highest level does not refer to the Court of Justice does not preclude a lower court from referring preliminary questions when the case has been sent back to that lower court.[29] The discretion for national courts to refer questions to the Court of Justice is emphasised by the Court,[30] so that when a national lower court starts a preliminary reference procedure, the Court answers this question[31] irrespective of the hierarchy of the national courts in the national legal order.[32] With regard to the validity of European law, *all* national courts are under the obligation to refer questions to the Court of Justice.[33] The decision of the Court in a certain case is binding on the national court that has raised the question. Moreover, all other courts in the Member States are bound by the interpretation of EU law in that judgment.[34]

This preliminary reference procedure is one of the fundamental aspects of the relationship between the courts in the European Union, since it divides the responsibilities for uniform application between the courts, leaving discretion to the national courts to a certain extent. The relationship between the courts in the European Union may therefore be described not in a hierarchical manner, but as a cooperation in which the different

28 The Court of Justice has held a broad interpretation of what elements constitute judicial bodies in the sense of the preliminary reference procedure. The qualification of such bodies for the purposes of Article 267 TFEU is a matter for the Court of Justice, which takes into account certain factors "such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent." See C-210/06, *Cartesio* [2008] ECR I-09641, par. 55.

29 Case 166/73, *Rheinmühlen-Düsseldorf* [1974] ECR 33, p. 33, C-210/06, *Cartesio* [2008] ECR I-09641 and C-173/09, *Elchinov* [2010] ECR I-08889.

30 C-332/92, C-333/92, C-335/92, i.e. *Conciliatura di Vercelli and Pretura circondariale di Vercelli – Italy* [1994] ECR I-00711, par. 17.

31 If not hypothetical or without any link with an actual dispute.

32 See also C-409/06, *Winner Wetten* [2010] ECR I-08015.

33 Case 314/85, *Foto-Frost* [1987] ECR 4199, par. 17.

34 This is also evident for the CILFIT criteria. If the Court of Justice has answered a question on the interpretation of Union law, other national courts do not have to refer a new question, since they are bound by this interpretation of EU law. Broberg and Fenger (2010), pp. 441-442.

courts have their own responsibilities in the legal system.[35] This cooperative character is supported by the fact that national courts may, if they feel capable, together with the reference send their view on how the Court of Justice should answer the question.[36]

As indicated, within the area of European citizenship, the preliminary reference procedure has been the major mechanism through which case law has developed. The role of the Court of Justice in the development of European citizenship in the early years is well known, and the Court has been applauded as well as criticised for this.[37] Not only the Court of Justice, but also the national courts have played an important, but probably less visible, role in the development of the case law as it stands nowadays.[38] The cooperative character of the judicial structure in the European Union is further enhanced by informal dialogues between national courts and the Court of Justice.[39]

6.2.4 Dialogues between the Court of Justice and national constitutional courts

Another judicial dialogue, albeit indirect, takes place between the national *constitutional* courts and the Court of Justice. The relationship between the Court of Justice and the constitutional national courts is an affair of love and hate. It has been described as a "relation of co-operation"[40] as well as a "*Guerre des Juges*."[41]

This dialogue between the constitutional courts and the Court of Justice is performed in a less direct manner. The judgments constitute the basis of this dialogue, and preliminary questions are not often referred to the Court of Justice by constitutional courts of the Member States.[42] Hence, direct consultation hardly takes place between these courts.

35 Meij (2010), p. 93. Nevertheless, since *Köbler*, the Member States may be held liable for national judgments that breach European law, causing harm to individuals. Such a breach should be a manifest breach of the obligation to apply Union law. A 'misreading' of Union case law by national courts would not constitute such a serious breach, so the impact of *Köbler* on the relationship between the Court of Justice and the national court may not be very negative, C-224/01, *Köbler* [2003] ECR I-10239 and C-173/03, *Traghetti* [2006] ECR I-05177.

36 Information note on references from national courts for a preliminary ruling, OJ C 297, 05.12.2009 pp. 1-6.

37 See for an extensive overview of judicial review by the ECJ: De Waele (2010). A critical view can be found in Hailbronner (2005), pp. 1245-1267. See for a more positive evaluation: Groussot (2008), p. 348.

38 Timmermans (2010), p. 349.

39 Timmermans (2012), pp. 17-19.

40 "Allerdings übt das Bundesverfassungsgericht seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht in Deutschland in einem 'Kooperationsverhältnis' zum Europäischen Gerichtshof aus, in dem der Europäische Gerichtshof den Grundrechtsschutz in jedem Einzelfall für das gesamte Gebiet der Europäischen Gemeinschaften garantiert, das Bundesverfassungsgericht sich deshalb auf eine generelle Gewährleistung der unabdingbaren Grundrechtsstandards beschränken kann." See the *BVerfG* 89, 155, BVR 2134, 2159/92 (*Maastricht-Urteil*), Judgment of 12 October 1993.

41 Claes (2006), p. 385.

42 Claes (2006), p. 433. However, more recently national constitutional courts have referred questions to the Court of Justice. For instance in April 2008, the Italian *Corte Constituzionale* also referred a preliminary question to Luxembourg (C-169/08, *Regione Sardegna* [2009] ECR I-10821), and the Austrian *Verfassungsgericht* (C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk* [2003] ECR I-04989) and the Belgium *Cour constitutionnelle* (C-236/09, *Test-Achats* [2011] ECR I-00773) as well as the Spanish Tribunal Constitucional (C-399/11, *Melloni* [2013] ECR nyr) have referred a case to the Court of Justice. In January 2014 the *Bundesverfassungsgericht* referred questions to the Court of Justice. See: *BVerfG*, 2 BvR 2728/13 of 14 January 2014.

Considering their role within the judiciary, this might be a sound attitude. Constitutional courts should interpret the constitution, which narrows their jurisdiction to reviewing the interpretation of their constitution. It is simply not their task to conduct an assessment of European law in substance. However, constitutional courts may be confronted with questions on the compatibility of European law with the national constitution, as the Maastricht decision of the *BVerfG* and that of the Polish Constitutional Court have shown.[43]

As observed, the prevalence of Union law is not limited to ordinary law, but also applies to national constitutional norms.[44] More recently, in *Winner Wetten*, the Court reaffirmed that "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law."[45] National constitutional courts do not, however, accept the primacy of European law over their national jurisdiction without any resistance.[46] These constitutional courts have expressed reservations as to the primacy of European law. The German Constitutional Court is a famous example of such judicial debate between the courts in the Union. In the *Solange* cases it opposed the unconditional primacy of European law over the German Constitution, without guarantees with regard to fundamental rights protection. In *Honeywell*, the *BVerfG* assessed whether the Court of Justice acted *ultra vires* with its decision in *Mangold*.[47] In this decision, the *BVerfG* found that the Court of Justice had not acted *ultra vires*. Moreover, the Constitutional Court stated that only in cases of sufficiently serious breaches of the *ultra vires* criterion would it use its jurisdiction to review acts of the European Union. It also explicitly acknowledged the role of the Court of Justice in '*Rechtsfortbildung*', as an interpreter of the law of the Union and its role in developing Union law.[48] At the same time, one may criticise the judicial dialogue between constitutional courts for lacking democratic legitimation when deciding on these constitutional issues.[49]

As observed, the relationship between the courts in the European Union can be described as a cooperation in a plural constitutional context.[50] As Sarmiento argues, the relation between the courts can be described as follows: "[T]hrough a process of trial and error, the ECJ and constitutional courts might be struggling to accommodate

43 *Bundesverfassungsgericht* Decision from 12 October 1993, 2 BvR L 134/92 and 2159/92, NJW (1993) 3047. Polish Constitutional Court Judgment of 11 May 2005, K 18/04.

44 "Allerdings übt das Bundesverfassungsgericht seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht in Deutschland in einem 'Kooperationsverhältnis' zum Europäischen Gerichtshof aus, in dem der Europäische Gerichtshof den Grundrechtsschutz in jedem Einzelfall für das gesamte Gebiet der Europäischen Gemeinschaften garantiert, das Bundesverfassungsgericht sich deshalb auf eine generelle Gewährleistung der unabdingbaren Grundrechtsstandards beschränken kann." See the *Maastricht-Urteil*, *BVerfG* 89, 155, BVR 2134, 2159/92 (*Maastricht-Urteil*), Judgment of 12 October 1993.

45 C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-08015, par. 61.

46 The Czech Constitutional Court even ruled that a decision of the Court was *ultra vires*. 2012/01/31 – Pl. ÚS 5/12: Slovak Pensions. See in more detail Zbíral (2012), pp. 1475-1492, Komarek (2012). More recently, in April 2013, the *Bundesverfassungsgericht* was critical regarding the judgment of the Court of Justice in *Fransson*. See also Editorial Comment (2013), pp. 925-930.

47 Case 2 BvR 2661/06 of 6 July 2010 and C-144/04, *Mangold* [2005] ECR I-09981.

48 Paras 63 and 64 of the *Honeywell* decision.

49 De Boer (2013), pp. 1101-1102.

50 See also Kumm (1999).

their respective claims of supremacy in a novel and more sophisticated framework in which all legal orders pursue a new role in a composite legal space."[51] The different courts have their own responsibilities regarding the different parts of the legal system (Union law, constitutional law, and ordinary national law) and interact in the exercise of their competence and responsibilities. National courts refer preliminary questions when they are obliged to do so or feel that a preliminary reference is necessary. The Court has the exclusive jurisdiction over the interpretation and validity of European law, whereas national courts have the jurisdiction to interpret national law and apply European law in national proceedings. Therefore, the judicial structure of the Union is intertwined and cannot be regarded as independent from the national judicial landscape.[52]

6.3 EUROPEAN CITIZENSHIP AND JUSTICIABILITY IN THE EUROPEAN UNION

Now that the judicial landscape in the broader context of the European Union has been discussed generally, it is time to turn to European citizenship specifically. The judicial mechanisms that are analysed in the subsequent part of this chapter are not exclusively applicable to the area of European citizenship, but also operate in other areas of Union law. In the context of this thesis the position of European citizenship in judicial review is the focus point and comparison with other substantive areas of Union law is not part of the aims of this study. The present chapter purely focuses on the relationship between European citizenship and justiciability in a constitutional context.

6.3.1 Direct effect of Union citizenship provisions

As observed, direct effect had been established long before European citizenship was introduced, but it might be seen as the early creation of "an ever closer Union among peoples" (the citizens of the European Union). The introduction of direct effect in Union law created an important procedure for the nationals of the Member States, enabling them to invoke or rely on Union law and including them explicitly as subjects of the law of the Community (at the time).[53] With the creation of direct effect, the rights of individuals evolved into a system of composite rights, derived from and given effect by national and European law. Indeed, "even before there was the idea of citizenship of the Union, the Court had inferred from the Treaties the concept that individuals could

51 Sarmiento (2013), p. 1268.

52 In *Winner Wetten*, the different responsibilities of the different courts are evident. The question arose whether a lower court had to stop applying national law in accordance with Union law, but contrary to a decision of the German Constitutional Court. The *BVerfG* had declared that the law at stake (monopoly on sports betting) was contrary to the German Constitution, but preserved the legal system for a period of time on the condition that the law be brought into line with the Constitution. The Court of Justice did not alter the supremacy of Union law, since it also prevails over national constitutional law. However, neither did it discuss how the national situation should be solved. Hence the Court of Justice interpreted European law and left the constitutional tensions of national law up to the *BVerfG* and the referring lower court. See also Beukers (2011), pp. 2005-2024.

53 In C-6/64, *Costa v E.N.E.L.* [1964] ECR 585, the Court argues *inter alia* that the Member States by establishing the EC had "created a body of law which binds both their nationals and themselves." Along the same lines the Court of Justice declared in *Van Gend & Loos* "The Community constitutes a new legal order […] the subjects of which comprise not only member states but also their nationals."

exercise effectively the rights conferred upon them."[54] Moreover, with the introduction of direct effect, the Court of Justice involved nationals of the Member States as "guarantor[s] for decentralised enforcement of EU law standards."[55] Direct effect may be linked to European citizenship in two ways: the European citizen as a guardian of the Treaties and, at the same time, direct effect as a guarantee for Union citizens as effective remedy on a national level to invoke Union norms.[56]

As mentioned, most cases on European citizenship originate from preliminary references by national courts that were confronted by individuals who had invoked their rights as a Union citizen.

> *Martínez Sala*[57] was triggered by the fact that Ms Sala appealed the refusal to grant her a child-raising allowance, as a Spanish national residing in Germany. Although the national case focused on her work experience in Germany and on her status as a worker, it opened the door for the Court of Justice to develop the concept of European citizenship. At the time, direct effect of what is now Article 21(1) TFEU had not been established. *Martínez Sala* was the first judgment on European citizenship in which a link was established between the prohibition of discrimination on the grounds of nationality and the right of Union citizens to move and reside freely within the European Union.

Article 18 TFEU was qualified by the Court as having direct effect,[58] and therefore nationals of the Member States could rely on this prohibition to challenge national measures before a national court.[59] Whether the old Article 18 EC (now Article 21(1) TFEU) had direct effect was questioned in the earlier days of the Court's case law on European citizenship. Since Article 21(1) TFEU refers to certain "limitations and conditions" as to the right to exercise free movement, it was doubted whether it could have direct effect. Since the rights to move and reside freely were formulated with conditions and limitations, Article 21(1) TFEU would not have been intended to be an independent provision, as Germany and the UK argued for instance in *Baumbast*.

In *Wijsenbeek*,[60] the question was posed whether Article 21(1) TFEU[61] had direct effect. The Court did not explicitly reject this argument, but implied in its judgment that Article 21(1) TFEU did not have direct effect because the provision is not formulated

54 Report of the Court of Justice on certain Aspects of the Application of the Treaty on European Union, May 1995, point 4.
55 Calliess (2013), p. 428.
56 The same can be argued for the provisions of the internal market, however, since direct effect is not purely related to European citizenship.
57 C-85/96, *Martínez Sala* [1998] ECR I-02691.
58 See for instance C-92/92 and C-326/92, *Phil Collins* [1993] ECR I-05145, par. 35: "Article 7 of the Treaty should be interpreted as meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefit of protection reserved to national authors and performers."
59 At the time Article 7 EEC.
60 C-378/97, *Wijsenbeek* [1999] ECR I-06207.
61 At the time Article 8A EC.

unconditionally.[62] Advocates General, meanwhile, tried to convince the Court to recognise Article 21(1) TFEU as a directly effective right in those early cases on Union citizenship.[63]

Three years later the Court took a turn in its case law. The implicit rejection of direct effect of Article 21(1) TFEU by the Court was overruled in *Baumbast.*[64] In that case, the Court for the first time explicitly stated that the freedom to move and reside freely in the territory of the Member States had direct effect and could be invoked by Mr Baumbast before the national court. On the basis of *Bickel and Franz*,[65] this turn in case law, recognizing the direct effect of Article 21(1) TFEU, was expected. In *Bickel and Franz*, the Court took the first steps to recognising direct effect of Union citizens' free movement. The Court ruled, with regard to the freedom to provide services, that Union citizens should be treated equally concerning the language spoken in criminal proceedings in the host Member State. The Court of Justice also emphasised that unequal treatment was regarded a restriction of the freedom to provide services and also referred to Article 21(1) TFEU. The Court added that "the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals."[66] This statement implied that *Bickel and Franz* could probably have invoked their right to free movement against the Italian authorities. As observed, in *Baumbast*, in 2002, the Court made a definite turn in its case law, recognising the direct effect of Article 21 TFEU.

> Mr Baumbast, a German national, married a Colombian national in May 1990, in the UK. The couple had two daughters, one of whom had a dual Colombian and German nationality, the other solely the Colombian nationality. In 1995, the Baumbast family had been granted a residence permit for five years, during which time the daughters went to school, the family bought a house in the UK, and they did not receive social benefits or use the UK's health system. In 1995, the application of Mr Baumbast for an indefinite residence permit was refused because he could not be qualified as a worker since he was no longer employed in the UK and he did not comply with the conditions required by Directive 90/364. One of the referred questions of the national court considered the right of Mr Baumbast, as a citizen of the Union who no longer enjoyed the right of residence as a migrant worker, to enjoy the right of residence by direct application of Article 21(1) TFEU.
>
> The Court repeated the well-known phrase that Union citizenship is destined to be the fundamental status of nationals of the Member States. Subsequently, the Court concluded that "as regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC [Article 21(1) TFEU]."[67]

62 C-378/97, *Wijsenbeek* [1999] ECR I-06207, p. 41.
63 Opinion of Advocate General La Pergola in C-85/96, *Martínez Sala* [1998] ECR I-02691 and by Advocate General Cosmas in C-378/97, *Wijsenbeek* [1999] ECR I-06207.
64 C-413/99, *Baumbast* [2002] ECR I-07091.
65 C-274/96, *Bickel and Franz* [1998] ECR I-07637.
66 C-274/96, *Bickel and Franz* [1998] ECR I-07637, par. 16.
67 C-413/99, *Baumbast* [2002] ECR I-07091, par. 84.

In *Chen*, the Court of Justice affirmed *Baumbast*: "[T]he right to reside in the territory of the Member States provided for in Article 18 (1) EC […] is granted directly to every citizen of the Union by a clear and precise provision of the Treaty."[68] Since the free movement was explicitly subject to limitations and conditions laid down in Union law, the direct effect of Article 21(1) TFEU was not evident. Article 21(1) TFEU explicitly mentions limitations and conditions to free movement. The Article provides that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." Nevertheless, this reference did not preclude Article 21(1) TFEU from having direct effect. What is even more striking is that these conditions and limitations were open to judicial review by the Court and by national courts.[69] Due to the fact that Article 21 TFEU had been qualified as a provision having direct effect, nationals of the Member States could invoke their right to free movement and non-discrimination on grounds of nationality before a national court in their Member State of origin or a host Member State. This possibility resulted in European citizenship litigation both on European and on national level.

6.3.2 Effects of direct effect of Articles 20 and 21(1) TFEU on justiciability

National courts found themselves confronted with Union citizens relying on Article 21(1) TFEU and Article 20 TFEU. In turn, these national courts referred questions to the Court of Justice on the application of the provisions of European citizenship. The Court formulated the scope of Article 21 TFEU in a broad manner. This means that, as is the case with the other economic freedoms, national courts have to apply the free movement provisions in various judicial conflicts. Moreover, the Court of Justice defined the scope of Article 20 TFEU without specific limitations and detailed boundaries, resulting in national litigation concerning Article 20 TFEU.[70]

The preliminary references of national courts opened the door for the application of Article 21(1) TFEU as a "fifth freedom"[71] by the Court. In this context, it was no longer necessary to establish a link with the general prohibition of discrimination on the grounds of nationality in order to invoke the free movement rights. The fact that the right to move and reside freely had direct effect implied that these rights could be invoked against national measures restricting this free movement.[72] The case law on European citizenship developed from a non-discrimination model towards a restriction model, as has been seen in *Pusa*[73] and *Morgan and Bucher*.[74] In these cases the Court of Justice applied Article 21(1) TFEU as an autonomous right to free movement for Union citizens, rather than linking free movement to the prohibition to discriminate on grounds of nationality as laid down in Article 18 TFEU. As a result, not only discrimination on

68 C-200/02, *Chen* [2004] ECR I-09925, par. 26.
69 Shaw (2010), p. 358.
70 For a critical view Kochenov (2013), pp. 502-516.
71 Editorial Comment (2008), p. 1.
72 Timmermans (2010), pp. 345-355.
73 C-224/02, *Pusa* [2004] ECR I-05763.
74 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.

grounds of nationality, but all restrictions to free movement of Union citizens fall within this scope and have to be justified by the Member States.[75] This line of case law could only be developed due to the recognition of direct effect of Article 21(1) TFEU by the Court of Justice, since this provision could be invoked before national courts and European citizens could therefore rely on their right to free movement before a national court.

> In *Morgan and Bucher*,[76] the national court asked the Court whether Articles 20 and 21(1) TFEU preclude a refusal to grant an education or training allowance by a Member State to one of its nationals for a full course of study in another Member State on the ground that the course is not a continuation of studies pursued at an education or training establishment located in the national territory for a period of at least one year.
>
> The preliminary questions in this case already assumed the autonomous application of Article 21(1) TFEU as a fifth freedom of the Union without any connection with Article 18 TFEU. The referring national courts asked whether "the freedom of movement guaranteed for citizens of the Union under [Articles 20 and 21(1) TFEU][77] prohibit a Member State, in a case such as the present, from refusing to award an education or training grant to one of its nationals for a full course of study in another Member State on the ground that the course does not represent the continuation of studies pursued at an education or training establishment located in the national territory for a period of at least one year" and whether "Article 20 and 21(1) TFEU prohibit the refusal of a training grant to a national who as a cross-border commuter is pursuing her course of study in a neighbouring Member State, on the grounds that she is residing at a border location in [the first-mentioned Member State] only for education or training purposes and that that place of abode is not her permanent residence".

More recently, Article 20 TFEU has also been held to have direct effect, at least implicitly. According to the Court "nationals of a Member State, family members of […] enjoy the status of Union citizens under Article 20 TFEU and may […] rely on the rights pertaining to that status, including against their Member State of origin."[78] The extension of the scope of judicial review to Article 20 TFEU and the fact that individuals may invoke Article 20 TFEU influences the judicial system. Situations that do not have a cross-border link could still fall within the ambit of European law – even if these situations are quite limited. Whenever the scope of European law is triggered, a situation falls under the scope of scrutiny of the Court of Justice, which extends the judicial protection of European citizens by the Court, at the expense of the national competence, for instance, to regulate asylum. Conceptually, the Court has a new tool to enhance the rights of European citizenship, which might even be used outside the scope of the particularities of *Ruiz Zambrano*.[79]

This means that due to the fact that Articles 20 and 21(1) TFEU have been qualified as having direct effect by the Court of Justice, the scope of judicial review of primary Union citizens' rights has been broadened. Even though *McCarthy* and *Dereci* and subsequent

75 See Chapter 3, Section 3.4.3 for a more detailed elaboration on this case law. See also Prechal, De Vries and Van Eijken (2011), pp. 213-249.

76 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.

77 Added HvE.

78 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 63.

79 Hailbronner and Thym (2011), p. 1257.

case law seem to imply a limited scope of Article 20 TFEU with regard to the substance of the rights of EU citizens, the scope of judicial review might be extended to other possible national measures. The scope of judicial review has been consolidated: provisions of European citizenship belong to EU's 'constitutional' law and their constitutionality is upheld by judicial procedures, especially the preliminary reference procedure. The scope of judicial scrutiny has quantitatively increased in terms of substance areas that are affected and have been brought under the scope of European scrutiny. More national measures have been tested against Union law since European citizenship has extended the personal as well as the material scope of application of Union law.[80] Since Article 21(1) TFEU is autonomously applied, more situations now fall under the scope of the free movement of Union citizens, which also increases the number of potential cases before national courts.

6.3.2.1 Illustration from national court practice: the effect of Ruiz Zambrano in Dutch case law

To illustrate the effect of the recognition of direct effect of Article 20 TFEU a case study of the Dutch case law on Article 20 TFEU, after the decision of the Court in *Ruiz Zambrano*, is interesting. The effect of the *Ruiz Zambrano* judgment and the influence of Article 20 TFEU on Dutch case law after the first months following the judgment clearly show the related impact. The fact that Article 20 TFEU has been qualified as a provision having direct effect has important consequences in the multilevel judicial legal order of the European Union, especially in the national judicial protection of European citizens. Only in the Netherlands, in several national cases, has the *Ruiz Zambrano* judgment been relied on or used as a yardstick for judicial review of a particular situation.[81] Article 20 TFEU has been invoked before the national court by individuals, since the Court of Justice implicitly declared that Article 20 TFEU has direct effect. Moreover, sometimes national courts have reopened cases for assessment of their own accord.

Dutch case law reveals that Dutch courts follow the more narrow interpretation of the Court of Justice in the application of *Ruiz Zambrano*.[82] National courts have held that Article 20 TFEU only applies to situations in which a Union citizen *de facto* has to leave the territory of the European Union.[83] One of the major issues in Dutch case law is the situation of families formed by one parent with the nationality of a third country, and a parent and a child (or children) with the Dutch nationality. In these cases the challenging question has been posed whether the third-country national parent of a dependent EU citizen should have a derived right to residence in the Netherlands in order to facilitate

80 See also Chapter 3, Section 3.4.3.

81 Up until June 2013, 39 judgments of Dutch courts dealing with Article 20 TFEU had been published online at www.rechtspraak.nl. However, this website contains a selection of cases and does not cover all case law. In the FIDE report of 2014 (forthcoming) an analysis of court practice in the Member States will be addressed in more detail.

82 The first time that Article 20 TFEU and *Ruiz Zambrano* were invoked was in a case at the end of March 2011. Rechtbank 's-Gravenhage, zittingsplaats Roermond, 28 March 2011, Awb 10/37591.

83 Even before *Dereci* the Dutch courts held this interpretation of Article 20 TFEU.

the residence of the child that has the Dutch nationality. Since the Court had not clarified the *Ruiz Zambrano* judgment on this point, the Dutch courts had to apply Article 20 TFEU, without clear limits. In the *Ruiz Zambrano* judgment, the Court referred to "a third country national with dependent minor children",[84] without specifying whether one or both parents should be granted a derived right to reside in the European Union. Whereas in *Chen* and *Baumbast* the Court of Justice referred to the primary carer of children,[85] in *Ruiz Zambrano*, the Court referred to the dependency of the children on a third-country national. Whether the concept of dependency and that of primary carer are different in scope is still unclear.[86] However, in subsequent case law the Court of Justice limited the definition of dependency to situations that would *de facto* lead to an obligation to leave the European Union. In the first cases before the Dutch courts, this stricter interpretation of dependency had not yet been clarified by the Court of Justice.

A study of cases shows that in most of them, the Dutch (district) courts deal with Article 20 TFEU, in the context of *Ruiz Zambrano*, quite restrictively. The Dutch courts, generally speaking, in several decisions have concluded that *one* parent has the right to reside in order to facilitate the residence of the dependent Union citizen, derived from the right of the EU citizen to reside in the territory of the European Union.

> The first case in which Article 20 TFEU was relied on concerns a national of Kosovo who migrated to the Netherlands and requested a residence permit without success. In the meantime, she gave birth to a daughter, after which her deportation was postponed for six weeks. She never left the Netherlands, however, and gave birth to a second child almost two years later. Her partner, a Dutch national, signed a declaration of paternity with regard to the two children, who had both been granted the Dutch nationality. The mother relied on the right to family life in her request for a permanent residence permit. She also relied on the *Ruiz Zambrano* judgment, since her children had acquired the Dutch nationality and were both European citizens. The Dutch court ruled, however, that the situation of the mother differed from that in *Ruiz Zambrano*, since her children could still enjoy residence in the European Union with their father, who had the Dutch nationality.[87]

Even stricter are cases in which the Dutch parent is (partly) unable to take care of the children.[88] In one of these cases the fact that the Dutch mother could not take care of her children did not result in a derived residence right for the father, who had the Moroccan nationality.

> He entered the Netherlands without a residence permit in 2002 and such a permit was never granted to him. In 2010, he was deported to Morocco. During his residence in the Netherlands, he had a relationship with a Dutch woman and two children were born (in 2005 and 2007). The children stayed in a foster home since their mother could not

84 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 43.
85 C-200/02, *Chen* [2004] ECR I-09925, par. 46 and C-413/99, *Baumbast* [2002] ECR I-07091, par. 75.
86 Van Eijken and De Vries (2011), p. 712.
87 Rechtbank 's-Gravenhage, zittingsplaats Roermond, 28 March 2011.
88 Rechtbank 's-Gravenhage, 8 July 2011, Rechtbank 's-Gravenhage, 14 July 2011, Rechtbank 's-Gravenhage, 31 August 2011.

> take care of them. She visited the children once every four weeks. During these visits, the children also had contact with their father by phone. The father relied on a national procedure regarding the rights of his children to family life and to have contact with their parents as laid down in the Charter (Article 7 and 24(3)).[89]

According to the district court, the children were not obliged to leave the territory of the European Union, since they could stay with their foster parents in the Netherlands. In another case, the fact that the Dutch parent was mentally ill was not considered as a ground to grant a derived residence right to the other parent with the nationality of a third country.[90] Another circumstance regarding which a Dutch district court did not find that both parents should be present to facilitate the residence of the Dutch children in the Netherlands was the fact that the related family consisted of eight children.[91] The Dutch court referred to the judgment in *Dereci* and ruled that the fact that it is desirable to live together as a complete family in one Member State cannot be included in Article 20 TFEU.

Nevertheless, Dutch courts have been more lenient in cases where there are certain exceptional circumstances.

> An example is the case concerning a Turkish father and a Dutch mother, with a Dutch child. Although the mother could take care of the child, therefore ensuring its residence in the Netherlands and thus in the European Union, the serious psychological illness of the father was reason for the Dutch court to rule that the Turkish father had a derived right to reside in the Netherlands. His illness was serious and it was indicated that his deportation to Turkey would lead to so much psychological suffering that his Dutch spouse and child had no choice other than to join the father and reside outside the European Union.[92]

In another case, the Council of State ruled that in specific circumstances, where the children would be under the inspection of childcare and the third-country national parent would be deported to a third country, this would lead to a more lenient application of Article 20 TFEU.[93] Nevertheless, the Court does require strong evidence that due to the specific situation the children would be forced to follow their parent to a third country. The mere declaration that the Dutch parent is unable to provide the necessary care is not sufficient to trigger the scope of Article 20 TFEU.[94] The fact that the presence of the third-country national parent is important for the psychological health of the Dutch parent is insufficient if others could also provide help to the Dutch parent.[95]

> Noteworthy is a case concerning social benefits. In this particular case, the Dutch court held that in order to facilitate the residence of the dependent Union citizens, a social

89 Rechtbank 's-Gravenhage, 8 July 2011.
90 Rechtbank 's-Gravenhage, 31 August 2011 and Rechtbank 's-Gravenhage, 14 July 2011.
91 Rechtbank 's-Gravenhage, 24 April 2013.
92 Rechtbank 's-Gravenhage, zittingsplaats 's-Hertogenbosch, 4 November 2011.
93 Raad van State, 26 April 2013.
94 Raad van State, 12 June 2013, par. 3.4.
95 Raad van State, 6 Augustus 2012.

allowance had to be granted.[96] Since the Court of Justice stated in *Ruiz Zambrano* that Mr Ruiz Zambrano had to be granted a work permit in order to be able to facilitate the residence of his children, the question raised was whether this would also apply to social benefits.[97]

What can be concluded from this brief case study is that the concept of European citizenship is very much alive in the national judicial arena.[98] Due to the fact that Article 20 TFEU has been recognised to have direct effect, and could therefore be relied on, Union citizens and their family members have invoked this provision in national proceedings. Since the Court of Justice used a more or less open formula in its case law on Article 20 TFEU, uncertainties still exist regarding the specific circumstances that fall within the scope of Article 20 TFEU. This means that national courts have to apply Article 20 TFEU to different situations, with specific circumstances, thereby creating national European citizenship litigation.

In terms of judicial review, the direct effect of European citizenship has been important for the development of the concept of citizenship in the Union, an effect which obviously has not been limited only to cases in the area of European citizenship.[99] The opposite is also true, where citizenship of the Union consolidates the judicial structures in the Union, since nationals of Member States are now able to invoke their rights as Union citizens before a national court. Those national courts give, in preliminary references, the Court of Justice new opportunities to further shape European citizenship. Importantly, the national courts can, to a great extent, apply the case law of the Court of Justice in a strict or broad sense, as seen in the study of cases regarding the effect of *Ruiz Zambrano* on Dutch judicial review. In this context, the content of European citizenship is not only shaped by the Court of Justice, but is also fashioned by the approach of the national courts within the limits of Union law. Obviously, direct effect as such is not specifically connected with EU citizenship, nor does the fact that provisions have direct effect qualify norms as constitutional. What is important with regard to European citizenship and constitutionalisation in this respect is that the recognition of direct effect fostered case law on Union citizenship, which in turn affected judicial review, allowing the Court of Justice to strengthen and "dress up" European citizenship. Even more important for the purposes of this thesis is the way the Court dealt with EU citizenship in its case law, as discussed below.

96 Rechtbank Arnhem, 10 July 2012.

97 The Court stated that "[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect" as to deprive the genuine enjoyment of the substance of the European citizenship right. C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 43. See Van Eijken and De Vries (2011), p. 213.

98 See also the Dutch report on European citizenship for FIDE 2014, forthcoming.

99 Also in other areas the Court has had an important role in activating concepts. Think of the free movement of goods, for instance. See also Chalmers (1995), pp. 55-73.

6.3.3 Shift in judicial review due to 'personal circumstances test' of citizens of the European Union

In the application of the principle of proportionality, the Court has used a personalised proportionality test in its Union citizenship case law, which has significant consequences for the way in which cases on European citizenship are determined.
The principle of proportionality is one of the general principles of Union law. General principles of Union law are derived from the Treaty (Article 19 TEU) and therefore belong to primary Union law. As Tridimas argues: "[T]heir equal ranking derives from their character as constitutional principles emanating from the rule of law."[100] Therefore general principles of Union law constitute a benchmark when reviewing secondary Union law. Moreover, they provide a yardstick to assess national law that falls within the scope of Union law. Whenever national law falls within the scope of Union law, it also has to comply with the general principles of Union law.[101] The content of what constitutes general principles of Union law is not established as black-letter law. New general principles of Union law are 'born' or brought to life, such as the general principle of non-discrimination on the grounds of age.[102] There is no clear-cut division between what belongs to fundamental rights and principles that are 'ordinary' principles of Union law. Examples of general principles of Union law are the principle of equality, rights of defence and the principle of proportionality. The Court qualified general principles of Union law as having "constitutional status."[103] General principles serve as a source of interpretation of secondary Union law: "[A]ll Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment."[104]

In this application of proportionality in European citizenship litigation, a shift has taken place, resulting in more attention now being paid to the personal circumstances of the individuals at stake. The principle of proportionality has various manifestations. Proportionality is used to assess legislative acts of the European Union and to assess national measures that affect the four freedoms and to limit the exercise of competences by the Union, within the principle of conferral. The intensity of the judicial review in these three situations differs.[105] As a rule, if the Court of Justice assesses whether Union legislation is in line with the principle of proportionality, it examines whether it is "manifestly inappropriate in relation to the objective" of the legislative measure.[106] With regard to national measures that fall under Union law because of the free movement provisions, the Court of Justice held that "national measures […] must be necessary and appropriate to attain the objective pursued" in order to comply with the principle of proportionality.[107] The difference between these tests is that the proportionality in the

100 Tridimas (2006), p. 51.
101 See for an extensive elaboration on national measures falling within the scope of Union law: Chapter 3, Section 3.3.2.
102 C-144/04, *Mangold* [2005] ECR I-09981.
103 C-101/08, *Audiolux* [2009] ECR I-09823, par. 63.
104 C-402/07 and 432/07, *Sturgeon* [2009] ECR I-10923, par. 48.
105 Tridimas (2006), p. 137.
106 C-309/10, *Zucker* [2011] ECR I-07333, par. 43.
107 C-413/99, *Baumbast* [2002] ECR I-07091, par. 91.

context of national measures is assessed within the context of a restriction of one of the freedoms, whereas the proportionality test against actions of the institutions is a form of control on the legislature of the European Union.

The *Baumbast* case is a clear example of a shift in judicial review with regard to proportionality in Union citizenship case law.

> As discussed above, Mr Baumbast could rely on Article 21(1) TFEU before the British court to have the right to residence. Nevertheless, the Court acknowledged that the exercise of the right to move and reside freely for Union citizens is subject to limitations and conditions conferred by the Treaty and the measures giving effect to Article 21(1) TFEU. Directive 90/364,[108] governing, at the time, the general right to reside in other Member States for Union citizens, laid down two conditions (Article 1(1) of the Directive): the Union citizen should, first, have health insurance covering all risks in the host Member State and, secondly, the Union citizen should have sufficient resources in order not to become a burden on public benefits. Mr Baumbast had comprehensive insurance in Germany, but it did not cover the risks of emergency treatment in the UK. Although this lack of emergency treatment coverage in the insurance might have been reason to conclude that Baumbast did not comply with the conditions of the Directive, the Court stressed that the general principles of Union law had to be taken into account in the application of the Directive. Subsequently, the Court of Justice assessed whether the principle of proportionality would be violated by refusing *Baumbast* the right of residence on the ground that he had incomplete coverage of the risks of sickness. In this assessment, the Court of Justice took into account the fact that the family had never applied for social benefits in the UK, that Mr Baumbast had worked and lawfully resided for several years in the host Member State, and that the family continued to reside in the UK even when Mr Baumbast's employment and self-employment came to an end. Moreover, the fact that the family had comprehensive health insurance in Germany was taken into account by the Court of Justice. It declared that under these particular circumstances the principle of proportionality, as a general principle of Union law, would preclude the rigid application of the conditions laid down in the Residence Directive.

The Court referred to the personal circumstances of *Baumbast*, and held that in the light of these circumstances it would not be proportional to refuse *Baumbast* the enjoyment of his right to reside in another Member State because he did not have insurance for emergency medical treatment. The Court of Justice referred to at least five grounds of personal circumstances that should be weighed in the proportionality test.

Remarkably, the Court did not review the *validity* of the conditions of the Directive as such, but it still called their *application* into question. In the old Directives of the 1990s, the condition to have sufficient resources and comprehensive health insurance were included as conditions for the free movement of Union citizens. The fact that European citizenship was included in the Treaty of Maastricht, after the Directives entered into force, did not render these requirements invalid. What happened was that the old Directives

108 Now repealed and replaced by Directive 2004/38.

were actually transformed from free movement rights into possible restrictions on the free movement of Union citizens when Article 21(1) TFEU was included in the Treaty.[109]

> First of all, the Directives of the 1990s granted the right to move and reside freely to a very limited group of European nationals. Hence, on the conditions of being qualified as a student or as a retired person, and as having sufficient resources and comprehensive healthcare insurance, citizens of the Union had free movement rights grounded in the Directives. Article 21(1) TFEU introduced a general right for free movement for all European citizens. After this general right to move and reside freely was included in Article 21(1) TFEU, the conditions of the Directive suddenly became potential restrictions on the general right provided for in Article 21(1) TFEU. Every national of one of the Member States nowadays has the right to move and reside freely based on Article 21(1) TFEU, but has to comply with the conditions first stated in the old Directives, now laid down in Directive 2004/38.

In order to be able to avoid reviewing the validity of the Directive, the Court used the discretion that was left between the two boundaries on free movement: the condition of having comprehensive health insurance and the limitation of an unreasonable burden on the state finances.[110] The preamble of the Directive stated: "[B]eneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State." In order to guarantee to the Member States that nationals of other Member States would indeed not become such a burden, the two conditions of sufficient resources and insurance were included. Nevertheless, the Court of Justice found that the fact that emergency treatment was not covered in the UK did not automatically mean that *Baumbast* and his family constituted a risk of becoming a burden on the financial system. The Court actually read the restrictions of the Directive in light of and considering the purpose of the Directive: the free movement of Union citizens.

In *Grzelczyk*,[111] decided a year before *Baumbast*, a first step towards this line of reasoning may be found. In that case, the Court concluded that although the Student Directive required that students with the nationality of another Member State had sufficient means, the circumstances of a student may change during his residence which could not automatically lead to the withdrawal of a residence permit. The Court concluded that the preamble of the Directive accepted a "certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States."[112] The same proportionality approach can be found in *Trojani*.[113]

> As a French national residing in a Salvation Army shelter and not having sufficient resources, *Trojani* could not rely on the right to reside in Belgium because he did not satisfy the condition of Directive 90/364 of having independent resources. The Court of Justice emphasised that "there is no indication that, in a situation such as that at

109 Dougan (2006), p. 615.
110 Dougan and Spaventa (2003), p. 705.
111 C-184/99, *Grzelczyk* [2001] ECR I-06193.
112 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 44.
113 C-456/02, *Trojani* [2004] ECR I-07573. See also Chen with regard to the requirement of having necessary resources, C-200/02, *Chen* [2004] ECR I-09925, paras 32-33.

> issue in the main proceedings, the failure to recognise that right [to reside in another Member State] would go beyond what is necessary to achieve the objective pursued by that directive."[114]

Although in *Trojani* the proportionality test did not mean that secondary Union law did not apply, the judgment implies that under other circumstances this could have been different. In the joined cases *Morgan and Bucher*,[115] the personal circumstances of the Union citizens also played an important role.

> In these cases, the subject of debate was the German regulation of exportation of student financial assistance to other Member States. According to German rules, students were entitled to student allowances when studying in another Member State if this education or training had first taken place in Germany for at least one year (the 'first-stage studies condition'). Both applicants started their education in another Member State (the UK and the Netherlands), and requested student allowances. Since their subjects, ergotherapy and applied genetics, were not available in Germany, both Morgan and Bucher did not fulfil this 'first-stage studies condition.' In addition, the entitlement to exportation of a student allowance was only provided for persons residing in Germany, a condition that was also not met by Morgan. The Court ruled that it may be legitimate for the Member States to ensure that the grant of social assistance for the maintenance of students does not become an unreasonable burden on the financial system. The financial burden may there be invoked as a reason for the restriction on the right of Union citizens to move and reside freely. A Member State may, according to standard case law, require a certain degree of integration of a Union citizen for the granting of social benefits, such as a student allowance for maintenance costs. Nevertheless, such justification is, obviously, limited by the principle of proportionality. The Court of Justice concluded that under the circumstances of the case, the first-stage studies condition for the exportation of the student fee was too exclusive and too general because it did not take into account the personal circumstances of the Union citizens. The fact that both applicants were raised in Germany and had completed their schooling there was one of the important circumstances the Court referred to.

Earlier, in *D'Hoop*, the Court ruled that a Member State may limit the granting of tide-over allowances to persons with a real link with its labour market, but that the conditions for making this distinction may not be too general and exclusive.[116] In *Nerkowska*,[117] the Court of Justice referred to the personal circumstances of Ms Nerkowska, who had applied for a disability pension granted to civilian victims of war or repression, since she had lost her parents and had been deported to the USSR with her brother and aunt.

> According to Polish law, the disability pension was only granted to persons residing in Poland, based on solidarity with victims of war. This residence requirement constituted a restriction of Article 21(1) TFEU, since it disadvantaged Polish nationals who had used their right to move to another Member State. The fact that the pension was granted on the basis of solidarity, and therefore required a real link with Poland, was legitimate. Nevertheless, the fact that Ms Nerkowska had lived in Poland for more

114 C-456/02, *Trojani* [2004] ECR I-07573, par. 36.
115 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.
116 C-224/98, *D'Hoop* [2002] ECR I-06191, paras 37-38.
117 C-499/06, *Nerkowska* [2008] ECR I-03993.

> than 20 years, and had worked and studied there had to be taken into account. The Court held therefore that under these circumstances the residence requirement was disproportionate, since it went beyond what was necessary to ensure that such a real link was present.

Hence, when a Union citizen is disadvantaged by the host Member State or by the Member State of origin in the right to move and reside freely, the personal circumstances of the Union citizen concerned should be weighed by the national authorities, rather than simply applying black-letter law. With regard to the abovementioned cases, these personal circumstances were taken into account in order to assess the entitlement to certain social benefits. Naturally, Member States are cautious about sharing social benefits with nationals of other Member States who have not contributed to their social welfare system, at least by paying taxes.[118] The 'real link' principle is designed as a yardstick by which to measure the degree of solidarity between the European citizen concerned and the Member State. Whether a Union citizen is integrated sufficiently in a host Member State may depend on certain personal circumstances.

Rottmann[119] is a significant example of how the principle of proportionality in European citizenship case law affects the discretion left to the Member States, as well as the judicial review of cases on EU citizenship. The nationality of Mr Rottmann could be withdrawn by Germany, as long as this decision complied with the principle of proportionality. In order to balance this proportionality, the national court had to take into account the specific circumstances of the case. In this assessment the national court had to weigh the gravity of the offence against the consequences of the loss of the status of Union citizenship; consider the lapse of time between the naturalisation decision and the decision to withdraw nationality; and take into account whether it is possible to recover the nationality of origin.

In this personalised proportionality assessment, the personal circumstances of the individual concerned *in concreto* have to be taken into account. The principle of proportionality in this approach does not function as an abstract principle of administrative law, but requires that the concrete circumstances be assessed in every case. In the case of Janko Rottmann, the German court had to weigh the gravity of the particular offence against the consequences of the nationality revocation. This means that the outcome of the assessment might differ depending on the gravity of the crime. In other words, if a Union citizen has committed murder, he or she could be deprived of his or her nationality in accordance with the principle of proportionality, whereas someone who has committed administration fraud may not be deprived of his or her nationality. In *Rottmann*, this personalised proportionality test clearly affected the competence of Member States to grant and revoke nationality, which could lead to tension in the division of powers between the European Union and the Member States. The judgment, however,

118 Nevertheless, as Advocate General Sharpston acknowledged in *Bressol*, European citizens who are not economically active in a host Member State may not pay direct taxes, but are a source of income for local economies by indirect taxes they contribute indirectly to that Member State's finances, par. 96.

119 C-135/08, *Rottmann* [2010] ECR I-0144. See also Kochenov (2010), Van Eijken (2011), pp. 26-30.

also left the national authorities discretion to balance the personal circumstances against the interests of Germany.[120]

Two different mechanisms may be discerned in the scope of judicial review in the case law on European citizenship. The first mechanism is the extension of the scope of judicial review in terms of personal circumstances if no secondary legislation exists. *Rottmann*[121] and *Morgan and Bucher* are examples of this.[122] In these cases, the principle of proportionality was applied in a persuasive manner, so that legitimate aims to restrict free movement could not be applied to the particular situation without weighing the concrete personal circumstances. Although the aim may, in principle, be legitimate, the particular circumstances of the individual concerned may shift the balance of his or her interest. Where usually the Member States would have the competence to regulate the situation without the interference of Union law, Member States' action is limited due to the principle of proportionality.
As a second mechanism, the proportionality principle is applied by interpreting proportionality with a highly 'personalised' test in situations governed by secondary Union law. *Baumbast* is a good example of this constitutional interpretation of the free movement of Union citizens, by which the strict application of secondary Union law is circumvented by applying a concrete proportionality test. Strictly speaking, *Baumbast* did not fulfil the conditions of the Directive, and would not be able to invoke a residence right based on the Directive. However, due to the personal circumstances, the proportionality test resulted in his situation being deemed as falling within the scope of the Directive and therefore under the scope of judicial scrutiny.

6.3.4 Constitutional impact of the 'personalised' proportionality test

The constitutional consequences of the above-mentioned personalised proportionality assessment in cases on European citizenship are remarkable. According to Article 21(1) TFEU, the right to move and reside freely is subjected to the conditions mentioned in the Directives.[123] These conditions, laid down in a Directive, are assessed indirectly on their proportionality. In practice, the Court reviews secondary law through the national application of the conditions laid down in that secondary law. What happens is that

120 Eventually, the German Court, after weighing the various circumstances, held that the withdrawal of Mr Rottmann's German nationality was proportional. The *BVerfG* held that "Die rückwirkende Rücknahme der Einbürgerung des Klägers ist auch im Übrigen trotz der möglichen Folgen des Staatsangehörigkeitsentzugs auf die unionsrechtliche Stellung des Klägers nicht unverhältnismäßig." BVerwG 5 C 12.10 – Urteil vom 11. November 2010, par. 33. The German Court took into consideration the fact that Rottmann was married to a German national, which gave him a derived right to reside in Germany, also as a stateless person. The *Bundesverwaltungsgericht* considered that under then-current German law it was explicitly prohibited to withhold the information concerned in a procedure of naturalisation. The national court also took the short period between the naturalisation and the withdrawal of the German nationality into account.

121 C-135/08, *Rottmann* [2010] ECR I-01449.

122 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.

123 Laid down in Directive 90/366/EEC on the right of residence for students, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 90/364/EEC on the right of residence. Repealed and replaced by Directive 2004/38 in April 2004.

Member States implement or apply the conditions of the Directive, but need to adjust their national application of these conditions according to the proportionality test. In other words, correctly implemented Union conditions are assessed by the Court of Justice in their specific application in individual national cases. Even when secondary Union law authorises a certain course of action, these actions are assessed on their compatibility with the principle of proportionality.[124] Constitutionally, this is rather a sensitive matter, since Member States should be able to trust the validity of secondary Union legislation as this legislation ought to comply with the principle of proportionality.

Member States are bound by general principles of Union law when implementing Union law and when derogating from Union law. The two conditions – having sufficient means and having comprehensive insurance for the costs of healthcare – do not leave much room for discretion by the Member States.[125] For this reason, the Court of Justice was accused of using "Union citizenship and the principle of proportionality […] to rewrite rules laid down in secondary Community law."[126] As mentioned in the section on social rights of Union citizens, the Court tries to strike a fair balance between restrictions on free movement for migrating Union citizens and solidarity with the nationals of the host Member State concerned.[127] The approach to the proportionality test, taking into account the personal circumstances of Union citizens, might be a way to assess this 'real link' with a Member State. The closer the link with a Member State is, the stronger the right to reside in that Member State will be.[128]

It has been questioned whether the Court still upholds the personalised interpretation in its decisions on Union citizenship.[129] The reason for this doubt lies in *Förster*.[130] Here, the Court accepted a requirement of five years of residence in a host Member State as a precondition for receiving a student allowance for the cost of maintenance. According to the new Directive 2004/38, five years of residence would be a precondition to such social benefits.[131]

> In *Bidar*,[132] decided before Directive 2004/38 was adopted, the Court held that three years of residence was satisfactory to prove sufficient integration in the host Member State in order to be entitled to equal treatment with regard to student assistance. After *Bidar*, the Union legislature included a five-year residence period in Directive 2004/38 as a precondition for the right to equal treatment regarding student allowances for the costs of maintenance. The Dutch legislature included this requirement in its Act on student allowances even before the deadline for implementing the Directive had passed. At that time, the *Förster* case was brought before the national court, which referred questions to the Court of Justice. The essential question was whether the

124 Spaventa (2008), p. 41. On the same point: Dougan (2006), pp. 618-619.
125 Dougan (2006), pp. 617-618.
126 Hailbronner (2005), p. 1251.
127 Chapter 4, Section 4.4.2.
128 See in this respect also Barnard (2005), p. 1478.
129 Spaventa (2010), pp. 141-169.
130 C-158/07, *Förster* [2008] ECR I-08507.
131 Articles 24(2) and 16 of Directive 2004/38.
132 C-209/03, *Bidar* [2005] ECR I-02119.

> prematurely implemented residence period of five years would be accepted by the Court, considering the *Bidar* case and the fact that the Directive did not have to be implemented yet. In practice, the Dutch legislature imposed a stricter norm on Ms Förster than what was required by Union law. The expectations were that the Court of Justice would circumvent the five-year residence requirement adopted after *Bidar* on the basis of the personal circumstances of the case.

Ms Förster had resided in the Netherlands for three years, during which time she studied and worked, without applying for social benefits. The Court, however, held that the residence requirement was appropriate without taking Ms Förster's specific circumstances into account. Hence, although the personal circumstances of Ms Förster could have been persuasive considering her being well-integrated and therefore not an unreasonable burden, the Court did not take that point of view.[133] The Court applied the Directive as a justification for Member States imposing restrictions on Union citizens. With *Bidar* in mind, one would have expected the Court to decide in favour of Ms Förster. The Court, however, kept to the limitations on equal treatment imposed by the Union legislature. It therefore seems that the Court of Justice will not use a 'Union citizenship interpretation' *contra legem*.[134]

The approach of the Court of Justice with regard to proportionality in European citizenship case law may result in the reinterpretation of valid secondary legislation, circumventing the application of strict rules, as seen in *Baumbast*, *Grzelczyk,* and limiting the competences of the Member States in certain areas, as in *Rottmann*. In these cases, the approach to proportionality seems to be sound considering the circumstances: "[O]ne can sleep easy in the knowledge that those citizens were treated just."[135] Nevertheless, a problem may arise with another important general principle of law: the principle of legal certainty.[136] For Union citizens, it is not very predictable to what extent a Member State may justify a certain denial of rights to nationals of other Member States, and under what circumstances such justification would not be accepted due to the application of proportionality. For example, if Mr Baumbast had only one daughter who had the Colombian nationality, or if he had previously received a small social benefit in the UK, would that have been sufficient to refuse him the right to reside in the UK? Further, would the judgment in *Trojani* have been different if Mr Trojani's circumstances had been a little bit more in favour of a residence right?

133 This is different from what the Advocate-General argued: "It is true that Directive 2004/38 places Member States under no obligation to grant maintenance aid for studies prior to acquisition of the right of permanent residence and thus not before five years have expired. However, apart from the fact that that directive is not applicable to the facts of the present case, it cannot detract from the requirements flowing from Article 12 EC and the general principle of proportionality." Opinion in C-158/07, *Förster* [2008] ECR I-08507, par. 131.

134 The case of *Wolzenburg* is another example in which the Court applied the criteria of secondary EU legislation rather than prioritising the personal circumstances of the EU citizen at stake. C-123/08, *Wolzenburg* [2009] ECR I-09621.

135 Dougan and Spaventa (2003), p. 706.

136 Spaventa (2008), p. 42.

At the same time, sometimes the individual circumstances have to yield to a collective interest of a constitutional nature, as is seen in the judgment in *Sayn-Wittgenstein*.[137] Austria argued that the prohibition on nobility titles for Austrian citizens was a constitutional rule that should ensure equality between citizens in Austria. The Court held that "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic."[138] It seems that the Court used Article 4(2) TEU, although not explicitly, to support the justification of the restriction caused by the prohibition of nobility titles. This results in a broader scope of justification for restrictions on the free movement of EU citizens and, consequently, in a different balance between the interests of free movement and those of the Member States. The personal circumstances in this case might have led to a different outcome, considering the fact that Ms Sayn-Wittgenstein had been recognised as having a nobility title since 1992.[139] Therefore the Court might also have taken into account that her title had been part of her identity for many years, but the Court did not refer to the personal circumstances of Ms Sayn-Wittgenstein in its assessment of the proportionality in the judgment.

Also in *Runevič-Vardyn* such weighing of individual rights and collective – constitutional – interests is reflected.[140]

> In *Runevič-Vardyn* the question arose whether the refusal of the Lithuanian authorities to use the Polish spelling on the certificate of an EU citizen was compatible with EU law. The Court held that "the protection and promotion of a language of a Member State which is both the national language and the first official language" could qualify as ground for justification and referred to Article 4(2) TEU, ruling that "the Union must respect its rich cultural and linguistic diversity. Article 4(2) TEU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language."[141]

The Court balanced the interests of *Runevič-Vardyn* against the constitutional interests of Lithuania, which included the protection of the State's official language.

These two cases show that Member States may be given more discretion by the Court to invoke national constitutional interests, because of the principle to respect national constitutional identities as introduced by the Treaty of Lisbon.[142] The duty to respect the national identities of the Member States may be used to interpret possible justifications for free movement and to weigh the constitutional interests of the Member States and

137 C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693. In this judgment the Court referred to Article 4(2) TEU for the first time. Previously the Court referred to national identity in C-473/93, Commission v. Luxembourg [1996] E.C.R. I-03207, par. 35.

138 C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, par. 92.

139 Dougan (2013), pp. 141-142.

140 Van Eijken (2012) (a).

141 C-391/09, *Runevič-Vardyn* [2011] ECR I-03787, paras 85-86.

142 Previously, Article 6(3) TEU guaranteed that "the national identities of the Member States" would be respected by the EU. It therefore seems that the present Article 4(2) TEU is broader than its previous version, also referring to the *fundamental, constitutional and political structures* of the Member States.

the right to the free movement of persons.[143] This case law seems to move away from the line of cases in which the Court performed a personal circumstances test in the examination of proportionality. How this case law will develop is unclear, but, if the Court continues this way, it is submitted that the Court will have to balance national constitutional interests, which might well be defined as collective interests of EU citizens at large, against the personal circumstances of each individual EU citizen.[144]

6.4 THE EFFECT OF EUROPEAN CITIZENSHIP ON THE 'CONSTITUTIONAL PRIMACY' OF UNION LAW

6.4.1 Hierarchy and constitutional primacy within the European Union

As indicated in the introduction, the analysis of this part of the research focusses on judicial constitutional primacy, examining whether the Court of Justice has approached Union citizenship as a constitutional issue.

In the second part of this chapter, the focus lies on how the superiority of constitutional norms is upheld with regard to European citizenship in the multilevel constitutional legal order of the Union.[145] In the theory of what constitutes a 'thick constitution' constitutions in general reign supreme over lower legislation: "[T]he constitution is superior law."[146] The constitutional norm, the *Grundnorm*, is the ultimate supreme norm in a legal order, from which all other standards originate. The norms that have to comply with the constitution, all together, constitute the legal system. In EU law, the hierarchy of norms differs from this traditionally national constitutional context, as discussed below.

Primary Union law has the highest ranking, at least in the perspective of the Court: As described previously, national constitutional courts may not unconditionally agree with such a strong statement.[147] The Treaty provisions have the highest ranking of Union law, and are the basis of all other European norms. The Treaty provisions are not subject to judicial review by the Court, which confirms their special constitutional status within Union law.[148] Evidently, the Court of Justice as an institution was also created and has been given jurisdiction by the same Treaties.
Since the Charter has been recognised as having the same legal status as the Treaties, it can be considered as part of the primary law of the Union.[149] As observed, general principles of Union law fall under the primary law of the European Union. These general principles are unwritten, but their legal roots lie in Article 19 TEU, in which the Court has been mandated to ensure "that in the interpretation and application of the Treaties the law is observed." This formulation implies that "there is more 'law' than simply what

143 Von Bogdandy and Schill, (2011), p. 1442, Thym (2013), p. 160.
144 In this respect the tensions arising in the AFSJ, as discussed in Chapter 4, Section 4.3.2.5.3 and Section 4.5, are similar in nature.
145 Chapter 2, Section 2.4.1.3.2.
146 Raz (2001), p. 153.
147 Chapter 6, Section 6.2.1.3.
148 Tridimas (2006), p. 50.
149 Article 6(1) TEU.

is provided by the Treaty."[150] In other words, Article 19 TEU formally provides the legal basis for the existence of general principles of Union law and the application of these principles by the Court.

The hierarchy of norms in Union law is constituted by the primary law of the Treaties, which, moreover, includes general principles of law, the Charter being the constitutional 'layer' of the hierarchy. Secondary and tertiary Union law should be derived from these primary provisions of Union law and ought to comply with these primary constitutional provisions of Union law. In this sense, secondary legislation has to comply with the primary law of the European Union. If secondary law is not in compliance with Union law, the conflicting provisions can be declared invalid by the Court. Provisions of primary Union law have primacy over secondary and tertiary Union legislation. Primary law of the European Union also prevails over conflicting *national* law. National law, which falls within the scope of Union law, also has to comply with the Treaty provisions, the general principles and the Charter. The hierarchy between the norms in the multi-layered legal order is limited by the conferral of competences. This shows the multilevel or composite nature of the European Union: the Union has the competence to act in particular situations, the Member States have the competence in other situations, and sometimes the European Union and its Member States share the competence. In this part of the research the focus lies on constitutional primacy: the primacy given to EU citizenship as a constitutional concept and how this interpretation affects the hierarchy of norms in EU law. Since the primacy of EU law as such is not connected to Union citizenship specifically, the attention lies on the more constitutional approach of EU citizenship by the Court, interpreting the conditions regarding free movement and the principle of proportionality.

6.4.2 The impact of European citizenship on the constitutional hierarchy of norms in the European Union

Within the case law on European citizenship, the principle of proportionality has played a significant role, as has been discussed in the first part of this chapter. The judicial review of European citizenship cases has been influenced by the approach of the Court when weighing up the personal circumstances in each individual case.[151] In *Baumbast*, this resulted in a lenient application of the condition that a Union citizen has to have comprehensive health insurance in the host Member State. Even though he did not fully comply with conditions set in the Directive, he had a right to residence because otherwise the principle of proportionality would be violated.

In the other cases, the application of personal circumstances was also decisive for the application of proportionality. As observed, the impact of proportionality in Union citizenship case law can be divided into two categories: the application of proportionality within the context of free movement or the application of proportionality when secondary

150 Jans et al. (2007), p. 117.
151 See also Dougan (2012), pp. 113-147.

law governs a particular situation. In the latter situation, conditions set by secondary Union law may be circumvented by the application of the principle of proportionality.

6.4.2.1 Tensions between primary Union law and secondary Union law

A second impact of European citizenship on the hierarchy of Union law is the way the Court of Justice has interpreted the primary Treaty provisions, at least with regard to the freedom to move and reside in the territory of the Member States. Naturally, constitutional primacy is, in general, also evident in the other primary provisions of Union law. European citizenship is not, in that sense, extraordinary compared to the other freedoms. However, the fact that the Treaty includes European citizenship, rather than maintaining or even broadening the existing Directives on free movement, is a clear choice by the Member States to give a more constitutional dimension to European citizenship provisions. Even if the Member States did not foresee how European citizenship would evolve, the fact that Union citizenship has been included in the Treaty is remarkable. At the same time, the Court's interpretation of the rights of Union citizens balances dangerously between judicial interpretation and policy making, and (in some cases) creates serious tensions between the judiciary and the legislature.

In the case law on European citizenship, a "humanization"[152] of individuals in case law takes place, in the sense that more attention is paid to the effect on individuals and the human aspect of a case.[153] This "human approach" to individuals is also visible in the application of the personalised principle of proportionality by the Court of Justice in Union citizenship cases. As Advocate General Colomer pointed out "cases such as *Carpenter*, *Baumbast and R*, *Bidar*, *Tas-Hagen and Tas* and *Morgan and Bucher* demonstrate a tendency towards protecting individuals, a concern with the personal situation of those who exercise a right under the Treaties which in the past was much less evident. Thus, the free movement of persons acquires its own identity, imbued with an essential nature that is more constitutional than statutory, transforming it into a freedom akin to the dynamics of the fundamental rights."[154]
Although European citizenship was not meant to be as broadly interpreted as has been done by the Court, the introduction of Union citizenship provided the Court with the opportunity to do so. This introduction constituted quite a legitimate reason "to embark upon a thorough judicial review of the relevant regulatory choices made by the Community legislature."[155]

The application of European citizenship provisions may lead to a certain tension between different norms in the sense of the hierarchy of norms in the European Union.

152 Nic Shuibhne (2010), p. 1610.
153 Such approach may also be seen in the cases on services, which in turn can be viewed as the initial development towards Union citizenship. Such approach can be found e.g. in C-274/96, *Bickel and Franz* [1998] ECR I-07637.
154 C-228/07, *Petersen* [2008] ECR I-06989, par. 17.
155 Dougan (2007), p. 662.

The *Bidar*[156] case is a good example of tension between secondary law and the primary European citizenship provisions. In that case, the constitutional primacy of European citizens' free movement is evident.

> *Dany Bidar* requested a complete student allowance,[157] including an allowance for the costs of maintenance. The fifteen-year-old French national came to the UK with his mother, who died 18 months later. *Bidar* resided with his grandmother as her dependent and completed his secondary education. When he had resided in the UK for three years, he applied for a full allowance for students, including assistance for the costs of maintenance. This request was refused because *Bidar* did not have the British nationality, nor was he "settled" in the UK, since in order to be settled, foreign students had to have resided for three years in the UK, besides the period of secondary education.

The conditions in the British Student Support Regulations constituted discrimination on the ground of nationality, in combination with the right to free movement of Union citizens, since it was almost impossible for foreign students to comply with the conditions. However, the Student Directive[158] did not allow students to claim maintenance assistance. According to Article 3 of the Directive, it did not establish "any entitlement to the payment of maintenance grants" for students from other Member States. Equally, Directive 2004/38, for which the implementation period had not yet expired, excluded equal treatment with regard to maintenance allowances for Union citizens prior to permanent residence (after five years).[159] The Court nevertheless found that the Student Directive did not exclude the application of Article 18 TFEU for a person who was lawfully resident based on Directive 90/364. Therefore *Bidar* was able to rely on the prohibition on discrimination on the grounds of nationality provided for in primary Union law. After *Bidar*, Directive 2004/38 replaced the three old Directives of the 1990s. Directive 2004/38 excludes equal treatment with regard to student allowances for maintenance prior to obtaining permanent residence, which is established after a lawfully continuous period of residence of five years in the host Member State. Since *Bidar* did not obtain his right to reside from the Student Directive, but enjoyed a residence right based on the general Residence Directive, the question arose whether *Bidar* was an extraordinary case because he already resided in the UK, or whether the Court would continue to apply primary law (Article 21(1) TFEU) rather than the Directive.

As discussed, *Förster* resulted from the *Bidar* judgment. One of the questions raised in *Förster* concerned how Directive 2004/38 and Articles 18 and 21(1) TFEU relate to each other. *Förster* came to the Netherlands with the purpose of studying, under Directive 93/96, which gave no entitlement to student allowances. However the Court found that this provision "does not preclude a national of a Member State who, by virtue of Article

156 C-209/03, *Bidar* [2005] ECR I-02119.

157 Since *Raulin*, student allowances for the costs of registration and fees of vocational training were already governed by Article 18 TFEU.

158 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, pp. 59-60.

159 Directive 2004/38, Article 24(2) in conjunction with Article 16.

18 EC [21(1) TFEU] and the provisions adopted to implement that article, is lawfully resident in the territory of another Member State where he or she intends to start or pursue education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article 12 EC [18 TFEU]."[160]
The Court, however, held that the five-year period included in Directive 2004/38 was appropriate to examine the degree of integration of a student from another Member State for the purposes of equal access to student allowances. The Court seemed to have moved away from its constitutional interpretation of the Union citizens' provisions. Even though the Commission and the Advocate General were both of the opinion that the five-year residence requirement should be applied in a less absolute manner, the Court accepted the more rigid requirement.[161] The Directive had not entered into force yet, and the Court could have continued to apply the *Bidar* requirements, since after three years Ms Förster had sufficiently integrated in the host Member State, and could have performed an assessment of the personal circumstances in the proportionality test. It therefore seemed that the Court broke with its previous case law, in which it indirectly reviewed strict secondary legislation through a constitutional prism of European citizenship. The question also arose whether *Förster* meant that the Court's 'real link' case law had been overruled.[162] Even if this were the case, the Court showed in subsequent case law that it interprets European citizenship provisions as leading principles and takes into account the personal circumstances of Union citizens.

After *Förster*, however, the Court of Justice again took what can be called a 'constitutional approach' to European citizenship in *Vatsouras*.[163] In that case, the Court of Justice interpreted Directive 2004/38 in the light and purpose of European citizenship and adjusted the application of the Directive according to this perspective. Different than the reasoning in *Förster*, the Court in *Vatsouras* did not call the validity of the Directive into question, but interpreted the Directive as such that the Union citizens at issue were not excluded from access to social benefits.[164] Although the Directive excludes equal treatment with regard to social benefits for jobseekers, the Court of Justice concluded that a social benefit aiming to facilitate the access to the market in a Member State cannot be regarded as a social benefit as excluded in Article 24(2) of Directive 2004/38.

> Athanasios Vatsouras's social benefit was withdrawn because his employment ended. Josif Koupatantze was refused the same social benefit, which he requested after his unemployment. As both were Greek nationals in Germany, the question arose whether they could be regarded workers in the sense of Union law and how this status related to the exclusion of Article 24(2) of Directive 2004/38. In this provision, social benefits for the unemployed are excluded from the scope of equal treatment of Union citizens.

160 C-158/07, *Förster* [2008] ECR I-08507, par. 43. Brackets added HvE.
161 The Advocate General was of the opinion that the five-year requirement was not proportional, C-158/07, *Förster* [2008] ECR I-08507, paras 97 and 128-133.
162 Golynker (2009), pp. 2021-2039.
163 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585. See also Spaventa (2010), p. 160 and Van Eijken (2009).
164 Dougan (2013), p. 141.

> In *Collins*,[165] the Court of Justice interpreted Regulation 1612/68 in the light of Article 18 TFEU and European citizenship to conclude that a social benefit for workers should also be granted to those unemployed persons with a real link with the host state. The personal scope of Article 49 TFEU was thereby extended to those unemployed Union citizens who had established a real link with the host Member State. Since the judgment in *Collins*, Directive 2004/38 came into force, which excluded equal treatment with regard to social benefits for the unemployed. Nevertheless, the Court in *Vatsouras* upheld the Union citizenship interpretation that it applied in *Collins*. The Court of Justice ruled that "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38."[166] The Court used the small discretion left in the exclusion of Article 2(2) in order to decide the case in favour of Mr Vatsouras and Mr Koupatantze.

Vatsouras provides another example of the creative interpretation of the Court in favour of European citizens. This 'Union citizenship friendly interpretation' of the provisions of the Directive may be called 'constitutional' since it considers Union citizenship freedoms as high and guiding principles of interpretation. This is evidently the result of the fact that the free movement of European citizens is framed in a Treaty provision, while secondary law has to adjust to the primary provisions of Union law. It seems that the Court is cautious not to overrule the European legislature, but at the same time the Court interprets secondary legislation in the advantage of the Union citizen.

Rottmann confirms the constitutional approach of the Court, since the Court argued that the *nature of European citizenship* brought the situation within the scope of Union law. Consequently, Germany had to comply with the principle of proportionality when withdrawing the German nationality from one of its nationals. In the cases on Article 20 TFEU, such as *Rottmann* and *Ruiz Zambrano*, one can notice a constitutional approach towards European citizenship, as the Court seems to have applied the concept of Union citizenship as such as an argument for applying a test of the "substance of rights."[167] Moreover, in *Ruiz Zambrano*, the Directive as secondary legislation laying down limits and conditions regarding free movement was somewhat circumvented by the Court of Justice.[168] The Directive was not, according to the Court, applicable to the situation of Mr Ruiz Zambrano as the Directive only applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members" according to Article 3(1). In this sense, the Court made a distinction between the right to move freely in the territory of the Member States and the right to reside in the European Union (based on Articles 21(1) and 20 respectively). The right to reside in the territory of the Member States is therefore not subject to the condition of having sufficient resources and health insurance. This is quite reasonable considering that nationals of another Member State must not become a burden on the social security system of the host Member State.[169] However, where the right to *reside* is at issue and,

165 C-138/02, *Collins* [2004] ECR I-02703.
166 C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585, par. 45.
167 Hailbronner and Thym (2011), pp. 1253-1270.
168 Wiesbrock.
169 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 44.

in particular, the right of a national to reside in his *own* Member State based on Article 20 TFEU, residence in the Member State of nationality should be ensured without such strict conditions.

In its case law, the Court seems to respect the boundaries of secondary law, but it uses its remaining discretion, if any, in order to interpret the freedoms of Union citizens as a fundamental freedom. In the cases following *Bidar*, a "Union citizenship consistent interpretation" of the Directive has come into being. The case law on Article 20 TFEU may yet, even though the Court until now has held a narrow interpretation of the 'substance of rights' conferred to EU citizens, prove to be a new route into the promised land for nationals of the Member States, for whom European citizenship ought to be the fundamental status.

6.5 CONCLUSION: THE IMPACT OF EUROPEAN CITIZENSHIP ON JUSTICIABILITY AND CONSTITUTIONAL PRIMACY

Let us return to the main question of this chapter: What is the impact of European citizenship on the justiciability and constitutional primacy of the European Union, in terms of constitutionalisation? European law has a demonstrably constitutional nature, in the sense of the superiority that Raz distinguished. Basically, primary Union law prevails over secondary law of the European Union, as well as over national law, within the framework of the principle of conferral. In order to ensure this constitutional primacy, different judicial procedures have been included in the Treaty.

This effect, more specifically, can be seen in the case law on European citizenship. The provisions regarding European citizenship have been declared to have direct effect (at least Articles 20 and 21(1) TFEU). In addition, Article 22(1) TFEU may be invoked before a national court.[170] The direct effect of European citizenship has been important in the strengthening of the judicial protection of individuals in the Union. Alternatively, one could even argue that judicial protection and direct effect have been introduced in European law because citizens of the Union were affected by Union law in the first place. First, direct effect was established because the Union also affected individuals. As the Court argued in July 1964, the Member States "created a body of law which binds both their nationals and themselves" and law of the Union forms an "integral part of the legal system of the member states, and thus forms part of their own law, and directly concerns their nationals in whose favour it has created individual rights which national courts must protect."[171] For these reasons, *inter alia*, direct effect has been established as a concept of Union law. Consequently, direct effect has been a vehicle to strengthen the judicial protection in the Union in favour of the individuals who were suddenly affected by the law of the European Union.

170 C-300/04, *Eman and Sevinger* [2006] ECR I-8055.
171 Case 6/64, *Costa v E.N.E.L.* [1964] ECR 00585, paras 3 and 7.

The preliminary procedure is an important example of the way the judicial structure in the European Union has increasingly become something of a judicial cooperation between courts. The fact that Union citizens may rely on their rights as European citizens before a national court has been very important for the further development of European citizenship. As observed, almost all cases on Union citizenship are decided by the Court in the context of a preliminary reference. More questions are and will be referred to the Court of Justice, which gives it, together with the national courts that apply the provisions to the national cases, the opportunity to further shape and fine-tune the concept of European citizenship.

Concerning the hierarchy of norms in the European Union, the test of proportionality might lead to a certain tension between secondary law and the principle of proportionality. In at least two ways the hierarchy of norms is affected, or strengthened, by European citizenship as a guiding concept. In the first place, with the personal approach to proportionality in the case law on European citizenship, priority has been given to the freedom of Union citizens, rather than the conditions regarding this right stated in the Directives that regulated free movement rights in more detail. This means that in certain circumstances, even national law that implements secondary Union law must yield. In the second place, the provisions of European citizenship as included in the Treaty are applied in a constitutional manner, in the sense that the Court interprets EU citizenship in such a way that it belongs to the highest norms. One of the significant cases is that of *Bidar*. In subsequent case law, such a constitutional interpretation of Union citizenship can also be seen. The new line of case law, which started with the cases of *Rottmann* and *Ruiz Zambrano*, may introduce a trend in case law in which the concept of European citizenship is used by the Court as a tool to obtain a fundamental status for nationals of Member States. At the same time, the constitutional national identity of a Member State may shift the balance, from an individual circumstances approach to broader discretion for Member States to justify restrictions to the exercise of free movement rights by EU citizens.

The flexible interpretation of the Court regarding the personal circumstances may not always be in European citizens' advantage. General principles of Union law are flexible and can provide for a just interpretation of the law. Such interpretation suits European citizenship in the sense that citizenship creates equal membership and solidarity, meaning that discretion for fair application of the law should be possible. However, one problem with this flexible interpretation is that the legal certainty of the Union citizens concerned may be at stake at the same time. Even though the Court seems mostly (but not always) to favour EU citizens over a strict interpretation of limitations to EU citizenship rights, a lack of legal certainty is not to the benefit of European citizens in general. It poses, for instance, problems in national cases, in which the outcome may differ in each and every case depending on how the personal circumstances are weighed by the national court. Moreover, another, constitutional problem may arise: that of the Court overstepping the horizontal division of powers. If the Court of Justice interprets EU citizenship provisions against the will and purpose of the legislature the horizontal division of powers in the Union might be interfered with. The fact that the Court, for instance, interpreted the

limitations of Directive 2004/38 in *Vatsouras and Koupatantze* in a way that favours the individual interest may well be against the will of the European legislature to restrict the access to social benefits (according to Article 24(2) of Directive 2004/38).

For the constitutionalisation of the Union, the impact of European citizenship on the two constitutional building blocks is not overly obvious, but it is noticeable. The impact on justiciability may be the stronger one, since individuals have become actual actors in the process in which the content and boundaries of European citizenship are shaped. The Court in Luxembourg polishes the concept of European citizenship and the rights that come with that status, but the national courts also play an important role in the way they apply the provisions and the questions they refer. In this context, the study on the application of Article 20 TFEU after *Ruiz Zambrano* in Dutch case law is telling.

With regard to the hierarchy of norms, the impact of European citizenship is less clear. The case law on European citizenship shows that the rights and freedoms of European citizens have been interpreted in a sense of constitutional primacy. The case law shows how the Court in certain cases takes the personal circumstances into account by balancing proportionality. In this sense it seems that the Court adopts a constitutional assessment of Union citizenship, ensuring that the individual rights of Union citizens are protected. At the same time one may wonder whether this approach of the Court is still present. In cases such as *Förster*, *Wolzenburg* and *Sayn-Wittgenstein* the Court seems to move away from its initial proportionality test in EU citizenship cases. In these cases, however, the Court was limited by either a specific Directive or by Article 4(2) TEU, which might explain the reasoning of the Court in these judgments. Perhaps the most important development is the fact that the Court of Justice uses the possible space to interpret provisions "Union citizenship consistently", in favour of the rights of Union citizens, at least where possible.

At the time of writing, it is unclear how these two developments, the personal circumstances test and respect for national constitutional identities of Member States, relate. It seems likely that the Court will continue to enhance European citizenship rights in the way it has done in previous cases, focusing on individual consequences. However, when a national constitutional measure hinders a Union citizen, the balance may shift to favour the Member State, due to Article 4(2) TEU.

"[A] need to achieve an 'integrated space' within which citizens will be the 'protagonists', with unlimited freedom of movement, establishment, access to employment, as well as the right to vote in local elections in other countries than their own."[1]

CHAPTER 7

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Conclusions: the effect of European citizenship on the constitutionalisation of the European Union

7.1 THE CONCEPT OF EUROPEAN CITIZENSHIP IN THE CONSTITUTIONAL CONTEXT OF THE EUROPEAN UNION

7.1.1 An open field…

Imagine an unploughed, open field without any roads, cars or people. Then imagine a destination in the distance, let us say a small wooden cabin, that can be reached by walking or driving through that field. To reach the destination, a small path will be created over time, not by intention *per se*, but in practice. The best way to reach the cabin is to go through the field, leaving the first traces of a path or a road. The grass will be trampled down and, off the beaten track, a path will become visible. This does not necessarily mean that there is an official road, nor that the road will ever be registered or that it even has all the characteristics to qualify as a road. It does mean that the field changes and that the tracks are the first signs of a larger network of roads. This phenomenon of so-called "desire paths"[2] can be used as a metaphor for the constitutionalisation of the European Union.

The European Union was not born as a constitutional federal state, nor was there an intention as such to create a "super state of Europe." The European Union can, to a certain extent, be compared with international organisations, but also has characteristics that are found in federal states. The European Union can probably be best described as "something in between"[3] these structures. Europe was recovering from the Second World War and, in order to build peace and economic stability, a new destination was

1 Spanish Prime Minister Mr Gonzalez in the COREPER meeting debating a political union. Agence Europe, No. 5252 of 11 May 1990.

2 The Macmillan Dictionary: 'desire path': a planning term referring to a path made by walkers or cyclists, as opposed to one that is officially planned.

3 Walker (2012), p. 78.

created, just on the other side of a field: a house with 'economic integration and welfare' on a sign on the door.
The structure of the European legal order has acquired more characteristics of a constitutional legal order; this is where the muddy path is now beginning to look like a road. In this thesis the paths created in the field over time have been examined, through the prism of European citizenship. Has the addition of 'European citizenship' to the sign on the door, next to 'economic integration and welfare', affected the constitutional paths meandering through the field? Or, in other words, to come back to the main research question:

How does European citizenship affect the process of constitutionalisation of the European Union?

7.1.2 European citizenship and constitutionalisation

Ever since the judgments in *Van Gend & Loos* and *Costa E.N.E.L.*,[4] the nature of the European Union has been debated in relation to individuals who are affected by Union law. Discussions concerning the involvement of these individuals are therefore not new, but have taken place from early on. The nationals of the Member States have always been influenced by this new European legal order. The European Union was more than a simple cooperation between States, but could it be described in terms that are familiar in constitutional theories? As indicated in the introduction of this thesis, this debate, on the nature of the European Union, is very much alive.

Before turning to the question of how European citizenship has affected the constitutionalisation of the Union, the nature of European citizenship as such is discussed below in Sections 7.1.3 and 7.1.4. Section 7.1.3 focusses on the definitions of citizenship in general and the place of European citizenship in those theories. The assumption underlying this thesis is that European citizenship is one of the constitutional elements of the European Union, triggering other constitutional features. In the analytical framework of this thesis the nature of European citizenship in terms of market citizenship and constitutional citizenship is elaborated on. In Section 7.1.4 this discussion is touched upon again. Section 7.2 summarises the main conclusions regarding each constitutional element. Section 7.3 deals with the question how to evaluate these constitutional effects of European citizenship in the context of constitutionalisation. An alternative perspective of European citizenship as a composite concept is discussed in Section 7.4. Finally, Section 7.5 provides a look into the future on the role of European citizenship in the constitutionalising European legal order.

4 Case 26/62, *Van Gend & Loos* [1963] ECR 1 and Case 6/64, *Costa E.N.E.L.* [1964] ECR special edition p. 585.

7.1.3 Citizenship in a multi-layered European legal order

Citizenship has traditionally developed in the context of the nation state as the status of those who were considered to be equal members of the polity. In order to achieve this equal status, citizens are given certain rights.
Several definitions and different models of citizenship exist. One may define citizenship in a more liberal meaning as market citizenship or economic citizenship. From this perspective, citizenship is connected to economic freedoms. A civic republican or active conception of citizenship concentrates on the political participation of citizens. Deliberative citizenship is based on a strong notion of participatory democracy.[5] Others have analysed various elements of citizenship. For instance, Bosniak categorised citizenship as having five elements: status, rights, political engagement, responsibilities and identity/solidarity/belonging.[6] Wiener identifies rights, access and belonging as the three elements on which citizenship is founded. She emphasises that historically citizenship constitutes the realisation of rights and the representation of identity in order to achieve full membership.[7] As discussed in the analytical framework of this thesis, Marshall emphasises equal membership as the core element of citizenship and focusses on equality and the rights aspect of citizenship, distinguishing the civil, social and political dimensions of citizenship rights. He defined citizenship as the "status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[8] *Equal membership*, *rights* and *identity/belonging* seem to be key characteristics of citizenship, although there are differences in the various definitions.[9] These elements of citizenship were transferred beyond the nation state by the concept of European citizenship, which has given rise to questions on membership, identity, and rights, but also duties of EU citizens.

In the European Union the concept of citizenship has been given a new meaning, since European citizenship constitutes a transnational form of citizenship. This formal inclusion of citizenship in the European Union is a historical and unique moment, since for the first time citizenship was introduced beyond the context of the nation state.[10] As observed, European citizenship has been criticised for being a symbolic concept, as well as for being too intrusive in Member States' legal orders. European citizenship has therefore been said to have an "exquisite Janus-like quality".[11]
Citizenship of the Union created a new connection between individuals with other nation states and the nationals of those states, at least from a legal perspective. It is therefore a

5 For a detailed overview and the connection between European citizenship and these models of citizenship see Kostakopoulou (2005).
6 Bosniak (2003).
7 Wiener (1997).
8 Marshall (1950, reprinted 1992), p. 18, Closa (1995), p. 490.
9 Bosniak therefore argues that on the one hand "the concept is simply too multivalent to play the kind of central analytical and aspirational role that it has come to play in the work of many contemporary scholars (…) Yet it is also true that citizenship's meaning is not entirely indeterminate. Status, rights, political participation, and identity represent the core or its analytical concerns", Bosniak (2003), p. 200.
10 As citizenship of a city or national citizenship. See also Kostakopoulou (2007), pp. 624-625.
11 Weiler (1998) (a), pp. 2-3. According to Weiler these different views on European citizenship are not altogether contradictory.

challenging concept, triggering questions regarding identity and belonging in the sense that new relations were created. European citizenship has changed the relationship between individuals and their state of origin, their relationship to other Member States and the relationship between the nationals of the 28 Member States in the EU. Nationals of Member States have the right to equal treatment and residence in other Member States, for instance, on account of Union law, which creates a new relationship with the host Member State as well as with the nationals of that host Member State.
Taking the different conceptions of citizenship into account, the aspect of *rights* seems to be most developed with regard to European citizenship. As has been analysed in this thesis the rights of Union citizens to move and reside freely, the right to equal treatment and political rights have been the main triggers for the constitutionalisation of the Union. European citizens' rights are both connected to a liberal as well as to a more civic model of citizenship, granting socio-economic rights as well as political rights.
The component of *identity/belonging* has been less developed so far in the context of the European Union. Notions such as solidarity have been given a new meaning. Nationals of the Member States not only need to share welfare with fellow nationals, but, under certain circumstances, with EU citizens from other Member States as well, even if those EU citizens did not contribute, at least not specifically, to the welfare system. *Equality and equal membership*, moreover, is one of the components that has been important for the development of Union citizenship and the constitutionalisation of the European Union. Equal treatment has also proven to be a challenging issue, since Member States do not have an equal level of welfare and the quality of educational systems differs, for instance. This means that some Member States may be more attractive to reside in for Union nationals than other Member States. Since equal access to welfare should be granted to residing Union citizens, unless refusal of access is justified, equality of Union citizens may create tensions between those who move and those who do not use their right to free movement. Moreover, although Union citizens need to be treated as equals, they never become truly equal, compared to nationals of a host Member State. Access to social benefits can be denied if a Union citizen has not proved to have a real link with the host Member State, for instance. Furthermore, a residing EU citizen may be expelled from the territory of a Member State if he or she poses a serious threat to public policy or public security or on imperative grounds of public security. Moreover, access to national elections may also be denied to residing EU citizens. On the other hand, equality significantly enhanced European citizenship, as has been discussed in Chapter 3.

Yet, despite the fact that European citizenship may not have been fully developed in the sense of all these citizenship conceptions, various aspects of those conceptions are certainly present. As observed in Chapter 2 of this thesis the question how to evaluate European citizenship in terms of market citizenship or a more constitutional form of citizenship has been a topic of debate in EU law and will be discussed below.

7.1.4 European citizenship: constitutional concept or market-based concept?

European citizenship is constitutional in nature, as argued in the analytical framework of this thesis. Arguments for this constitutional nature are the fact that European citizenship

was accomplished with political rights and because the concept was placed by several actors in the Union, by the Court, the Member States and the European legislature, in a constitutional context.[12]

In the same sense, Advocate General Sharpston argued more than 20 years after the introduction of European citizenship:

> "[F]rom the moment that the Member States decided to add, to existing concepts of nationality, a new and complementary status of 'citizen of the Union', it became impossible to regard such individuals as mere economic factors of production. Citizens are not 'resources' employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights."[13]

Similarly, the Court of Justice stated on several occasions that European citizenship is destined to be the fundamental status of Union citizens.[14] Nevertheless, fact is that European citizenship has its roots in the internal market and that the rights granted to European citizenship still have a connection with mechanisms common in the internal market freedoms. European citizenship developed through the model and system of the internal market freedoms, which shaped the first years of European citizenship after Maastricht. European citizenship became more independent from its market childhood and developed along more constitutional lines. Its attachment to the internal market is likely to continue to exist in the future, since the division between European citizenship and the free movement of economically active persons is not always clear.[15]

After analysing the impact of European citizenship on the constitutionalisation of the European Union, some points may be noted on the constitutional nature of European citizenship as such. It is absolutely true that European citizenship does carry in its core a form of market citizenship. European citizenship also adds, however, a more constitutional layer to this market citizenship. European citizenship can be defined in both ways: on the one hand the concept is still connected to the internal market structures, but on the other, it has developed into a constitutional concept, due to the political rights attached to its status, as well as the case law that has been including the European citizen in the Union as a non-economic actor. This dual picture of Union citizenship is described in the various parts of this thesis.

In addition to market-based citizenship, new constitutional dimensions have been attached to the status of European citizenship. The inclusion of free movement in the Treaty of Maastricht transformed the limited form of free movement of Union citizens, granted by the three directives on free movement, into a general and primary right to free movement, on which the Directives imposed conditions. Cases such as *Garcia Avello,* in

12 Chapter 2, Section 2.1.4.
13 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 127.
14 C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31, C-224/89, *D'Hoop* [2002] ECR I-06191, par. 28, C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 22, C-403/03, *Schempp* [2005] ECR I-06421, par. 15.
15 In this sense, the Court tends to prefer to apply the economic freedoms when possible. See in more detail: Van Eijken and De Vries (2011), p. 709 and Chapter 3, Section 3.4.5.

which the Court dealt with the civil status and the recognition of names, showed that the economic link between free movement and European citizenship disappeared.[16] In this sense, the free movement of persons moved away from their initial more economic meaning, guaranteeing equal treatment with regard to all kinds of areas, not only social or economic benefits.

Moreover, the political rights of Union citizens remain an important argument for a constitutional interpretation of the concept. The rights to vote and stand as a candidate for European and municipal elections created new political links between the citizen and the European Union, as well as between the Union citizen and host Member States. As has been observed, following the inclusion of the right to vote and stand as a candidate in municipal elections, Member States had to allow non-nationals to enter their (local) politics. Moreover, with the Treaty of Lisbon, the political rights have recently been enhanced, introducing the citizens' initiative and thereby creating a more direct connection between Union citizens and the European Union.

Additionally, the more recent shift in the Court's case law is noteworthy: Article 20 TFEU has been interpreted as having an autonomous meaning and direct effect. This case law started with the case of *Rottmann*. The formulation in *Rottmann* that European citizenship and the rights attached to that status fall "by reason *of its nature and its consequences*, within the ambit of European Union law" is constitutionally significant.[17] This statement implies that the Court of Justice indeed applies European citizenship as a constitutional and fundamental status of the nationals of the Member States. This is affirmed in *Ruiz Zambrano*,[18] in which the Court clearly took a new direction in its case law to ensure the effectiveness of the rights of European citizens and to fashion the concept of European citizenship, irrespective of free movement. Even though the substance of European citizenship rights, often, remains connected with the internal market and free movement, this case law clearly goes beyond the Union citizen as market citizen. In *Ruiz Zambrano* there was no economic link, other than the fact that Mr Ruiz Zambrano became unemployed and asked for social benefits, and neither was there a link with free movement, since the children acquired the Belgian nationality and were born in Belgium. Although one could argue that the *future* free movement rights of the children would lose much of their meaning if they were forced to leave the territory of the Union, this connection with free movement is not evident. The Court did not refer to Article 21 TFEU, but decided the case on the effectiveness of European citizenship as a status. Subsequently, with the case law on Article 20 TFEU, something of a minimum standard of protection is now offered to European citizens by Union law. Whatever the specific area of law, European citizens may not be deprived by Member States of the essential part of their European citizenship as a minimum level of protection.

The synergy between European citizenship and constitutionalisation of the Union can be described as interacting in two directions. In the first place, European citizenship has been introduced in the European Union because the legal order of the Union was

16 Shaw (2011), p. 589.
17 C-135/08, *Rottmann* [2010] ECR I-01449, par. 42.
18 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177.

more than a simple international legal order and affected the daily lives of those who were living in the European Union. Therefore, there was an increasing need to involve the nationals of the Member States in the legal order as subjects and holders of rights and duties. Constitutionalisation of the European Union started developing before the formal introduction of European citizenship and may be regarded as one of the sources of the establishment of European citizenship. In this sense, European citizenship is the result of the incipient constitutionalisation of the European Union.
In the second place, ever since the incorporation of the formal and legal status of nationals of the Member States as European citizens, the European Union has become more constitutional as a reaction to that status. This last dimension has been analysed in the present thesis. Hence, European citizenship is the result of the constitutionalisation of the European Union, while at the same time European citizenship triggered, and continues to trigger, the constitutionalisation of the European Union further.

7.2 THE CONTRIBUTION OF EUROPEAN CITIZENSHIP TO THE CONSTITUTIONALISATION OF THE EUROPEAN UNION

In the analysis in the previous chapters of this thesis, the effect of European citizenship has been discussed in the framework of four constitutional building blocks. In the first place, European citizenship and the effect it has on the division of powers between the Member States and the European Union has been examined.[19] Secondly, the connection between European citizenship and two elements of a common constitutional ideology has been debated. These two ingredients of the constitutional ideology are fundamental rights protection[20] and democracy (including political rights).[21] Thirdly, the focus shifted to the effect of European citizenship on the judicial landscape of the European Union. Justiciability as one of the constitutional elements of the European Union and the impact of European citizenship on it has been described.[22] Finally, the role of European citizenship in what has been defined in this thesis as constitutional primacy has been discussed.[23] In what follows, first the main conclusions regarding each constitutional element will be discussed, summarising the main findings of each chapter in Section 7.2.1 to Section 7.2.4. Subsequently, the question is posed how these conclusions contribute to answering the main question of this thesis, how European citizenship has affected the process of constitutionalisation, in Section 7.3.

7.2.1 Vertical division of powers

European citizenship has extended the scope of European Union law considerably. Although the free movement of persons derived from the market freedoms in the premature contours of the concept of European citizenship, the inclusion of Articles 20 to 25 TFEU, and the incorporation of the citizenship provisions in the Charter, marked

19 Chapter 3.
20 Chapter 4.
21 Chapter 5.
22 Chapter 6.
23 Chapter 6.

a shift in the vertical division of powers. This shift has been manifested in the case law of the Court of Justice since 1998.

The equality of European citizens on the grounds of nationality catalysed the extension of the scope of Union law. As observed in Chapter 3, the fact that the scope of Union law has been widened resulted in more national law having to comply with the limitations of Union law.[24] Even though the Member States remain competent to regulate a certain area of law, the limitations by general principles of Union law and non-discrimination apply to all Member State actions. European citizenship creates tensions between the scope of Union law and the competences of the Member States in several sensitive areas, such as migration, social benefits for non-nationals and family reunification rights.

European citizenship not only extended the scope of Union law, but did so in different ways. In the first place, European citizenship was used by the Court to broaden the scope of non-discrimination on the grounds of nationality. Second, European citizenship became a 'fifth freedom', in addition to the four economic freedoms. As a consequence Article 21(1) TFEU may be invoked against any national measure that constitutes an obstacle to the free movement of Union citizens. Third, what belongs to the wholly internal situation of Member States was recently reduced by the case law on Article 20 TFEU. The scope of European citizenship is now extended to those European citizens who have not exercised their right to free movement, but are deprived of the genuine enjoyment of their status of European citizenship. Fourth, the existing freedoms are interpreted from a European citizenship perspective, broadening the scope of economic free movement. As observed in Chapter 3, a restricting effect of European citizenship can also be detected. The 'real link' requirement that was developed in the sphere of non-economic free movement and access to social benefits is now also being applied by the Court in cases regarding frontier workers. In this perspective, significantly enough, the free movement of workers is limited rather than broadened by European citizenship.

However, in various ways the scope of Union law has been broadened notably by European citizenship, especially by the relevant case law of the Court. The extension of the scope of European law means that, in terms of the vertical division of powers, Member States need to comply with the principles of European citizenship. This obligation has been extended by Union citizenship, since the scope of Union law has been broadened.
Moreover, the case law of the Court may lead to the harmonisation of certain areas of law. In the field of student allowances, Advocate General Sharpston called on the European legislature and the Member States to provide for coherency and legal certainty by adopting legislation.[25] For such a spill-over effect, a legal basis is required. Article

24 Chapter 3, Section 3.5.
25 C-173/08, *Bressol and others* [2010] ECR I-02735, par. 153.

21(2) TFEU[26] could be used as a legal basis for legislation to facilitate the free movement of European citizens in the future.[27]

7.2.2 Fundamental rights protection

The connection between fundamental rights protection and European citizenship seems natural at first sight. The link between these concepts, however, has not been clearly established yet. The analysis of the contribution of European citizenship to fundamental rights protection has revealed that Union citizenship has a limited role in the protection of fundamental civil rights. The protection of fundamental rights in the European Union was triggered by the German Constitutional Court reacting to the supremacy of Union law over national constitutions.[28] Even though the interest of the nationals of the Member States was advocated in the *Solange* judgments,[29] European citizenship as such did not trigger the protection of fundamental rights in the Union. The two concepts, citizenship of the Union and fundamental rights, developed, more or less, autonomously. Nevertheless, European citizenship and fundamental rights influenced each other.

The free movement of European citizens certainly added to the protection of fundamental rights in the European Union: since the personal scope has extended to individuals who are not economically active, a non-economic link has been established between the nationals of the Member States and the scope of Union law, in which the fundamental rights are protected. In the context of free movement and the right to reside in the European Union, questions on the right to family life have been raised, for example. Furthermore, in the area of social rights, European citizenship has had a clear impact. The introduction of European citizenship and the case law on free movement led to welfare systems in the European Union being restructured. Based on the case law with regard to equal access to social benefits, territorial and national walls around the social security systems in the Member States were broken down. Social fundamental rights seem to be the category of fundamental rights that has been most developed and fine-tuned in case law. The case law on student allowances is a clear example of the social rights as triggered

26 If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

27 See for instance the Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 COM(2013) 228.

28 *BVerfG* 37, 271 2 BvL 52/71 (Solange I) and *BVerfG* 73, 339 (Solange II).

29 *BVerfG* 37, 271 2 BvL 52/71 Solange I, par. 6. "Soweit also danach Bürger der Bundesrepublik Deutschland einen Anspruch auf gerichtlichen Schutz ihrer im Grundgesetz garantierten Grundrechte haben, kann ihr Status keine Beeinträchtigung erleiden nur deshalb, weil sie durch Rechtsakte von Behörden oder Gerichten der Bundesrepublik Deutschland unmittelbar betroffen werden, die sich auf Gemeinschaftsrecht stützen. Andernfalls entstünde gerade für die elementarsten Statusrechte des Bürgers eine empfindliche Lücke des gerichtlichen Schutzes. Im übrigen gilt für die Verfassung einer Gemeinschaft von Staaten mit einer freiheitlich-demokratischen Verfassung im Zweifel grundsätzlich nichts anderes wie für einen freiheitlich demokratisch verfaßten Bundesstaat: Es schadet der Gemeinschaft und ihrer freiheitlichen (und demokratischen) Verfassung nicht, wenn und soweit ihre Mitglieder in ihrer Verfassung die Freiheitsrechte ihrer Bürger stärker verbürgen als die Gemeinschaft es tut."

by European citizenship and fine-tuned by the Court and the European legislature. The 'real link' principle has resulted in different notions of solidarity, depending on the degree of integration of a Union citizen in a host Member State, or the real link with the Member State of origin.

However, fundamental rights protection is, mostly, linked to free movement and is not attached to the status of European citizenship as such. The application of the Charter and the general principles of Union law are triggered by harmonisation or by free movement, which means that no direct connection has been established between Article 20 TFEU and the protection of fundamental rights, at least, not yet. The case law that started with *Ruiz Zambrano* could have created such a link, but so far the scope of Union law has been activated only when national measures *de facto* or *de jure* deprive a Union citizen of its essential rights, which is at present interpreted as situations in which a Union citizen is forced to leave the territory of the European Union. The Court is and probably will continue to be reluctant to connect Article 20 TFEU with the scope of application of the Charter, since Article 51(1) of the Charter explicitly limits the scope of application of the Charter. The Court has circumvented the Charter by introducing the test of the 'substance of the rights' of Union citizens on the basis of Article 20 TFEU, rather than deciding the case on the basis of human rights. The Court therefore deliberately chose not to regard the residence rights of the *Ruiz Zambrano* children as an issue of fundamental rights.[30] The new case law on Article 20 TFEU, however, is significant for the constitutionalisation of the European Union, as well as for the constitutionalisation of the concept of European citizenship. Since Article 20 TFEU may now be invoked against any national measures depriving a Union citizen of the substance of his European citizenship rights, fundamental rights issues are likely to come up too. One may well argue that depriving citizens of certain fundamental rights also affect the core of Union citizenship.

In some other areas, in addition, a connection between citizenship of the European Union and fundamental rights could be made, irrespective of free movement: the Area of Freedom, Security and Justice, and services of general interest are examples. Even though the specific legal instruments in these areas cannot be linked neatly and directly to Union citizenship, the European citizen in these areas may serve as a legitimation for policy and legislative initiatives of European legislation and the broader protection of fundamental rights.[31] An example of such a legitimising function is the principle of mutual confidence in criminal justice in the Union.[32] In the 'Hague Programme', the Council emphasises that "mutual confidence shall be based on the certainty that all European citizens have access

30 Along the same lines, the Court did not approach Rottmann's case in the context of fundamental rights but approached statelessness as an issue of EU citizenship as such. See on this point in more detail Kochenov (2010).

31 Chapter 4, Section 4.5.

32 Also with regard to the AFSJ the Court held in *N.S.*: "[T]he creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights." C-411/10 and C-493/11, *N.S.* [2011] ECR I-13905, par. 83.

to a judicial system meeting high standards of quality."[33] Moreover, the free movement of Union citizens in the Area raises new questions on the protection of fundamental rights in terms of safety and security rights, also where it concerns European citizens who have not exercised their right to move. In the field of European criminal justice certain links can be revealed with European citizenship. Fundamental rights of suspects and victims of cross-border crimes in the European Union need to be respected, as well as the population of a host society that has not exercised free movement rights. European citizenship therefore triggers the debate, case law and legislation regarding fundamental rights protection in different ways: attached to the free movement rights of Union citizens, attached to the right to reside in the territory of the Union and as a legitimising factor for broad legislation that protects the interests and fundamental rights of Union citizens.

7.2.3 Democracy

The contribution of European citizenship to democracy and political rights has been visible from early on. In the early discussions on the substance of European citizenship, political participation rights were a topic of debate. According to the Spanish proposal, citizenship of the Union had to be accomplished with "special rights."[34] These special rights were, among others, translated into electoral rights for the European Parliament and local elections in the Member States.[35] At the same time, the European Parliament pleaded that European citizenship should be established.[36] Moreover, in the context of the academic debates on the democratic deficit of the European Union, the interests of European citizens were brought into the discussion, which resulted in a lively debate on how to include European citizens in the political process.

European citizenship is accomplished with several political rights. In the Treaty and the Charter, various political rights are attached to European citizenship: electoral rights,[37] the right to submit complaints to the European Ombudsman,[38] the right to petition to the European parliament[39] and, most recently, the citizens' initiative.[40] Moreover, the enhanced role for national parliaments strengthens the political participation of the Union citizens.[41]
The impact of these political rights of European citizens in terms of constitutionalisation of the European Union is most visible in the electoral rights for municipal elections and

33 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 3.3.2005, C 53/1, par. 3.2, C-399/11, *Melloni* [2013] ECR nyr, par. 63.
34 The Road to European Citizenship, 24 September 1990, point I.
35 The 'Adonnino Report' – Report to the European Council by the ad-hoc committee 'On a People's Europe', A 10.04 COM 85, SN/2536/3/85, par. 2.
36 European Parliament Resolution on the Intergovernmental Conference in the context of its strategy for European Union, p. 19.
37 Article 22 TFEU, Articles 39 and 40 of the Charter.
38 Article 24 TFEU and Article 43 of the Charter.
39 Article 24 TFEU and Article 44 of the Charter.
40 Article 11(4) TEU.
41 Lenaerts and Cambien (2009), p. 188.

European elections. As observed in Chapter 5,[42] several national constitutions had to be amended in order to grant the right to vote and stand as a candidate to non-nationals. The impact of European citizenship in opening up the electoral systems of the Member States is noteworthy in the sense that certain constitutional electoral rights were granted to European citizens on account of Union law. The protective constitutional walls of the Member States have been broken down and Union law has created political links between Union citizens and host Member States.

The electoral rights for European citizens to vote and stand as a candidate for the European Parliament are, additionally, constitutionally important. These rights give Union citizens the opportunity to be involved in the European decision-making procedure. At the same time, Union citizens have no absolute right to vote and stand as a candidate for European elections. Article 22(2) TFEU grants a right to have equal access to electoral rights in a host Member State. Up until now there has not been much case law on electoral rights for European elections, but in the two cases decided, the Court held a broad interpretation of Article 22(2) TFEU. Dutch nationals residing in Aruba could rely on a prohibition against discrimination, since Dutch legislation resulted in different treatment: according to Dutch legislation, a Dutch national who transferred his residence from Aruba to a non-member country had the right to vote in the same way as a Dutch national transferring his residence from the Netherlands to a non-member country, while a Dutch national resident in Aruba did not have that right. The Court held that even though the Member States are free to organise elections for the European Parliament, the principle of non-discrimination should be respected, on account of Union law. Without establishing a link with free movement or with the case law as developed with regard to Article 18 TFEU and Article 21 TFEU, the Court decided that discrimination of Dutch European citizens is prohibited under EU law with regard to these electoral rights.[43] The Court based its judgment on the personal scope of Union citizenship, rather than free movement. As observed, up until now, not much case law has been decided on this issue, so perhaps future case law will reveal the real constitutional impact of European electoral rights for Union citizens.

With regard to the connection between European citizenship and democracy, the enhanced role of the European Parliament can be mentioned. The European Union is becoming more independent from the Member States as the European Parliament has, especially after the Lisbon Treaty, a vote in the decision-making process on behalf of the citizens of the European Union. Since Lisbon, the areas of co-decision making have been extended, for instance to the Area of Freedom, Security and Justice.[44]

Electoral rights in national elections, on account of Union law, are still lacking, as they are solely regulated by national law. The enhanced role of national parliaments ensures, however, that the European citizens are represented in European Union decision-making procedures at least by the possibility to review whether the Union operates within the limits of subsidiarity and proportionality.[45] At the same time European citizenship has affected the role of the European Parliament in European law. In these past decades, the

42 Chapter 5, Section 5.4.3.
43 See also Shaw (2007), p. 188.
44 Articles 82, 83, 84 and 87 (1) and (2) and 88 TFEU.
45 Article 12 TEU.

role of the European Parliament has been enhanced in order to create more democracy and legitimacy of the European legal order. Since the European Parliament represents the citizens of the Union, strengthening the role of the European Parliament was one of the solutions to create a more democratic foundation of the Union.

The other political rights for European citizens are 'softer' in nature, but are nevertheless important for the constitutionalisation of the Union. The right to submit complaints to the European Ombudsman is a clear example of a constitutional guarantee for citizens towards the public authorities. The European Ombudsman was established in order to protect the European citizens against the institutions of the European Union, in the same sense that citizens are protected by an Ombudsman on the national level. According to the Spanish proposal of 1991:

> "The European citizen, who already enjoys the right of petition through the Committee on Petitions of the European Parliament and who also has access to the Court of Justice in certain cases, could receive greater protection of his rights within the framework of the Union by submitting petitions or complaints to a European 'Ombudsman' whose function would be to protect the specific rights of the European citizen and help to safeguard them."[46]

Even though the right to submit complaints is granted to a broad range of persons, including third-country nationals who are residing in the European Union,[47] the establishment of the European Ombudsman, as a constitutional concept in the Union, was triggered by European citizenship. Under the influence of the European Ombudsman, codes of good administrative behaviour were established and the right to good administration was included in the Charter. Moreover, transparency was enhanced in the European Union by the European Ombudsman. This achievement may not be linked to European citizenship directly, but was promoted in order to protect European citizens. This has made the European Union more accountable and transparent to its citizens.[48]

The right to petition to the European Parliament also constitutes a direct link between the European Parliament and Union citizens, even though the scope of the instrument is limited.[49] The right to petition to the European Parliament together with the right to submit complaints to the European Ombudsman stimulate the direct input by European citizens in the decision-making process and the behaviour of the European institutions. Finally, the citizens' initiative is one of the instruments for achieving participatory democracy. The instrument is a direct result of European citizenship, ensuring the political participation of European citizens in the European Union. Even though the practical effect of the citizens' initiative is still unknown, this new democratic structure opened possibilities for direct democratic participation. Since the Treaty of Lisbon

46 The Spanish Proposal for a European Ombudsman, Intergovernmental Conference on Political Union, 21 February 1991, Annex 2.

47 Article 228 TFEU provides that any citizen of the Union or any natural or legal person residing or having its registered office in a Member State is entitled to submit a complaint to the European Ombudsman.

48 Curtin and Mendes (2011), p. 6.

49 Article 227 TFEU.

acknowledged not only the citizens' initiative, but also consultations and dialogues with civil society in legal terms, these new provisions may be at the beginning of a new process of democratisation in the European Union.

European citizenship has without any doubt had a noticeable impact on democracy as a European common value. With the introduction of the specific political rights to European citizens, these rights have been granted constitutional status. At the same time, the nature of the European Union has become, even though certainly weaknesses remain, more democratic under the influence of European citizenship. More political links have been created to involve the European citizen in the decision-making process of the European Union by enhancing the input as well as the output legitimacy, in terms of dialogues with civil society and transparency, for instance.

7.2.4 Justiciability and constitutional primacy and European citizenship

Even though the impact of European citizenship is not considerable on justiciability and constitutional primacy, certain developments in case law are noteworthy.

European citizenship extended the ambit of European law considerably.[50] This extension implies that the jurisdiction of the Court of Justice has broadened too. In addition, the national courts are obliged to apply provisions of European citizenship in more national cases, at least in a quantitative sense. This extension of what falls within the scope of European law was triggered by the fact that Article 18 TFEU and, a little later, Article 21(1) and Article 20 TFEU have been recognised by the Court of Justice as having direct effect. One of the reasons for the Court to establish direct effect of Union law provisions in 1964 was the fact that individuals were affected by European law. In that sense, an incipient version of what is now European citizenship can be discovered as one of the main roots of direct effect and the consequences it had for the legal order of the European Union. At the same time, direct effect of the provisions on European citizenship meant that individuals could rely on their rights as European citizens before national courts. This national ligation resulted in the referral of several preliminary questions to the Court of Justice, which was able to shape the concept of European citizenship further. In a way the European citizens became, by the direct effect of European citizenship provisions,[51] guardians of the substance of the rights of European citizenship.

The case law of the Court of Justice currently includes a trend of considering the personal circumstances of the European citizen at issue in the interpretation of the proportionality test. In some cases, this balance of personal circumstances had led to a disregard of secondary Union law and the conditions provided for in the Directive at issue.[52] In other cases, the national courts had to weigh the personal circumstances of the European citizens in cases concerning restrictions of free movement.[53] Since personal

50 On the extension of the scope of Union law under the influence of European citizenship see Chapter 3.
51 At least Article 21 TFEU, Article 20 TFEU and Article 22 TFEU.
52 C-456/02, *Trojani* [2004] ECR I-07573 and C-413/99, *Baumbast* [2002] ECR I-07091 are examples of this.
53 C-11/06 and C-12/06, *Morgan and Bucher* [2007] ECR I-09161.

circumstances are weighed by the Court or by national courts, the emphasis lies on the individual, rather than it being a market-based test.[54] Connected to the Court's approach, European citizenship is approached in a constitutional manner by the Court. The Court of Justice applied the provisions on European citizenship as having constitutional priority over limitations, provided for in secondary EU law, as has been seen in *Bidar*.[55] Moreover, the Court seems to have a human approach in its case law, favouring individual interests. Even though the Court in these cases operates within the limits of secondary Union law and primary law, the Courts upholds a "European citizenship-consistent interpretation", whenever possible.[56] In other words, whenever the Court is able to interpret conditions or measures in such a way that the individual citizen is favoured, it seems to do so. At the same time, the Court carefully balances the boundaries of the two constitutional values: the national identity of Member States and the rights of European citizens. Since Lisbon, Article 2(4) TEU refers to the national identity of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. This provision seems to limit case law in which the individual European citizen is favoured. In more recent case law the Court seems to grant Member States more discretion to invoke such specific national constitutional values as justification for the right to free movement of Union citizens.

7.3 EUROPEAN CITIZENSHIP AND CONSTITUTIONALISATION OF THE EUROPEAN UNION COMBINED

7.3.1 Fragmentation and constitutionalisation

In the previous section and the interim conclusions of the individual chapters, the impact of Union citizenship on various constitutional (sub)concepts has been elaborated on. The idea that European citizenship has affected the constitutionalisation should also be viewed from a more holistic perspective, however. In sum the constitutional effects of European citizenship on the nature of the European Union reveal a fragmented picture. European citizenship affected the constitutionalisation, but perhaps not as much as was hoped for by some. The impact of European citizenship is evidently present, but not to the same degree for all constitutional elements. For certain constitutional features, the relevant impact of Union citizenship is quite clear; for other features, this effect is less easily discernible.

The most important effects are detectable with regard to the extension of the scope of Union law by the free movement of Union citizens. The vertical division of powers is therefore affected, since Member States may not, without justification, hinder the free movement of Union citizens or deprive Union citizens of the genuine enjoyment of the substance of their Union citizenship rights. This creates tension between what belongs to the competence of the Union and what continues to be the competence of the Member

54 Although also in cases of healthcare, for instance, such an approach is visible.

55 However, in the field of criminal justice tension arises with regard to the interpretation of expulsion measures and the residence rights of Union citizens. See on this point Chapter 4, Section 4.3.2.5.3.

56 Compare C-158/07, *Förster* [2008] ECR I-08507and C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-04585, Chapter 6, Section 6.4.

States. This does not only hold true for free movement, but also for instruments in the AFSJ, for instance. Fundamental rights protection might be increased on account of EU law as well, as a result of the extension of the scope of Union law. Since the application of fundamental rights on account of Union law depends on the scope of Union law, the widening of Union law affects that application too. The extension of Article 18 TFEU as well as the extension of the scope of Union law regarding Article 20 and 21 TFEU have several constitutional consequences, not limited to the division of powers.
Another important constitutional effect has been found with regard to political rights of Union citizens. These political rights, to vote and stand as a candidate for European and municipal elections, are constitutional rights *pur sang*, involving the citizen in the political process. In this area the constitutional picture, however, is also diffuse, since no fully-fledged political rights are granted. Compared to the other fundamental rights, social rights are the most developed ones, with the use of non-discrimination on the grounds of nationality and the free movement of Union citizens by the Court. The civil rights dimension is less well-established and, despite the entry into force of the Charter, largely depends on the exercise of free movement. This mechanism is not new and is also applicable in the other economic free movement provisions. There is still a gap between the migrating European citizen and the Union citizen who stays in his own Member State in that sense. As observed, the effect of European citizenship on justiciability and constitutional primacy is probably the weakest. Even though certain effects have been found, they are, for a large part, based on mechanisms used in the internal market, on non-discrimination and free movement. The most important effects of European citizenship seem to derive from the rights that were proposed in the early days by the Spanish delegation: free movement and political rights.

Despite the above-mentioned effects of European citizenship, gaps remain in the link between European citizenship and the constitutional safeguards by the European Union. A striking example is the gap in the protection of fundamental rights. The case law on Article 20 TFEU may offer European citizens a constitutional right to reside in the territory of the European Union, but the right to family life is not included in the substance of the rights as protected by Article 20 TFEU. This means that a Union citizen who is dependent on a parent with the status of a Union citizen and a parent with the nationality of a third country may have to choose: either to reside in the European Union, enjoying the rights of a Union citizen, or to reside with two parents outside the European Union. Even though the Court held that the substance of the rights of Union citizens is only at risk in very particular situations, the right to family life can be considered such situation. The illustration of the effect of *Ruiz Zambrano* in Dutch case law reveals how national courts are confronted with various situations in which Article 20 TFEU is invoked. The scope of Article 20 TFEU, moreover, is not limited to dependent children, but may also be extended to adults with the nationality of one of the Member States, who depend on a third-country national. The right to family life and the right to enjoy the substance of the rights as a Union citizen, in that sense, may be in conflict.
Also outside the scope of Article 20 TFEU the residence of third-country nationals as family members of Union citizens is one of the main (future) challenges for the Court.

As Advocate General Sharpston emphasised in her Opinion in *Ruiz Zambrano*

> "when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families. The family unit, depending on the circumstances, may be composed solely of EU citizens, or of EU citizens and third-country nationals, closely linked to one another. If family members are not treated in the same way as the EU citizen when exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning."[57]

Cases such as *Chen*, *Baumbast*, *Carpenter* and *Metock,* but also *Dereci, McCarthy,* and *Ymeraga* stress the issue of third-country family members and Union citizenship.[58] It is submitted that questions regarding (derived) residence rights and mixed families will be one of the important challenges in the area of Union citizenship.

Another gap in the constitutional protection of Union citizens is the lack of political rights in national elections. From a constitutional point of view, the fact that Union citizens may lose their rights to vote for national elections is not satisfactory. Since citizenship entails full and equal membership and identity, it is seems odd that European citizenship does not safeguard these rights when a European citizen exercises the right to move and reside freely in the European Union. The right to political participation is a citizenship right *pur sang*, in the sense that a citizen should be able to participate in the political process of the state whose legislation the citizen is affected by. The fact that a Union citizen may not be allowed to vote or stand as a candidate in his or her Member State of origin, as a result of exercising the right to move and reside in another Member State, is hard to explain in terms of constitutional citizenship. In the same sense, the concept of citizenship sits uncomfortably with the lack of guarantees to be able to be politically involved in the Member State of residence. Since citizenship should involve political membership, such electoral rights in the Member State of residence would be desirable.

In terms of constitutional effects Article 4(2) TEU adds a new dimension to constitutionalisation, in the sense that the constitutional structures and values of the Member States are included explicitly as part of the European constitutional values. These constitutional values may not be beneficiary for individual European citizens who want to reside in a particular Member State, as cases such as *Sayn-Wittgenstein* and *Runevič-Vardyn* reveal. Paradoxically, respecting the constitutional national identities has become part of the European constitutional values and stands on the same footing as European citizenship. These two concepts, the national identities of Member States as well as European citizenship, should be upheld and respected by the Court. At the same time, one may argue that upholding the constitutional values of a particular Member State is to the benefit of the population at large of that Member State, as part of the national common constitutional ideology.

57 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 128.
58 More recently C-456/12 and C-457/12, *O. and B.* and *S. and G.* [2014] ECR nyr.

As observed, the constitutionalising effect of European citizenship has mostly been driven by the Court of Justice. Although the national courts – and the EU citizens, who brought cases to the national courts – have an important role too, it is the Court that truly fuelled the concept of EU citizenship into acquire its present form. The Court has been praised as well as criticised for that role. A point that may be raised in the context of this thesis is that European constitutionalisation is judicially driven, which might be problematic in terms of democratic legitimacy. On the one hand, one of the objections raised is that the Court lacks democratic legitimation. On the other, it is not only the Court to which Union citizenship owes its development. As argued in Section 7.1.4, Member States proposed the concept as such in the context of the European Union as a political Union. Moreover, also the institutions support the concept of Union citizenship. For instance, the Council and the European Parliament proclaimed 2013 as the year of the European citizen. The European Commission has made several efforts to further develop European citizenship, as can be seen in the EU citizenship reports. Moreover, the citizens' initiative was included in the Treaty, which was adopted by all Member States.

Another problematic issue of judicial constitutionalisation is that the case law on European citizenship seem to be far from predictable. Case law on European citizenship is dynamic and personal circumstances are taken into account. An important point of criticism regarding this judicially driven constitutionalisation is the often brief reasoning of the Court, especially in ground-breaking cases such as *Ruiz Zambrano*. In this judgment the Court only needed seven paragraphs to introduce the test of 'substance of the rights' of EU citizens, leaving the national courts without much instruction on how to deal with similar cases. Even though in subsequent case law the Court explained its interpretation of Article 20 TFEU, these judgments are still very generally formulated and do not answer important questions on the scope of application of Article 20 TFEU and the Charter.
At the same time, national courts are given discretion to apply the EU-citizenship provisions. The concept of European citizenship should not be shaped only in the European arena, but should be developed further and should be applied in the national context to be a meaningful concept. Although this thesis has dealt with case law and developments on the European level, research on the impact of European citizenship in national legal orders is just as important, since the concept and the broader contours are shaped by the Court of Justice and the European legislature, and the actual application of the concept should take place at national level. In this sense it would be of major importance to assess the national case law on European citizenship. That is what Union citizens turn to: the national court, in order to invoke or rely on their status as European citizens. However, it is up to the Court to provide the national courts with sound reasoning, so that these courts can apply the provisions on EU citizenship to specific national cases.

Combining all these constitutional effects of European citizenship, one can argue that a true process of constitutionalisation is lacking, since the related impact remains fragmented. Some constitutional aspects are more developed than other aspects. This is, however, no reason to deny the constitutionalising effect of European citizenship. As

argued by Raz, every constitution has its own constitutional features, some may be more developed than others, depending on the context of the constitution. Neither is the fragmented constitutionalising effect any reason to argue that the European Union is not a constitutional legal order. As this thesis has tested and revealed, the introduction of European citizenship has affected the constitutionalisation in several ways, some with different intensity than others. To this, one may add that the question of coherency also depends on the view one has on the European Union: in a pluralistic view, incoherency is not a problem, since the different levels or parts of the system are mutually complementary. This perspective will be discussed below from the viewpoint of composite citizenship.

7.4 EUROPEAN COMPOSITE CITIZENSHIP

In this thesis, the nature of the European Union as a constitutionalising Union is a central theme. The present thesis adheres to the theory of multilevel constitutionalism,[59] a term launched by Pernice.[60] Along similar lines, Maduro and Besselink have described the European Union in terms of constitutional pluralism or as a composite constitutional legal order.[61] Without going into detail on the differences between these theories, a key element is that the legal orders of the European Union and those of the Member States should not be regarded as watertight compartments, but as legal orders that interact and are dependent on each other. One does not build a house without a roof; one does not build a roof without walls to support its construction. Similarly, the constitutional structure of the European Union includes the national constitutional systems as well as the European constitutional values. From a pluralist perspective, these legal orders are not isolated, but together constitute one legal system in dynamic interaction. As an additional result of the analysis of the role of European citizenship in the process of constitutionalisation of the European Union, a clearer picture of European citizenship as a concept in the European Union can be construed.

As argued above, the European Union can be qualified as a multi-level constitutional legal order, i.e. a legal space that consists of European law as well as national law. From the same perspective, the European citizen can be defined as a composite legal subject within this multilevel legal order. The citizen in this context is regarded as having a status that consists of different qualifications, which can each be activated by specific levels of the legal system. In this sense the different layers (or parts) of the European Union, interpreted as a multi-layered legal order, all have their own responsibilities towards the citizen, whereas the citizen can derive different rights from different levels of the system and have duties towards the system. What is clear is that European citizens have been granted constitutional rights on account of Union law, even if these rights are not fully fledged. The national (and local) government layers add their own and specific substantive rules applicable to these rights.

59 Chapter 2, Section 2.3.1.
60 Pernice (1999), p. 707.
61 Maduro (2003), Besselink (2007).

The nature of the European Union therefore changed too. The introduction of a European Ombudsman, structures for democratic participation, entitlements to equal access to welfare systems and a citizenship-consistent form of judicial review have been included in the European legal order in order to guarantee the European citizen certain constitutional safeguards and rights.
The fragmented effect of European citizenship may be understood within the context of this multilevel constitutional legal order. What may be qualified as fragmented, may also be qualified as multilevel, i.e. as part of different systems that interact. Arguably, the idea of plural constitutionalism is also applicable to European citizenship as such. European citizenship can be captured in the term composite citizenship, in the sense that European citizenship is composed of various statuses, rights and duties.[62]
In the words of Pernice:

> "The concept of multilevel constitutionalism focuses on the correlation of national and European law from the perspective of both states and citizens. On the assumption that in modern democracies citizens are the basis and origin of public authority and decision-making power, […] we reach an understanding that the two levels of government are complementary elements of one system serving the interest of their citizens, both national and European."[63]

In this context, European citizenship as a constitutional concept might be understood as composite citizenship. The status of European citizenship is built upon nationality of the Member States. It therefore depends on the national legislation on nationality. Therefore it is not an autonomous legal status, but a status that is additional to national citizenship. This dependency is visible in Article 20 TFEU, which explicitly states that "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."[64] European citizenship created an additional circle of rights for nationals of the Member States, i.e. a double political connection for those nationals: a political link with the host Member State and the fellow nationals in that Member State, and at the same time a connection with the European Union and fellow European citizens.[65] In that sense, Union citizenship is "neither a neat nor a consistent entity. Rather, it is a continuum of possibilities."[66]

62 Compare Calliess (2013), p. 428.
63 Pernice (2009), pp. 372-373.
64 The original text of Article 17 EC included a subtle difference: it stated that Union citizenship was to be "complementary" to national citizenship, instead of "additional." What this difference means is still unclear. Interestingly enough, in the Draft of the Constitutional Treaty, the following text was proposed: "[E]very citizen of a Member State is a citizen of the Union; enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses, with the rights and duties attaching to each." Preliminary Draft Constitutional Treaty of 28 October 2002 [2002] CONV 369/02.
65 Closa (1995), pp. 493-294. See also Meehan (1993), p. 1, stating that "a new kind of citizenship is emerging that is neither national nor cosmopolitan but that is multiple in the sense that the identities, rights and obligations associated [...] with citizenship, are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions and alliances of regions."
66 Koustakopoulou (2000), p. 490.

In the analysis of the various chapters of this thesis, this composite citizenship has become more concrete and visible. Key characteristics of composite citizenship are the different layers or parts of the system of the European Union to which the European citizen is attached in terms of rights and duties.[67] This attachment of rights for Union citizens resonates with a shared responsibility towards European citizens at different governmental levels.[68] As a first illustration, electoral rights are noteworthy.[69] The electoral rights attached to European citizenship are threefold. In the first place, a Union citizen may vote in the *European elections*, based upon national law or on account of Union law in another Member State, according to the law of that Member State. Secondly, a European citizen may vote in *national elections*, based solely upon national law. Thirdly, a citizen of the European Union is entitled to vote in *municipal elections* in his or her Member State of nationality, based upon national law, and is entitled to vote in another Member State for municipal elections on account of Union law and according to the rules of that Member State. Even though the electoral rights are fragmented, and in some situations are even lost, the different entitlements to vote contribute to a European voting space, anchored in national as well as European law. The national electoral systems provide the substantive electoral rights whilst European law requires equality with regard to municipal and European elections. The *Eman and Sevinger* case[70] is an example of this interaction with regard to European electoral rights in overseas territories of the Netherlands. In *Eman and Sevinger*, the Court held that even though the electoral rights for the European Parliament are based in Union law, "it is for the Member States to adopt the rules which are best adapted to their constitutional structure."[71] This choice of Member States is, nevertheless, subject to the general principles of Union law, such as non-discrimination and proportionality. As can be seen from this example, the interaction between the national (constitutional) rules and the European entitlement to vote and stand as a candidate for the European Parliament is intertwined in nature.[72] The substance of the rights is covered by national law, whilst the entitlement to vote for European citizens in another Member State and the general principles of Union law are imposed by Union law.

67 Duties for Union citizens are not included in the Treaty. However, on a national level, nationals of the Member States have certain duties as citizens of that particular Member State. In some Member States (Belgium), voting rights are obligatory and may be seen as a citizens' duty.

68 Schrauwen (2013), p. 14.

69 Chapter 5, Sections 5.4.1, 5.4.2 and 5.4.3. on European, national and municipal electoral rights of European citizens.

70 C-300/04, *Eman and Sevinger* [2006] ECR I-8055. See Chapter 5, Section 5.4.1.1. for a more detailed discussion of this case.

71 C-300/04, *Eman and Sevinger* [2006] ECR I-8055, par. 50, Besselink (2008), p. 801.

72 C-300/04, *Eman and Sevinger* [2006] ECR I-8055, par. 61: "[T]here is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held, the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified." Compare with C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917, paras 78-79.

With regard to fundamental rights protection, this composite citizenship can be seen as well. As has been observed in Chapter 4 of this thesis,[73] the connection between European citizenship and fundamental rights protection is fragmented, or in more positive terms, divided among different levels of the European legal order, including the constitutions of the Member States. Since equal treatment of Union citizens is connected to cross-border situations, and discrimination on the grounds of nationality in itself implies a cross-border dimension, the Union protection is only applicable whenever a Union citizen has an interstate connection with Union law.[74] Similarly, civil, social and other fundamental rights are largely granted through the free movement approach, based upon Article 21 TFEU. The fragmentation of fundamental rights protection has been subject to criticism, calling into question whether European citizenship could be a meaningful concept when reverse discrimination is accepted and fundamental rights protection depends on the exercise of free movement rights. Nevertheless, this criticism may be nuanced by a composite perspective of European citizenship as the national legal order protects Union citizens in their own Member States based on national law or the ECHR. As the Court held in *Dereci*:

> "[I]f the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR."[75]

Moreover, the compositeness of Union citizenship becomes evident in the way that social fundamental rights are granted to Union citizens. The 'real link' case law divides the different responsibilities towards Union citizens between the Union and the Member States involved. Member States may require a real link and set conditions to assess that real link between a Member State and a Union citizen. Consequently, the Member States may concretise the real link in national requirements, which need to comply with the limits of Union law. For European citizens, the real link case law means that a kind of European solidarity is created: when a real link exists with a Member State, either the original or the host Member State, equal treatment has to be ensured, in principle. This model of equality and compositeness creates differentiation in social rights for Union citizens, which depends on the substantive choices of Member States, how to govern their social security systems. Union law demands equal access, but the substance of the social rights is derived from the Member States.

Whenever a European citizen crosses a border in the European Union, or falls within the personal scope of European legislation, Union law is triggered and therefore the Member States are not solely responsible for the Union citizen at stake, but the European Union

73 Chapter 4, Section 4.5.
74 Or when there is a link with Union law by legislation.
75 C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 72.

may also be held responsible. In that sense, European citizenship may be interpreted as a status that obliges the different governmental parts of the European Union to take responsibility whenever the Union citizen comes within the scope of that part (be it the national or the European space). This delegated or divided responsibility of fundamental rights protection becomes manifest in Article 6(3) TEU, which refers to the European Union, the national constitutional traditions as well as to international law. The European Union does not operate in a vacuum, which means that the protection of fundamental rights may be fragmented, but at the same time regulated on other levels.
Additionally, in the judicial structure of the Union, the idea of plural constitutional (judicial) protection of citizens in the European Union is visible in the way judicial review is structured in the Union by cooperation and judicial dialogues between the various courts. The European citizen may invoke entitlements on account of European citizenship on its own or in a host Member State before a national court. The European citizen as a legal subject is protected by the cooperation between the Court of Justice and the national courts,[76] which makes the reasoning of these judgments important.[77] The fact that most case law on European citizenship originates from preliminary references highlights the importance of national courts, as well as the European citizen themselves, as guardians of European citizenship rights.

In a composite citizenship model, the legal links between the citizen, and the various layers or parts of government are taken as a central focus point. In light of composite citizenship, the various public authorities (municipal, national or European) all have their own responsibilities towards European citizens in their own field of competence. Additionally, fundamental rights (social, civil, political) are granted to Union citizens by the various governmental layers: European, national or even local.
Hence, in certain situations, a Union citizen is protected by Union law (e.g. free movement or the principle of non-discrimination); in other situations by national law implementing Union law (i.e. directives); and in yet other situations by national legislation without any European dimension. This means that the model of Union citizenship does not fit precisely into existing models that are familiar on a national level. This is exactly the reason why citizenship of the Union has attracted so much academic interest.

As argued, this mutual influence between the status of nationality (and national citizenship) and European citizenship is strongly noticeable in the way rights are distributed in the European Union and Member States: some rights are granted on account of European Union law (for instance in the TFEU and the Charter), some purely by national law and some on account of European Union law by the national legislature. Similarly, the lack of duties for European citizens in the Treaties may be explained. As observed in Chapter 2, Section 2.1.3., no specific duties are included in the Treaties, which has been subject to criticism. One may argue, nevertheless, that the duty to comply with national law and European legislation, insofar as it is applicable to individuals, is

76 And in the rare cases of European citizenship that started with an infringement procedure, also including the European Commission as guardian of the application of the Treaties.
77 See the brief reasoning of the Court in *Ruiz Zambrano* and questions that have been raised before the national courts.

an inherent duty in Union law for European citizens. The duty to comply with national laws of a host Member State may not be included in the Treaty, but is, in a composite idea of citizenship of the Union, inherently present in the law of that host Member State. In this light, the judgment of *P.I.* may be read, in which the Court seems to refer to the duty of Union citizens to comply with the values in the host society as counterparts to the right to reside in the territory of a host Member State. As argued by Azoulai and Coutts, the interpretation of the Court of the expulsion grounds "reflects the fact that Union citizenship should not be seen as an individual prerogative, but as part of a broader process of interaction whereby the obligation of the Member State to recognize the migrant is mirrored by the obligation of the migrant to recognize the common space of values he or she is given to live in, in the form that is particularized in the host society."[78]

This thesis focusses on the rights of Union citizens, in which composite European citizenship became visible. This compositeness can also be found in the way *identity* and *belonging* as elements of citizenship are manifested.
As described above, the rights of Union citizens, and perhaps also the duties, are composite in nature, stemming from local, national and European level. As touched upon before,[79] even though the European Union clearly has no *demos* or single people, the nationals of the Member States could collectively form *demoi*. In this sense Union citizens do not only belong to a national people, but additionally or complementarily to European *demoi*. European citizenship from this perspective is to be defined as a plural construction of political membership and identity.

Basically, the European citizen is a multi-faceted individual capable of holding a number of different statuses, depending on the legal sphere in which the citizen falls: national (including the local sphere), European and even global. The different statuses together form the composite citizen. The multi-layered legal order is responsible for this composite European citizen insofar as the citizen is encompassed within its legal scope. This may create gaps and irregularities in the road of European citizenship, but at the same time the dynamic interaction between the different levels of the European Union provides, as much as possible, a layer of protection.

7.5 OUTLOOK: THE FUTURE PROSPECTS OF EUROPEAN CITIZENSHIP IN A CONSTITUTIONAL CONTEXT

7.5.1 Where we are in the open field

In the present thesis, the impact of European citizenship on the constitutionalisation of the European Union has been analysed. The role of the concept when regarding the different constitutional building blocks has been examined. The result of this study at first sight shows a fragmented picture. On some constitutional elements, European citizenship has had a significant impact; for other constitutional features this link is

78 Azoulai & Coutts (2013), p. 569.
79 Chapter 2, Section 2.2.2.2 and Chapter 5, Section 5.3.1.4.

weaker. It may, however, surely be concluded that European citizenship was born out of constitutional processes in the European Union and grew up as a concept triggering the constitutionalisation of the European Union further. For several elements, the impact of European citizenship is considerable. The fragmented picture may become more coherent when looking through the prism of pluralistic constitutionalism and European composite citizenship. European composite citizenship is a more comprehensive and fair perspective to assess the concept within the European Union. That the nature of the Union has been changed by these composite European citizens may be clear. The question remains: What lies ahead?

7.5.2 More destinations, new paths to explore?

To start with, let us recall the words of Advocate General Léger in 1996, who stated:

> "The Court has not yet had an opportunity to give a ruling on the 'new' concept of European citizenship introduced by the European Union Treaty. The recognition of European citizenship, enshrined in Articles 8 to 8e of the EC Treaty, is of considerable symbolic value and is probably one of the advances in the construction of Europe which has received most public attention. Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained."[80]

Ever since May 1998,[81] the Court of Justice has developed a vast and considerable line of case law interpreting European citizenship, and this case law has been developing dynamically up until now. Not only the Court, but also other institutions gave substance to European citizenship. As argued in this thesis, the concept of European citizenship was also shaped by the Member States, the European legislature, national courts, and the European citizens themselves. In reaction to the case law of the Court of Justice, the European legislature adopted new legislation.[82] The national courts referred several questions concerning European citizenship in the past two decades. Together, these actors breathed life into the concept of European citizenship. In this light, what will the future bring for European citizenship or, more importantly, what will European citizenship bring for the nature of the European Union?

In the last twenty years European citizenship has evolved from, what was believed to be, an empty promise into one of the topical concepts of current Union law. New challenges are ahead, which may shape European citizenship and the constitutional debate regarding the European Union in the future.

80 C-214/94, *Boukhalfa* [1996] ECR I-02253, par. 63.
81 C-85/96, *Martínez Sala* [1998] ECR I-02691.
82 See Article 24 of Directive 2004/38 for instance.

7.5.2.1 Challenges...

From the perspective of composite citizenship, the fact that European citizenship does not cover all constitutional elements is not problematic, since national citizenship is part of the concept as well. However, some caveats remain.

Outside the strictly legal context, there are still obstacles before we can speak of a real, fully-fledged constitutional and fundamental status of Union citizens, even in the context of composite citizenship. The fact that a large part of the nationals of the Member States do not feel connected to the European project is just one of the important issues that remain unresolved at the time of writing, and will probably remain problematic. Another obstacle from this perspective is the financial crisis in Europe, which has not exactly enhanced the enthusiasm for European integration among the nationals of the Member States. The financial crisis has also put the concept of solidarity between nationals of Member States in a new perspective.[83] The crisis has increased the tension between Union citizens who exercise their free movement and should have equal access to certain social benefits, and Union citizens who reside in their Member State of origin and do not use their rights as Union citizens. The idea of composite European citizenship is a fair alternative to evaluate EU citizenship, but such gaps are not bridged by the concept. This issue has not been addressed in this thesis, since the analysis is based on legal research, but certainly, the fact that Union citizens, mostly, do not feel connected to the European Union is one of the major obstacles for the concept of Union citizenship to overcome.

Two other, more legal, challenges for the future development of Union citizenship lie in the field of the civil and political dimension of fundamental rights for European citizens.

Even though European citizenship is best understood as composite citizenship, there may remain gaps in protection. The level of protection of fundamental rights by the Member States, also in what may be perceived as a wholly internal situation, poses concerns. The recent constitutional changes in Hungary and the subsequent infringement procedure started by the Commission have raised an issue regarding the protection of EU citizens in the protection of their fundamental rights in their Member State of origin. The position of the Roma in Member States has also been a concern for the European Commission. Moreover, the situation of the Roma reflected another issue: that of individual protection versus the protection of a collective, such as minority groups in Member States, irrespective of individual claims or the exercise of free movement rights.[84] Since the Union is limited, up until now, in its actions to respond to these situations, this urges the question whether this limited role is in line with a constitutional concept of Union citizenship.
To which extent could there be grounds to react to a degradation of fundamental rights in situations without a cross-border element or a legislative link with EU law? The proposal of Von Bogdandy, as discussed in more detail in Chapter 4 of this thesis,

83 On this point also Shaw (2012).
84 For an outstanding analysis of the Roma and protection of fundamental rights by the EU see Dawson and Muir (2011).

seeks for a solution in connecting EU citizenship and human rights as the constitutional value of the European Union, on the basis of Article 2 TEU and Article 20 TFEU. At the time of writing the Court nor the European legislature had made such connection, even though the Commission initiated a pre-Article 7 procedure, should the rule of law, as a constitutional value of the Union, be at serious risk. However, even if the Court or the European legislature were to interfere with Member States' law or practices that systematically limit fundamental rights of Union citizens, irrespective of a free movement element, the question is how such interference relates to the concept of a composite European citizenship and to the division of powers as well as to the respect for constitutional national identities?
In a wholly internal situation without any connection with EU law, fundamental rights protection should be guaranteed by the Member State. Here, interference with human rights protection outside the scope of Article 51(1) of the Charter is problematic. At the same time, violations of fundamental rights may become a matter of Union law, if the citizens of the Union are seriously and systematically deprived of their fundamental rights in a Member State. In this sense the protection of fundamental rights in a wholly internal situation is the responsibility of a Member State, based on its own constitution or the ECHR, but in very specific situations, covered by Article 7(2) TEU, when human rights are seriously and persistently violated by a Member State, such situation has a link with EU law. In the latter case, the Union should also be responsible for the wellbeing of its citizens. Subsequently, the question would be, who is to decide whether national law constitutes such serious and persistent violation of fundamental rights? The Court, the Council, the Commission?

Reverse discrimination and the wholly internal situation are both issues that will continue to pose problems. Even in a composite form of European citizenship, certain situations, such as reverse discrimination, are not satisfactory and often perceived as unfair. At the same time, respect for the competences of the Member States and national citizenship is also required. As argued it is primarily the Member States that are responsible for citizens in a wholly internal situation, whereas the Union is responsible in a Union context. However, some situations can be considered as a grey area, in which both layers could be responsible. The Union should only interfere in certain very specific situations, in which a connection with EU law can be made. In this sense the proposal of Advocate General Sharpston in *Ruiz Zambrano* to solve reverse discrimination seems to be appropriate, taking the values of fundamental rights, European citizenship as well as the national competences and responsibilities towards citizens into account. She suggests broadening the interpretation of Article 18 TFEU to "prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law."[85] As indicated, the Court did not act on her suggestion, at least not yet.

85 C-34/09, *Ruiz Zambrano* [2011] ECR I-01177, par. 150.

Hence, only in a situation in which the Union may be said to have the responsibility to protect its citizens and where Member States fail to protect their citizens may the Union take action. Serious or systematic violations of human rights which could be linked to EU law by Article 7(2) TFEU, or situations where reverse discrimination leads to violations of human rights and offer no equivalent protection in the Member State on the basis of Article 18 TFEU, would constitute an appropriate reason to interfere with what now seem to be internal situations.

7.5.2.2 ...and destinations ahead

At a more concrete level, at least three areas are likely to develop in the near future with regard to European citizenship, affecting the constitutionalisation of the European Union.

A first point for future development lies in the sphere of political rights. As argued above, European citizenship has affected democracy by creating a political connection between nationals of the Member States and the EU as well as other Member States. On the other hand, as argued, this political dimension of European citizenship could be developed further, so that the political rights of Union citizens are enhanced and guaranteed by the European Union. As observed above, one of the main challenges for European citizenship is the creation of a more political European citizenship. It is also one of the main future developments.

The new Article 11 TFEU is one of the elements that will certainly be tabled in the European arena. The citizens' initiative may prove a catalyst for new legislative proposals. Moreover, the initiative procedure is an important manner of bringing the European citizen closer to the European Union. Citizens of the Union have the possibility to engage in a transnational participatory democratic procedure, which not only links Union citizens with the European Union, but also creates a democratic link between the nationals of the Member States. The citizens' initiative could therefore result in a form of European *demos*, a space in which the different Union citizens of different Member States express, or at least have the possibility to express, a common will. The citizens' initiative provides bottom-up input to the Commission. The establishment of European citizenship was a top-down exercise, rather than being based on European grassroots support for the introduction of political rights and a constitution-based concept in the European Union. The concept lacks underlying values such as a common identity and legitimation by the people. The citizens' initiative may not solve that issue, but it at least creates a more popular form of democracy.

On the other hand, the citizens' initiative can be criticised. On paper the citizens' initiative seems rather frail regarding the limitations and conditions to submitting a citizens' initiative, and due to the fact that the Commission is not obliged to accept any of the initiatives, even if they are successfully submitted. Moreover, the question has arisen whether it constitutes a real Union citizens' right or will mainly be used by NGOs and lobby groups. Therefore the citizens' initiative may prove to be just window-dressing and a procedure with no actual impact.

Despite these weaknesses, it is expected that the Commission will not set aside proposals too lightly. Considering the on-going campaign to involve the Union citizen in the European project and to enhance its legitimacy, the Commission will probably take seriously these initiatives submitted by one million Union citizens. Moreover, certain initiatives may support the enhancement of Union citizens' rights. The 'Let me Vote' initiative is an interesting example of such bottom-up legitimacy for a proposal of the Commission.[86] According to the Commission report on European citizenship, the lack of electoral rights on a national level for European citizens is high on the political agenda. It might be doubted whether the Commission has the competence to act in this specific area, but the input from the citizens' initiative may prove to legitimise a broad interpretation of the competences of the Union to cover national elections in the future. There is strong indication that European citizens and various NGOs will use the instrument to put issues on the Commission's agenda. Furthermore, the role of the Court of Justice in the procedure of the citizens' initiative may also enhance the constitutionalisation of the citizens' initiative, as a real form of transnational participatory democracy.[87] At the time of writing, the first case is pending before the Court regarding the rejection of the registration of a citizens' initiative.[88] This citizens' initiative proposed to the Commission to "establish the Principle of the 'state of necessity.'" According to the initiative, this principle should justify the refusal of payment of a State when the financial and political existence of this State is in danger because of the servicing of abhorrent debts. The Court shall assess whether the procedure and refusal of the Commission are in accordance with Union law. It is hard to predict how the Court will interpret its new jurisdiction regarding the citizens' initiative. The role of the Court might be decisive for the success of the initiative, together of course with the Commission.
As observed above, the role of the Court with regard to the other democratic principles laid down in Article 11 TFEU, such as the dialogue with civil society, are also of future interest. Since these democratic principles are rooted in the Treaty, the Court of Justice's future case law will hopefully show how these legal principles relate to the destined fundamental status of Union citizens, empowering the political side of European citizenship.

Secondly, the Area of Freedom, Security and Justice is a challenging area of law and is expected to develop much more in the future. New questions arise concerning the role of European citizenship with regard to criminal justice and the connection between fundamental rights, European citizenship and mutual recognition.[89] The Area is 'offered' to the citizens of the European Union, but at the same time it may negatively affect their fundamental rights. The tension between the right to reside in another Member State versus the right to safety and security of the European citizens residing in their Member State of origin is a topical issue, which will surely be debated in future case law.[90] The tension between criminal justice and fundamental rights has been issue in recent case law

86 See Chapter 5, Section 5.4.6.
87 Dougan (2011)(a), pp. 1847-1848.
88 Case T-450/12, *Anagnostakis v Commission*, pending, action brought on 11 November 2012.
89 Van Eijken and Marguery (2015), forthcoming.
90 See on this topic Chapter 4, Section 4.3.2.5.3.

of the Court. The question how these tensions relate to European citizenship is expected to become more urgent. Cases such as *Wolzenburg*, *P.I.* and *Melloni* are examples of the collision between the AFJS and fundamental rights of Union citizens, but surely more such cases will be referred to the Court of Justice in the future.
What the criminal aspects of the AFSJ show, moreover, is the tension between the desire to create a safe and secure European space and the sensitivity of criminal matters for states. Criminal law is a state issue traditionally, in order to protect own nationals against threats to their fundamental rights. Therefore, national constitutional safeguards to protect persons from being surrendered may conflict with the principle of mutual recognition in the Area. The case of *Melloni* may serve as an example of constitutional tensions: the Spanish constitutional right to a fair trial[91] had to yield to the mutual recognition of the Framework Decision.

Moreover, in the future the protection of victims in other Member States is on the Commission's agenda.[92] In May 2011, the Commission proposed a package on victims' rights to enhance the position of victims in the Area. The first Directives have been adopted, focussing on the protection of Union citizens as victims of crime.[93] It is very likely that more attention will be paid to the citizen in the Area by the European legislature in terms of the protection of fundamental rights and victims, by the Court in cases in which citizenship, criminal justice and fundamental rights meet, and by national courts. In the same sense, although not elaborated on in this thesis, the other components of the Area, such as cooperation regarding civil matters may further develop in the future under the influence of European citizenship.[94] The role of the European Union as a protective polity, guaranteeing its citizens a safe and secure area to live in, is under development and challenges will have to be dealt with in order to achieve the aim of a secure and safe European Union.

Thirdly, the case law concerning Article 20 TFEU is likely to be fine-tuned in the upcoming years. After *Rottmann* and *Ruiz Zambrano*, a new line of case law was born, which resulted in national litigation on Article 20 TFEU before national courts in cases on migration and the right to family life. Even though the Court of Justice made it clear in subsequent case law that Article 20 TFEU is limited to those situations in which a European citizen is *de facto* deprived of the effectiveness of European citizenship as such, new issues with regard to the scope of Article 20 TFEU are very likely to be tabled in

91 As part of the right to a fair trial, Spain made the surrender under the EAW conditional on the possibility of review of a conviction *in absentia*.

92 The Commission included the protection of victims as one of its future actions to improve European citizens' rights. EU Citizenship Report 2013, EU citizens: Your Rights, Your Future, COM (2013)269 final.

93 See also Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

94 See for instance the Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 COM(2013) 228, proposed on the basis of Article 21(1) TFEU and Article 114(1) TFEU.

Luxembourg.[95] Under which circumstances a Union citizen is *de facto* deprived of the effectiveness of his or her status as a Union citizen has, up until now, been limited to the withdrawal of nationality and national measures that force a Union citizen to live outside the European Union. In the future, more of these specific circumstances may be added to the scope of Article 20 TFEU. As has been seen in previous case law on Article 21 TFEU, the Court may in the (far) future extend the scope of European citizenship beyond a strict interpretation. Perhaps the current timeframe is not ready for a broad interpretation of Article 20 TFEU, but a first opening to a more extensive link between EU citizenship and the European Union is, certainly, present.
In addition, another issue affected by this case law is the regulations that apply to residence for third-country nationals, national migration laws and the right of EU citizens to have their family members with them in the European Union. Up until recently, a Union citizen had to move to another Member State in order to be able to invoke the right to free movement and inherently to be able to live with his or her spouse in the host Member State. *Ruiz Zambrano*, even if interpreted in a narrow manner, adds a new dimension: even without the exercise of free movement, national migration legislation or decisions of national migration authorities can be affected by the right of Union citizens to family life in combination with the right to reside in the European Union.

Questions regarding the new democratic principles, regarding the Area of Freedom, Security and Justice, and regarding the interpretation and application of Article 20 TFEU will foster new discussions and developments in the law of the European Union. Through this process, new constitutional effects may materialise in the attempt to bring the European citizen closer to the European Union and in tackling challenges that lie ahead in these fields.
European citizenship has developed in a constitutional context of the European Union, resonating with the process of constitutionalisation that started with direct effect, supremacy and fundamental rights protection. Since the European Union increasingly affected the nationals of the Member States, a legitimising concept of citizenship proved necessary. Now European citizenship has affected, in turn, the constitutionalisation of the European Union. The concept of European citizenship and the constitutionalisation of the European Union mutually strengthen each other. The Prime Minister of Spain called upon the Member States in May 1990 to make the Union an "integrated space" within which citizens would be the "protagonists." The European citizens have, indeed, become a central subject of law in the European Union. As analysed in this thesis, not only the position of the European citizen has changed over the past two decades, but the European Union itself has become more constitutional in nature under the influence of European citizenship. New paths have been created in what once was, but is certainly no longer, an open, unploughed field.

95 See for an illustration from Dutch case law Chapter 6, Section 6.3.2.1.

SAMENVATTING

1. DE ROL VAN HET EUROPEES BURGERSCHAP IN DE CONSTITUTIONALISERING VAN DE EUROPESE UNIE

Met de inwerkingtreding van het Verdrag van Maastricht in november 1993, kregen alle onderdanen van de lidstaten van de Europese Unie een nieuwe, aanvullende hoedanigheid: die van Europees burger. De introductie van het Unieburgerschap kwam niet uit de lucht vallen. Het Tindemans-rapport (1974) bevatte, naast diverse voorstellen voor verdere Europese integratie, een titel over het Europees burgerschap.[1] Later werd ook in het kader van een debat over de politieke Unie gesproken over het invoeren van Europees burgerschap, waarbij 'speciale' rechten aan de onderdanen van de lidstaten zouden worden toegekend.[2] In de rechtspraak en secundaire EU-wetgeving werd het vrije verkeer van personen al uitgebreid tot situaties die geen directe link met de vier marktvrijheden hadden. Uiteindelijk werd met het Verdrag van Maastricht het Europees burgerschap formeel ingevoerd.

In dit proefschrift staat de invloed van het Europees burgerschap op de constitutionalisering van de Europese Unie centraal. Constitutionalisering is in het kader van dit proefschrift gedefinieerd als het proces waarin de Europese Unie steeds meer kernmerken van een constitutionele rechtsorde verkrijgt.

De centrale onderzoeksvraag in dit proefschrift is:

Heeft het Europees burgerschap invloed op de constitutionalisering van de Europese Unie?

1 Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76.

2 Zie Intergovernmental Conference on Political Union, European Citizenship, 21 February 1991, Spanish Memorandum "The Road to Citizenship", p. 329.

Om vast te stellen of en in welke mate het Europees burgerschap effect heeft op de constitutionalisering van de Europese Unie is dit onderzoek opgedeeld in vier kernelementen van een materiële constitutie, geïnspireerd op de theorie van Joseph Raz.[3] De vier constitutionele elementen die het prisma van dit proefschrift vormen, zijn (1) de verticale bevoegdheidsverdeling, (2) het bestaan van een gemeenschappelijke ideologie, onderverdeeld in fundamentele rechten en democratie, (3) het bestaan van rechterlijke constitutionele toetsing en (4) de hiërarchie van normen. Deze vier hoofdelementen worden in dit onderzoek in de context van de Europese Unie geplaatst, waarna per element de invloed van het Europees burgerschap wordt besproken.

De constitutionalisering van de Europese Unie verwijst naar de ontwikkeling van de Europese Unie van een internationale organisatie naar een rechtsorde met constitutionele kenmerken. Dat proces moet geplaatst worden in een breder debat over het karakter van de Europese Unie. Het Hof van Justitie (het Hof) stelde in *Van Gend & Loos*[4] en *Costa v. ENEL*[5] reeds vast dat de Europese Unie meer is dan een verbond tussen staten, maar dat het een nieuwe rechtsorde vormt, waar individuen rechtstreeks door geraakt worden. In de zaak *Le Verts*[6] refereerde het Hof aan het Verdrag en de Gemeenschap in constitutionele termen. Het Hof benadrukte in die zaak "dat de Europese Economische Gemeenschap een *rechtsgemeenschap* is in die zin, dat noch haar lid-staten noch haar instellingen ontkomen aan het toezicht op de verenigbaarheid van hun handelingen met het *constitutionele handvest* waarop de gemeenschap is gegrond, namelijk het verdrag."[7] De Europese Unie is dus meer dan een 'gewone' internationale organisatie, maar tegelijkertijd is de Europese Unie geen natiestaat. Het is een rechtsorde met constitutionele kenmerken die nog volop in ontwikkeling is. Het Europees burgerschap is één van die constitutionele kenmerken. De assumptie die aan dit onderzoek ten grondslag ligt, is dat het Europees burgerschap constitutioneel van aard is en dat de introductie daarvan in het primaire recht van de Europese Unie de constitutionalisering van de Unie verder versterkt. Het gaat daarbij om een wederkerig proces. Europees burgerschap is geïntroduceerd omdat de rechtsorde van de EU individuen uit de lidstaten raakte en zij rechtssubjecten van die nieuwe rechtsorde zijn. Tegelijkertijd zorgt het Europees burgerschap ervoor dat de Europese Unie meer constitutioneel van aard wordt. De focus in dit onderzoek ligt op deze laatste ontwikkeling.

2. DE INVLOED VAN HET EUROPEES BURGERSCHAP OP CONSTITUTIONELE ELEMENTEN IN DE EUROPESE UNIE

2.1. Europees burgerschap en de bevoegdheidsverdeling

Eén van de elementen van een constitutie, zoals door Raz geïdentificeerd, is dat een constitutie de bevoegdheden verdeelt tussen de verschillende bestuurslagen, zowel

3 Raz (2001).
4 Zaak 26/62, *Van Gend & Loos* [1963] Jur. 1.
5 Zaak 6/64, *Costa E.N.E.L.* [1964] Jur. 585.
6 Zaak 294/83, *Les Verts* [1986] Jur. 1339.
7 Zaak 294/83, *Les Verts* [1986] Jur. 1339, par. 23. Cursivering HvE.

horizontaal als verticaal. In de context van de Europese Unie is een dergelijke verticale bevoegdheidsverdeling tussen de lidstaten en de Europese Unie vastgelegd in artikel 2 VWEU. Een aantal bevoegdheden is exclusief aan de Unie toebedeeld en op een aantal gebieden worden de bevoegdheden gedeeld. Hoewel de lidstaten op een aantal terreinen uitsluitend zelf bevoegd zijn, moeten zij de grenzen die het Unierecht stelt respecteren, wanneer een situatie binnen de werkingssfeer van het Unierecht valt. In het derde hoofdstuk van dit proefschrift wordt de invloed van het EU-burgerschap op de bevoegdheidsverdeling geanalyseerd.

De impact van het Europees burgerschap op de verticale bevoegdheidsverdeling is aanzienlijk, met name omdat het Europees burgerschap de werkingssfeer van het EU-recht heeft uitgebreid tot terreinen die binnen de bevoegdheden van de lidstaten vallen. Hoewel het Hof herhaaldelijk stelde dat "het burgerschap van de Unie, (…) niet tot doel heeft, de materiële werkingssfeer van het Verdrag eveneens uit te breiden tot interne situaties die geen enkele aanknoping met het gemeenschapsrecht hebben",[8] is de personele en de materiele werkingssfeer van het Unierecht aanmerkelijk verruimd door de rechtspraak met betrekking tot het Europees burgerschap. Die lijn van rechtspraak, die begon met de zaak *Martinez Sala*[9] in 1998, verruimde het discriminatieverbod op grond van nationaliteit (artikel 18 VWEU). Artikel 18 VWEU verbiedt discriminatie op grond van nationaliteit "binnen de werkingssfeer van de Verdragen en onverminderd de bijzondere bepalingen". Het Hof koppelde artikel 18 VWEU aan het recht van Unieburgers om vrij te reizen en te verblijven, waardoor de werkingssfeer van artikel 18 VWEU verruimde.[10] Daarnaast ontwikkelde het Hof een belemmeringenverbod op basis van artikel 21 VWEU, waardoor iedere belemmering van het recht om vrij te reizen en te verblijven, zonder rechtvaardiging, niet is toegestaan.[11] Terreinen die voorheen geacht werden onder de volledige bevoegdheid van de lidstaten te vallen, werden alsnog geraakt door het Unierecht. De rechtspraak betreffende artikel 18 en 21 VWEU beperkt zich niet tot de terreinen waarop de EU expliciete bevoegdheid om te handelen bezit, maar bestrijkt tal van rechtsgebieden, zoals sociale zekerheid, onderwijs en belastingen.[12] Die gebieden zijn vaak gevoelig van aard, en juist daarom hebben de lidstaten op die terreinen de bevoegdheid. Door de rechtspraak met betrekking tot Unieburgerschap (zoals ook met betrekking tot de andere vrijheden) worden deze terreinen onder de werkingssfeer van het Unierecht gebracht.

Sinds 2011 is een nieuwe lijn van rechtspraak ontwikkeld in de zaak *Ruiz Zambrano*[13] en de rechtspraak die daarop volgde, in o.m. *McCarthy*, *Dereci* en *Iida*.[14] Hoewel die rechtspraak en de reikwijdte van artikel 20 VWEU tot op heden beperkt is uitgelegd door het Hof, is de werkingssfeer van het Unierecht met die rechtspraak uitgebreid tot

8 C-64/96 en C-65/96, *Uecker en Jacque* [1997] Jur. I-03171, par. 23.
9 C-85/96, *Martínez Sala* [1998] Jur. I-02691.
10 Zie bijvoorbeeld C-184/99, *Grzelczyk* [2001] Jur. I-06193.
11 Bijvoorbeeld in de zaken C-224/02, *Pusa* [2004] Jur. I-05763 en C-11/06 en C-12/06, *Morgan en Bucher* [2007] Jur. I-09161.
12 Zie o.m. C-184/99, *Grzelczyk* [2001] Jur. I-06193, C-73/08, *Bressol* [2010] Jur. I-02735, C-403/03 en *Schempp* [2005] Jur. I-06421.
13 C-34/09, *Ruiz Zambrano* [2011] Jur. I-01177.
14 C-434/09, *McCarthy* [2011] Jur. I-03375, C-256/11, *Dereci* [2011] Jur. I-11315 en C-40/11, *Iida* [2012] Jur. n.n.g.

situaties die daarvoor werden geacht onder de volledige bevoegdheid van de lidstaten te vallen.
Het Unieburgerschap heeft derhalve op verschillende wijzen de werkingssfeer van het Unierecht uitgebreid, zodat meer nationale regels aan de bepalingen van het Unierecht kunnen worden getoetst. Die uitbreiding van de werkingssfeer kan uiteindelijk leiden tot een *spillover effect* in de zin dat de Europese Unie bepaalde terreinen harmoniseert, nu die reeds door de rechtspraak geraakt worden. Buiten de sfeer van het Europees burgerschap is een dergelijk effect al zichtbaar met betrekking tot de economische vrijheden.[15]

2.2. Europees burgerschap en een gemeenschappelijke ideologie

Een tweede kenmerk van een constitutie, volgens de theorie van Raz, is dat deze een gemeenschappelijke ideologie en normen bevat over de wijze waarop de samenleving vormgegeven zou moeten worden. In het kader van dit proefschrift worden fundamentele rechten en democratie als twee van deze Europese constitutionele waarden gedefinieerd. Zowel de bescherming van fundamentele rechten als democratie zijn waarden waarop de Europese Unie is gestoeld. Artikel 2 VEU stelt: "De waarden waarop de Unie berust, zijn eerbied voor de menselijke waardigheid, vrijheid, democratie, gelijkheid, de rechtsstaat en eerbiediging van de mensenrechten (…). Deze waarden hebben de lidstaten gemeen (…)." De rol van het Europees burgerschap in het bestaan en versterken van een constitutionele gemeenschappelijke ideologie is onderzocht op deze twee verschillende aspecten: fundamentele rechten en democratie. In dit deel van het onderzoek zijn, gekoppeld aan democratie, eveneens de politieke fundamentele rechten van Unieburgers beschouwd.

In hoofdstuk 4 staat de relatie tussen Europees burgerschap en fundamentele rechten centraal. Die relatie is gefragmenteerd van aard, in de zin dat sommige fundamentele rechten duidelijk door het Europees burgerschap zijn versterkt, terwijl het verband met andere fundamentele rechten minder duidelijk aanwezig is. Het Europees burgerschap heeft verreweg de meeste invloed gehad op de ontwikkeling van sociale rechten. Zoals gezegd, heeft het Hof in zijn rechtspraak bepaald dat zowel discriminatie op grond van nationaliteit als elke belemmering van Unieburgers, zonder rechtvaardiging, niet is toegestaan, als zij gebruikmaken van hun recht om naar een andere lidstaat te reizen en daar te verblijven. Dat betekende eveneens dat diverse sociale voordelen aan migrerende Unieburgers zonder onderscheid moeten worden toegekend. Studiefinanciering is een van de prominente voorbeelden, maar ook een pensioen voor oorlogsslachtoffers of een uitkering voor werkzoekenden viel door de toepassing van het Europees burgerschap onder de werkingssfeer van het Unierecht.[16] Op andere fundamentele rechten is de impact van het Europees burgerschap kleiner. Hoewel het Handvest voor de Grondrechten (Handvest) van de Europese Unie sinds Lissabon bindend is, is nog geen link gelegd tussen het Handvest en het Europees burgerschap in de rechtspraak of Europese

15 Zie bijvoorbeeld Richtlijn 2011/24/EU over het recht van patiënten op zorg in het buitenland, PbEU L 88, 4/4/2011, p. 45.
16 C-209/03, *Bidar* [2005] Jur. I-02119, C-192/05, *Tas-Hagen en Tas* [2006] Jur. I-10451 en C-224/98, *D'Hoop* [2002] Jur. I-06191.

wetgeving. Fundamentele rechten, zoals het recht op familieleven, zijn bijvoorbeeld niet specifiek aan het Europees burgerschap gekoppeld en zijn afhankelijk van een interstatelijke dimensie. Daardoor bestaat er een kloof tussen de migrerende Unieburger en de Unieburger die in zijn of haar lidstaat van nationaliteit verblijft. Op grond van het vrije verkeer worden fundamentele rechten geactiveerd. Slechts op een aantal gebieden zijn er fundamentele rechten die aan de zogenoemde 'statische' Unieburger worden toegekend, zoals in de Ruimte voor Vrijheid, Veiligheid en Recht (de Ruimte), bijvoorbeeld voor slachtsoffers van misdrijven. In de Ruimte ontstaan spanningen tussen de verschillende fundamentele rechten, zoals het recht om te verblijven versus veiligheid, waardoor de Europese en nationale rechters met vragen over fundamentele rechten en Unieburgerschap worden geconfronteerd in de Ruimte.

In hoofdstuk 5 van dit onderzoek is de relatie tussen het Europees burgerschap en democratie geanalyseerd. Deze twee concepten hebben diverse raakvlakken. In de eerste plaats hebben Unieburgers een aantal politieke rechten gekregen. Het recht om in een andere lidstaat te stemmen en kandidaat te staan in gemeenteraadsverkiezingen en in Europese verkiezingen, zijn daar belangrijke voorbeelden van (zie artikel 22 VWEU). Een gemis in die politieke link tussen het EU-burgerschap en politieke rechten is dat toegang tot nationale verkiezingen niet wordt toegekend op grond van het Europees burgerschap. Sterker nog, wanneer een Unieburger gebruikmaakt van zijn recht om vrij te reizen en te verblijven in een gastlidstaat, kan deze Unieburger ook zijn politieke rechten in de lidstaat van nationaliteit verliezen. Verder versterken enkele andere politieke rechten van Unieburgers de democratische link tussen Unieburgers en de Unie, zij het in meer beperkte zin.[17]
Sinds het Verdrag van Lissabon is in artikel 11 VEU een aantal belangrijke politieke mechanismen opgenomen. Volgens lid 1 van dit artikel zijn deze nieuwe democratische mechanismen gebaseerd op het volgende beginsel: "De instellingen bieden de burgers en de representatieve organisaties langs passende wegen de mogelijkheid hun mening over alle onderdelen van het optreden van de Unie kenbaar te maken en daarover in het openbaar in discussie te treden." Het Europees burgerinitiatief dat is opgenomen in lid 4 van artikel 11 VEU, is de meest significante link tussen Europees burgerschap en democratie en politieke rechten. Hoewel er op het Europees burgerinitiatief veel af te dingen is, zorgt het in ieder geval voor een duidelijke politieke link tussen de Unieburgers en de Unie. Daarmee is ook een meer directe vorm van democratie gecreëerd. Of het Europees burgerinitiatief ook daadwerkelijk impact heeft, hangt af van de Unieburgers, maar ook van de Europese Commissie. Ook de Europese Ombudsman en het Hof kunnen daar een rol in spelen.

17 Het recht om zich te wenden tot de Europese Ombudsman, het recht om een verzoekschrift in te dienen bij het Europees Parlement, zie artikel 24 VWEU.

2.3. Europees burgerschap in rechterlijke toetsing en de invloed op de hiërarchie van normen

In hoofdstuk 6 van dit proefschrift is gekeken naar de invloed van het Europees burgerschap op rechterlijke toetsing in de Europese Unie. Rechterlijke toetsing wordt in de theorie van Raz beschouwd als een constitutioneel element, in de zin dat er bepaalde rechterlijke procedures zijn die de normen uit de constitutie waarborgen. Bovendien moeten deze procedures ervoor zorgen dat de constitutionele normen als hoogste norm worden geëffectueerd. In de context van de Europese Unie zijn deze twee elementen anders van aard dan in deze meer klassieke opvatting van Raz. Voorrang en rechtstreekse werking van Unierecht zijn niet per se van constitutionele aard, in de zin dat een rechtstreeks werkende norm die eveneens voorrang heeft ook per definitie een constitutionele status zou hebben. In dit hoofdstuk is dan ook meer specifiek gekeken naar de manier waarop het Hof Unieburgerschapszaken behandelt.

Zoals opgemerkt, heeft het EU-burgerschap de reikwijdte van het Europees recht aanmerkelijk verruimd. Dat betekent dat ook de reikwijdte van rechterlijke toetsing is opgerekt. Het Hof heeft een ruimere jurisdictie gekregen, omdat meer (potentiële) conflicten tussen Europees recht en nationaal recht zich kunnen voordoen, nu het Europees burgerschap ook ingrijpt op terreinen die voorheen werden beschouwd als volledig interne situaties waarop het EU-recht geen invloed uitoefende. De relatie tussen het Europees burgerschap en de rechterlijke toetsing komt ook tot uitdrukking in de erkenning van de rechtstreekse werking van artikelen 18, 20, 21, lid 1, en 22, lid 1 VWEU. Doordat het Hof aan deze bepalingen van het EU-burgerschap rechtstreekse werking heeft toegekend, is meer Europese en nationale jurisprudentie ontstaan, omdat Unieburgers hun rechten kunnen inroepen voor de nationale rechter.
Wat betreft de rechterlijke toetsing is het van belang dat het Hof het Unieburgerschap een constitutionele waarde toekent, in de zin dat het Hof de rechten van Unieburgers ruim interpreteert en die rechten als fundamentele Unierechtelijke normen ziet die leidend zijn voor de interpretatie van andere bepalingen van het Unierecht. Die ruime opvatting is te vinden in de manier waarop het Hof de proportionaliteit in Unieburgerschapszaken interpreteert. Het Hof oordeelde in zaken met betrekking tot Unieburgers dat de persoonlijke omstandigheden van Unieburgers moeten worden gewogen in de proportionaliteitstoets door de nationale rechter. In plaats van een abstracte proportionaliteitstoets schreef het Hof in die rechtspraak een concrete toets voor van de verschillende persoonlijke omstandigheden. Zo oordeelde het Hof in *Trojani*[18] en *Baumbast*[19] dat de eisen uit de richtlijn in het licht van de proportionaliteitstoets niet algemeen mogen worden toegepast, maar dat de persoonlijke omstandigheden moeten worden meegewogen.
Hoewel die rechtspraak van het Hof niet coherent is, lijkt het Hof in een aantal zaken in ieder geval een 'Europees-burgerschap-vriendelijke interpretatie' te geven, in de zin dat Unieburgers ruime bescherming geboden wordt door die interpretatie. Niet in alle zaken is dat het geval, in een aantal andere zaken lijkt het Hof juist meer ruimte aan lidstaten te

18 C-456/02, *Trojani* [2004] Jur. I-07573.
19 C-413/99, *Baumbast* [2002] Jur. I-07091.

laten om beperkingen op te leggen aan Unieburgers van andere lidstaten, op grond van artikel 4, lid 2 VEU. Het is vooralsnog onduidelijk hoe deze twee ontwikkelingen zich tot elkaar verhouden.

3. DE EUROPESE BURGER IN EUROPESE CONSTITUTIONELE CONTEXT

3.1. Fragmentatie en constitutionalisering

De impact van het Europees burgerschap op de constitutionalisering van de Europese Unie laat een gefragmenteerd beeld zien: op sommige constitutionele elementen heeft het Unieburgerschap wel degelijk invloed, op andere elementen in mindere mate. Dat betekent echter niet dat het Europees burgerschap geen rol speelt in de constitutionalisering. In het perspectief van een gelaagde of samengestelde Europese constitutionele rechtsorde is deze fragmentatie goed te duiden. De Europese Unie moet, volgens deze theorieën, niet als geïsoleerd van de nationale constitutionele rechtsordes worden bezien, maar als een geheel van regels, inclusief die van de lidstaten.[20] De verschillende lagen van die Europese constitutionele rechtsorde zijn met elkaar in interactie en staan niet los van elkaar. In die zin is het gefragmenteerde beeld dat uit de analyse van dit onderzoek komt, te verklaren, omdat het Europees burgerschap een onderdeel is van een groter geheel, waarbij ook de rechtsordes van de lidstaten een grote rol spelen.

3.2. De Europese samengestelde burger

Een dergelijk samengesteld beeld geeft ook het Europees burgerschap, dat beschouwd kan worden als Europees samengesteld burgerschap en niet los van het nationale burgerschap bekeken moet worden. De Unieburger bestaat als het ware uit verschillende lagen, die geactiveerd worden naar gelang de EU-burger zich in de context van de EU of die van het nationale domein begeeft. In sommige gevallen zal de Unieburger rechten op grond van de Europese Unie in de nationale context verkrijgen. Dat wil zeggen dat iedere 'gouvernementele' laag, zij het lokaal, nationaal of Europees, verantwoordelijk is voor een deel van de bescherming van Europese burgers. Tegelijkertijd betekent het dat de Unieburger aan verschillende lagen van de Europese gelaagde rechtsorde verplichtingen heeft, die voornamelijk, of eigenlijk vrijwel exclusief, in het nationale domein liggen.

Dat het Europees burgerschap samengesteld van aard is, blijkt al uit het feit dat het Europees burgerschap gebaseerd is op nationaliteit. Daarnaast bepaalt Artikel 20 VWEU: "Het burgerschap van de Unie komt naast het nationale burgerschap doch komt niet in de plaats daarvan." Het samengesteld burgerschap is, bovendien, onder meer zichtbaar in de wijze waarop de rechten van Unieburgers zijn geformuleerd: veelal in termen van gelijkheid. In dit proefschrift is het samengestelde karakter van het Europees burgerschap steeds zichtbaarder geworden. Bijvoorbeeld in de toekenning van de politieke rechten van Unieburgers wordt dit duidelijk. Een Unieburger heeft geen absoluut recht om te stemmen voor de gemeenteraadsverkiezingen, maar een recht op

20 Zie Pernice (2002), Maduro (2003) en Besselink (2007).

gelijke toegang tot die verkiezingen (artikel 22, lid 1 VWEU). De lidstaten bepalen nog steeds hoe hun electorale systeem er uitziet, de EU bepaalt dat EU-burgers daarvan niet mogen worden uitgesloten wanneer zij in een gastlidstaat verblijven. Tegelijkertijd heeft een Unieburger actief en passief kiesrecht in de Europese verkiezingen op grond van EU-recht. Bovendien moet een Unieburger, op grond van EU-recht, gelijke toegang krijgen tot de Europese verkiezingen in een andere lidstaat. Het kiesrecht in nationale verkiezingen is een nationale aangelegenheid. Een Unieburger heeft dus kiesrecht in die verkiezingen volgens het nationale recht.
Een dergelijke interactie tussen de verschillende rechten is eveneens terug te vinden in de bescherming van fundamentele rechten. De fundamentele rechten van Unieburgers worden binnen de context van de EU beschermd door het Handvest en de algemene rechtsbeginselen van de EU, maar in een nationale context worden Unieburgers beschermd door hun nationale grondwettelijke bepalingen en het EVRM. In die zin ontstaat er als het ware een dekking van fundamentele rechten. Zoals het Hof in *Dereci* oordeelde:

> "Indien de verwijzende rechter in de onderhavige zaak van oordeel is dat, gelet op de omstandigheden van de hoofdgedingen, de situatie van verzoekers in de hoofdgedingen onder het recht van de Unie valt, zal hij moeten onderzoeken of de ontzegging van een verblijfsrecht aan deze laatste, het recht op eerbiediging van hun privéleven en familie- en gezinsleven in de zin van artikel 7 van het Handvest aantast. Wanneer hij daarentegen van oordeel is dat genoemde situatie niet binnen de werkingssfeer van het recht van de Unie valt, zal hij dit onderzoek in het licht van artikel 8, lid 1, van het EVRM moeten verrichten."[21]

De Europese burger is aldus te beschouwen als een gelaagde Unieburger, die constitutioneel verschillende relaties met de verschillende rechtsordes heeft: soms met zijn eigen lidstaat, soms met een gastlidstaat en soms met de Europese Unie.

4. DE WEG VOORUIT…

Het Europees burgerschap heeft zonder twijfel bijgedragen aan de constitutionalisering van de Europese Unie en dat proces is nog zeker niet ten einde. Het burgerschap van de Unie, ooit ingevoerd met als doel de Unieburger bij de Europese Unie als politieke Unie te betrekken, is nog niet voltooid, maar zal zeker onderwerp van toekomstig beleid, wetgeving en rechtspraak zijn.

Ondanks het feit dat het Europees burgerschap het best begrepen kan worden als samengesteld burgerschap, blijven er gaten in de bescherming van Unieburgers. Met name met betrekking tot fundamentele rechten en omgekeerde discriminatie is het gebrek aan effectieve bescherming door de EU problematisch, wanneer lidstaten die bescherming niet of onvoldoende waarborgen. Wanneer lidstaten de fundamentele rechten van hun onderdanen ernstig en systematisch schaden, zou optreden van de Europese Unie wenselijk zijn, ook als er geen ander specifiek aanknopingspunt met

21 C-256/11, *Dereci* [2011] Jur. I-11315, par. 72

het EU-recht aanwezig is.[22] Hoewel in een samengesteld-burgerschapsidee de lidstaten verantwoordelijk zijn voor hun burgers in de context van de nationale constitutionele rechtsorde, zou de EU in zeer uitzonderlijke situaties wel bevoegd moeten zijn om in te grijpen. Dat zou dan alleen gelden voor situaties waarin de betreffende lidstaat een ernstige en systematische inbreuk op de fundamentele rechten maakt en dus zelf niet de verantwoordelijkheid neemt om de Europese samengestelde burger afdoende te beschermen. Wat de rechtspraak betreft kan worden vastgesteld dat het Hof vooralsnog terughoudend is, mede omdat het de grenzen die artikel 51, lid 1 van het Handvest trekt, heeft te respecteren. Mettertijd zou een dergelijke constructie wellicht wel tot de mogelijkheden behoren.[23]

Meer concreet zijn er drie deelgebieden waarop het Unieburgerschap zich naar verwachting in de toekomst meer zal ontwikkelen.

In de eerste plaats is het de verwachting dat de politieke dimensie van het Europees burgerschap zich verder zal ontwikkelen. Het Europees burgerinitiatief zou potentieel kunnen bijdragen aan het versterken van de politieke dimensie van het EU-burgerschap, afhankelijk van de daadwerkelijke effecten van dat instrument. In ieder geval leidt het Europees burgerinitiatief tot een soort van Europees *demoi*, waarin Unieburgers uit ten minste zeven lidstaten een voorstel voor wetgeving aan de Commissie kunnen initiëren. Op dit moment is het nog zeer onduidelijk welke effecten het Europees burgerinitiatief zal hebben, maar potentieel kan dit instrument een waardevolle toevoeging aan de democratische legitimatie betekenen. Datzelfde geldt voor de nieuwe democratische beginselen die zijn opgenomen in artikel 11 VEU. Veel is nog onduidelijk over de daadwerkelijke betekenis van deze paragrafen, maar artikel 11 VEU kan van betekenis zijn voor *politiek* Europees burgerschap.[24]

In de tweede plaats is de Ruimte voor Vrede, Veiligheid en Recht een terrein waar het EU-burgerschap een belangrijke rol speelt en zeker zal gaan spelen. Recente rechtspraak van het Hof geeft een spanning weer tussen de rechten van Unieburgers om te verblijven in een andere lidstaat, en de wederzijdse erkenning als instrument in de Ruimte om gemakkelijk verdachten en veroordeelden over te leveren. De zaak *P.I.*[25] is een voorbeeld van een dergelijke spanning, waarin het verblijfsrecht van P.I. werd ingetrokken nadat hij was veroordeeld voor seksuele delicten met een minderjarige. De vraag rees of P.I., die meer dan tien jaar verbleef in de gastlidstaat, mocht worden uitgezet op grond van dwingende redenen van openbare veiligheid. Het Hof oordeelde dat de handelingen van P.I. "een buitengewoon ernstige inbreuk vormen op een fundamenteel belang van de samenleving, die een rechtstreekse bedreiging kan vormen voor de gemoedsrust en de fysieke veiligheid van de bevolking en dus kan vallen onder het begrip 'dwingende

22 Zie voor een uitgebreid voorstel in die zin Von Bogdandy (2013).
23 Zo heeft de Europese Commissie recentelijk een pre-artikel 7 VEU procedure voorgesteld, zie Mededeling van de Commissie aan het Europees Parlement en de Raad "Een nieuw EU-kader voor het versterken van de rechtsstaat", COM(2014) Final.
24 Zie meer uitgebreid Senden (2011)(b).
25 C-348/09, *P.I.* [2012] Jur. n.n.g.

redenen van openbare veiligheid', op grond waarvan een maatregel van verwijdering overeenkomstig (…) richtlijn 2004/38 kan worden gerechtvaardigd".[26] Dat betekende dat het fundamentele recht om in een lidstaat te verblijven mocht worden ingetrokken om de bevolking van de gastlidstaat te beschermen. Dergelijke vragen met betrekking tot spanningen tussen (fundamentele) rechten van Unieburgers, die van de migrerende Unieburger en die van de bevolking van een gastlidstaat, zullen steeds vaker op het bordje van de nationale rechter terechtkomen en vervolgens vaak worden voorgelegd aan het Hof in Luxemburg. Naast de rechten van verdachte en veroordeelde Unieburgers zet de Commissie meer recent in op de bescherming van slachtoffers, waardoor Unieburgers meer vertrouwen in de strafrechtsystemen van de lidstaten zouden moeten krijgen. Ook in die zin is de verwachting dat het Unieburgerschap een rol gaat spelen in de Ruimte.

Ten slotte zal de rechtspraak met betrekking tot *Ruiz Zambrano* en artikel 20 VWEU in de toekomst ongetwijfeld navolging krijgen. Hoewel het Hof in de rechtspraak volgend op *Ruiz Zambrano* een beperkte uitleg aan artikel 20 VWEU heeft gegeven, in de zin dat artikel 20 VWEU slechts in te roepen is wanneer een Unieburger *de facto* gedwongen is de Europese Unie te verlaten, zijn er nog vele onduidelijkheden. Nationale rechters worden geconfronteerd met specifieke gevallen waarin de grenzen van artikel 20 VWEU niet per se duidelijk zijn. In de nabije toekomst kan dan ook verwacht worden dat er meer verwijzingen met betrekking tot de reikwijdte van artikel 20 VWEU naar het Hof zullen worden verwezen hetgeen tot een verdere ontwikkeling van deze rechtspraak zal leiden.

26 C-348/09, *P.I.* [2012] Jur. n.n.g., par. 33.

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