Chapter 7
Free Movement of Workers and Union Citizens

Alina Tryfonidou

Abstract This contribution seeks to offer some insights into the changing nature of the relationship between EU and Member State competences, with regards to the provision of SSGIs. In particular, it will consider how the provisions on the free movement of workers and the, more recently added, citizenship provisions of the Treaty, impose constraints on the Member States' autonomy with regards to the provision of such services. The essay will focus on two specific types of SSGIs that are still, mainly, provided by the State (education and the provision of a social assistance system) and will explore how the CJEU has responded to the tension between the aims of the free movement of workers and the citizenship provisions, on the one hand, and the autonomy of the Member States in these fields, on the other.

Contents

A. Tryfonidou (✉)
School of Law, Foxhill House, Whiteknights Road, Reading, RG6 7BA, UK
e-mail: A.Tryfonidou@reading.ac.uk

U. Neergaard et al. (eds.), *Social Services of General Interest in the EU*, Legal Issues of Services of General Interest, DOI: 10.1007/978-90-6704-876-7_7,

7.1 Introduction

In the early days of the welfare state, certain areas of the economy were set apart from the free market philosophy, since in those sectors it was considered inappropriate for the desire to make profit to overweigh certain non-economic considerations such as, for instance, the need to ensure the universal provision of certain essential services for the benefit of all. The creation and development of the European internal market and the recent global financial crisis are, nonetheless, forces which push towards the opposite direction and are increasingly leading to a 'radical restructuring' of the relationship between the State and the market.[1] On the one hand, certain services which have traditionally been provided exclusively by the State because they have a public service mission and, for this reason, it has been considered that they should not be subject to market forces, are now in the process of being liberalised and/or privatised,[2] and this has created the need to (re-)define the extent to which the EU has the power to assess the role of the State in the provision of such services. On the other hand, the further development of the European integration and the establishment of the status of Union citizenship, have meant that even when the Member States continue to provide such services themselves, they may now be required by EU law to extend their availability to nationals of other Member States who are lawfully resident within their territory. Bringing such services within the realm of the free movement rules of the Treaty and, thus, making the actions of the Member States with regards to their organisation, provision and financing subject to EU control, results in the further diminution of the areas of Member State competence that are entirely immune from EU scrutiny.

One category of the aforementioned services are the so-called SSGIs, which are nowhere mentioned in the Treaties, but to which reference is made in numerous recent documents produced by the Commission and other bodies such as ETUC.[3] The Treaty drafters have chosen, instead, to make use of the wider terms of SGEIs and SGIs,[4] which collectively refer to public services that fulfil people's daily needs and are essential for their well being, such as, gas, water and energy supply, postal services, healthcare, education and the maintenance of a social assistance

[1] Szyszczak 2001, p. 36.

[2] See, for instance, the recent discussion in the United Kingdom concerning the cuts in the grants paid to higher education institutions and the corresponding increase in tuition fees.

[3] For a further explanation of the term 'SSGIs', see Chap. 9 by Neergaard in this collection of essays.

[4] Another term used for SGEIs and SGIs is 'public services'—see CJEU, Case C-18/88 *GB-Inno* [1991] *ECR* I-5980, para 22; CJEU, Case C-393/92 *Almelo* [1994] *ECR* I-1520, paras 47 and 49; Behrens 2001, pp. 472–473. Note, however, that the Commission has refrained from using that term as a synonym for any of the above terms —see Commission, *Green Paper on Services of General Interest*, COM(2003) 270 final, 25 May 2003, para 19. Also, commentators who have made use of this term as another label for SG(E)Is have recognised that the terms are not 'co-extensive'—see, for example, Ross 2004, p. 489.

and social security system.[5] The Commission has recognised the special role of SSGIs 'as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion'.[6] As explained, '[t]he market, left to itself, does a good job of supplying many services of general interest for many people. However, sometimes markets fail to deliver socially desirable objectives and, as a result, services are underprovided by the market… In such cases public sector intervention may be necessary'.[7]

EU law, therefore, allows full account to be taken of the specificities of SSGIs and of the importance attached to the freedom of the Member States to organise the provision of such services in whichever way they consider most appropriate. The Commission has explained that as a general rule, the EU leaves it up to the Member States to decide whether they shall provide public services themselves, directly or indirectly (through other public entities), or whether they will entrust their provision to a third party.[8] However, the exercise of this choice and, most importantly, its consequences, has to be in compliance with EU law. As pointed out by Ross, 'European law does not as such say anything about the size of public budgets allocated by Member States to public services. Nor does it predetermine choices as to how such services are to be delivered. However, EU law is *not* neutral towards the way public services are organized and operated within those choices'.[9]

Therefore, the important question is how can the EU interfere with Member State choices when it comes to the provision of SSGIs? Or, perhaps more accurately, when do the actions of the Member States in this context fail to comply with EU law? This contribution will not seek to answer this broad question, but will, rather focus on two, more specific, research questions. The first research question—which will be answered in this Section—asks: in what circumstances do the citizenship provisions of the Treaty, as well as the provisions governing the free movement of workers, apply to situations involving the provision of SSGIs? The second research question, which will be explored in Sects. 7.2 and 7.3, is more specific and the answer to it will be distilled from the conduct of two case studies. This question asks how the CJEU has responded to the tension between the

[5] For an article on the 'growing Europeanisation of the public utilities legal order' see Napolitano 2005.

[6] Commission, *Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union,* COM (2006) 177 final, 26 April 2006.

[7] Commission, *Report to the Laeken European Council, Services of General Interest*, COM(2001) 598, 17 October 2011, para 1(3). For a further explanation of market failure in this context see Commission, *Communication from the Commission, Services of General Interest in Europe,* COM(1996) 443 final, 11 September 1996, p. 5.

[8] COM(2001) 598, para 2(7).

[9] Ross 2004, p. 304.

aims of the free movement of workers and the citizenship provisions, on the one hand, and the autonomy of the Member States with regards to the provision of two particular SSGIs (public education and the provision and maintenance of a social assistance system), on the other.

The remaining part of this Section will seek to provide an answer to the first research question.

As noted above, when the Member States exercise their competence with regards to the provision of SSGIs, they have to act in compliance with EU law. But which provisions of the FEU Treaty are applicable in situations involving Member State action with regards to the provision of SSGIs?

It is true that in the context of EU free movement law, it is the free movement of services provisions that appear to primarily apply to SSGIs. Hence, if the provision of an (economic)[10] SSGI across borders is impeded, then this will amount to a violation of Article 56 TFEU. However, the refusal to provide a specific SSGI to certain persons may not, only, amount to an obstacle to the cross-border provision of the core service as such, but may also have the further effect of impeding the free movement of those persons who are refused its availability.

In particular, as will be seen in the two subsequent sections of this contribution, the way that a State chooses to organise the provision of a non-economic SSGI may be subjected to scrutiny under the other (economic) free movement provisions, if it is proved that this may have an impact on the exercise of an(other) economic activity across borders. For instance, the refusal to extend the availability of a SSGI to migrant workers or their families, may be capable of impeding the free movement of the former and may, thus, be caught by the free movement of workers provisions. In addition, the introduction of the citizenship provisions into (what is now) the FEU Treaty has made it possible for SSGIs to be included within the scope of EU law—and thus be subjected to EU scrutiny—in situations that do not involve any link with the economic aims of the EU.

However, it should be noted that when the free movement of persons provisions are held to apply to a situation involving the provision of SSGIs, the Court merely seeks to remove any discrimination on the grounds of nationality/free movement with regards to the provision of these services, and, thus, the EU's interference is confined to requiring the host Member State not to treat nationals of other Member States/free movers differently. Hence, under this 'discrimination model' the content of the national rules on the issue remains intact.[11] In other words, the Member States remain free to choose which SSGIs they will provide, as well as how such services will be provided. Yet, although in theory this is the case, in reality, the Member States may feel inclined to change their laws (both with respect to their own nationals and with regards to the nationals of other Member

[10] Note, however, that if a specific SSGI is found not to be an 'economic service' because it is not provided for remuneration as this was defined in CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365, para 17, then Article 56 TFEU does not apply and any impediment to its provision across borders is not prohibited by that provision.

[11] Barnard 2008, p. 4.

States) if otherwise they will be financially unable to continue offering a particular service.[12] For example, a Member State may be unable to provide a free higher education system open to all and may, thus, decide to impose limiting conditions on access to education for everyone—something which may be seen as, in effect, allowing the principle of free movement to trump over the adequate provision of an SSGI.[13]

The remaining part of this contribution will be divided into two main parts, each devoted to one type of SSGI: education and the organisation and maintenance of a social assistance system. The purpose will be to examine the second research question posed in this piece: i.e. to what extent can, and has, the EU interfered in the provision of two particular types of SSGI (education (Sect. 7.2) and the organisation and maintenance of a social assistance system (Sect. 7.3)) and what has been the corresponding diminution in the political autonomy of the Member States in these areas.

7.2 Education as an SSGI and the Free Movement of Workers and Union Citizens

The provision of education is, clearly, an SSGI. It is, also, one of the areas listed in Article 6 TFEU and for which the EU has a (solely) supplementary competence, i.e. it has the competence to merely support, coordinate or supplement the actions of the Member States in this field. However, whilst each Member State is free to choose the education system that it will build within its territory,[14] it has to act in compliance with EU law when doing so.[15] Hence, and as will be seen in more detail below, there has always been a tension between the exercise of national competence with regards to the provision of this SSGI, on the one hand, and the

[12] Neergaard and Nielsen 2010, p. 456.

[13] As explained by Szyszczak '[t]here are no criteria as to the *quality* of welfare benefits provided within a Member State, with the Citizen acting as a market or consumer citizen making a choice. There are no safeguards against "levelling down" when a Member State feels threatened by an influx of "welfare tourists" and decides to lower or withdraw a welfare benefit'. Szyszczak 2009, p. 285.

[14] CJEU, Case C-40/05 *Lyyski* [2007] *ECR* I-99, para 39.

[15] See CJEU, Case C-73/08 *Bressol* [2010] *ECR* I-2735, para 28; CJEU, Joined Cases C-11 & 12/06 *Morgan and Bucher* [2007] *ECR* I-9161, para 24; CJEU, Case C-337/97 *Meeusen* [1999] *ECR* I-3289, para 25; CJEU, Case C-308/89 *Di Leo* [1990] *ECR* I-4185, paras 14–15. This is the same approach that has been adopted in other areas which are, also, reserved for the Member States and for which the EU (if at all) has only supportive competence. See, for instance, criminal law and direct taxation and the relevant case-law: CJEU, Case C-348/96 *Calfa* [1999] *ECR* I-11 and CJEU, Case C-279/93 *Schumacker* [1995] *ECR* I-225, respectively.

requirements of EU law and, more specifically, the aim of building an internal market and liberalising inter-State movement, on the other.[16]

The Member States devote significant public resources for maintaining a high quality education system for the benefit of their *own* citizens. As explained by the Court in *Humbel*, 'the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields'.[17] For this reason, and because the Court has been of the view that with regards to courses provided under the national educational system the characteristic of remuneration is absent, the provision of education by a Member State is not a(n economic) 'service' within the meaning of Article 56 TFEU and, thus, the actions of the Member States with regards to this are not subject to an assessment as to their compatibility with that provision.[18] Nonetheless, as will be seen, this does not mean that the actions of the Member States in this field are always immune from EU interference: the Court has held that other provisions of the Treaty may be employed in order to require the Member States to provide their 'services' in the education field to nationals of the other Member States and, as a result, spend part of the public resources earmarked for the purpose of building and maintaining an education system for the benefit of nationals of the other Member States.

The Court has confirmed in a long line of case law that the conditions of *access* to vocational training fall within the scope of the Treaty[19]; and that both higher education and university education constitute vocational training.[20] More specifically, the Court has held that Member State nationals who qualify as 'workers' within the meaning of Article 45 TFEU, are entitled to be treated equally with nationals of the host State when it comes to access to education, and advantages relating to access to education have been found to amount to 'social advantages' under Article 7(2) of Regulation 1612/68, to which the worker is entitled, either for

---

[16] Opinion of AG Stix-Hackl of 21 September 2006 in CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6853, para 4, and CJEU, Case C-318/05 *Commission* v. *Germany* [2007] *ECR* I-6957, para 4.

[17] CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365, para 18. See, also, more recently CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6879, para 40: 'Note, however, that [c]ourses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article [57 TFEU], since the aim of those establishments is to offer a service for remuneration'. See Ibid. para 40; CJEU, Case C-109/92 *Wirth* [1993] ECR I-6447, para 17; CJEU, Case C-56/09 *Zanotti*, [2010] *ECR* I-4517, paras 31–33.

[18] CJEU, Case C-263/86 *Humbel* [1988] *ECR* 5365.

[19] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593, para 25; CJEU, Case C-65/03 *Commission* v. *Belgium* [2004] *ECR* I-6427, para 25; CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969, para 32; CJEU, Case C-295/90 (*European*) *Parliament* v. *Council* [1992] *ECR* I-4193, para 15; CJEU, Case 24/86 *Blaizot* [1988] *ECR* 379, para 11; CJEU, Case 42/87 *Commission* v. *Belgium* [1988] *ECR* 5445, para 7; CJEU, Case C-40/05 *Lyyski* [2007] *ECR* I-99, para 28.

[20] CJEU, Case 24/86 *Blaizot* [1988] *ECR* 379, paras 15–20; CJEU, Case 42/87 *Commission* v. *Belgium* [1988] *ECR* 5445, paras 7–8; CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969, para 33.

himself[21] or for the benefit of his descendants.[22] Furthermore, the children of migrant workers who wish to have access to education in the host State, can themselves rely on Article 12 of Regulation 1612/68, in order to require the host Member State not to discriminate against them on the ground of their nationality.

Most important, nonetheless, was the Court's recognition in the case of *Gravier* in the 1980s,[23] that economically inactive Member State nationals are entitled to rely on Article 18 TFEU, which prohibits discrimination on the grounds of nationality *within the scope of EU law*, and to require the Member States not to discriminate against them in relation to access to education in the territory of another Member State. The Court has, further, read this as obliging the host State to allow incoming students to reside within its territory for the duration of their course.[24]

More specifically, as regards the issue of the imposition of a limit on the number of students that can be admitted to an educational course, the CJEU has made it clear that Member States are 'free to opt for an education system based on free access—without restriction on the number of students who may register—or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality'.[25] Similarly, the conditions required to be satisfied for gaining admission to university education, must comply with the above principle.[26]

Apart from national measures involving the imposition of (non-financial) limits or conditions on access to education, the Court has had to consider whether the requirement to pay an enrolment or registration fee constitutes a violation of EU law.

---

[21] Council Regulation No. 1612/68 of 15 October 1968 on Freedom of Movement for Workers within the Community, *OJ* 1968 L 257/2. For more on this see Lonbay 1989, p. 376. See, also, Article 7(3) of the same Regulation. Note that, although in the context of freedom of establishment, there is no equivalent provision, the Court interpreted the relevant provision of the Treaty (Article 49 TFEU) as covering such advantages—see CJEU, Case C-337/97 *Meeusen* [1999] *ECR* I-3289.

[22] CJEU, Case 94/84 *Deak* [1985] *ECR* 1873, para 22; CJEU, Case C-7/94 *Gaal* [1995] *ECR* I-1031.

[23] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593.

[24] CJEU, Case C-357/89 *Raulin* [1992] *ECR* I-1027, para 34; CJEU, Case C-295/90 *European Parliament* v. *Council* [1992] *ECR* I-4193, para 15. This was initially enshrined in Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students, *OJ* 1993 L 317/59 and is now provided in Article 7(1)(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation No. 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* 2004 L 158/77.

[25] CJEU, Case C-73/08 *Bressol* [2010] *ECR* I-2735, para 29.

[26] CJEU, Case C-147/03 *Commission* v. *Austria* [2005] *ECR* I-5969 and CJEU, Case C-65/03 *Commission* v. *Belgium* [2004] *ECR* I-6427.

In the landmark case of *Gravier*, the Court of Justice made it clear that discrimination on the grounds of nationality with regards to the payment of an enrolment or registration fee, constitutes a violation of Article 18 TFEU, since it impedes access to education in the territory of another Member State.[27] The case involved a French national who moved to Belgium in order to take-up a strip cartoon art course at the Academie Royale des Beaux-Arts in Liège. The problem was that the Belgian authorities demanded of all foreign students (including Gravier) to pay the 'minerval' (an enrolment fee), whilst such a fee was not imposed on Belgian nationals. We know from the facts of the case that in Belgium, primary and secondary education was free of charge in the State system and in subsidised establishments, and institutions of post secondary or higher education could only charge low registration fees intended to finance their social services. Hence, the educational services provided by these institutions were not economic activities and, accordingly, Gravier could not be considered a service recipient, within the meaning of Article 56 TFEU.[28] Also she could not enjoy the right to be treated equally with students of Belgian nationality as the child of migrant workers, since her parents were French nationals resident and working in France.[29]

The Court found that the fact that the requirement to pay an enrolment fee was only imposed on foreign students clearly amounted to (direct) discrimination on the grounds of nationality, contrary to Article 18 TFEU. The main question, however, was whether the situation fell within the scope of the Treaty since it was only if this was so that this discrimination would be prohibited. In its response, the Court noted that 'although educational organisation and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law'.[30] More specifically, the Court in its judgment for the first time made it clear that 'the conditions of access to vocational training fall within the scope of the Treaty',[31] observing that '[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired'.[32]

---

[27] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593. Note that this was, actually, held by the Court in its judgment in the earlier case of *Forcheri* (CJEU, Case 152/82 *Forcheri* [1983] *ECR* 2323), however, that judgment could not be considered a clear authority for this proposition since the Court's reference appeared to place reliance on the fact that Ms Forcheri was the wife of a migrant *worker*.

[28] CJEU, Case 293/83 *Gravier* [1985] *ECR* 593, para 3.

[29] Ibid. para 5.

[30] Ibid. para 19.

[31] Ibid. para 25.

[32] Ibid. para 24.

Shortly after *Gravier*, the Court was confronted with the further question of whether financial assistance given to students which is not related to *access* to education but is rather aimed at covering the maintenance expenses of students, falls within the scope of the EU law.

At first, it was considered that it is only migrant workers (and their families) that can rely on EU law in order to require the host Member State to treat them equally with its own nationals as regards the grant of financial assistance for maintenance expenses associated with education. Two provisions of Regulation 1612/68 have been relied upon for this purpose: Article 7(2) which provides that migrant workers 'shall enjoy the same social and tax advantages as national workers' in the host State[33] and Article 12, according to which the children of migrant workers shall be admitted to the host State's 'general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'.[34]

Conversely, with regards to non-economically active persons, the Court had initially held in the cases of *Lair* and *Brown* that EU law does not include within its scope the payment of financial assistance which aims to cover the maintenance costs of a student during his education.[35] The Court, in particular, noted that: ' at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the… Treaty for the purposes of [Article 18]. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions (see Gravier) and on the other, 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… Treaty'.[36]

Nonetheless, in recent years and, in particular, following the establishment and development of the status of Union citizenship, the Court has had a change of heart with regards to this issue.

The first signs that the *Lair/Brown* principle was about to be consigned to legal history appeared in the seminal citizenship judgment of *Grzelczyk*.[37] The eponymous applicant was a French national who moved to Belgium to study at university. During the first 3 years of his studies, he worked part-time and, as a consequence, was able to defray his maintenance expenses. However, his fourth and final year at university proved to be more demanding and, therefore, he had to

---

[33] CJEU, Case 235/87 *Matteucci* [1988] *ECR* 5589, paras 11 and 16; CJEU, Case 39/86 *Lair* [1988] *ECR* 3161, paras 23–24; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205, para 25; CJEU, Case C-3/90 *Bernini* [1992] *ECR* I-1071, para 20.

[34] CJEU, Case 9/74 *Casagrande* [1974] *ECR* 773, para 9; Joined Cases 389–390/87 *Echternach and Moritz* [1989] *ECR* 723; CJEU, Case C-308/89 *Di Leo* [1990] *ECR* I-4185.

[35] CJEU, Case 39/86 *Lair* [1988] *ECR* 3161; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205. For a criticism of this distinction see O'Leary 1997, p. 121, para 6.23; Gori 1999.

[36] CJEU, Case 39/86 *Lair* [1988] *ECR* 3161, para 15; CJEU, Case 197/86 *Brown* [1988] *ECR* 3205, para 18.

[37] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193.

stop working in order to be able to concentrate on his studies. In order to cover his living expenses, he applied for the 'minimex' (the Belgian minimum subsistence allowance). The Belgian authorities rejected his application on the ground that he was neither a Belgian national, nor a worker whose situation was covered by Regulation 1612/68. In its judgment, the Court found Belgium to be in violation of EU law and concluded that Mr Grzelczyk was entitled to the minimex under the same conditions as Belgian nationals: put another way, non-Belgian students (who were not workers) should be entitled to the minimex under the same conditions as this was available to Belgian students.

True, the minimex was not an education-related allowance; it was an allowance granted to *anyone* with inadequate resources. However, one could say that, when granted to a student, it served the same purpose as financial assistance for maintenace during studies. And yet, in *Grzelczyk* the Court found that it fell within the scope of EU law and, as such, its grant should not be subject to discriminatory conditions. The Court noted: '[i]t is true that, in paragraph 18 of its judgment in [*Brown*], the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of [Article 18 TFEU]'.[38] 'However, since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new Chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since *Brown*, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements'.[39] The Court then noted that the fact that a Union citizen pursues university studies in a Member State other than that of his nationality cannot, of itself, deprive him of the possibility of relying on Article 18 TFEU which, on the facts, should be read in conjunction with Article 21 TFEU, since Mr Grzelczyk had exercised his right to move and reside in another Member State.[40]

It was four years later in *Bidar*, however, that the Court made it pellucidly clear that financial assistance to cover a student's maintenance costs now falls within the scope of EU law. In that case, at issue was the compatibility with EU law of the refusal of the UK authorities to grant to a French university student a subsidised loan to cover his maintenance costs, due to the fact that he was not 'settled' in the UK. Although by the time of his application, Bidar had been resident in the UK for three years and, thus, satisfied the 'residence requirements' of UK law, he was nonetheless not 'settled' within the meaning of the relevant legislation, because his residence during that time was 'wholly or mainly for the purpose of receiving full-

[38] Ibid. para 34.

[39] Ibid. para 35.

[40] Ibid. para 36.

time education'. The Court found that the residence and settlement requirements were (indirectly) discriminatory on the grounds of nationality. The question, however, was whether the situation fell within the scope of EU law. In particular, the Court was directly confronted with the question of whether in the present state of EU law, assistance to students in higher education intended to cover their maintenance costs, fell outside the scope of the Treaty and, in particular, Article 18 TFEU. In reply to this, the Court made the following pronouncement:

> It is true that the Court held in *Lair* and *Brown* (paragraphs 15 and 18 respectively) that 'at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 therefore […]'. In those judgments the Court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the Member States in so far as it was not covered by specific provisions of the EEC Treaty'.[41]

The Court then continued:

> However, since judgment was given in *Lair* and *Brown*, the Treaty on European Union has introduced citizenship of the Union into the EC Treaty and added to Title VIII (now Title XI) of Part Three a Chap. 3 devoted inter alia to education and vocational training (*Grzelczyk*, paragraph 35).[42]

After detailing the various changes in the Treaty, the Court concluded that:

> [i]n view of those developments since the judgments in *Lair* and *Brown*, it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article [18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidized loan or a grant, intended to cover his maintenance costs.[43]

The Court, however, proceeded to qualify this by noting that

> 'although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (see *Grzelczyk*, paragraph 44), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by the State'.[44]

The Court then concluded that

> '[i]n 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'.[45]

---

[41] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 38.

[42] Ibid. para 39.

[43] Ibid. para 42; CJEU, Case C-158/07 *Förster* [2008] *ECR* I-8507, para 41.

[44] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 56.

[45] Ibid. para 57.

This idea of a 'link' with the society of the host State had not been entirely new in EU free movement law, but was in fact firstly introduced earlier in the same decade in cases involving job seekers, where the Court accepted that the host Member State can limit the availability of job seekers' allowances to persons who have demonstrated a sufficient link with the employment market of the host State.[46] On the facts in *Bidar*, the Court stressed that 'the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time'.[47] Hence, the UK requirement of three years' of residence in the UK territory was considered by the Court to be appropriate for ensuring that only students who were sufficiently integrated into its society had the right to have recourse into its social assistance system. However, the Court held that the requirement that the student is 'settled' in the UK is not justified since it precludes any possibility of a national of another Member State obtaining settled status as a student, and thus it makes impossible for such a national, whatever his actual degree of integration into the society of the host Member State, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs.[48] This appears to be implying that in order for a Member State to be able to rely on the need to confine the availability of certain benefits to persons who present a sufficient link to its society, it has to take into account all the factors pertaining in a situation in order to judge whether a sufficient link has been established.

The importance of the integration of the migrant student into the society of the host State is, further, reflected in Directive 2004/38, which makes it clear that the longer the migrant has resided in the territory of the host State, the more entitled he becomes to have recourse to its social assistance system. However, taking into account the concerns of the Member States for the danger of benefit tourism, the drafters of the Directive sought to provide a safety valve for the Member States, when it comes to the provision of financial assistance to cover maintenance expenses during studies. Article 24 of the Directive provides that the host Member State shall not be obliged, prior to acquisition of the right of permanent residence under Article 16, to grant maintenance aid for studies, including vocational training, consisting in student grants or students loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. Hence, the host Member State is entitled to lay down a requirement that only (economically inactive) students who are resident in the territory of the host State for a minimum of 5 years

[46] CJEU, Case C-138/02 *Collins* [2004] *ECR* I-2703, para 67; CJEU, Case C-22/08 *Vatsouras* [2009] *ECR* I-4585, para 38; CJEU, Case C-224/98 *D'Hoop* [2002] *ECR* I-6191, para 38; CJEU, Case C-258/04 *Ioannidis* [2005] *ECR* I-8275, para 30. In *Bidar*, however, the Court expressly noted that requiring such a link in this instance would be inappropriate, 'since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market' (see CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 58).

[47] CJEU, Case C-209/03 *Bidar* [2005] *ECR* I-2119, para 59.

[48] Ibid. para 61.

can have recourse to the social assistance system of that State for the purpose of being supported financially during their studies.

The Court came to endorse this approach in its judgment in *Förster*,[49] where it accepted as lawful and in compliance with EU law a Dutch requirement that a migrant student must have been lawfully resident in the Netherlands for an uninterrupted period of at least 5 years before claiming a maintenance grant. Some commentators have considered this case to be a retrograde step,[50] in that although from the Court's ruling in *Bidar* it might be deduced that the important question in each case should be the actual integration of the migrant into the society of the host State—something which can be proved in various ways—in *Förster* the Court appears to be happy to accept that a Member State is free to automatically deem a migrant student not to have established a genuine link with its society, if that person has not resided within its territory for 5 years.

Hence, this has made it clear that national authorities do not have to engage in an individual assessment of each situation to establish whether the migrant student is sufficiently integrated into the society of the host State; it suffices if they provide maintenance assistance *only* to migrant students from other Member States who are lawfully resident in their territory for at least 5 years. In this way, the Court—in line with the drafters of the 2004 Directive—sweetened the pill for the Member States who now have to foot the bill for migrant students with regards to expenses for which—until quite recently—they only needed to provide assistance to their own nationals and nationals of other Member States who contributed to their economy through their work and payment of taxes.

Finally, in recent years, there have also been cases where national legislation in the area of education was challenged, because it impeded the freedom of nationals of a Member State to move to another Member State for the purpose of receiving education there. In *Morgan and Bucher*,[51] it was held that where *the home Member State* provides for a system of education or training grants, it must ensure that the detailed rules for the award of those grants do not discriminate against persons who move to another Member State in order to receive education and, as such, create an unjustified restriction on the right to move and reside within the territory of the Member States.[52] Similarly, in *Schwarz*,[53] the Court stressed that Articles 21 and/or 56 TFEU preclude legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes

---

[49] CJEU, Case C-158/07 *Förster* [2008] *ECR* I-8507. Note that although the judgment was delivered after the 2004 Directive came into force (and even after its date of implementation had passed), the latter was not yet applicable to the facts of the case. Yet, the Court was clearly influenced by Article 24 of the 2004 Directive—see para 55 of the judgment.

[50] See, inter alia, O'Leary 2009. For a rather more positive view on the judgment see Golynker 2009.

[51] CJEU, Joined Cases C-11 & 12/06 *Morgan and Bucher* [2007] *ECR* I-9161.

[52] Ibid. para 28.

[53] CJEU, Case C-76/05 *Schwarz* [2007] *ECR* I-6853.

that possibility in relation to school fees paid to a private school established in another Member State. This is because this limitation imposed by the *home State* discriminates against 'free movers' and, as a result, impedes the free movement of students to another Member State.[54]

The above analysis has illustrated that although the provision of educational services (i.e. an SSGI) is still an area that the EU has, merely, supplementary competence, the freedom of action of the Member States in this sphere has been significantly curtailed. As has been seen, although they are free to make the initial choices concerning the conditions and limitations that are imposed with regards to access to education in their territory, as well as the financial assistance provided for access to education and maintenance during studies, Member States must now ensure that, with regards to the above issues, they treat Union citizens coming from other Member States in the same way as they treat their own nationals. And, following the introduction of the status of Union citizenship, this is so irrespective of whether the migrant is economically active and, thus, contributes to the economy of the host State or whether (s)he has merely entered its territory with the aim of pursuing an educational course. Nonetheless, recognising the interests of the Member States in maintaining a viable social assistance system, the CJEU also accepted that the host Member State can limit the availability of maintenance assistance during studies to nationals of other Member States who can demonstrate a sufficient link with its society.

7.3 The Organisation and Maintenance of a Social Assistance System as an SSGI and the Free Movement of Workers and Union Citizens

In the previous Section, we saw what has been the impact of EU law on the provision of education—one of the SSGIs that form part of national welfare systems. In this section, we shall take a broader approach and we shall consider what has been the impact of EU law on the organisation and maintenance of national welfare systems in general.

Until quite recently, the welfare of the population of a Member State was regarded as the concern of that State alone and, as such, it was considered to generally fall outside the realm of EU competence and supervision. Hence, the welfare policy of a State and, in particular its choices in relation to the organisation and maintenance of its social assistance and social security system, were held to be largely immune from EU interference. This is an area which is closely intertwined with State sovereignty and since it is the State itself that funds such a system, it is

[54] As very rightly explained by Dougan 2005, p. 944, EU law 'plays an important role in apportioning responsibility for covering the relevant costs [of migrant studies] between three main actors: the host State, the home State, and the student him/herself'.

all the more appropriate for it to manage it and distribute its funds in a way which accords with its own priorities and culture. The EU does not have any competence in this field and, more importantly, it does not possess a social budget.[55] Accordingly, in the absence of an EU social budget and an EU criterion of (re)distributive justice on the basis of which (EU) public funds would be allocated, it lies with the Member States to determine how to distribute national public funds mainly raised through taxation.[56]

Since the resources of States are not infinite, a criterion has to be employed for distinguishing persons who are entitled to receive social assistance benefits, from persons who are not. This has, traditionally, translated into a requirement of 'belonging' to the society of a State. The notion of solidarity is key here and it is considered that it is only persons who belong to the society of a Member State that owe solidarity obligations towards each other, which in essence means that public money collected through the joint efforts of everyone, will be used to cater for the needs of those of the 'group' who fall on hard times.

Before the process of European integration began, it was—mainly—nationality that was used as the criterion for determining 'belonging' in the society of a Member State.[57] However, as will be seen, the process of European integration has required a reconsideration and adaptation of this criterion. In particular, the establishment of the internal market has necessitated the expansion of the notion of 'belonging' to encompass migrant economic actors who contribute to the economic life of the host State and, more recently, the introduction of the status of Union citizenship has further broadened this notion to include (economically inactive) Union citizens who can demonstrate a sufficient link with the society of the host State.[58]

Accordingly, although it is still the case that the organisation of a social assistance system is an area where the Member States have exclusive responsibility, in recent years, and especially following the introduction of Union citizenship, the decisions of the Member States in this field have become increasingly subjected to EU scrutiny and, as will be seen, from this has emerged a 'constitutional-type' EU law review of Member State choices with regards to the provision of this SSGI.

In this part of the contribution, I shall consider how the extent to which the EU project has moved on from purely market integration to the creation of a quasi-constitutional polity with its own citizenship status, has affected the exercise of Member State competence in this field. The organisation and functioning of a social assistance system can be viewed as a (non-economic) SSGI and, as such, and, in particular having in mind its special characteristics, has traditionally been

---

[55] Damjanovic and de Witte 2009, p. 55.

[56] Dougan 2009, pp. 152–153.

[57] Ibid. pp. 154–157.

[58] Boeger appears to be of the view that it is still, in essence, nationality that determines who belongs to the society of a Member States (its 'demos') and that the EU's interference in the 'development of social programmes' is confined to a requirement that the interests of nationals of other Member States are represented within national political processes. Boeger 2007, pp. 323–324.

considered as a largely no-touch zone for the EU. Yet, through its case law, the Court of Justice has managed to balance the need to respect the autonomy of the Member States in this field with the EU aim of ensuring that Union citizens (whether economically active or not) can move and reside freely in the territory of a Member State other than that of their nationality.

In the early stages of European integration, when the aim was still merely to build the EEC, it was only economically active Member State nationals who contributed to the market-building aims of the Treaty that could rely on EU law when they wished to be granted social assistance benefits in the host State. This was, obviously, considered necessary when seen from the point of view of the EU, since the refusal of social assistance benefits by the host State would appear to be capable of impeding the exercise of the fundamental freedoms and/or the integration of the migrant into the society of the host Member State. Moreover, nationals of other Member States who were economically active in the host State did not, merely, contribute to the economy of the host State but they, also, funded through the taxes that they paid, the social assistance system that they were claiming from and, thus, it was considered appropriate for them to be entitled to draw from this pool of resources.[59] Accordingly, and as will be seen below, through its case law, the Court ensured that the notion of solidarity at Member State level is no longer defined and limited by nationality, but is now built up between the nationals of the host Member State and migrant economic actors who possess the nationality of another Member State. It seems that migrant workers, through their permanent residence and work in the host State demonstrate a sufficient link and commitment to the society of that State and thus develop a form of solidarity with its nationals.

Yet, like with education, in this context as well, the EU has always imposed merely a non-discrimination obligation on the Member States: the EU could never—and still cannot—specify what types of social assistance benefits each Member State must provide; it can merely limit the way the Member State chooses to distribute the benefits it *already provides*. Therefore, since the Court's early case law, the principle of non-discrimination on the grounds of nationality was held to be applicable in this context, and thus the Member States could not refuse social assistance benefits to nationals of the other Member States who were lawfully resident and working in their territory, if such benefits were granted to their own nationals. The main tool used by the Court in this context was the aforementioned Article 7(2) of Regulation 1612/68, which requires the host State to grant to workers coming from other Member States the same social and tax advantages as it grants to its own nationals.

The Court in its judgment in *Even*, noted that the advantages which are extended to 'workers' by Article 7(2) of Regulation 1612/68 'are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of

[59] Dougan 2005, p. 945.

their residence on the national territory and the extension of which to workers who are nationals of other Member States seems suitable to facilitate their mobility within the Community'.[60] It can, thus, be observed that the Court adopted a rather broad approach to the term 'social advantages' and hence a relatively wide array of social assistance benefits were made available to migrant workers.[61]

Moreover, the Court has not imposed any limiting conditions on the ability of workers to rely on EU law in order to have recourse to the social assistance system of the host State. Put differently, as long as someone is a 'worker' within the meaning of Article 45 TFEU, he is entitled to social assistance benefits in the host State under the same conditions as those imposed on the nationals of the host State. And, quite circularly, the Court held in the *Kempf* case that the fact that a migrant (part-time) worker receives less than the minimum amount necessary for subsistence and needs to supplement his income by having recourse to the social assistance system of the host State, does not mean that his activity is not 'effective and genuine work' within the meaning of Article 45 TFEU and, therefore, he is still considered a 'worker' within the meaning of that provision.[62]

Prior to the introduction of Union citizenship by the Treaty of Maastricht, it was only economically active Member States nationals or, even, passive economic actors, who could rely on EU law in order to claim equality as regards the provision of social assistance benefits in the host State.[63] Nonetheless, following the introduction of Union citizenship and, more importantly, the Court's interpretation of the citizenship provisions, it has been made clear that, even economically inactive Union citizens can now rely on the EU prohibition of nationality discrimination, in order to require the host Member State to grant them social assistance benefits under the same conditions as those that are available to its own nationals.[64]

The first step to this direction was effected in the landmark *Martínez Sala* ruling.[65] In that case a Spanish national who was lawfully resident in Germany for more than 20 years, sought to rely on EU law in order to require the German authorities to grant her a child-raising allowance under the same conditions that this was granted to German nationals. The Court held that she could rely on Article

---

[60] CJEU, Case 207/78 *Even* [1979] *ECR* 2019, para 22.

[61] For an analysis see O'Keeffe 1985; Steiner 1985. See, for instance, CJEU, Case 65/81 *Reina* [1982] *ECR* 33; CJEU, Case 32/75 *Fiorini (neé Cristini)* [1975] *ECR* 1085.

[62] CJEU, Case 139/85 *Kempf* [1986] *ECR* 1741.

[63] See, for instance, CJEU, Case 186/87 *Cowan* [1989] *ECR* 195. See, also, more recently CJEU, Case C-164/07 *Wood* [2008] *ECR* I-4143. Note that in both cases the Court used the market freedoms (free movement of services in the former and freedom of establishment or free movement of workers in the latter) in order to bring the applicant within the scope of the Treaties but it considered whether there was a violation of Article 18 TFEU rather than the prohibition of discrimination under the relevant market freedom. Possibly, this is due to the fact that the contested refusal to grant the said social assistance benefit would be incapable of impeding the exercise of the relevant freedom.

[64] For an explanation see Damjanovic and de Witte 2009, pp. 71–73.

[65] CJEU, Case C-85/96 *Martínez Sala* [1998] *ECR* I-269.

18 TFEU to challenge the discrimination that was practised with regards to the grant of this allowance, since her situation fell within the scope of the Treaty: the child-raising allowance applied for had been held in previous case-law to fall within the material scope of EU law and she, as a Union citizen lawfully resident in the host State, fell within the personal scope of the Treaty. Accordingly, despite the fact that she was not a migrant worker and, also, notwithstanding the fact that there did not appear to be any link between the claimed right and her movement from Spain to Germany (i.e. her move would not be impeded as a result of the refusal of the claimed allowance), EU law applied.[66]

In *Martínez Sala* the eponymous applicant did not have to rely on EU law in order to derive a right of residence in Germany, since she was already entitled to such a right under national law. Accordingly, her recourse to the social assistance system of the host State could not question her right of residence in the host State. In particular, the Court did not have to rule on whether Ms Martínez Sala's need to have recourse to the German social assistance system meant that she was not financially self-sufficient and, thus, that she did not satisfy the self-sufficiency conditions imposed by secondary legislation to which the right of residence under Article 21 TFEU has always been subject.[67] The Court, nonetheless, had to confront this issue in the case of *Grzelczyk*, seen above, where the Court considered whether Mr Grzelczyk maintained his right to reside in Belgium which he derived from Article 21 TFEU, despite his need to have recourse to the social assistance system of the host State, and concluded that he did. The Court stressed that, although Member States may take the view that 'a student who has recourse to social assistance no longer fulfils the conditions of his right of residence' and, thus, they may take measures to withdraw his residence permit or not renew it,[68] '[n]evertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system'.[69] As the Court explained, whilst secondary legislation provides that the right of residence granted by EU law only exists as long as beneficiaries of that right fulfil the self-sufficiency conditions laid down by secondary legislation, the latter also 'envisages that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'.[70] According to the Court, this illustrates that the

[66] For more on this case see Closa Montero 2010.

[67] These conditions were, at the time, provided in the 1990 Residence Directives (Directive 93/96/EEC; Council Directive 90/364 of 28 June 1990 on the Right of Residence, *OJ* 1990 L180/26; Council Directive 90/365 of 28 June 1990 on the Right of Residence for Employees and Self-Employed Persons Who Have Ceased Their Occupational Activity, *OJ* 1990 L 180/28) and are now provided in Article 7 of Directive 2004/38/EC.

[68] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, para 42.

[69] Ibid. para 43; CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 45; CJEU, Case C-408/03 *Commission* v. *Belgium* [2006] *ECR* I-2647, paras 66–69. This is now enshrined in Article 14 of Directive 2004/38/EC.

[70] CJEU, Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, para 44.

relevant secondary legislation 'accepts 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'.[71]

Therefore, with its judgment in *Grzeczlyk*, the Court made it clear that economically inactive Union citizens can derive from EU law a right to reside in the territory of another Member State, and they maintain that right even when they have to have recourse to the social assistance system. This, however, can continue only for as long as they do not impose an unreasonable burden on the social assistance system of the host State. In addition, building on *Martínez Sala*, Union citizens who are lawfully resident (either under EU law or national law) within the territory of a Member State other than that of their nationality, are entitled to rely on the principle of non-discrimination on the grounds of nationality in order to require the host State to make available to them social assistance benefits, under the same conditions as these are granted to its own nationals.

This latter mode of reasoning can also be seen in the subsequent *Trojani* case,[72] which involved a(n economically inactive) French national who had moved to Belgium in 2000. Whilst being there, he found accommodation in a Salvation Army hostel, where in return for board and lodging and some pocket money he did various jobs for about 30 h a week as part of a personal socio-occupational reintegration programme. As he had no resources, he approached the Belgian authorities with a view to obtaining the minimex (i.e. the same social assistance benefit claimed in *Grzelczyk*), and this was refused on the ground that he was neither a migrant worker within the meaning of EU law, nor was he a Belgian national. The CJEU in its judgment, nonetheless, held that Mr Trojani was entitled to the minimex. Although he did not have sufficient funds to support himself and, as a result of that, he did not satisfy the conditions which would enable him to exercise his right to reside in Belgium under Article 21 TFEU, he had been granted a residence permit under Belgian law and, thus, he was lawfully resident on Belgian territory. As a result of that, he was entitled to rely on Article 18 TFEU in order to receive a social assistance benefit such as the minimex, under the same conditions as Belgian nationals.

Shortly after *Grzelczyk*, the Court in *D'Hoop* extended the principle of non-discrimination, to cover discrimination against free movers as regards the receipt of social assistance benefits in their State of nationality.[73] Accordingly, in certain instances, the EU can come to second-guess the refusal of the Member States to provide social assistance benefits to *their own* nationals, provided that the situation involves a sufficient cross-border element.

---

[71] Ibid.

[72] CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573.

[73] CJEU, Case C-224/98 *D'Hoop* [2002] *ECR* I-6191. See, also, subsequently, CJEU, Case C-192/05 *Tas-Hagen and Tas* [2006] *ECR* I-451; CJEU, Case C-221/07 *Zablocka* [2008] *ECR* I-9029; CJEU, Case C-499/06 *Nerkowska* [2008] *ECR* I-3993.

In its subsequent case law the Court further clarified the right of Union citizens to reside and receive social assistance in a Member State other than that of their nationality.

In *Baumbast*, the Court made it clear that the right of residence enshrined in Article 21 TFEU, is a directly effective right granted automatically to *all* Union citizens.[74] And although the Court acknowledged that this right is subject to limitations and conditions (namely, the economic self-sufficiency conditions laid down in secondary legislation), it also pointed out that 'those limitations and conditions must be applied in accordance with the general principles of that law, in particular the principle of proportionality'.[75] Hence, all Union citizens have the right to reside in the host State; and they have this right even when they are neither economically active nor economically self-sufficient. However, the host Member State can rely on the self-sufficiency conditions and withdraw the right of residence in its territory, if the migrant becomes an unreasonable burden on its social assistance system.[76]

In *Bidar*, the Court affirmed the previous 'broadening' of the categories of Union citizens that can receive social assistance benefits in the host State but, also, sought to provide some form of 'assurance' to the Member States, who were starting to get anxious that a large influx of (economically inactive) migrant Union citizens into their territory who, relying on EU law, might be able to receive social assistance benefits, would lead to the collapse of their social assistance system. The Court employed the notion of 'integration into the society' (or a link with the society) of the host State, as a criterion for distinguishing (economically inactive) Union citizens who can rely on social assistance benefits in the host State and such Union citizens who cannot.

Accordingly, *Bidar* made it clear that (economically inactive) Union citizens can have recourse to the social assistance system of the host State; but the extent to which they can do so depends on their degree of integration into the society of that State. This 'graded' approach[77] to the enjoyment of social assistance benefits by the host State is, also, reflected in Directive 2004/38[78] which accepts that five years of residence in the host State is sufficient proof of someone's integration into the society of that State: Article 16 of the Directive grants the right of permanent residence to Union citizens who satisfy this requirement and, as can be gathered from the provisions of the same Directive, Union citizens who acquire this right in the host State can have unlimited recourse to the social assistance system of the host State. It thereby seems that a Union citizen's integration into the society of the

[74] CJEU, Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para 84; see, also, CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 31.

[75] CJEU, Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para 91; CJEU, Case C-456/02 *Trojani* [2004] *ECR* I-7573, para 34.

[76] For more on this see Dougan and Spaventa 2003.

[77] For more on this see Somek 2007, pp. 790–791.

[78] White 2010, p. 1579.

host State gives rise to a certain degree of 'solidarity' which, in its turn, enables him/her to require the (nationals of the) host Member State to provide for him/her in case (s)he falls on hard times.[79] Hence, the Court appears to be considering that there is a gradual development of solidarity between Union citizens who hold the nationality of another Member State but who have established a certain degree of integration into the society of the host State, with the nationals of that State; and, the greater the integration into that society, the greater it is the entitlement of the migrant Union citizen to social assistance in the host State.

Hence, Member States are now called by the EU to extend the availability of this type of SSGI, to nationals of other Member States who are lawfully resident within their territory. In other words, Member States must now make available the social assistance benefits that bestow on their own nationals, not only to migrant *economic actors* who are lawfully present in their territory, but also to *any* Union citizen, as long as the latter does not impose an unreasonable burden on their social assistance system. This, obviously, challenges the traditional notion of solidarity, which is based on nationality, and extends this to cover all Union citizens who are capable of demonstrating a certain link with a particular Member State.[80]

7.4 Conclusion

This contribution has had as its aim to review the changing nature of the relationship between EU and Member State competences, in the context of the provision of SSGIs. In particular, the focus was placed on a consideration of how the freedom of movement for workers and the citizenship provisions of the Treaty, impose constraints upon the Member States' autonomy with regards to the provision of such services.

It was considered that the best way to introduce this topic was by conducting two case studies and looking closely at how in each of the areas studied, the Court has gradually increased the influence of EU law on Member State action in this sphere. It has been seen that although the provision of SSGIs is, still, an area of activity that is largely reserved for the Member States, the latter are nonetheless not entirely free to act as they wish in the exercise of their powers and they are now increasingly called to extend the availability of such services to nationals of other Member States who are lawfully present in their territory. In particular, it has been seen that movement by Union citizens now carries with it a legitimate expectation to have access to SSGIs in the host State under equal terms as those imposed on its own nationals. Accordingly, the choices of a Member State with regards to the provision, organisation and financing of its SSGIs appear, now, to

[79] See also, Ross 2004, p. 314.

[80] For more on this see Dougan 2009.

have been subjected to EU scrutiny which requires the Member State to explain the reasons for refusing—when it does so—such services to the nationals of other Member States. Nonetheless, the *initial* choices of the Member States with regards to the provision and organisation of SSGIs remain largely immune from EU interference and the Member States are still free to organise and finance SSGIs in whichever way they consider most appropriate, provided that they respect the principle of non-discrimination on the grounds of nationality and free movement.

References

Barnard C (2008) Employment rights, Free movement under the EC Treaty and the Services Directive, Europa Institute Mitchell Working Paper Series, Paper 5/2008. Available at http://www.law.ed.ac.uk/file_download/series/44_employmentrightsfreemovementundertheectreatyandtheservicesdirective.pdf

Behrens P (2001) Public services and the internal market—an analysis of the Commission's communication on services of general interest in Europe. Eur Bus Organ L Rev 2:469

Boeger N (2007) Solidarity and EC competition law. Eur L Rev 32:319

Closa Montero C (2010) Martínez Sala and Baumbast: an institutionalist analysis. In: Poiares Maduro M and Azoulai L (eds) The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty. Hart, Oxford

Damjanovic D, de Witte B (2009) Welfare integration through EU law: the overall picture in the light of the Lisbon Treaty. In: Neergaard U, Nielsen R, Roseberry L (eds) Integrating welfare functions into EU law—from Rome to Lisbon. DJØF Publishing, Copenhagen

Dougan M, Spaventa E (2003) Educating Rudy and the (non-)English patient: a double-bill on residency rights under article 18 EC. Eur L Rev 28:699

Dougan M (2005) Fees, grants, loans and dole cheques: who covers the costs of migrant education within the EU? Common Mark L Rev 42:943

Dougan M (2009) The spatial restructuring of national welfare states within the European Union: the contribution of union citizenship and the relevance of the Treaty of Lisbon. In: Neergaard U, Nielsen R, Roseberry L (eds) Integrating welfare functions into EU law—from Rome to Lisbon. DJØF Publishing, Copenhagen

Golynker O (2009) Annotation of Förster. Common Mark L Rev 46:2021

Gori G (1999) Union citizenship and equal treatment: a way of improving community educational rights? J Soc Welf Fam L 21:405

Lonbay J (1989) Education and law: the community context. Eur L Rev 14:363

Napolitano G (2005) Towards a European legal order for services of general economic interest. Eur Pub L 11:565

Neergaard U, Nielsen R (2010) Blurring boundaries: from the Danish welfare state to the European social model? Eur Labour L J 1:434

O'Keeffe D (1985) Equal rights for migrants: the concept of social advantages in article 7(2), regulation 1612/68. Yearb Eur L 5:93

O'Leary S (1997) The principle of equal treatment on grounds of nationality in article 6 EC, A lucrative source of rights for member state nationals? In: Dashwood A, O'Leary S (eds) The principle of equal treatment in EC law. Sweet and Maxwell, London

O'Leary S (2009) Equal treatment of and EU citizens: a new chapter on cross-border educational mobility and access to student financial assistance. Eur L Rev 34:612

Ross M (2004) The europeanization of public services supervision: harnessing competition and citizenship? Yearb Eur L 23:489

Somek A (2007) Solidarity decomposed: being and time in European citizenship. Eur L Rev 32:787
Steiner J (1985) The right to welfare: equality and equity under community law. Eur L Rev 10:21
Szyszczak E (2001) Public service provision in competitive markets. Yearb Eur L 20:35
Szyszczak E (2009) Legal tools in the liberalisation of welfare markets. In: Neergaard U, Nielsen R, Roseberry L (eds) Integrating welfare functions into EU law—from Rome to Lisbon. DJØF Publishing, Copenhagen
White RCA (2010) Revisiting free movement of workers. Fordham Int L J 33:1564